

# CYNGOR SIR POWYS COUNTY COUNCIL.

## Confidential Report to Cabinet Executive 2012

**REPORT AUTHOR:** Cllr Rosemarie Harris  
Portfolio Holder for Social Services, Care and Health  
Cllr Tony Thomas  
Portfolio Holder for Resources, Workforce and Housing

**SUBJECT:** Review of Fees for Residential/Nursing Care Homes.  
This report is confidential for commercial reasons

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**REPORT FOR:** Decision

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### 1. Summary and proposal

**1.1** The Council has a duty under the NHS and Community Care Act 1990 to provide nursing or residential care services to meet the assessed needs of the older or physically disabled people. These services are commissioned entirely from independent sector service providers.

**1.2** The 2011-12 budget for older and disabled people allows for the purchase of 440 placements in independent residential and nursing care homes (this figure excludes the block beds purchased from BUPA which is subject to a separate contract). In addition the budget allows for some 30 placements in independent residential care homes for mentally ill clients.

**1.3** Officers have developed a methodology to assess fee rates for care in residential and nursing homes that is in line with the Welsh Government Commissioning Framework Guidance and Good Practice (August 2010). The results of applying this methodology are set out in this report and the impact is a proposed increase in fees to ensure sustainability of service in the short term, based on a home by home assessment.

### 2. Background

**2.1** Historically Powys has set a flat rate fee for Residential and Nursing Home Care for Older People. Comparative rates for all Welsh Councils are set out in Annex 1.

**2.2** In December 2010 the Honourable Mr Justice Hickinbottom granted the application for judicial review from the Chief Executive and manager of 3 care homes in Pembrokeshire. The residential care home rate set by Pembrokeshire CC for 2010/11 was £390 per week and was judged to be unlawful:

*“in my judgement, the Council was fully entitled to take into account its own financial position when determining the level of accommodation and care services upon the minimum required by section 21 (National Assistance Act 1948 as amended) and in setting the fee rate for those who provide those services. However, it erred in law in*

*failing properly to take into account other factors which I have identified in this judgement, such as the potential adverse consequences of the decision for providers and residents, which it was required to balance against the constraints on its own resources. The manner in which the Council dealt with capital costs for the purposes of setting the rate was simply methodologically wrong; but the other sub-grounds succeed, because the Council failed to take into account matters other than its own financial resources in a proper and lawful way.”*

2.3 The specific issues were:

- The way in which Pembrokeshire had calculated capital costs was not logically defensible or legally rational
- The actual levels of care were higher than those for which Pembrokeshire proposed to include in the costs assessment model and a reduction in staffing levels could have an adverse impact on residents and there was no evidence that the council had taken this into account before setting the rate.
- Pembrokeshire was aware that a significant proportion of homes are small, the occupancy level is very high and providers have been expressing concerns about the fee rates in the context of their business. Pembrokeshire, if determined to set one rate for all homes large and small, ought to have taken into consideration the local circumstances, and the possible consequences for providers and residents of setting a fee rate based upon only those homes which benefited from the economies of scale. There is no evidence that Pembrokeshire did so.
- There was a failure to take into account the effects of inflation and the implementation of the Working Hours Regulations and Pembrokeshire failed to consider the effect of the cut in real terms that it was imposing.

2.4 In response to the Pembrokeshire Judgement, officers attended an all Wales workshop in April 2011 on the implications of the Pembrokeshire judgement and it became clear that Powys along with most if not all other Welsh Local Authorities may be at risk of legal challenge from disgruntled providers based upon alleged failures to follow the Welsh Government guidance.

2.5 Cabinet was briefed by Parry Davies, Executive Director for Care and Wellbeing on the detail of the risks for Powys County Council.

Officers then worked on an approach to setting fees for Care Homes that would ensure that the Council was adhering to the guidance set out in the Welsh Government's Social Care Commissioning Guidance "Fullfilled Lives, Sustainable Communities".

2.6 There has been a more recent Judicial Review (February 2011) where nine Welsh care home providers sought to judicially review Neath Port Talbot County Borough Council's decision to increase the fees paid per bed by 5.7%. The care home providers argued that the Council had not taken into account the true costs of providing residential care and had dismissed concerns about patients' welfare in their pursuit of reduced costs.

The Judge noted that, in setting the rate paid to care home providers, Neath Council had decided not to apply the 'toolkit' model often used by councils. This set the case apart from previous applications for Judicial Review, where councils had chosen to apply the toolkit but then failed to do so. Those councils' decisions were quashed

because the councils had not followed the process that they had set out to do and had not properly assessed the actual cost of delivering care.

In contrast to previous cases, the Court found that Neath Council had properly considered all relevant factors (albeit not applying the 'toolkit' model) and had also taken into account the future viability of care homes by offering a commitment to minimum annual increases in rates of 4% over the next three years. Accordingly, the Court dismissed all of the providers' grounds for challenge and found in favour of Neath Council.

The case emphasises the importance of commissioners undertaking an appropriate process, including properly reviewing fees with providers and taking into account all relevant factors. It also demonstrates that, although a specific "toolkit" need not be applied, procedures must still be in place to ensure that decision-makers act fairly, proportionally and transparently having due regard to the true costs involved in providing care. Should commissioners not do so, they are at serious risk of a judicial review claim being successfully brought against them by care home providers.

### **3.0 Development of Methodology**

3.1 Officers from Adult Social Care, Corporate Procurement and Legal Services have developed a methodology to assess a fair rate base on the care and local circumstances for each home. The methodology involves looking at the financial costs for each home using open book methodology. It also involves looking at the quality of care provided by the home. A procurement specialist with experience in this field together with the Commissioning and Contracts Officer with experience in residential care analyse the information and meet with the homes to clarify information and assess a fair fee for each home.

3.2 The methodology that has been developed is in accordance with the Council's Commissioning and Procurement Strategy. This strategy is compliant with all of the standards set out in the Welsh Government's Commissioning Framework. In particular the methodology developed satisfies Standards 9 and 10. These are:

Standard 9 – Directly provided and contracted social care services offer value for money and are fit for purpose

Standard 10 – Commissioners have understood the costs of directly provided and contracted social care services and have acted in a way to promote service sustainability

3.3 Several homes had requested a review of the fees paid by the Council. They were invited to participate in the process and there was a mixed response to that invitation with some homes refusing to participate, and others challenging why detailed information has been requested.

3.4 The Senior Policy Officer from Care Forum Wales was invited to a meeting to go through the proposed methodology to ascertain if there were any issues that they could foresee from the methodology. The response was supportive of the approach being taken.

3.5 Having obtained broad support, it was agreed that for homes participating in the process, any adjustment to fees judged reasonable by PCC would be backdated to

the date that detailed information was received from the care home. It was also proposed that all homes in Powys would be invited to participate in the exercise.

#### **4.0 Progress to date**

4.1 There were five homes where the fee rate had been proactively disputed. Those homes were invited to participate in the process in the first instance of which one home declined. Since that date a further 3 homes have requested to go through the process.

4.2 Each home in Powys is individual and this exercise has demonstrated that it would not be a fair reflection of the market and local circumstances to use a “one size fits all” toolkit such as the Laing and Buisson toolkit that had been used by Pembrokeshire. The general findings are that:

- The costs in some homes are dictated by their design, where smaller wings or separate floors mean that staffing the home to provide safe levels of care is inevitably inefficient which has an impact on cost.
- Some homes are not financially sustainable on the fees that are currently being paid. Without an increase they are at risk of no longer being able to operate.
- Some homes are making a reasonable profit but at the expense of adequate investment in the quality of care in the home.

4.3 The market for Nursing Home Care in Radnorshire and Montgomeryshire is extremely restricted, with just 4 nursing homes registered for this population. In the short to medium term the Council has a duty to offer a reasonable fee rate to these homes to ensure that Nursing Home Care is available for older people living in these areas.

4.4 In the longer term a commissioning strategy is being developed to meet the future accommodation and care needs of older people in Powys. The Powys Change Plan includes the development of a joint Commissioning strategy for Older People to be developed and the Adult Social Care Service Business Plan includes work to develop an Accommodation Strategy. These will seek to establish develop the market so that people will have choice closer to where they live and the fees paid will reflect value for money in a financially sustainable market.

#### **5.0 Projections**

5.1 For 2011/12 the anticipated spend on Nursing and Residential Care placements is £10.5m (net of £1.1m free nursing care funded by Powys teaching Health Board). For all residential and nursing home placements in Powys in 2011/12 and subsequent years, Powys is likely to need to increase fee levels with the financial impact as follows:

2011/12      £278,000 retrospective payment in 2011/12

2012/13      provision for the impact from other homes who take up the opportunity to go through the open book process. Any potential increases in fees offered would be recommended to members for decision.

An inflationary increase of 3.75% (50% RPI, 50% CPI) on fee rates for homes that have been through the process in 2011/12, together with homes currently being paid on the Powys basic rates of £354 for residential care and £532 for nursing home care. This will potentially cost up to £420,000. This assumes that out of county placements also increase by this amount although this is dependent on increases agreed by the host Council.

2013/14 an additional £438,000 based on a further 3.75% uplift

Detailed home by home calculations are available in the background papers.

5.2 This takes no account of potential demographic increases. Powys could contest challenges to the fee rates, and each judicial review will cost in the order of c.£200K (Pembrokeshire estimated cost) in Legal costs plus any back payments which may become due if the councils fees are deemed to be “unfair”.

## **6.0 Sustainability and Environmental Issues/Equalities/Crime and Disorder/Welsh Language/Other Policies etc**

6.1 The focus of this report is to ensure sustainability in the Care Home market.

## **7.0 Children and Young People’s Impact statement – Safeguarding and Wellbeing**

7.1 The subject of this report is care for Older People. There is a potential impact on safeguarding for vulnerable adults in ensuring that the quality of care provided meets standards relating to dignity and respect and meets individual care needs.

## **8.0 Local Members**

8.1 This report covers the whole of the County Council area.

## **9.0 Other Front Line Services**

## **10.0 Support Services (Legal, Finance, HR, ICT, BPU)**

10.1 Legal, corporate procurement and finance advice have been sought in developing the methodology and in negotiations with individual homes.

10.2 Corporate Finance confirm that the recommended retrospective care home fees of £278,000 can be funded from one-off deferred charge service user income already received, and provisions made in the accounts for the financial year 2011/12. The inflationary uplift of 3.75% of approximately £420,000 and the future cost of challenges, can be funded by the investment in the Council’s 2012/13 Medium Term Financial Plan of £1,467k which will be held corporately until the sums are approved.

## **11.0 Local Service Board/Partnerships/Stakeholders etc**

11.1 Powys Teaching Health Board pay the free nursing care element of Nursing Home Fees (£120.56 per place per week). This element is set by the Welsh

Government and has not increased with inflation, which shifts the financial pressure to the Local Authority.

## 12.0 Communications

## 13.0 Statutory Officers

## 14.0 Members Interests

Recommendation:	Reason for Recommendation:
<ul style="list-style-type: none"> <li>• Note the progress to date</li> <li>• Approve and increased rates for those providers who have participated in open book process in 2011/12 to the value of £278,000</li> <li>• Approve an increase of 3.75% from 1<sup>st</sup> April 2012 on current rates where homes are currently being paid the Powys rates (from £354 to £367 for residential care and from £532 to £552 for nursing care) and have not been through the open book process</li> <li>• Instruct officers to invite all care homes to participate in the open book process during 2012/13 and any recommended increases over and above inflation to be approved by the Social Services, Care and Health Cabinet Portfolio Holder</li> </ul>	<p>The recommendations are to provide member authorisation to enable the process to be completed in setting fees with care homes that have engaged in the open book process during 2011/12.</p>

<b>Person(s) To Action Decision:</b>	Parry Davies, Executive Director Care and Wellbeing
<b>Date By When Decision To Be Actioned:</b>	1st April 2011

<b>Relevant Policy (ies):</b>			
<b>Within Policy:</b>	Y	<b>Within Budget:</b>	Y

<b>Contact Officer Name:</b>	<b>Tel:</b>	<b>Fax:</b>	<b>Email:</b>
Barbara Smith	01597 826849		barbara.smith@powys.gov.uk

<b>Relevant Portfolio Member(s):</b>	Cllr Rosemarie Harris Cllr Tony Thomas
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<b>Relevant Local Member(s):</b>	<b>Whole County</b>
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## Appendix 1: SSIA Fee Survey 2010-2011

	Very Dependant Elderly/Higher Residential	
		EMI
Anglesey	£375 - £411	£403-£445
Blaenau-Gwent	£382	£445
Bridgend*	£417-£462	£447-£523
Caerphilly	£390 - £472	£472
Cardiff	£321	£408-£459
Carmarthenshire	£380.40	
Ceredigion	£400	
Conwy	£342-£437	£437
Denbighshire	£332.07-£415.58	£427.72
Flintshire	£407.81-£433.43	£441.98-£469.73
Gwynedd	£345.94-£397.67	£397.67
Merthyr Tydfil	£372	£467
Monmouthshire		
Neath Port Talbot	£403	
Newport	£400-4450	£455-£516
Pembrokeshire	£390	
Powys	£354	
Rhondda Cynon Taff		
Swansea	£426	
Torfaen	£365.97	£441.37
Vale of Glamorgan		
Wrexham	£334.09 - £426.20	£465.12

	<b>Nursing</b>	<b>EMI Nursing</b>
<b>Anglesey</b>	£513.90-£549.90	£594.90
<b>Blaenau-Gwent</b>	£517.56	£574.56
<b>Bridgend*</b>	£537.56-£582.56	£567.56-£612.56
<b>Caerphilly</b>	£542.56	£592.56
<b>Cardiff</b>	£512.80	
<b>Carmarthenshire</b>	£500.96	£525.01
<b>Ceredigion</b>	£520.56	£520.56
<b>Conwy</b>	£557.90	£597.90
<b>Denbighshire</b>	£536.14	£561.53
<b>Flintshire</b>	£528.37-£553.99	£562.54-£590.29
<b>Gwynedd</b>	£540.49	£572.97
<b>Merthyr Tydfil</b>	£551.90	£585.90
<b>Monmouthshire</b>		
<b>Neath Port Talbot</b>		£544.76
<b>Newport</b>	£520.56-£570.56	£575.56-£636.56
<b>Pembrokeshire</b>	£510.56	£510.56
<b>Powys</b>	£532	£533
<b>Rhondda Cynon Taff</b>		
<b>Swansea</b>	£546.56	£551.56
<b>Torfaen</b>	£512.04	£561.93
<b>Vale of Glamorgan</b>		
<b>Wrexham</b>	£546.76	£585.68