

## **Cabinet – 9 December 2020**

### **To approve extension to flexible arrangements for Adult Social Care providers during COVID-19 pandemic**

**Portfolio:** Councillor Rose Martin

**Related portfolios:** All

**Service:** Adult Social Care

**Wards:** All

**Key decision:** Yes

**Forward plan:** Yes

#### **1. Aim**

- 1.1. This report: (i) updates Cabinet about the financial implications of Adult Social Care's May 2020 decision to pay providers flexibly; and (ii) seeks approval for the Council to continue to support and provide financial relief to Adult Social Care providers in order to ensure continuity of care for service users for the period from 29 June 2020 until the end of the current financial year.
- 1.2. These flexible payments to providers are outside of usual contracted arrangements, during the ongoing period of the pandemic and have resulted in extra expenditure of approximately £485,400 in addition to the £319,000 projected for the 14-week period (23 March 2020 – 28 June 2020) approved by Cabinet on 19 May 2020 (where the £319,000 sum was inclusive of payments to Domiciliary Care and Supported Living, Extra Care and Day Care). From 29 June arrangements have continued for Domiciliary Care and Adult Social Care seeks approval for these to continue to the remainder of the current financial year. If there is a need to extend these arrangements beyond this point then a further report will be brought forward and when clarity on funding arrangements for 2021/22 are clearer.
- 1.3. This report also highlights the potential risk of additional expenditure if demand, complexity and/or staff absence changes at short notice and highlights the ongoing work to support the Adult Social Care market.

## 2. Summary

- 2.1. In line with Government guidance and as part of the Adult Social Care's response to the pandemic, a number of measures have been adopted, to enable providers of commissioned care services to be paid in a way that supports their cash flow and sustainability. These measures are:
  - a. Domiciliary care – Payment by plan;
  - b. Increased payment frequency;
  - c. Additional expense reimbursement.
- 2.2. An Adult Social Care provider payment plan was put in place by the Executive Director of Adult Social Care on 20 March 2020, which meant domiciliary care providers were paid in accordance with financial values contained within service users' support plans ('payment by plan') rather than paid for actual care delivery in accordance with the existing payment arrangements.
- 2.3. Since these measures were introduced the number of people waiting for care in Walsall has reduced with both community packages and discharges from hospital commencing in a timely manner. Care providers continue to manage staff absences and 'bubble arrangements'; and to date there has been no provider failure in Walsall.
- 2.4. The arrangements put in place covering the initial 14 weeks of the pandemic (23 March – 28 June this year) were expected to cost an additional £319,000, however the 19 May Cabinet Report, Adult Social Care highlighted that that should the arrangement continue, and care hours return to the levels provided pre COVID-19, then this option would represent an enhancement to the level of payment which providers would normally receive by £47,300 per week. The actual total cost to date of the arrangements for this initial period was £804,000. This cost has been funded by COVID-19 Response and Support Package funding provided by central government as detailed further in the finance section.
- 2.5. In addition to provider payment plan arrangements, Adult Social Care commissioners continue to consider additional financial relief arrangements to the Adult Social Care market with approved governance via the Council's Supplier Action Payment Group (set up in response to COVID-19 to provide governance role in relation to the additional financial support issued by Government to support organisations to respond to COVID-19 increased financial burdens). In addition to these flexible arrangements Cabinet approved a financial commitment of £200,000 in May 2020 and a further £500,000 October 2020 for contracted and non-contracted provider additional expenses.
- 2.6. In accordance with the Council's Constitution, this is a Key Decision for the following reasons:
  - The decision will incur 'significant' expenditure of greater than £250,000;

- The decision is likely to have a significant impact on two or more wards of the borough as the proposed alternative model of delivering care flexibly is a change to the way in which service is delivered.

### **3. Recommendations**

- 3.1. That Cabinet approves the continuation of the Adult Social Care recommended provider payment option of 'payment by plan' (except where there is no evidence of care having taken place) for domiciliary care services until the 31 March 2021 with an estimated total additional cost of £1,359,324 for 2020/21. This will be funded from the COVID-19 Response and Support Package funding provided by central government.
- 3.2. That Cabinet approves delegated authority to the Executive Director of Adult Social Care in consultation with the Portfolio Holder of Adult Social Care to enact these recommendations and subsequently authorise the sealing or signing of any associated contracts, deeds, variations and other related documents.
- 3.3. That Cabinet approves delegated authority to the Executive Director of Adult Social Care in consultation with the Portfolio Holder of Adult Social Care and the S151 officer to extend the flexible arrangements subject to budget being available.

### **4. Report detail**

#### **Know**

- 4.1. Following on from the detail contained in the report to Cabinet on 19 May this year, a plethora of regional and national guidance continues to be published to support commissioners to alleviate the pressures on the adult social care sector as a result of the pandemic.
- 4.2. Providers have responded well to the support provided by the Council and this has contributed to continuity of care for our residents and no provider failure.
- 4.3. Providers continue to face an unpredictable future as the pandemic continues with 'bubble arrangements', staff sickness and isolation continuing to impact on the management of staffing levels and excessive financial increases across a number of areas including insurance premiums, recruitment and personal protective equipment (PPE).
- 4.4. Adult Social Care Providers continue to indicate to the Council that by enabling them to utilise their local knowledge and insight of our vulnerable adults (based on their day to day contact), during this unprecedented period, that they can work flexibly, innovatively and prioritise their resources to meet service users' needs, which in turn better manages existing demand and creates additional capacity.

- 4.5. The option of payment by plan and a number of alternative payment options were considered by Cabinet on 19 May this year. The new model of paying providers on a payment by plan basis rather than paying providers for actual care delivery, which was the pre pandemic payment arrangement, was approved. For illustration, if a provider currently supports 50 service users each with 10 hours of care, this would equate to a guaranteed payment of 500 hours being paid. Using the payment on plan process, the Council therefore asks the provider to meet the needs of those individuals flexibly within those 500 hours, and in doing so utilising those resources more effectively, thereby releasing additional capacity.
- 4.6. The options that the directorate considered were:
- (i) Pay against actual care delivery;
  - (ii) Payment against support plan value;
  - (iii) Payment against support plan value (except where there is evidence that no care has been delivered) – **Preferred**;
  - (iv) Payment by actual care delivery + 10%.
- 4.7. Whilst payment by plan does not have the lowest cost, it is considered to be the most cost effective and has the strongest rationale in terms of maintaining service delivery and protecting the market. Payment by plan are the only options where providers should be able to provide additional capacity where necessary, which is a critical factor. The other options are reliant on care providers continuing to deliver care, as they were previously to safeguard themselves from a drop in income. Therefore there is no incentive for a provider to deliver care and meet assessed need in a more innovative way in a shorter duration if they are penalised for this financially.
- 4.8. The rationale for choosing payment by plan over payment against support plan is that providers have not always demonstrated full compliance with notifying the Council of reasons for 'no care delivery' and therefore in order to safeguard against fraudulent behavior it is prudent to assume that care delivery has not been attempted or is not required where there is no evidence of care being delivered. Providers have the facility to evidence where there are other reasons why a care call has not been recorded and on receipt of this evidence, the Council can make payment for this activity.
- 4.9. A further reason for payment by plan is that some neighboring local authorities have also adopted this option and the risk if Walsall adopted a less favorable option is that care providers would choose to deploy their resources in other local authority areas with more favorable payment terms.
- 4.10. The Coronavirus Act 2020 enacted on 1 April 2020 makes changes to the Care Act 2014 ('Care Act') to enable local authorities to prioritise the services they offer in order to ensure the most urgent and serious care needs are met, even if this means not meeting all service users' assessed needs in full or delaying some assessments. Stage 2 Care Act easements applies flexibility under the pre-amendment Care Act including decisions for individual service

type to prioritise short term allocation of care and support using current flexibilities within the Care Act, for example changing, delaying or cancelling some service types. This payment plan agreed on 20 March 2020 was considered on 7 April 2020 by the Director of Adult Social Services and Adult Principal Social Worker in accordance with this guidance, documented and agreed as a Stage 2 flexibility and has subsequently been regularly reviewed.

- 4.11. Actions implemented on 23 March 2020 were followed by formal notification to the market and various communications to providers throughout April, May, June, August and November this year, alongside assurance about financial payments, to support providers' immediate cash flow pressures and revised payment remittances during this time.
- 4.12. The Council's internal systems have been reconfigured and providers issued with extensive details on how the interim arrangements operate and the Council's requirements of providers during this period.
- 4.13. Cabinet Office procurement note (PPN 02/20) issued on 20 March this year approved provider relief until the 30 June 2020. A further Cabinet Office procurement note (PPN 04/20) was issued on 9 June 2020 with provider relief arrangements continuing up to 31 October this year. Adult Social Care have continued to these contractual arrangements after the supplier relief period expired on 31 October and propose to continue with this arrangement, subject to regular review, for the duration of the pandemic.
- 4.14. Adult Social Care have duties under the Care Act, which include market management and market shaping, specifically:
  - local market shaping to encourage quality, choice and sufficiency of provision;
  - local contingency planning in case of provider failures;
  - ensure care is maintained where provider fails financially and services cease – for everyone, including self-funders, to ensure people's needs continue to be met;
- 4.15. With the above in mind, a wider issue exists across the non-contracted community and voluntary sector market, specifically day care and social clubs, who have reported that due to enforced temporary closures, this is causing financial sustainability issues. This sector directly support a number of our vulnerable adults across the community and will be required to resume this role post pandemic.
- 4.16. It is for this reason that Cabinet agreement was sought in May this year for a financial commitment of £200,000 and a further £500,000 in October this year in order to swiftly respond to the wider Adult Social Care market.
- 4.17. The Adult Social Care market is experiencing a particular set of challenges in relation to the pandemic, with testing, 'bubble' arrangements, use of PPE and staff retention, so flexible arrangements are required to give providers the

autonomy to deliver care in ways that support continuity of care delivered to service users.

- 4.18. In Walsall, the Quality in Care Team continues to work in partnership with health and public health teams to provide the sector with comprehensive support to meet some of these challenges.
- 4.19. The Walsall Adult Social Care Market is a fragile market in ordinary times; our Adult Social Care Commissioners have now assessed all such provision as a significant risk and this has been escalated to the Council's cross directorate Supplier Payment Group.
- 4.20. Adult Social Care Commissioners have conducted detailed analysis of how the Council could have considered paying providers who deliver community based care, in order to inform the approach approved by Cabinet on 19 May 2020. This approach has contributed to ensure continuity of service to our vulnerable residents with the number of people waiting for care reduced and both community packages and discharges from hospital commencing in a timely manner.
- 4.21. Care providers continue to meet demand and staff absences and there has been no provider failure.

#### **Council Corporate Plan priorities**

- 4.22. This proposal links to the Council's corporate priority 'Communities are prospering and resilient. The most vulnerable are protected from avoidable harm, including treating and caring for people in a safe environment through working within the local community. It enhances quality of life for people with care and support needs and those with long term conditions; out of hospital, community based provision provides a safe and more appropriate environment for individuals recovering from ill health and/or injury or requiring long term care.
- 4.23. The Care Act embodies a principled, person-centred and values-based approach to all aspects of the provision of social care. It is essential that these principles and values are maintained during this period and that the Council adheres to the 'Responding to COVID-19: the ethical framework for adult social care' which aligns to the councils priorities.

#### **Risk management**

- 4.24. The monitoring of the expenditure will be overseen by the Adult Social Care directorate, in conjunction with finance colleagues.
- 4.25. It is acknowledged that there is a risk that service users' individual needs may not be met because of providers' flexible approach and therefore additional operational safeguards have been implemented so that anyone who receives significantly less care than that detailed in their support plan is contacted by an Adult Social Care officer for a wellbeing check.

- 4.26. There is potential challenge in relation to the equity of impact/benefit of the preferred option on providers. This is understood and will be managed and mitigated as necessary.

### **Financial Implications**

- 4.27. When the Cabinet report in May this year was compiled, when comparing the activity and expenditure information available at the time with pre-pandemic levels, the information indicated a decrease in demand for domiciliary care services. At the time this reduction was believed to be largely due to a significant reduction in care provided since the 'lockdown', for example because family members had been furloughed and therefore taken on responsibility of care in place of service users' carers. It was estimated this would result in savings to the Council of £12,400 per week compared to the average cost paid prior to the pandemic. For the 14-week period to the end of June 2020, assuming this reduction was to continue throughout that period, there would have been an overall reduction of £173,600. It should be noted in the May report it was flagged that should the care hours return to the levels provided pre-pandemic, then this option would represent an enhancement to the level of payment which providers would have normally received by £47,300 per week.
- 4.28. The initial reduction in care delivered was fairly short lived and care visits after three weeks returned back to normal levels; the total cost of payments for care as a result of payment based upon planned care started to exceed pre-pandemic levels. As a result, the actual additional cost of the changes in the payment methodology resulted in a total additional cost of £310,974 for the 14 week period to 28 June, 2020.
- 4.29. Since the end of June this year this revised payment methodology has continued. The current estimated additional cost for the period July 2020 to December 2020 is £698,900. Should this payment methodology continue for the period January 2021 to March 2021 there will be a further estimated additional cost of £349,450.
- 4.30. The total estimated additional costs of the payment to domiciliary care providers relating to payment by plan up to 31 March, 2021 is £1,359,324. This will be funded from the COVID-19 Response and Support Package funding provided by central government.

### **Legal Implications**

- 4.31. Legal Services have now been engaged about exploring and mitigating implications in relation to the action taken to date; consideration has been given to:
- a The practicalities for how any contractual variations in respect of continued supplier relief on implied terms will be documented including consideration and appropriate mitigation to minimise the risk of

- procurement and best value challenges (with reference to the contractual provisions that allow variations);
- b The Council's exit routes, eg time limiting any variations with a minimum of one months' notice to the market to revert back and making them conditional of contractual provisions ;.
  - c Mitigating any risks of providers or other care providers challenging decisions taken in relation to payment arrangements;
  - d Mitigating any risk of challenge in other ways, where any variations fall outside of - or have not considered - the possibilities allowed by: (i) the procurement regulations; or (ii) Cabinet Office supplier payment relief guidance. The impact of the procurement regulations is dealt with in the Procurement Implications section below.
- 4.32. Legal advice and support will be sought if any further variation of contracts are required.

### **Procurement Implications/Social Value**

- 4.33. Payment terms and conditions with care providers form part of existing contractual agreements for the services referred to in this report, all of which have been awarded in accordance with Public Contract Regulations 2015 (the PCR).
- 4.34. Cabinet Office Procurement Policy Notes published in March and June this year (PPN 02/20 and PPN04/2 respectively) gave instructions to Local Authorities to support supplier cash flow through pragmatic approaches, ensuring that providers do not profiteer from the pandemic and that particular focus is put on supporting providers who are at risk during this time. This was supported by an 'open book' approach to ensure that the Council had the requisite transparency in how supplier relief was used.
- 4.35. The temporary arrangements the Council has already entered into constituted contract variations in line with the guidance provided in the Procurement Policy Notes up to specific dates.
- 4.36. PPN04/20 had an end date of 31 October this year, so the continued and any future contractual variations cannot rely on a mandate from these policy notes for provision from 1 November this year onwards.
- 4.37. Any variation of contracts must be in line with PCR Regulation 72 ('Modification of contracts during their term'). Variations must not be 'material', the tests for which include whether it alters the overall nature of the contract, changes the economic balance in favour of the provider or extends the scope considerably, whether or not they were included for in the initial procurement and their value.
- 4.38. To date Adult Social Care has implemented the following contract variations to support market as a response to the pandemic:

- (i) Increasing the frequency of payment to providers in receipt of Scheduled Payments, namely the Residential and Nursing contracts and the Community Based Services (CBS) framework;
  - (ii) 'Payment by Plan' for Domiciliary Care providers on the Community Based Services framework.
- 4.39. Specific procurement and legal advice will be sought by the directorate in relation to any variation which may be required for increasing the frequency of payment to providers in receipt of Scheduled Payments (ie Residential and Nursing contracts and the CBS framework), however it is likely that these would not be seen as 'material changes'.
- 4.40. As regards continuing with a variation for payment by plan for Domiciliary Care providers on the CBS framework, this framework agreement has been varied several times since it was originally procured. Without the mandate provided by PPN02/20 and PPN04/20 there is a risk that any further modification, when taking the aggregate view of all the modifications could be in breach of Regulation 72.
- 4.41. However, when balancing this with the duty to continue to support the provider market during the pandemic, continuing with these arrangements as variations can be seen as the option which poses the least risk to the Council because variations were put in place in accordance with guidance published in Cabinet Office Procurement Policy Notes, and the reason for these was in response to the pandemic. This requirement could not have been foreseen when these contracts went to competitive tender.
- 4.42. Procurement and Legal Services have recommended that such variations should only be in place for the shortest amount of time required in order to respond to the pandemic, and appreciate that the timescale for this is unknown at this time so will be subject to careful and thorough management by Adult Social Care.
- 4.43. Procurement have recommended that these variations are put in place alongside relevant controls for transparency, ensuring that providers are not 'profiteering' from any support measures, and in relation to electronic call monitoring, to ensure that the Council has visibility of exactly what care is being delivered.
- 4.44. Procurement have also recommended that the ideal course of action as the Council transitions from responding to the pandemic to reset plans is to re-procure these services, as this will enable new arrangements to align with the Council's strategic direction in relation to care, and ensure that the risks posed by multiple contract variations is removed.

### **Health and wellbeing implications**

- 4.45. It is in the health and well-being interests of those supported by Adult Social Care services that the market continues to be supported to be financially

sustainable and to flex its capacity so that it can continue to meet the assessed care needs of those who require them.

- 4.46. The principles and actions contained within this report are in full accordance with the Marmot objectives because service users will have increased independence, improved health and can positively contribute to their communities in a safe and healthy way.

### **Staffing implications**

- 4.47. There are no staffing implications arising out of this report.

### **Reducing Inequalities**

- 4.48. An Equality Impact Assessment (EqIA) has been completed in line with the Care Act easements guidance and the impact of the decision on the people who ordinarily use the service has been considered.
- 4.49. Continuity of care is significantly reduced if care providers are not given the autonomy to risk assess and deliver care flexibly. The impact on service users is that whilst there may be changes to how and when their needs are met, their priority needs will continue to be met. Provider flexibility creates capacity to take on new care packages or continue to deliver existing packages safely within reduced resources.
- 4.50. Adult Social Care have also considered the impact of payment by plan on families and carers of service users. Families and carers may experience anxiety about care being reduced. However, by providers delivering care flexibly they should also find some reassurance that their priority needs are being met. The Department of Health and Social Care's guidance *Responding to COVID-19: the ethical framework for adult social care* (published 19 March 2020) continues to inform all of Adult Social Care's decision making about the subject matter of this report.

### **Consultation**

- 4.51. All Adult Social Care providers across Walsall and the Council's Health and Care partners are engaged in regular tele-conferences, by email, through a dedicated 'provider hotline' and through an Adult Social Care provider information and advice internet page.
- 4.52. Leaflets have been produced for providers to issue to service users when having discussions about their care delivery which sets out the 'new way of working' and addresses frequently asked questions. The leaflet also advises who to contact should they be unhappy with their new arrangements.

## **5 Decide**

The option of payment by plan and a number of alternative payment options were considered by Cabinet on 19 May this year where the preferred approach of a payment by plan was approved, rather than paying providers for actual care delivery, which was the pre-pandemic payment arrangement, for the reasons summarised in sections 4.5 – 4.9 above.

## **6 Respond**

Subject to Cabinet approval the arrangements for flexible working will continue as implemented at the start of the pandemic.

## **7 Review**

Adult Social Care will consider national guidance as issued and our local intelligence to inform our ongoing approach.

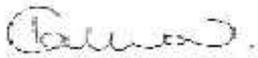
## **Background papers**

19 May 2020 Cabinet report

### **Author**

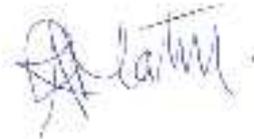
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Date: 09 December 2020



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