FUNDING FOR OLDER PEOPLE'S SERVICES

CARE ENGLAND

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EXECUTIVE SUMMARY

- Having a good understanding of the legal context of care services and commissioners' legal duties is vital to securing payment on reasonable terms.
- Providers are entitled to be paid properly for the work they do. They should not be expected to supplement the public purse and need to recover a reasonable rate of return for their services and their capital investment.
- Providers should equip themselves so that they have a thorough knowledge of the relevant statutory guidance applicable to the subject services and are therefore able to assert their entitlements in negotiations with commissioners.
- Providers are entitled to assert, in support of the people they support, the rights of those individuals and to assist them to hold commissioners to account. A good understanding of the rights of the individual is also beneficial.
- Adopting a strategy to improve financial returns from commissioners must be seen as a long-term project; the levers available may bring immediate results but often cannot; the consistent application of principled arguments and provision of hard data around the actual cost of providing care are the key tools to apply.
- Providers routinely overlook the contractual rights they have and assessing the contractual options available should be the first step in any exercise to seek fee increases.
- Public law remedies are a useful weapon but rarely deliver exactly what is required but should not be overlooked, particularly if action can be taken by multiple providers.
- The care system is meant to rest fundamentally on choice and control sitting with the individual; this idea is rarely fully honoured by commissioners. Much can be made of this fact through recourse to the relevant guidance and the threat of making a complaint to the LGSCO.
- Providers can assist themselves by being well briefed on the rights of individuals to such things as top ups and deferred payments which can assist providers to secure better rates.
- Although not as well-known, many similar duties to those which apply to local authorities apply to CCGs commissioning health and care services; the legislative framework is very complex and this may lead to CCGs having a limited knowledge of their obligations.
- The framework for pricing of CHC services gives providers a significant opportunity to assert a strong position with regard to being paid properly for the services being supplied, to have fees reviewed regularly and for care assessments to be updated as needs change.

1. INTRODUCTION

1.1 This report has been commissioned by Care England to assist its members when engaging in discussions and disputes with commissioners of health and personal care services ("**Commissioners**") for older people ("**services**"). The report commences with an explanation of the legal framework in which services are commissioned, separated into residential care, home care and NHS funded Continuing Healthcare ("**CHC**") services. This will enable members to gain a clear understanding of the legal context in which Commissioners are meant to operate in the context of agreeing, reviewing and setting fees for services.

1.2 This report is prepared against a background where providers face increasing pressure on the fees offered by Commissioners to provide services. There are increasing concerns about the ability of local authorities to fund services and significant constraints on their budgets. NHS commissioning is often haphazard and providers often find it difficult to establish a dialogue with particular Clinical Commissioning Groups ("**CCGs**").

1.3 Care England members are inevitably left having to negotiate fees on a case by case and Commissioner by Commissioner basis. The focus of this report is, therefore, to highlight how to engage effectively with Commissioners of such services. The appendices to the report comprise template letters for use in respect of each type of services described. The templates contain a range of optional paragraphs covering different scenarios faced by providers struggling to secure the appropriate fee rates for the services that they are providing.

1.4 The report draws a distinction between the way in which local authorities can be held to account compared with the way in which CCGs can be held to account. NHS commissioning is generally more complex and therefore less well understood than local authority commissioning.

1.5 The focus of this report is on services in England because that is the context of the Care Act 2014 ("**the Care Act**" or "**the Act**") in respect of local authority commissioning, the advice in connection with NHS commissioning applies across England and Wales and many of the general points made would apply in other jurisdictions but subject to necessary clarification and detailed amendment where a different legislative framework applies. Where public law remedies are referred to these would tend to be similar in any jurisdiction in the UK.

1.6 We have also included an explanation of the remedies available to providers who wish to dispute inadequate fees or poor commissioning which are:

1.6.1 contractual remedies - our starting point is always to look at the contractual position as this will often provide useful levers;

1.6.2 public law remedies - where there are arguments that the Commissioner has failed in its public law duties either towards the provider or to the individual; although public law remedies are not ideal, they do have a place by way of threat and also if it is possible to engage with a number of providers in a

particular locality a collective approach to challenge a general failure on the part of the Commissioner can be worthwhile; and

1.6.3 remedies available to individuals - including those remedies that can be promoted and even undertaken by providers in support of those individuals, particularly those that do not have any other representative (apart from the local authority social worker).

1.7 There are 3 template letters set out in the Appendices to this report. The letters cover different circumstances where fee issues arise, local authority residential care, local authority home care and CCG CHC services. They are provided as PDFs but Care England members can access them in Word form by contacting Anthony Collins Solicitors, john.wearing@anthonycollins.com; ramjeet.kandola@anthoncollins.com.

2. LEGAL FRAMEWORK FOR FUNDING OLDER PEOPLE'S RESIDENTIAL CARE SERVICES ("RCS")

2.1 Paragraphs 2.2 to 2.10 (below) should be considered in the context of both this section on residential care services and for the following section 3 on home care services.

2.2 The legal framework for care services is based predominantly on the Care Act and the accompanying Statutory Guidance issued under s.78 of the Act ("**the Statutory Guidance**") which can be found here: Care and support statutory guidance - GOV.UK (www.gov.uk).

2.3 The Care Act creates a range of duties which are imposed on local authorities with responsibility for care services. The duties create both private law rights which can be enforced by individuals and those that represent them and public law duties which the local authority must fulfil in a way which complies with the general obligations of a public authority to act within the general law, to meet its obligations under the Human Rights Act 1998 and to fulfil other public sector duties such as those under the Equality Act 2010 and the Disability Discrimination Act 1994. This report does not cover public law duties in detail, save in the context of the ability to challenge local authority and CCG decision making, as set out in section 4 (below).

2.4 The scheme of the Care Act involves a logical progression through various stages when the local authority is asked to assess a person for their care needs or to reassess or reconsider whether existing services are meeting those needs. The progression is as follows:

Assessment (including reassessment and review) – service provision decisions – financial decisions (eligibility and contribution) – personal budget – direct payments – choice of accommodation.

The Act and other Regulations cover other specific aspects which the local authority must abide by but the essential scheme of the Care Act is what needs to be understood by providers so that they can navigate the approach which local authorities should take and therefore be in a position to hold local authorities to account should they fail to do so.

2.5 It is important to understand that there are certain broad based "target" duties on local authorities which are set out in the opening sections of the Care Act. Such duties are described as "target" duties because they do not normally give rise to any specific rights to challenge a failure to deliver those rights to the individuals concerned however, they are important in terms of context. Local authorities must consider them and they should influence the outcome of their decisions, including those in relation to costs paid for care services and the local authority's responsibility to properly manage their market for care services in their area.

2.6 The most important target duties are set out in section 1 (1) of the Care Act which states that;

"*the general duty of a local authority, in exercising a function under [the Act] in the case of an individual, is to promote that individual's wellbeing".*

The Statutory Guidance expands upon this for example:

"1.7 promoting wellbeing involves actively seeking improvements in the aspects of wellbeing set out (in the guidance) when carrying out a care and support function in relation to an individual at any stage of the process…"

and

"1.8 a local authority can promote a person's wellbeing in many ways … a local authority should consider each case on its own merits, consider what the person wants to achieve and how the action which the local authority is taking may affect the wellbeing of the individual".

2.7 It is a fundamental element of the care system that a large majority of services are provided by the independent sector rather than by local authorities. Local authorities do not have the power to delegate the delivery of all of their functions under the Care Act so for some duties they cannot relinquish responsibility for their decisions (such as those in respect of assessments) but there are many such as the day to day provision of care services where responsibility passes to the provider.

2.8 As the purpose of this report is to highlight how providers can achieve better outcomes in terms of the fees they are paid for services, it is important to understand the various circumstances where this issue is relevant and how the levers available differ in each case:

- at the start of the relationship when a new arrangement is being negotiated;
- during the provision of services when care needs change or costs increase which require the fees to increase to match the costs being incurred (including, but not limited to, annual fee reviews);
- where a private payer becomes eligible for local authority funding;
- the point at which the Commissioner has refused to pay the necessary fees to meet the costs being incurred to provide the service; and
- the recovery of underpaid or unpaid fees after termination of the contract.

2.9 Unlike working age adults in receipt of services who often have no income or capital beyond basic welfare benefits many older people have assets and income which affect the fees payable (or at least the source of those fees). This is an important factor which needs to be part of any strategy to secure fees at the appropriate level for all services.

2.10 The approach taken by many local authorities does little to reflect the principles of the Care Act. Fee rates are often set by reference to fixed tariffs, standard fees which do not reflect how individual needs should be addressed and increasingly through informal bidding processes or online dynamic purchasing systems which serve as reverse auctions securing the lowest price, often at unsustainable levels but which are secured

at providers' marginal cost. This report does not cover short term or respite placements which do not tend to create significant fee problems.

2.11 The arrangements made in respect of new placements in residential care tend to fall into a limited number of categories, for example:

- placements made under a block contract arrangement;
- placements made pursuant to dynamic purchasing systems ("**DPS**");
- spot purchases where the local authority or CCG has no alternative formal mechanism;
- arrangements made when the individual runs out of funds when already in a home and becomes eligible for local authority support; and
- "emergency" placements where the local authority is under significant pressure to make a placement either because an existing placement has broken down or a care needs assessment has demonstrated the need to place someone urgently in a particular locality for example near to family and community connections.

2.12 There are now fewer larger scale block contracts in existence in connection with OP services, DPS are more common.

2.13 Although there are opportunities to influence the initial fees for a service it may not be straightforward to do so as the relative strength of bargaining position of the parties will vary from case to case. Many providers will be managing services on the basis that the fees payable by the local authority at the outset will not be sufficient to cover their costs. They may be able to "carry" low fees on a particular service because of the volume of other placements or the number of private pay residents in a particular home.

2.14 The next 9 sections highlight those elements of the statutory framework that will equip and empower providers and individuals in their dealings with local authorities over fees. It is rare for such commissioners to either understand or correctly apply all of the relevant principles. These elements are reflected in the template letters in the Appendices.

2.15 **The Assessment** - The local authority will often fail to comply strictly with the requirements of section 25(1) of the Care Act which sets out what a care and support plan **must** contain for a resident, which includes:

- the assessed needs;
- the extent to which the needs meet the eligibility criteria;
- the needs that the local authority is actually going to meet and how it is going to meet them;
- a personal budget for the services;
- direct payment arrangements (where relevant, see section 3.6 (below));
- the outcomes the adult wishes to achieve in day-to-day life and how the care and support proposed could contribute to the achievement of those outcomes.

It is often the case that there is an immediate opportunity to challenge poor assessments (and the same goes for reassessments) because of the lack of any detail in the care and support plan proposed. Problems are also encountered where specialist assessment is required (for example, where people suffer from a sensory deprivation, or where due to capacity issues, specific arrangements need to be put into place to ensure that the individual can contribute as much as possible to the process). Because of the nature of older peoples' residential care services, there is a tendency not to look at each person individually. This is often a cost-saving exercise on the part of the local authority concerned but it should be resisted on behalf of the individual resident whose needs should be looked at exclusively from their own perspective.

2.16 **Choice and Control** - The issue of the choice of where and/or by whom a particular residential care service is being provided can be of great importance to the individual and their family. The well-being principle (see paragraph 2.6 above) is expressed in a checklist set out in section 1(3) of the Act establishing the importance of such elements as:

- beginning with the assumption that the individual is best placed to judge the individual's well-being;
- the individual's views, wishes, feelings and beliefs;
- the individual participating as fully as possible in decisions relating to the exercise of the function concerned.

2.17 **Advocacy and involvement** - Another example of the way in which the individual is to be placed at the heart of any reassessment process is the need for the local authority to consider whether an independent advocate is required to support the individual to be fully involved in the process. For example, the Statutory Guidance states as follows:

*Paragraph 10.2 … "the person **must** be genuinely involved and influential throughout the planning process and should be given every opportunity to take joint ownership of the [care and support] plan with the local authority if they wish, and the local authority agrees."*

*Paragraph 10.49… "the local authority **must** also involve the person the plan is intended for…. and any other person the adult requests to be involved. Where the person lacks capacity to ask the authority to do that, the local authority **must** involve any person who appears to the local authority to be inte*rested in the welfare of the person and should involve any person who would be able to contribute useful information."*

People who can contribute useful information would almost inevitably include those staff of the provider who are providing the day to day care for the individual as they are likely to have very useful insights into the needs and wants of the individual concerned. This is even more important were there are no close family members able to contribute.

2.18 **Personal Budgets** - A further example of how choice and control is meant to be central to the process is found in the references in chapter 11 of the Statutory Guidance to personal budgets. Paragraph 11.3 includes the following provisions:

"*The personal budget is the mechanism that…enables the person…to exercise greater choice and take control over how their care and support needs are met."*

- *being able to choose from a range of options for how the money is managed (including direct payments) **must** be offered;*
- *the budget **must** involve the individual having a choice over who is involved in developing the care and support plan for how the personal budget will be spent, as well as having greater choice and control over the way the personal budget is used to purchase care and support, and from whom."*

(Our emphasis, but please also note direct payments are not generally available for residential care)

The Local Authority must provide a written Personal Budget which should be available to the individual (and, as a result, to the provider) as part of the Care and Support Plan (see sections 10.36 and 11.24 of the Statutory Guidance, 11.24 also covers the point that the calculation must be transparent giving an illustration of what the resident can pay for the services required to meet the assessed and eligible care needs. The failure to provide a personal budget (or an adequate personal budget) would be actionable by the individual by way of judicial review but providers can also bring this to the commissioner's attention, if for example the rate being offered does not reflect the personal circumstances and needs of the resident for example in terms of their need to remain in a particular locality to maintain community connections rather than be moved to a "cheaper" location.

2.19 **Preferred Accommodation** - There are particularly useful provisions in connection with an individual exercising a choice to either remain at or move into his or her preferred accommodation. The provisions are contained in regulations which provide that the local authority must arrange for an adult to be accommodated in the accommodation of his or her choice. This is subject to the cost either being within the adult's personal budget or where a third party is willing to meet the difference (the so called "third party top up").

This issue is particularly pertinent when a resident is asked to move from their home when they become eligible to receive public funding.

The choice of accommodation also extends to what type of service best suits the person's needs, whether this should be in a care home, at home with personal care being provided or in some form of retirement living arrangement.

The regulations are particularly useful when it can be established that an individual's needs can only be met properly at a particular location. This could be for a number of different reasons but should generally be based on a proper assessment of the needs of that person which would result in a particular location being identified as the only location at which those needs can be met. An important consideration should be the impact of a move on a person's health (particularly if they are frail) as moving is recognised as having a detrimental impact generally.

Where only one location is suitable, the local authority has no choice but to pay the full cost of that service, notwithstanding that such costs may be significantly higher than its preferred rate or the personal budget that has been set. If, for example, the person has long established links with a particular community where their friends and family reside, where they attend a place of worship or engage in significant community activities it is likely that the area in which the home is located may be the only location capable of meeting the properly assessed needs of the individual. Only if another cheaper home in the locality could be found would that comprise a suitable alternative.

The local authority is also obliged to provide written reasons for any refusal to arrange for the provision of preferred accommodation. This means that if there is a suggestion that an individual should move away from his or her existing accommodation, these rules apply and the assessed care needs must demonstrate that alternative provision would be appropriate. The local authority must be able to demonstrate that there are equivalent alternatives available before such a move is made and must also put in writing the reasons why the individual cannot be allowed to stay in his or her preferred accommodation.

All of the features set out above may be present in any particular case and as a matter of course the local authorities' failure to apply the rules should be drawn to their attention in every case. As will be seen from section 5 (below) in which we set out the remedies that might be available, significant advantage is likely to arise from identifying such failures even if there is no obvious breach of the relevant contract. The following sections draw attention to the particular importance of Top-up arrangements in older people's RCS and to the issue of Deferred Payments and other issues specific to older people's RCS.

2.20 **Top-ups –** The starting principle for funding decisions is found at paragraph 8.2 of the Guidance, which states:

"*Where a local authority arranges care and support to meet a person's needs, it may charge the adult, except where the local authority is required to arrange care and support free of charge.... The overarching principle is that people should only be required to pay what they can afford. People will be entitled to financial support based on a means test and some will be entitled to free care… The principles are that the approach to charging….should:*

- *ensure that people are not charged more than is reasonably practicable for them to pay;*
- *be comprehensive to reduce variations in the way people are assessed and charged;*
- *be clear and transparent so people will know what they will be charged;*
- *promote well-being, social inclusion and support the vision of personalisation, independence, choice and control;*

- *be person-focused, reflecting the variety of care and caring journeys and the variety of options available to meet their needs;*
- *apply charging options equally so that those with similar needs or services are treated the same and minimise anomalies between different care settings;*
- *be sustainable for local authorities in the long-term."*

Local authorities are obliged to have a charging policy and must have regard to the advice contained in the Guidance, which covers in particular the following:

- *"care home residents are expected to contribute most of their income, excluding earnings;*
- *for non-residential care charges, local authorities should not simply adopt the minimum income threshold but consider setting a maximum percentage of disposable income available for meeting charges and/or a maximum charge, based on a percentage of care home charges in the local area;*
- *local authorities should be alive to special circumstances in which minimum income thresholds may have unreasonable effects on individual cases.*

The detailed machinery for financial assessment is set out in the Care and Support (Charging and Assessment of Resources) Regulations 2014 and Annexes A to F of the Statutory Guidance. One key point to note, in terms of the potential to challenge financial decisions is where a commissioner sets any strict arbitrary rules, the points highlighted above demonstrate that local authorities cannot rely on general rules.

The approach also encompasses the need to make available information about top-ups as well as deferred payment arrangements. The idea of top-ups derives from the Care and Support and Aftercare (Choice of Accommodation) Regulations 2014 which give effect to the idea that, where possible, people should be given a choice of accommodation (see 2.19 (above)). The rules provide that (except in limited circumstances, primarily during a 12 week disregard period or where a deferred payment arrangement is in place) the top-up payment must come from a third party (usually a family member or friend, not the resident themselves. See below regarding deferred payment arrangements.

The rules can apply equally on admission or when the person's financial circumstances change while in residence and they become entitled to local authority funding having depleted their capital through self-funding their care. In both cases it is advantageous for the provider to have a thorough understanding of the rules and the local authority's obligations so that they can properly advise individuals and families what their rights are and how they can assert them if they wish to move into or stay at the provider's home.

Fundamentally, the rules provide that if someone chooses their preferred accommodation, the local authority must allow that to be their accommodation unless there is a genuine cheaper alternative available. If there is no cheaper alternative actually available, the local authority is obliged to pay whatever rate the provider sets for

the care. In addition, if there is a third party willing to make an additional payment to allow the resident to choose alternative accommodation, the local authority is obliged to accept that, if a provider agrees to provide the care and accommodation on the local authority's usual terms and the third party pays the difference and written agreement is entered into dealing with the top-up. In practice, this means that local authorities set policies for top-ups so as to avoid circumstances in which they are asked to agree top-ups that they are not sure will work. It is important to understand the local policies applicable in each particular case. Some local authorities have tried to adopt policies in which top ups are never allowed. Such a policy is illegal as would be a policy which made it impossible for a genuine decision to be made in particular circumstances that a top up should be allowed.

2.21 **Deferred Payments –** Deferred payment arrangements allow care fees to be rolled up over a period and only paid once capital is available (usually from the sale of a house). Local authorities are obliged to offer to enter into a deferred payment agreement in many cases and have the power to enter into such agreements in most others, including in supported living such as extra-care or other retirement living settings. This involves the local authority taking a charge over the resident's former home pending the sale of that property. This is a strong positive duty and local authorities cannot refuse, although some do. Some providers offer what are effectively private deferred payment arrangements whereby they take a charge over the property and accept reduced or delayed payment of fees in a variety of circumstances. Care must always be taken that the provider is not in breach of the Consumer Credit and Financial Services regimes which can attract significant criminal penalties and render agreements unenforceable.

The detailed provisions are set out in the Care and Support (Deferred Payment) Regulations 2014. These requires that each local authority has a policy for deferred payments and this will differ from place to place. The aim of the scheme is to avoid people being forced to sell their home in their lifetime to pay for their care. However, it is often used in practice simply to defer payment allowing a more significant period to achieve a sale rather than having to rush to sell in adverse circumstances. Families may also wish to take advantage of any house price inflation as the value of the property may be increasing, and also to rent out the property in the meantime to pay for care charges.

Local authorities may be reluctant to offer deferred payments, usually because of the additional administrative costs involved and providers may help residents and their families by promoting their knowledge of their entitlement. Crucially, from the provider's perspective, it is important to discover wherever there is a deferred payment arrangement being proposed as it will need to account for any change in the resident's financial circumstances. The provider may be happy to accept the local authority rate pending the deferred payment agreement coming into force, but if the property is sold it may wish to make it clear that it would then expect to be paid the full private rate for the care being provided. Although local authorities are not obliged to include top-up arrangements within the deferred payment, it is potentially possible to have a top-up payment made alongside a deferred payment arrangement.

Particular problems can arise where an individual is admitted for a short period while a deferred payment arrangement is being considered, using the 12 week disregard facility which allows the value of a person's residence to be ignored for the purpose of calculating their entitlement to financial support (under paragraph 2 Schedule 2 to The Care and Support (Charging and Assessment of Resources) Regulations 2014 for a period of up to 12 weeks. The initial placement may be made at a local authority rate where the individual could afford to pay the full private rate both during the 12 week period and during the deferred payment period. As the ability of the individual to pay a top up to meet the full costs of the placement can only be measured if a formal financial assessment is obtained providers need to be wary of accepting such residents where the local authority refuses to share the relevant information, even during what appears to be a temporary period. Providers should reserve their position and make it clear to the local authority, in writing, the basis upon which any placement made is being accepted.

2.22 **Local authorities commissioning for private payers –** Any person who has an apparent need for personal care can ask the local authority to assess their need for personal care. This low threshold creates an obligation which has to be met, notwithstanding that it may appear obvious that the individual will not be eligible to receive services paid for by the local authority due to their financial position. The local authority cannot charge for assessments. A local authority has a power but not a duty to arrange residential care for private payers (including at any rates the local authority has secured for its own residents). Section 18 (3) of the Care Act was only brought into force to oblige local authorities to arrange home care services, not residential care services although that may change as a result of reforms currently being considered. At present some local authorities will arrange residential care for residents able to pay privately but if this becomes an obligation all local authorities will have to do so. Where local authorities arrange residential care for private payers this can create difficulties if the provider is not told that the person is paying privately until after the arrangements have been concluded. It should therefore be part of the provider's "on-boarding" process to verify what the financial position of the resident is, particularly if there is any doubt about the arrangement having been made via the local authority. This means that certain checks should be undertaken even if the approach to place a person in the home comes from a local authority. If local authorities resist sharing information on Data Protection grounds the provider may need to insist on the resident providing the information themselves.

2.23 **Managing situations where an individual loses capacity –** This can be a particular problem where a contract for services is signed by an individual and then they lose capacity, and a problem arises with regard to continuity of payment. Our recommendation is that in all cases the individual on taking up residence is encouraged either to prove that they have a Lasting Power of Attorney in place to deal with their finances or will put one in place within 3 months of arriving at the home. If this happens and there is no LPA in place and therefore no-one to take responsibility for the contractual arrangements, then if there is no family member willing to apply to the Court

of Protection to be appointed the individual's Deputy to manage their affairs, then the local authority should be approached to make an application in default of the family doing so. The contract will remain in place, and even in circumstances where someone has come into a home without capacity in the hope that arrangements can be put into place, but they are not, there is still a contract for "necessities" against which enforcement action can be taken if necessary. In all cases, proper verification of the financial position of the individual should be undertaken before they are allowed into occupation of the home and such checks are becoming commonplace. Urgent action should be taken in any circumstances in which arrears of more than one month have accrued, as the sooner action is taken, the better. In circumstances where, for example, the arrangement has been initiated by the local authority, it is usually the local authority's responsibility to continue to pay if there is any break in payment, and providers are encouraged to assert their rights strongly in such circumstances.

3. LEGAL FRAMEWORK FOR FUNDING HOME CARE SERVICES ("HCS")

3.1 This section should be read in light of the content of section 2 (above) much of which is equally applicable to HCS.

3.2 The essential difference between HCS and RCS services is that the costs of the accommodation involved are either not taken into account (where the person owns the accommodation) or accounted for separately if they are in rented accommodation. Therefore, the care provider is only receiving payment in respect of a personal care service not the accommodation costs. This often means that the accommodation is owned by the individual or is provided by a party which has no relationship with the care provider such as in Extra Care Schemes. Here a service level agreement specifying responsibility for various aspects of the scheme concerned may be agreed and the accommodation and care may be provided by related parties. The regulatory environment means that the accommodation cannot be linked to the care provision as CQC take the view that the individual must be able to change care provider without that affecting their accommodation.

This arrangement means that the care provider is in a more precarious position as it is relatively easy to change care provider without the individual losing their home. Although associated companies can provide both, the care provision must be capable of being re-provided by a different party without impacting on the accommodation, to meet CQC requirements.

3.3 Challenging inadequate fees carries a greater risk and can be more difficult because there is less at stake and lower entry costs for alternative providers of HCS means other providers may be willing to offer lower fees. There are provisions which should give the people supported some say in the provision of their care (including who provides it) but there is no equivalent to the choice of accommodation regulations that are described at paragraph 2.18 (above).

3.4 On the other hand, direct payments which are not available for residential care services, are available for supported living services, giving a different angle that can be explored in terms of allowing individuals to continue to choose your services. Although this is part of the wider "choice and control" agenda from the Care Act, this approach demands that the local authority has properly calculated the personal budget to meet assessed needs and offered a direct payment. We look at the impact of each of these aspects, below.

3.5 The local authority must provide a written care needs assessment and a personal budget for anyone for whom it is obliged to provide personal care service, see paragraph 2.17 (above).

3.6 Although in practice direct payments have become less prevalent, the overall plan of the Care Act and the Statutory Guidance is that local authorities should offer direct payments wherever possible and bring them to an end only as a last resort. This is made clear in the Statutory Guidance which states:

- *"Direct payments remain the government's preferred mechanism for personalised care and support.*
- *Direct payments provide independence, choice and control by enabling people to commission their own care and support in order to meet their eligible needs.*
- *Direct payments along with personal budgets and personalised care planning provide a platform with which to deliver a modern care and support system."*

The use of direct payments as a means to secure continuity of a care service for an individual being supported at home or in a supported living setting should not be overlooked.

3.7 Direct payments must be made available and every local authority should have a policy setting out how they can be accessed including for people who lack capacity (where an independent third party must be involved in the arrangement). A local authority cannot have a blanket policy which does not permit direct payments and although it can impose rules on how direct payments are to be managed these need to be reasonable and if they are not, they can be challenged. In recent times direct payments seem to have gone out of fashion somewhat, but particularly where there is a threat to a service or an inappropriate re-tendering exercise is undertaken, we have successfully advised clients who have persuaded groups of people who they support to seek direct payments so that they can continue to purchase the same services from our clients. Where the individuals concerned lack capacity this is more difficult because it requires the intervention of a third party (who can be a member of the person's family or circle of support) and if such support is lacking this can be problematic although if the local authority is doing its job properly an independent advocate should have been appointed to assist the individual, including with seeking direct payments. One alternative in such circumstances is to engage with a brokerage which offers that sort of support, a number of which are active in the supported living sector.

3.8 As we have seen the idea of choice and control is fundamental to the provision of care services. Although it is found in the Care Act itself (see for example paragraph 2.16 (above)) it is also central to nearly all of the guidance written to direct commissioners and others in the provision of care services since the early 2000s. Thus, the individual should be put at the heart of any decision-making process which impacts on their care. This is very rarely the case as many local authorities lack the necessary assessment skills and have a poor understanding of their obligations under the Care Act and this therefore gives providers the ideal opportunity to intervene and challenge the way in which such things are being managed by the local authority.

4. LEGAL FRAMEWORK FOR FUNDING CHC FUNDED SERVICES ("CHC")

4.1 The legal framework for CHC funded services is complex and this complexity has led to a situation in which both commissioners and providers may have a limited knowledge of the way in which the system is supposed to work, and from the commissioners' perspective, a limited knowledge of their statutory obligations for this type of service. This often appears to result in apparently arbitrary decision making by Clinical Commissioning Groups ("**CCGs**") which is difficult to challenge. In this section we set out the overall duties of CCGs for commissioning services, and their specific duties which have a direct impact on engagement, pricing, care planning and delivery. We then look at the contractual position under the NHS Standard Form Contracts and more widely and the guidance given to CCGs in respect of pricing. The right to receive CHC is an individual right and providers will also be well aware that they can be caught between CCG's and individuals arguing about entitlement to CHC, we deal with the issues arising when this happens, in paragraph 4.17 (below)

4.2 There are numerous general duties imposed on CCGs by virtue of the legislative framework in which they operate. CCGs have the responsibility to meet the requirements of those persons for whom they have responsibility as set out in section 3 of the NHS Act 2006. This includes an obligation to arrange the provision of accommodation services and services for the care of a person suffering from illness.

This report assumes that the issue of whether an individual with complex needs requires a primarily health-based service (and therefore entitled to CHC arranged and funded in its entirety by the NHS) has already been determined (but see also paragraph 4.17 (below). FNC payments for residential nursing care are made when residents in residential care require nursing care. FNC is funded through the local CCG via the set FNC tariffs are paid in addition to the care fees paid privately or by a local authority. Care needs to be taken to ensure the fees payable by the resident or the local authority take proper account of the FNC payments.

There are some areas where strong partnership arrangements between local authorities and CCGs exist where local authorities are the body taking primary responsibility for the services. In such cases the guidance in sections 2 and 3 (above) in relation to local authority duties should also be referred to however there is a clear dividing line so that local authorities are not permitted to commission health rather than social care services.

4.3 Although a CCG is entitled to have regard to the resources available to it, and there is no individually enforceable entitlement to a particular level of care from the NHS, the section 3 duty requires a CCG to commission services to meet an individual's reasonable needs. The CCG would be susceptible to a public law challenge if they failed to do so or did so in a way that was unreasonable or discriminatory. Their general duties also extend to the need for transparency; each CCG must have a constitution setting out the procedures to be followed in making decisions which must be transparent and to which the CCG can be held accountable. These rules are derived primarily from the NHS Constitution but there are other specific duties applicable, which we identify below.

4.4 There is an overriding duty for CCGs to promote the involvement of patients, their carers and their representatives in decisions about their treatment and the NHS must publish guidance on their duty. The current Guidance is: *"Involving people in their own health and care; Statutory guidance for clinical commissioning groups and NHS England".*

The general duties on CCGs when commissioning CHC services are found in a combination of statutory provisions and regulations, but essentially the obligation is to fulfil the terms set out in the National Framework for NHS Continuing Healthcare and NHS Funded Nursing Care which was issued on 1st March 2018 ("**the Framework**" or "**the National Framework**") which can be found here: Guidance overview: National framework for NHS continuing healthcare and NHS-funded nursing care - GOV.UK (www.gov.uk); CCGs are obliged to align their processes with the principles set out in the National Framework. These include an obligation for CCGs to consider where the Framework requires clear arrangements to be made with provider organisations and to ensure that such arrangements are built into their commissioning processes.

4.5 The National Framework expands the guidance in various areas including those relating to care planning and delivery where it is made clear that the CCG must manage and plan to deliver all the services that are required to meet the needs of the individual concerned, not just health services. The National Framework also covers review and reassessment processes (see below) and emphasises that a person-centred approach is required when commissioning services. This has direct parallels with the obligations on local authorities to involve the individual. A similar emphasis requires CCGs to consider all national guidance issued in respect of services for people with a learning disability.

4.6 The key elements of CCGs commissioning duties are set out in the National Framework and the following extracts are useful reminders of the extent of those duties in respect of the elements mentioned:

"***Care planning and delivery***

*165. Where an individual is eligible for [CHC] the CCG is responsible for care planning, commissioning services and for case management. It is the responsibility of the CCG to…. procure services…for **all** services that are required to meet the needs of all individuals…. The services commissioned must include ongoing case management for all those eligible for CHC including review and/or reassessment of the individual's needs.*

166. CCG should operate a person-centred approach to all aspects of CHC using models that maximise personalisation and individual control and that reflect the individual's preferences, so far as possible, when delivering CHC through a personal health budget, where this is appropriate …"

4.7 There is similar direction in respect of care planning:

*"**Care planning***

171. The care planning process is central to the commissioning and provision of care to meet an individual's needs. Responsibility for care planning lies with the CCG.

*172. Where a person qualifies for CHC, the package to be provided is that which the CCG assesses is appropriate to meet **all** of the individual's assessed health and associated care and support needs….. the CCG should have due regard to the individual's wishes and preferred outcomes…the approach taken should be in line with the principles of personalisation.*

There is more guidance on the person-centred approach set out in the core principles of the National Framework which describe the requirement that the CHC process to be person centred which means "placing the individual at the heart of the assessment and care planning process". This also includes ensuring that the individual and/or their representative is fully and directly involved in the assessment process, that the process takes full account of the individual's own views and wishes and that the process addresses communication and language needs. There is a Practice Guidance Note attached to the National Framework which sets this out in more detail.

Most importantly, when commissioning the care package, the CCG is required to document the individual's wishes and expectations of how and where the care is to be delivered. This means that where the individual's own views and wishes for their CHC package align with the provider's interests, it gives an opportunity to positively influence the outcome and support the individual to express their wishes as part of any negotiation or renegotiation of a care package. This can sit alongside reminders to the CCG about their statutory duty to involve individuals and other aspects of the guidance.

4.8 The National Framework also provides guidance on how a CCG should commission services from providers; this includes a requirement for the service specification to be clearly set out and agreed in any contract with the provider for CHC services. Commissioning arrangements need to align with the following extracts from the Framework:

*"**Commissioning and provision***

174. CCGs should take a strategic as well as an individual approach to fulfilling their CHC commissioning responsibilities….To help inform this approach CCGs should have an understanding of the market cost for care and support within the relevant local area…

176. CCGs should ensure clarity regarding the services being commissioned from providers…the services that a provider…is expected to supply should be clearly set out in the service specification or contract between the provider and the CCG.

177. The starting point for agreeing the package and setting where [CHC] services are to be provided should be the individual's preferences….CCGs can take comparative costs and value for money into account when determining the model of support to be provided but should consider the following factors when doing so:

(a) the cost comparison has to be on the basis of genuine costs for alternative models…

(c) costs have to be balanced against other factors in the individual case such as an individual's desire to live in a family environment.

180. The funding provided by CCGs [for CHC] should be sufficient to meet the needs identified in the care plan."

The Framework makes it clear that CCGs must set costs on the basis of a genuine assessment of the real costs, not an assumed standard cost model. This should avoid CCGs setting arbitrary costs without reference to the individual's needs or the provider's actual costs (within reason) and the local market rate for the services. This is considered in further detail below.

4.9 The Framework also contains guidance which has parallels with the choice of accommodation rules for local authority funding. The Framework refers to these as "higher cost packages" and refers to circumstances where an individual indicates a preference for a higher cost accommodation or services package. The guidance indicates that the support offered should be that necessary to meet the assessed needs and therefore the crucial element is how needs are assessed. The quality of that assessment and the skills and experience of the person making the assessment is of crucial importance. There is no equivalent to the duties placed on local authorities in connection with specialist assessment processes but clearly, if the individual concerned can express a particular preference (either themselves or through an advocate) then this would trigger a similar duty under the Framework guidance. An example is given where a CCG is considering a move from an existing placement previously funded by a local authority but with a contribution from the individual and the guidance states:

"*CCGs should consider if there are reasons why they should meet the full costs of the existing care package, notwithstanding that it is at a higher rate."*

This could include that the frailty, mental health needs or other relevant needs of the individual mean that a move to other accommodation could involve significant risk to their health and well-being. This aspect will be of most relevance to older people, but the second example given in the guidance is in respect of out of an "out of area" placement. If an individual's needs are best met in a particular locality because of connections with the local community or family, then the fact that such placements are more expensive than are available out of county should not be allowed to override the individual's preference, particularly if a move or a failure to move would be of significant detriment to that individual.

Once again, in line with other guidance, decisions to move people from one location to another should be put in writing by the CCG with the reasons for the decision being given.

The guidance also refers to CCGs being required to ensure that a choice of care provider is offered to individuals when a new package of care is being arranged, so that genuine choice is available.

4.10 CCGs are also responsible for proactive case management of each CHC package. This involves arranging regular reviews and assigning a named case manager or point of contact for anyone in receipt of CHC. This should involve the management of the whole package of the care service, not just the healthcare aspects. It also requires that the

CCG ensures that any changes in the person's needs are addressed. The specific review process specified in the Framework is as follow:

"*181. Where an individual is eligible for CHC a review should be undertaken within 3 months of the eligibility decision being made. After this, further reviews should be undertaken on* ***at least*** *an annual basis although some individuals will require more frequent review in line with clinical judgement and changing needs." (Our emphasis).*

The result of this is that where services are no longer adequate and providers find themselves having to deliver additional support over and above that which has been specified by the CCG, they should remind the CCG of those obligations. Although the Framework is only guidance, our view is that the CCG is under a legal obligation to conduct a review if the patient's needs have changed pursuant to its core duty under section 3 of the NHS Act 2006.

4.11 The arrangements for formal contracting for CHC services is unhelpfully complex and this can lead to both parties to the contract being unsure as to the approach to be taken.

Each CCG is obliged to use the NHS Standard Contract for CHC services, as well as community-based services. In most cases, this is likely to be the Short Form version of the Standard Contract which is to be used in placements in a care home or for a package of home care; use of the Standard Form Contract is obligatory.

4.12 The NHS Standard Contract is comprised of Particulars (for local agreement), Service Conditions and General Conditions. The General Conditions can never be overridden and any changes to the Service Conditions must be varied only by reference to the particular criteria that are set out in the Standard Contract; Particulars would normally comprise the detailed specification of the services being commissioned. Just because CCGs are mandated to use the Short Form Standard Contract, it does not necessarily follow that they always will, and providers may find themselves in circumstances where there is no contract, merely an exchange of letters or even less than that. Given the importance of contractual remedies, the starting point in such circumstances would be to seek confirmation from the CCG regarding the contract and preferably to make arrangements for a formal contract to be prepared with the specification of the service included in the relevant Particulars.

4.13 Other key issue arising from the Standard Form Contract that are relevant to recovery of fees or otherwise to asserting the rights of the provider are:

- best interest decision-making;
- transparency;
- procurement rules and service specification changes;
- constructive engagement;
- disputes; and
- termination.

We have not set out these provisions at length but they all may need to be addressed depending on the circumstances you are confronted with. The contractual arrangements should not be overlooked in any dispute with a CCG.

4.14 Pricing is a crucial element of the arrangements for CHC and there are extensive provisions about pricing, set out in the Health and Social Care Act 2012 ("**the HSCA**"), as well as the national and local tariffs established for certain services.

4.15 The expectation is that for CHC services for older people, it would be local prices rather than tariff prices that apply. However, the guidance in the document published by NHS Improvement (formerly Monitor) under section 116 of the HSCA ("**the National Tariff**") contains the rules for determining how local prices should be set. There are two rules which relate to local pricing, established by section 6 of the National Tariff, the current versions of which are as follows (the rules tend to change periodically):

"*Local pricing rules: general rules for services without a national price and outside the scope of the aligned payment and incentive approach.*

Rule 1

(a) *Providers and commissioners must apply the principles in section 4.1 when agreeing prices for services without a national price.*

(b) *Where a commissioner and provider cannot agree a price the price payable shall be that applicable unit or [Best Practice Tariff] price for the service (if any such price is specified in Annex A), subject to any national variation which would have applied if the price was a national price.*

Rule 2

Commissioners and providers should have regard to the cost of uplift and efficiency factors for 2021/2022 (as set out in sections 6.7 and 6.8), and the cost base adjustment for the transfer of CQUIN funding (see section 6.6), when setting local prices for services without a national price for 2021/2022."

The guidance on Rule 2 is contained in the following paragraphs of the National Tariff:

"*62. Rule 2 requires commissioners and providers to have regard to national price adjustments. In effect they should be used as a **benchmark** to inform local negotiations. However, these are **not the only factors** that should be considered. (Our emphasis).*

63. Relevant factors may include, but are not restricted to:

- *comparative information (e.g. benchmarking) about provider costs and opportunities for local efficiency gains*
- *differences in costs incurred by different types of provider – for example, differences in indemnity arrangements…or other provider-specific costs (such as the effects of changes to pensions and changes to the National Minimum Wage)."*

The principles which Rule 1 specifies must be applied are as follows:

"47. ….commissioners and providers must apply the following 3 principles when agreeing the local payment approach:

- *The approach must be in the best interests of patients.*
- *The approach must promote transparency to improve accountability and encourage the sharing of best practice.*
- *The provider and commissioner must engage constructively with each other when trying to agree local payment approaches."*

4.16 The National Tariff goes on to explain in further detail what each of these principles means. These can be distilled into the following principles which should be borne in mind in the context of any engagement over pricing:

- providers and commissioners are given a significant amount of freedom to determine how to apply the factors;
- a record of how local payment approaches comply with the principles should be kept by both parties;
- factors which are designed to deliver the best interests of patients include quality, cost effectiveness, innovation and allocation of risk (with these factors being considered according to the particular circumstances);
- providers and commissioners are directed to obtain sufficient information to make decisions, use appropriately qualified and experienced individuals to assess the information and follow an appropriate process to arrive at their conclusions;
- pricing arrangement must be transparent to allow both parties to be accountable to each other as well as patients and other stakeholders;
- constructive engagement, although designed for larger scale services, includes principles around having an agreed framework to negotiate pricing, the sharing of information and the involvement of service users in the process.

The obligation to consider and manage information in a transparent manner gives providers the opportunity to provide their own information (for example in connection with local cost pressures on salaries and other costs).

4.17 **Disputed entitlement to CHC**

Providers will be familiar with the challenges often made by residents and their families to CHC decisions. The key point where such disputes arise is to ensure that the resident understands that they are obliged to continue to pay the fees in such circumstances and providers should avoid situations in which they are drawn into the arguments.

4.18 **Additional Services Contracts**

Providers also need to be aware of the opportunity presented by arranging for residents to pay for additional services over and above those contracted for by the CCG to meet the assessed needs of the resident. This supplementary income is an alternative to seeking an increase in fees from the CCG but must be dealt with correctly to avoid potential claims that such payments

were invalid that can result is significant repayments. A properly drawn contract, including a specification which demonstrably shows how the services that are being supplied are offered in addition to the CHC funded services commissioned, is required. The scope of this opportunity is quite broad and includes the offer of a better room (by size or situation) so is worth careful consideration.

5. HOLDING COMMISSIONERS TO ACCOUNT ON FEES – REMEDIES TO CONSIDER

5.1 We can identify a number of general circumstances in which it is necessary to engage with commissioners in respect of inadequate fees and in this section we identify the opportunities that exist to challenge inadequate fees. Typical scenarios that we address in this section include:

- failure to pay adequate annual fee increases taking into account inflationary pressures (an issue particularly acute at present given recent legislative changes);
- agreeing new fees when there has been a change in care needs and the service specification no longer covers what is actually required to keep the service user safe and in receipt of effective services;
- failures to address circumstances in which it is no longer possible for the provider to continue to offer the service for whatever reason (including inadequate costs or the needs of the individual being beyond what can be safely delivered by the provider);
- a commissioning process which is neither transparent nor fair and in which the principles of personalisation are overlooked;
- having established that there is a dispute with the commissioner an inability to take any action due to the lack of any clear contractual provisions which could either lead to a variation of the contract or a review of the service specification and pricing.

5.2 There are essentially 3 different approaches that can be taken to seeking remedies from a commissioner who is not paying adequately for the service being commissioned. The first and most straightforward is via the contract. This is easier in the context of local authority commissioners as NHS commissioning tends to be less prescriptive and often lacking when it comes to having clarity over the contractual position the parties find themselves in. However, enforcing contractual rights is more precise than the other remedies available and should always be considered first in any assessment of how to proceed in particular circumstances.

5.3 The second option available is to seek a remedy where the commissioner has failed in its public law obligations. This would normally be undertaken by way of judicial review, which involves asking a court to review the decision that the commissioner has made. The most common way in which this has been used by groups of providers in recent years has been through challenges to tariff fees set by local authorities for older peoples' services. Actions have been bought against a range of local authorities across England and Wales (see below).

There are also other decisions that can be subject to judicial review such as a decision to tender a service in a certain way. For example, reviewing the proposed use ofa "dynamic purchasing system" which avoids the possibility that a personal budget is set for each service user, which negates the emphasis on the individual having choice and

control over their services and which limits the opportunity for the local authority concerned to ensure that there is a sustainable market in care services in their locality. Likewise, there may be circumstances in which the provider can take action on behalf of individuals it supports if decisions have been made about them which are capable of review. This can be by way of poor commissioning practice, the absence of assessments or reviews, the inability or unwillingness to offer direct payments or the failure to fund certain types of support due to lack of forward planning.

The difficulty with judicial review is that it is "blunt instrument" the result of which is normally that the decision has to be retaken. It does not necessarily involve an adequate remedy for the applicant however as part of an overall tactical approach it can be a useful strategy to adopt and put the provider in a strong position to be able to negotiate a better overall outcome. The value of judicial review can be enhanced if providers can work together with local care associations etc. rather than act unilaterally.

5.4 The final option is to support the people you support to take action themselves or do so on their behalf. As well as actions by way of judicial review this can also encompass formal complaints to the local authority or CCG concerned or complaints to the relevant ombudsman. This is the Local Government and Social Care Ombudsman ("**LGSCO**") in respect of care services or the Parliamentary and Health Service Ombudsman in respect of health services. The LGSCO is keen to see more complaints made so that it can take a more proactive role in improving standards in the care sector. Large scale complaints about generally poor commissioning practice as it impacts on particular services may be something which the LGSCO would be prepared to entertain and take a robust attitude towards. The advantage of complaints of this nature is that they do not carry any cost risk (unlike any other form of litigation where the losing party generally pays the winning parties costs). Complaints can be made via the LGSCO website: Home - Local Government and Social Care Ombudsman, we suggest legal advice is taken where any complaint is being made on behalf of someone you support.

5.5 The template letters set out in the Appendices to this report are focused on contractual remedies but make reference to public law duties extensively so that the commissioner will be aware that public law remedies are being considered. Careful consideration should also be given in most cases to making requests under the Freedom of Information Act 2000. Given the extensive duties on commissioners to be transparent and to rely on data and for their decision making processes to be rational, carefully chosen questions which draw out the basis of the decisions they have made. Detailed consideration of requests under the Freedom of Information Act are beyond the scope of this report.

5.6 The consideration of contractual remedies always requires attention to the contract itself. However, contracts for care services tend to follow a similar pattern and there are certain key terms that always justify particular attention when considering what contractual remedies may be available.

- **Fee review mechanisms** – contracts usually contain a fee review mechanism, but most give the commissioner discretion as to whether to apply a fee review, however contract law often assists by implying a term in cases where discretion is

given to one party that it must act in good faith (generally speaking this means acting in a fair and commercially acceptable manner in the context of the arrangements). A simple refusal to review fees is unlikely to have been taken in good faith and the opportunity arising from fee review mechanisms should always be addressed.

- **Variations** – contracts often include provisions dealing with variations to the contract, this may be a unilateral power for one or other party to put forward a proposed variation which then has to be considered by the other party, similar rules apply so if the commissioner has discretion over whether to accept the variation, it must act in good faith and may be obliged to provide written reasons for their refusal depending on the subject matter of the request.
- **Changes in assessed need** – although the duty to re-assess care needs is for the benefit of the individual the care provider is equally interested and in many cases will be entitled to seek appropriate action on the part of the commissioner (acting as the individual's representative) to ensure that appropriate steps are taken to re-assess care needs, set a new personal budget and increase fees accordingly. Using the threat of a report to the LGSCO can be a useful tactic in such cases.
- **Generating a dispute** – commissioners do not wish to engage in disputes any more than providers do, their resources being limited. The threat of a formal dispute resolution process can be effective in bringing commissioners to the negotiating table.
- **Threat of termination** – threatening termination and actually terminating a contract are possible options when a provider is faced with an intransigent commissioner who will simply not engage in any meaningful debate; this is dealt with in further detail below.

5.7 The threat of termination or the actual termination of a care contract can have significant merit in terms of obliging a commissioner to take appropriate action to review fees. Sometimes providers are required to terminate contracts where they can no longer safely deliver the services which an individual requires or where the commissioner has failed to look after the individuals interests in terms of moving them to an appropriate service or location following a period in a particular service. Many commissioners are reluctant to act in circumstances where they can foresee significant additional costs arising and will prevaricate to avoid having to act.

Termination of a contract is not always straightforward, and care needs to be taken to ensure that there is a clear understanding of the basis upon which the termination is taking place. The appropriate notice period needs to be given (in the absence of a contractual provision this period needs to be reasonable). The provider also needs to consider any difficulties with CQC if it wishes to close a service (by removing a location or de-registering entirely) as CQC will not allow this to happen unless the services have been re-provided before closure. The basis upon which the services to be delivered after termination of the contract (in circumstances where the commissioner has not made alternative provision) also needs to be carefully set out in correspondence with CQC

setting out the provider's position. There may also be consultation duties on the provider arising from the Care Act and common law which require closure decisions to be subject to consultation with the individuals concerned. Detailed consideration of anything other than the threat of termination is beyond the scope of this report.

5.8 The impact of the pandemic has limited the number of fee challenges against local authorities over the last 2 years. We envisage that this will change in 2022 because of the impact of low settlements in the past 2 years and the high inflationary pressures particularly on wage costs that will be faced across the sector form 1 April 2022. General fee challenges may still have a part to play in resetting commissioning practice and the most powerful arguments available in such cases are those based on data and it is crucial that providers either specifically (in relation to a particular service) or generally (in respect of their overall provision) are able to evidence and ideally verify independently how their cost pressures are being manifested in terms of their increased costs. Only by sharing such information with commissioners and being able to compare the factual information with the fee uplifts offered by local authorities (often made without the factual data to support them) can a realistic challenge be bought in respect of general fee uplifts.

5.9 The courts and the LGSCO have both made it clear that there are circumstances in which it is legitimate for providers to support the individuals in their care to bring actions or complaints against commissioners. This is particularly in circumstances where there are a number of individuals affected or in circumstances where there is no suitable representative available to advocate on the individual's behalf. There are organisations which proactively support such individuals and reference can be made to them. They will take up the cause on behalf of individuals within your care but consideration should also be given to bringing such actions in your own right. It is likely that only in the most serious of cases would a provider want to bring judicial review proceedings on behalf of an individual or group of individuals but promoting complaints to the relevant ombudsman is a much easier proposition. Complaints to the ombudsman has risks for the provider (in the sense that they are subject to the LGSCO jurisdiction themselves) but poor commissioning practice is something which the LGSCO routinely criticises local authorities for and will readily offer redress to individuals affected by poor commissioning practice. We envisage that this route to seek redress will become more popular.

6. CONCLUSIONS

6.1 The frustrations felt by providers when faced with intransigent commissioners is something which has been a feature of the care sector throughout its history. There is an understandable reluctance to have recourse to the law when services are meant to operate on the basis of shared interests and partnership working between providers and commissioners, however in the absence of any formal requirement for commissioners to act in a particular way accompanied by a simple process of redress if they do not leaves providers with no option but to gain a solid understanding of the legal position so that they have the advantage when asserting their rights or those of the individuals they support to receive the services that they are entitled to and to be paid at a sustainable rate for those services.

Anthony Collins Solicitors LLP

Date: January 2022

Our Ref: JHW/42079.0009

Appendix 1

Fee Challenge Template Letter – Local Authority Residential Care Services

This template is provided as a PDF but members can access them by contacting Anthony Collins Solicitors, john.wearing@anthonycollins.com; ramjeet.kandola@anthoncollins.com. The 3 letters cover different circumstances where fee issues arise, namely local authority residential care, local authority supported living and CCG CHC services.

Care England

Template letter to local authorities
Re. Fee rates for residential care services for older people

Introduction

This template is applicable to residential care commissioned by a local authority. The purpose of the template is to challenge inadequate fee arrangements, and other poor commissioning practices, in a range of circumstances. The template is based on the law as at 31st October 2021.

The template is set out in the following sections:

1. Introduction
2. Our contract with you
3. Overarching duties
4. Our costs and fees payable
5. Top up on individual becoming eligible for local authority support
6. Request for further information
7. Exit from the agreement
8. Quality and safety of our services
9. Summary

The letter should be completed by reference to the embedded notes and our Report to Care England of January 2022 to which this template was attached. There are different templates for Supported Living and CHC Funded Services.

Much of this letter relates to the Care Act 2014 and the Statutory Guidance which accompanies it. This letter is therefore only applicable to councils in England. It does not apply to services commissioned by CCGs, nor to local authorities in Wales, Scotland or Northern Ireland. It is designed for services for older people not working age adults.

We recommend that **specific legal advice is sought** by organisations wishing to bring a challenge. In particular, it should be noted that where issues arise from a decision or policy made by the local authority (which may be susceptible to challenge by way of judicial review) and in the context of a tender (where procurement law remedies may apply) time will be of the essence, with time limits of generally 3 months or 30 days for applying for such relief respectively. These extremely short time limits are strictly enforced and a provider will have to act very quickly to obtain any of the remedies potentially available in such cases.

These extremely short time limits are strictly enforced and a provider will have to act very quickly to obtain any of the remedies potentially available in such cases.

How to edit this letter

The suggested text of the outline letter follows.

Parts of the letter which require you to add or amend text are enclosed in square brackets and shaded green, for example:

[Insert text here]

You should add the required text where appropriate and remove the green shading in your final version.

Throughout this letter we provide guidance on how to select the right information, or to make your case stronger. Guidance notes are shaded in violet and look like this:

> *** Guidance note:** You should delete all of this text before producing the final version of this letter.

To produce the letter we suggest the following steps, in this order:

1. Save this file to your computer network or hard drive;
2. Edit the letter carefully, adding the necessary text and removing optional parts that do not apply;
3. Delete all of the guidance notes, including this page and the Introduction;
4. Copy and paste the letter into your standard letter format;
5. Have the letter proof-read and checked before you send it.

Delete all text from this point and above

*** Guidance note:** This letter should be addressed to the relevant local authority's officer. Your contract with the council will usually state who this person is. Generally, it is the person within the council to whom you should address formal notices about your contract. The person is often the head of the council's contracts department, the director of adult social services, or the authority's solicitor. We suggest that, in the absence of any contractual requirements, you send the letter by first class post and email.

Where you consider the council is acting in a grossly unfair or unsafe manner, you may also wish to copy in the "Monitoring Officer" at the council. This is the individual tasked with ensuring that a local authority complies with its legal obligations and doing so can assist in escalating your concerns. Local authorities should provide contact details for its Monitoring Officer on its website.

[On your headed paper]

[Date]

[Insert name of local authority's officer]
[Insert name and address of council] [add email address]

Dear [Insert name of officer],

Residential care services [at location(s)] [for [named individual]

1. Introduction

*** Guidance note:** Explain here your reason for writing to the council, including details of the issues you face, for example:

- you wish to assert the need to have a significant increase in fees to meet increased costs beyond your control;
- the approach to fees in a new tender cannot deliver care at the required quality, or in compliance with your duties to your staff;
- care needs have changed but there has been no reassessment and no fee increase;
- because an existing contract no longer covers your costs;
- because the council has imposed a freeze or an effective cut in fees by offering inadequate annual uplift(s) in successive years;
- the council has made a proposal which is in breach of your contract, for example when it includes a price review mechanism.

[Insert your opening text here.]

2. Our contract with you

*** Guidance note:** The starting point for any engagement over fees should be a review of the contract you hold with the commissioner, so include any relevant details here. Challenging poor commissioning is most effective when based on contractual rights, as they are more certain and the outcomes are more easily predictable than those arising from public law (judicial review) actions.

See also section 7 below on termination of the contract, which is a useful tactic where the contract contains no helpful provisions, as it gives rise to a new contract (unless the commissioner accepts the termination and moves the person).

Choose one or more of the following examples:

We refer you to our contract with you dated [insert date] and the provisions at [include details of any uplift mechanisms and/or variation provisions, including those which are annual and which are at the council's discretion (see also Our Costs (below)].

The proposal[s] that you have made fails to address or comply with these terms and we consider [it][they] amount[s] to an actionable breach of contract.

We would ask that you reconsider your position in order to take into account the contractual arrangements between us.

3. Overarching duties

As the council will be aware, the Care Act 2014 and Statutory Guidance which came into force on 1 April 2015 introduced a number of new duties on local authorities. We would remind the council in particular of the following:

*** Guidance note:** The Care Act 2014 and associated Statutory Guidance introduced a number of duties and principles into the commissioning arena. The legislative framework provides detailed guidance on how commissioning of services should be undertaken. You may wish to refer to some of the sections of the Statutory Guidance which are relevant to your case and quote them in this section of your letter, as follows. It is not necessary to quote them all – choose the ones most relevant to your argument.

Well-being

The council should be aware that the first section of the Act establishes the "*well-being principle*" – an overarching principle that you **must** take in account when exercising **any of your responsibilities** under the Act.

Well-being is a broad concept comprising:

- personal dignity;
- physical, mental health and emotional wellbeing;
- protection from abuse and neglect;
- control by the individual over day-to-day life;
- participation in work, education, training or recreation;
- social and economic wellbeing;
- domestic, family and personal relationships;
- suitability of living accommodation; and
- the individual's contribution to society.

We consider the council's [failure to pay a reasonable rate for the service][approach to commissioning/tendering the service][fee review history for the past few years] has failed to acknowledge these duties, leaving the vulnerable adults in our care at risk of significant damage to their well-being. The failures also undermine the foundational principles of choice and control which should rest with the individual in the context of what and how services are delivered.

Staff costs

The council will be aware of the fact that our staff costs represent our largest cost and that recruitment and retention remains a huge challenge throughout the care sector. [Our fees must be increased to reflect such costs if the council is to meet its duties under the Care Act.]

The Care Act Statutory Guidance duties include the following references:

Paragraph 4.21

> *"Local authorities **must** facilitate markets that offer a diverse range of high-quality and appropriate services. In doing so, they must have regard to ensuring the continuous improvement of those services and encouraging a workforce which effectively underpins the market. The quality of services provided and the workforce providing them can have a significant effect on the wellbeing of people receiving care and support, and that of carers, and it is important to establish agreed understandable and clear criteria for quality and to ensure they are met."*

Paragraphs 4.28, 4.30 and 4.31

> *"People working in the care sector play a central role in providing high quality services. Local authorities **must** consider how to help foster, enhance and appropriately incentivise this vital workforce to underpin effective, high quality services."*

*"When commissioning services, local authorities should assure themselves and **have evidence** that service providers deliver services through staff remunerated so as to retain an effective workforce. Remuneration **must** be at least sufficient to comply with the national minimum wage legislation for hourly pay or equivalent salary. This will include appropriate remuneration for any time spent travelling between appointments. Guidance on these issues can be found on the HMRC website."*

*"When commissioning services, local authorities should assure themselves and have evidence that contract terms, conditions and fee levels for care and support services are appropriate to provide the delivery of the agreed care packages with agreed quality of care. This should support and promote the wellbeing of people who receive care and support and allow for the service provider ability to meet statutory obligations to pay at least the national minimum wage **and** provide effective training and development of staff. It should also allow retention of staff commensurate with delivering services to the agreed quality and encourage innovation and improvement. Local authorities should have regard to guidance on minimum fee levels necessary to provide this assurance, taking account of the local economic environment. This assurance should understand that reasonable fee levels allow for a reasonable rate of return by independent providers to remain sustainable in the long term."*

Sustainability

The expected increases in demand for care services generally will necessitate continuing investment in our services if they are to remain sustainable and meet the needs of residents. This requires us to receive an appropriate rate of return on the capital we invest.

The Statutory Guidance helpfully elaborates on the Council's obligation to ensure sustainability; to highlight just a few examples:

Paragraph 4.33

*"Local authorities **must** work to develop markets for care and support that – whilst recognising that individual providers may exit the market from time to time – ensure the overall provision of services remains healthy in terms of the sufficiency of adequate provision of high quality care and support needed to meet expected needs. This will ensure that there are a range of appropriate and high quality providers and services for people to choose from."*

Paragraph 4.35

*"Local authorities **must not** undertake any actions which may threaten the sustainability of the market as a whole, that is, the pool of providers able to deliver services of an appropriate quality – for example, by setting fee levels below an amount which is not sustainable for providers in the long-term."*

Paragraph 4.69

*"Local authorities **must** understand local markets and develop knowledge of current and future needs for care and support services, and, insofar, as they are willing to share and discuss, understand providers' business models and plans."*

Paragraph 4.97

"Local authorities should consider the contract arrangements they make with providers to deliver services, including the range of block contracts, framework agreements, spot contracting or 'any qualified provider' approaches, to ensure that the approaches chosen do not have negative impacts on the sustainability, sufficiency, quality, diversity and value for money of the market as a whole – the pool of providers able to deliver services of appropriate quality."

Paragraph 4.101

"Local authorities should ensure that where they arrange services, the assessed needs of a person with eligible care and support needs are translated into effective, appropriate commissioned services that are adequately resourced and meet the wellbeing principle of the Act."

Paragraph 11 of Annex A

*"In all cases the local authority **must** have regard to the actual cost of good quality care in deciding the personal budget to ensure that the amount is one that reflects local market conditions. This should also reflect other factors such as the person's circumstances and the availability of provision. In addition, the local authority **should not** set arbitrary amounts or ceilings for particular types of accommodation that do not reflect a fair cost of care."*

Quality and breadth of service

Paragraph 4.22

"When considering the quality of services, local authorities should be mindful of the capacity, capability, timeliness, continuity, reliability and flexibility of services delivered to support wellbeing, where appropriate, using the definitions that underpin the CQC's fundamental standards of care as a minimum, and having regard to the ASCOF framework of population outcomes. High quality services should enable people who need care and support, and carers, to meet appropriate personal outcome measures."

Paragraph 4.23

"Local authorities should also consider other relevant national standards including those that are aspirational, for example, any developed by the National Institute of Health and Care Excellence (NICE)."

Paragraph 4.24

"Local authorities should encourage a wide range of service provision to ensure that people have a choice of appropriate services; appropriateness is a fundamental part of quality. For example, a working age person should be able to choose care and support tailored for their situation, and not be faced with only a choice of facilities designed for older people, as this is unlikely to be appropriate to their situation, regardless of how high quality the facilities may be in their own contexts. Appropriate services will meet people's needs and reasonable preferences."

*** Guidance note:** Consider including some text of your own, linking the particular issues you face with the council's failures to meet its statutory obligations.

[Insert your comments here]

4. Our costs and the Fees payable

*** Guidance note:** It is important to understand what your actual costs are and what the disparity is between them and the fees being offered. We cannot emphasise strongly enough how worthwhile it is to send the council a detailed analysis of your actual costs and the financial information upon which it is based.

Therefore, where possible include in or with the letter a breakdown of your costs. The more comprehensive and robust this analysis is, the more difficult it is for the commissioner to ignore and hence the more powerful it will be. This approach also lays the foundation for future challenges under public law principles.

[Insert a summary of your costs here or in a separate spreadsheet or other summary. The request made should make reference to the particular principles set out in the Overarching Duties section (above) which the council is breaching.]

[The fees currently being paid for the Services are inadequate and recent fee uplifts have failed to keep up with the increases in our costs reflected in the information [above][attached].

[Our contract with you specifies that the council will consider an increase in the fees each year [from 1st April]. The council is obliged to act fairly when exercising this discretion but it is apparent that it has not done so [on successive occasions in [2020 or 2021]]. This has meant a significant shortfall has developed between the actual costs of providing the service and the fees payable which is no longer sustainable. We consider that the council is obliged to make a decision on the fees it pays us by reference to the actual costs required to meet the principles set out above and that it is failing to do so.]

[The contract we have with you allows us to seek a variation in the contract. Please treat this letter as a request for a variation to the fees payable under the contract with immediate effect. The variation is requested because [the level of services required to meet the needs of the people we support have increased significantly without any change in the fees] [the fees payable have failed to keep pace with the inflationary pressure all care providers are subject to.]

[The increased costs we will have to meet with effect from 1st April [2022] are set out in [above] [the attached], these are considerable and we estimate a fee increase of at least [x%] will be required just to keep pace with inflation, let alone meet the pressures on recruitment and retention which all care providers face.]

[If the council is not prepared to engage in a review of the fees which reflects the costs we are obliged to incur to provide the service it commissions we will be obliged to pursue appropriate remedies which may include court action.]

5.Top up on individual becoming eligible for Local Authority support

The individual concerned has expressed a strong preference to remain in the accommodation we currently offer following the change in financial circumstances which requires that the council now offer financial support to [him][her]. The council is under an obligation to offer a choice of accommodation to the individual and to allow a top up arrangement to be made where that would facilitate the choice. [The family of the individual has indicated that they are willing to make a top up arrangement with the council and we would be grateful for confirmation that the council will facilitae that as soon as possible.]

6. Request for further information

*** Guidance note:** This section is designed to require the council to respond to requests for information which reinforces the fact that their commissioning decisions are under scrutiny. Referring to the Freedom of Information Act 2000 will prevent the Council from ignoring the request and will start a clock ticking on the provision of information - the authority has 20 working days to respond. It is often necessary to consider carefully the exact nature of the questions so as to draw out worthwhile information. The following are examples and specific advice may be required if the answers you require are not forthcoming.

The following request is being made under the Freedom of Information Act 2000. Please provide me with:

1. The method or mechanism which has been adopted by the council to set fee levels for older peoples' residential care services for [period(s)] and the data on which those calculations were based.
2. Details of the consultation exercise the council has undertaken in connection with fee settings for this type of service in the last [3] years.
3. The council's policies on fee setting for care services for older people.
4. Confirmation that the council has taken advantage of the adult social care precept and the percentage/amount of this which has been allocated to services for older people.

*** Guidance note:** Include here any other requests for information or materials relevant to the specific case, for example as above how the authority has come up with its figures and what consultation has taken place to support these.

[Insert further requests under the Freedom of Information Act here]

7. Exit from the agreement

*** Guidance note:** The following section is for use where an arrangement is untenable and you have a right in the contract to exit the arrangement or where you at least want to threaten to terminate the service. You must check your contract with the council before including this section to confirm that termination without cause is permitted and what the relevant notice period is. An alternative form of words is provided where the contract has no notice period or there is no period specified. The wording will need to be adapted if you are only terminating an individual placement.

[We refer to clause [insert number] of our contract with you. Under this we may end the service provided with [insert number] [months'] [weeks] notice. [Unless our requests in relation to fee levels for this service are met we will have no choice but to consider exercising this right.] [Please treat this letter as notice of the termination of the contract which will come to an end on [date].]

[We do not believe there are any current written terms applicable to our contract with you or, if there were, we consider they have expired. We are, therefore, entitled to give you reasonable notice of the termination of the contract. We consider [3 months] notice to be reasonable and the contract for the [services] will, as a result of this notice, come to an end on [date].

*** Guidance note:** the following paragraphs are for use when the council fails to respond where you have advised that you can no longer deliver care safely.

[If our services continue beyond the expiration of the notice period given by virtue of this letter our services will be provided at the full cost to us of providing the service which we estimate to be £ per week. Following termination of the contract we will invoice the council for our services and provide a breakdown of the invoice showing the actual costs incurred in connection with the provision of the service for the remaining time that the council commissions the services from us.]

We are terminating this contract for [set out reasons which may be either for want of a fee review, the fee just being inadequate generally or because you are no longer able to offer the service due to the increased needs of the individual you support etc]. [As we are no longer able to provide this service and it is a matter of the safety and best interest of the individual that they are moved to an appropriate service as soon as possible. We will draw matters to the attention of the local Safeguarding Adults Board should the council not take prompt steps to deal with a move to a more appropriate location in a timely manner. We are of course more than happy to collaborate in that process in line with our own obligations to the individual, but you will appreciate that we have no powers to re-assess their needs nor to commission alternative services.

8. Quality and safety of our services

*** Guidance note:** It may be worth saying something about maintaining quality services and the safety of these for service users. For example:

Ultimately our position on fees is based on the value we place on the quality of the services which we provide to the people we support and our workforce.

The weight to be attached to high quality services is reflected in both the legislative framework and the Care Quality Commission's regulatory regime and is something we are unwilling to jeopardise.

We are not prepared to compromise on the quality of our services or endanger the well-being of the people we support by accepting fee rates which undermine either of these principles. We do not consider the council should be acting in a way that could increase such risks and prejudice the interests of the people it commissions services for.

9. Summary

*** Guidance note:** Conclude with a bullet point summary of the points you have made in the letter and/or next steps, for example requesting a meeting, further information or giving a deadline by which you will service notice on the contract. If you are planning to initiate legal proceedings this will also be the part of the letter that threatens the council with such action. Please note that if legal proceedings are to be initiated, we suggest you seek advice as a more formal letter before action is also likely to be required after this letter is sent.

[Insert summary here]

*** Guidance note:** Always include a deadline by which you require to hear from the Council so that you can escalate matters if they do not respond and what action you will take on failure to do so. In an emergency this could be as little as 7 days, 14 days would be a typical period.

We look forward to hearing from you in relation to the above at your earliest convenient and in any event no later than [date].

Yours sincerely,

[Insert name of your signatory]

[Insert job title]

Appendix 2

Fee Challenge Template Letter – Local Authority Home Care Services

This template is provided as a PDF but members can access them by contacting Anthony Collins Solicitors, john.wearing@anthonycollins.com; ramjeet.kandola@anthoncollins.com. The 3 letters cover different circumstances where fee issues arise, namely local authority residential care, local authority supported living and CCG CHC services.

Care England

Template letter to local authorities
Re. Fee rates for homecare services for older people

Introduction

This template is applicable to home care services commissioned by a local authority. The purpose of the template is to challenge inadequate fee arrangements, in a range of circumstances. The template is based on the law as at 31st October 2021.

The template is set out in the following sections:

1. Introduction
2. Our contract with you
3. Our costs
4. Overarching duties
5. Request for further information
6. Exit from the agreement
7. Quality and safety of our services
8. Summary

The letter should be completed by reference to the embedded notes and our Report to Care England of January 2022 to which this template was attached. There are different templates for Residential Care and CHC funded services.

Much of this letter relates to the Care Act 2014 and the Statutory Guidance which accompanies it. This letter is therefore only applicable to councils in England. It does not apply to services commissioned by CCGs, nor to authorities in Wales, Scotland or Northern Ireland. It is designed for services for older people not working age adults.

We recommend that **specific legal advice is sought** by organisations wishing to bring a challenge. In particular, it should be noted that where issues arise from a decision or policy made by the local authority (which may be susceptible to challenge by way of judicial review) and in the context of a tender (where procurement law remedies may apply) time will be of the essence, with time limits of generally 3 months or 30 days for applying for such relief respectively. These extremely short time limits are strictly enforced and a provider will have to act very quickly to obtain any of the remedies potentially available in such cases.

should be taken before action is implemented or refrained from in specific cases. No responsibility can be accepted for action taken or refrained from solely by reference to the contents of these materials. © Anthony Collins Solicitors LLP 01/2022.

How to edit this letter

The suggested text of the outline letter follows.

Parts of the letter which require you to add or amend text are enclosed in square brackets and shaded green, for example:

[Insert text here]

You should add the required text where appropriate and remove the green shading in your final version.

Throughout this letter we provide guidance on how to select the right information, or to make your case stronger. Guidance notes are shaded in violet and look like this:

> *** Guidance note:** You should delete all of this text before producing the final version of this letter.

To produce the letter we suggest the following steps, in this order:

1. Save this file to your computer network or hard drive;
2. Edit the letter carefully, adding the necessary text and removing optional parts that do not apply;
3. Delete all of the guidance notes, including this page and the Introduction;
4. Copy and paste the letter into your standard letter format;
5. Have the letter proof-read and checked before you send it.

Delete all text from this point and above

*** Guidance note:** This letter should be addressed to the relevant local authority officer. Your contract with the council will usually state who this person is. Generally, it is the person within the council to whom you should address formal notices about your contract. The person is often the head of the council's contracts department, the director of adult social services, or the authority's solicitor. We suggest that, in the absence of any contractual requirements, you send the letter by first class post and email.

You may also wish to copy in the "Monitoring Officer" at the council. This is the individual tasked with ensuring that a local authority complies with its legal obligations and can assist in escalating your concerns. Local authorities should provide contact details for its Monitoring Officer on its website.

[On your headed paper]

[Date]

[Insert name of local authority's officer]
[Insert name and address of council] [add email address]

Dear [Insert name of officer],

Home care services [at location(s)] [for named individual(s)]

1. Introduction

*** Guidance note:** Explain here your reason for writing to the council, including details of the issues you face, e.g.:

- you wish to assert the need to have a significant increase in fees to meet increased costs beyond your control;
- the approach to fees in a new tender cannot deliver care at the required quality, or in compliance with your duties to your staff;
- care needs have changed but there has been no reassessment and no fee increase;
- because an existing contract no longer covers your costs;
- because the council has imposed a freeze or an effective cut in fees by offering inadequate annual uplift(s) in successive years;
- the council has made a proposal which is in breach of your contract, for example when it includes a price review mechanism.

[Insert your opening text here.]

2. Our contract with you

*** Guidance note:** The starting point for any challenge should be a review of the contract you hold with the commissioner, so include any relevant details here. Challenging poor commissioning is most effective when based on contractual rights, as they are more certain and more easily predictable than those arising from public law remedies such as judicial review.

Due to the nature of the contractual relationships in a supported living setting (often involving a separate housing provider) care must be taken to avoid breaches of other contracts which should be checked before any action is taken which may prejudice you.

The barriers to entry for organisations seeking to offer a personal care service without accommodation are inevitably lower than those where accommodation is also commissioned from the same organisation. This means more robust arguments may need to be put to secure a favourable outcome, including ones which assert the rights of the individuals concerned (see below regarding Choice and Control and Direct Payments).

See also section 6 below on termination of the contract. This is a useful tactic where the contract contains no helpful provisions as it gives rise to a new contract (unless the commissioner accepts the termination and moves the person).

Choose one or more of the following examples:

We refer you to our contract with you dated [insert date] and the provisions at [include details of any specific provisions such as fee uplift mechanisms and/or variation provisions].

The [fees you are currently paying] [proposal[s] that you have made] fail to address or comply with these terms and we consider [it][they] amount[s] to an actionable breach of contract.

We would ask that you reconsider your position in order to take into account the contractual arrangements between us as set out in this letter.

3. Our costs

*** Guidance note:** It is important to understand what your actual costs are and what the disparity is between them and the fees being offered. We cannot emphasise strongly enough how worthwhile it is to send the council a detailed analysis of your actual costs and the financial information upon which it is based.

Therefore, where possible include in or with the letter a breakdown of your costs. The more comprehensive and robust this analysis is, the more difficult it is for the commissioner to ignore and hence the more powerful it will be. This approach also lays the foundation for future challenges under public law principles.

[Insert a summary of your costs here or in a separate spreadsheet or other summary. The request made should make reference to the particular principles set out in the Overarching Duties section (below) which the council is breaching.]

[The fees currently being paid for the Services are inadequate and recent fee uplifts have failed to keep up with the increases in our costs reflected in the information [above][attached].

[Our contract with you specifies that the council will consider an increase in the fees each year [from 1st April]. The council is obliged to act fairly when exercising this discretion but it is apparent that it has not done so [on successive occasions in [2020 or 2021]]. This has meant a significant shortfall has developed between the actual costs of providing the service and the fees payable which is no longer sustainable. We consider that the council is obliged to make a decision on the fees it pays us by reference to the actual costs required to meet the principles set out above and that it is failing to do so.]

*__Guidance Note__: If your issue relates to Live-In Care you can explain that:

The current legal position is that if a carer is paid by reference to time (i.e. an hourly rate) or salary (i.e. a monthly payment), all hours of the live-in assignment will count when calculating if the national minimum wage has been paid on average over the pay reference period. The safest option is therefore to pay live-in carers for every hour of a live in assignment and this should be reflected in the fees you receive for such services. (Please note however that a potential solution to this is a payment of flat fee under a Daily Average Agreement)

[Insert a summary of your costs here]

4. Overarching duties

As the council will be aware, the Care Act 2014 and Statutory Guidance which came into force on 1 April 2015 introduced a number of new duties on local authorities. We would remind the council in particular of the following:

*** Guidance note:** The Care Act 2014 and associated Statutory Guidance (as updated) introduced a number of duties and principles into the commissioning arena. The legislative framework provides detailed guidance on how commissioning of services in the sector should be undertaken. You may wish to refer to some of the sections of the Statutory Guidance which are relevant to your case and quote them in this section of your letter, as follows. It is not necessary to quote them all – choose the ones most relevant to your argument.

Well-being

The council should be aware that the first section of the Act establishes the "*well-being principle*" – an overarching principle that you **must** take in account when exercising **any of your responsibilities** under the Act.

Well-being is a broad concept comprising:

- personal dignity;
- physical, mental health and emotional wellbeing;
- protection from abuse and neglect;
- control by the individual over day-to-day life;
- participation in work, education, training or recreation;
- social and economic wellbeing;
- domestic, family and personal relationships;
- suitability of living accommodation; and
- the individual's contribution to society.

We consider the council's [failure to pay a reasonable rate for the service] [approach to commissioning/tendering the service] [fee review history for the past few years] has failed to acknowledge these duties, leaving the vulnerable adults in our care at risk of significant damage to their well-being.

Staff costs

The council will be aware of the fact that our staff costs represent our largest cost and that recruitment and retention remains a huge challenge throughout the care sector. Our fees must be increased to reflect such costs if the council is to meet its duties under the Care Act.

The Care Act Statutory Guidance duties include the following references:

Paragraph 4.21

> "*Local authorities **must** facilitate markets that offer a diverse range of high-quality and appropriate services. In doing so, they must have regard to ensuring the continuous improvement of those services and encouraging a workforce which effectively underpins the market. The quality of services provided and the workforce providing them can have a significant effect on the wellbeing of people receiving care and support, and that of carers, and it is important to establish agreed understandable and clear criteria for quality and to ensure they are met."*

Paragraphs 4.28, 4.30 and 4.31

> *"People working in the care sector play a central role in providing high quality services. Local authorities **must** consider how to help foster, enhance and appropriately incentivise this vital workforce to underpin effective, high quality services."*
>
> *"When commissioning services, local authorities should assure themselves and **have evidence** that service providers deliver services through staff remunerated so as to retain an effective workforce. Remuneration **must** be at least sufficient to comply with the national minimum wage legislation for hourly pay or equivalent salary. This will include appropriate remuneration for any time spent travelling between appointments. Guidance on these issues can be found on the HMRC website."*
>
> *"When commissioning services, local authorities should assure themselves and have evidence that contract terms, conditions and fee levels for care and support services are appropriate to provide the delivery of the agreed care packages with agreed quality of care. This should support and promote the wellbeing of people who receive care and support and allow for the service provider ability to meet statutory obligations to pay at least the national minimum wage **and** provide effective training and development of staff. It should also allow retention of staff commensurate with delivering services to the agreed quality and encourage innovation and improvement. Local authorities should have regard to guidance on minimum fee levels necessary to provide this assurance, taking account of the local economic environment. This assurance should understand that reasonable fee levels allow for a reasonable rate of return by independent providers to remain sustainable in the long term."*

Choice and Control

The consistent policy imperative from the Department for Health and Social Care reflected in all Guidance issued since the early 2000s, as well as being fundamental to the Care Act itself (see, for example, section 1(3)(b) of the Act) directs commissioners to put at the heart of their decision-making the views, wishes, feelings and beliefs of the

individuals for whom they provide services. The purpose behind these policy initiatives is to give individuals choice over how their services are provided, by whom and where, and control over the processes by which impact they come about. The Statutory Guidance adds to this, for example:

Paragraph 1.15

The council should have an approach that "*looks at a person's life holistically, considering their needs in the context of their skills, ambitions and priorities – as well as the other people in their life and how they can support the person in meeting the outcomes they want to achieve. The focus should be on supporting people to live as independently as possible for as long as possible.*"

Paragraph 1.19

The wellbeing principle is "*intended to cover the key components of independent living, supporting people to live as independently as possible….[with a] focus on the outcomes that truly matter to people, rather than using the relatively abstract term "independent living".*"

The outcome of this is that the way in which services are to be commissioned should promote the individual's participation in all aspects of life including work, recreation, social and economic activities in domestic, family and personal relationships, as well as in the wider community. Short term decision-making is inimical to such a principle.

Sustainability

The expected increases in demand for care services generally will necessitate continuing investment in our services if they are to remain suitable[sustainable?] and will meet the needs of residents. This requires us to receive an appropriate rate of return on the capital we invest.

The Statutory Guidance helpfully elaborates on the council's obligation to ensure sustainability; to highlight just a few examples:

Paragraph 4.33

> *"Local authorities **must** work to develop markets for care and support that – whilst recognising that individual providers may exit the market from time to time – ensure the overall provision of services remains healthy in terms of the sufficiency of adequate provision of high quality care and support needed to meet expected needs. This will ensure that there are a range of appropriate and high quality providers and services for people to choose from."*

Paragraph 4.35

> *"Local authorities **must not** undertake any actions which may threaten the sustainability of the market as a whole, that is, the pool of providers able to deliver*

services of an appropriate quality – for example, by setting fee levels below an amount which is not sustainable for providers in the long-term."

Paragraph 4.69

*"Local authorities **must** understand local markets and develop knowledge of current and future needs for care and support services, and, insofar, as they are willing to share and discuss, understand providers' business models and plans."*

Paragraph 4.97

"Local authorities should consider the contract arrangements they make with providers to deliver services, including the range of block contracts, framework agreements, spot contracting or 'any qualified provider' approaches, to ensure that the approaches chosen do not have negative impacts on the sustainability, sufficiency, quality, diversity and value for money of the market as a whole – the pool of providers able to deliver services of appropriate quality."

Paragraph 4.101

"*Local authorities should ensure that where they arrange services, the assessed needs of a person with eligible care and support needs is translated into effective, appropriate commissioned services that are adequately resourced and meet the wellbeing principle of the Act."*

Quality and breadth of service

Paragraph 4.22

"When considering the quality of services, local authorities should be mindful of the capacity, capability, timeliness, continuity, reliability and flexibility of services delivered to support wellbeing, where appropriate, using the definitions that underpin the CQC's fundamental standards of care as a minimum, and having regard to the ASCOF framework of population outcomes. High quality services should enable people who need care and support, and carers, to meet appropriate personal outcome measures."

Paragraph 4.23

"*Local authorities should also consider other relevant national standards including those that are aspirational, for example, any developed by the National Institute of Health and Care Excellence (NICE)."*

Paragraph 4.24

"Local authorities should encourage a wide range of service provision to ensure that people have a choice of appropriate services; appropriateness is a fundamental part of quality. For example, a working age person should be able to choose care and support tailored for their situation, and not be faced with only a choice of facilities

designed for older people, as this is unlikely to be appropriate to their situation, regardless of how high quality the facilities may be in their own contexts. Appropriate services will meet people's needs and reasonable preferences."

Direct Payments

The council should offer direct payments wherever possible in accordance with the Care Act and the Statutory Guidance. They remain the preferred mechanism for personalised care and support and provide independent choice and control by enabling the individuals to commission their own care and support in order to meet their eligible needs. They provide a platform with which to deliver a modern care and support system. This means that the council should be actively considering direct payments as a means to ensure choice and control in these circumstances. As they must be made available (subject to your policy) and must be made available to people including the people we support who lack capacity, this necessitates individual consideration be given to whether a direct payment in this case would prove to be a more stable approach to the provision of services.

*** Guidance note:** Consider including some text of your own, linking the particular issue you face with failures to meet statutory obligations.

[Insert your comments here]

5. Request for further information

*** Guidance note:** This section is designed to require the council to take action which reinforces the fact that their commissioning decisions are under scrutiny. Referring to the Freedom of Information Act 2000 will prevent the council from ignoring the request and will start a clock ticking on the provision of information - the authority has 20 working days to respond. It is often necessary to consider carefully the exact nature of the questions so as to draw out worthwhile information. The following are examples and specific advice may be required if the answers you require are not forthcoming.

The following request is being made under the Freedom of Information Act 2000. Please provide me with:

1.The method or mechanism which has been adopted by the council to set fee levels for home care services for [period(s)] and the data on which those calculations were based.

2. Details of the consultation exercise the council has undertaken in connection with fee settings for this type of service in the last [3] years.

3. The council's policies on fee setting for home care services for older people.

4. Confirmation that the council has taken advantage of the adult social care precept and the percentage/amount of this which has been allocated to services for older people.

*** Guidance note:** Include here any other requests for information or materials relevant to the specific case, for example as above how the authority has come up with its figures and what consultation has taken place to support these.

[Insert other requests under the Freedom of Information Act here]

6. Exit from the agreement

*** Guidance note:** The following section is for use where an arrangement is untenable and you have a right in the contract to exit the arrangement or at least want to threaten to terminate the service. You must check your contract with the council before including this section to confirm that termination without cause is permitted and what the relevant notice period is. An alternative form of words is also provided where the contract has no notice period or there is no "time" evident. The wording will need to be adapted if you are only terminating an individual placement.

We refer to clause [insert number] of our contract with you. Under this we may end the service provided with [insert number] months' notice from today's date. Unless our requests in relation to fee levels for this service are met, we will have no choice but to consider exercising this right.

We do not believe there are any current written terms applicable to our contract with you, or if there were, we consider they have expired. We are, therefore, entitled to give you reasonable notice of the termination of the contract. We consider [3 months] notice to be reasonable and the contract for the [services] will, as a result of this notice, come to an end on [date].

*** Guidance note:** the following paragraphs are for use when the council fails to respond where you have advised that you can no longer deliver care safely.

[If our services continue beyond the expiration of the notice period given by virtue of this letter our services will be provided at the full cost to us of providing the service which we estimate to be £ per week. Following termination of the contract we will invoice the

council for our services and provide a breakdown of the invoice showing the actual costs incurred in connection with the provision of the service for the remaining time that the council commissions the services from us.]

We are terminating this contract for [set out reasons which may be either for want of a fee review, the fee just being inadequate generally or because you are no longer able to offer the service due to the increased needs of the individual you support etc]. [As we are no longer able to provide this service and it is a matter of the safety and best interest of the individual that they are moved to an appropriate service as soon as possible. We will draw matters to the attention of the local Safeguarding Adults Board should the council not take prompt steps to deal with a move to a more appropriate location in a timely manner. We are of course more than happy to collaborate in that process in line with our own obligations to the individual, but you will appreciate that we have no powers to re-assess their needs nor to commission alternative services.

7. Quality and safety of our services

*** Guidance note:** It may be worth saying something about maintaining quality services and the safety of these for service users. For example:

Ultimately our position on fees is based on the value we place on the quality of the services which we provide to the people we support and our workforce.

The weight to be attached to high quality services is reflected in both the legislative framework and the Care Quality Commission's regulatory regime and is something we are unwilling to put at risk.

We are not prepared to compromise on the quality of our services or endanger the well-being of the people we support by accepting fee rates which undermine either of these principles. We do not consider the council should be acting in a way that could increase such risks and prejudice the interests of the people it commissions services for.

8. Summary

*** Guidance note:** Conclude with a bullet point summary of the issues you have made in the letter and/or next steps, for example requesting a meeting, further information or giving a deadline by which you will service notice on the contract. If you are looking to initiate legal proceedings this will also be the part of the letter that threatens formal action. Please note that if legal proceedings are to be initiated, we suggest you seek legal advice as a more formal letter before action is also likely to be required after this letter is sent.

[Insert summary here]

*** Guidance note:** Always include a deadline by which you require to hear from the council so that you can escalate matters if they do not respond and what action you will take on failure to do so.

We look forward to hearing from you in relation to the above at your earliest convenient and in any event no later than [date].

Yours sincerely,

[Insert name of your organisation's Authorised Officer]

[Insert job title]

Appendix 3

Fee Challenge Template Letter – NHS Services

This template is provided as a PDF but members can access them by contacting Anthony Collins Solicitors, john.wearing@anthonycollins.com; ramjeet.kandola@anthoncollins.com. The 3 letters cover different circumstances where fee issues arise, namely local authority residential care, local authority supported living and CCG CHC services.

Care England

Template letter to CCGs
Re. Fee rates for CHC Services

Introduction

This template is applicable to health and care services commissioned by a CCG. The purpose of the template is to challenge inadequate fee arrangements and other poor commissioning practices in a range of circumstances. This template is based on the law as at 31st October 2021.

It is set out in the following sections:

1. Introduction
2. Our contract with you
3. Our costs
4. The CCG's overarching duties
    - 4.1 Transparency and fair dealing
    - 4.2 Constructive Engagement
    - 4.3 Best interests of the patient
    - 4.4 Price setting
5. Request for further information
6. Exit from the agreement
7. Quality of our services
8. Summary

The letter should be completed by reference to the embedded notes and our Report to Care England of January 2022, to which this template was attached. There are different templates for Residential Care and Home Care Services commissioned by a local authority.

This letter is only applicable to CCGs in England. It does not apply to services commissioned by local authorities (please see separate templates), nor to health authorities in Wales, Scotland or Northern Ireland.

We recommend that **specific legal advice is sought** by organisations wishing to bring a formal challenge. In particular, it should be noted that where issues arise from a decision or policy made by the local authority (which may be susceptible to challenge by way of judicial review) and in the context of a tender (where procurement law remedies may apply) time will be of the essence, with time limits of generally 3 months or 30 days for applying for such relief respectively.

These extremely short time limits are strictly enforced and a provider will have to act very quickly to obtain any of the remedies potentially available in such cases.

How to edit this letter

The suggested text of the outline letter follows.

Parts of the letter which require you to add or amend text are enclosed in square brackets and shaded green, for example:

[Insert text here]

You should add the required text where appropriate and remove the green shading in your final version.

Throughout this letter we provide guidance on how to select the right information, or to make your case stronger. Guidance notes are shaded in violet and look like this:

> *** Guidance note:** You should delete all of this text before producing the final version of this letter.

To produce the letter we suggest the following steps, in this order:

1. Save this file to your computer network or hard drive;
2. Edit the letter carefully, adding the necessary text and removing optional parts that do not apply;
3. Delete all of the guidance notes, including this page and the Introduction;
4. Copy and paste the letter into your standard letter format;
5. Have the letter proof-read and checked before you send it.

Delete all text from this point and above

*** Guidance note:** This letter should be addressed to the relevant CCG's officer. Your contract with the CCG will usually state who this person is. Generally, it is the person within the CCG to whom you should address formal notices about your contract. The person is often the head of the CCG's contracts department or of LD services. We suggest that, in the absence of any contractual requirements, you send the letter by first class post and email.

[On your headed paper]

[Date]

[Insert name of CCG Officer]
[Insert name and address of CCG] [add email address]

Dear [Insert name of officer], [Sirs]

CHC Services [Location][for individual]

1. Introduction

*** Guidance note:** Explain here your reason for writing to the CCG, including a brief history and details of the issues you face, e.g.:

- the person, the care package and its history the fee has not been increased for a period of time;
- the care needs of the individual have changed and a review of fee increase is required;
- there is some other change of circumstances that requires an increase in the fee;
- the CCG has failed to honour what it agreed in connection with the fee

The range of circumstances dealt with in template include the following steps:

- .

asking for a contract to be issued;

asking for a proper price to be agreed for the service (including in arrears);

asking that the CCG undertake a review of the individual's care needs in a compliant manner;

seeking a variation to the current arrangements;

terminating or threatening to terminate the contract; and

potential challenges around breaches of public law duties, a threat to invoke the dispute resolution process or making a FOIA request.

[Insert your opening text here.]

2. Our contract with you

*** Guidance note:** The starting point for any engagement over fees should be a review of the contract you hold with the commissioner, so include any relevant details here. Challenging poor commissioning is most effective when based on contractual rights, as they are more certain and more easily predictable than those arising from public law remedies such as judicial review. See also section 6 below on termination of the contract, which is a useful tactic where the contract contains no helpful provisions as it gives rise to a new contract (unless the commissioner accepts the termination and moves the patient).

The CCG should normally use the NHS Standard Form Contract (Short Form) with Particulars, which includes the specification and price for the service. Often this is not the case, so a preliminary request (see below) may be for the CCG to issue a formal contract.

Choose one or more of the following examples.

[You are obliged to issue a formal contract for this service but have failed to do so. Please issue us with a formal contract for our consideration within the next [14 days].

We refer you to our contract with you dated [insert date] and the provisions at [include details of any specific provisions such as fee uplift mechanisms and/or variation provisions; if nothing specific refer to section 13.11 of the General Conditions].

[The [fees you are currently paying] [proposal[s] that you have made] fail to address or comply with these terms and we consider [it][they] amount[s] to an actionable breach of contract.]

We would ask that you [re]consider the position in order to take into account the contractual arrangements between us as set out in this letter.

3. Our costs

*** Guidance note:** It is important to explain to the CCG what your actual costs are and the disparity is between them and the fees being offered. We cannot emphasise strongly enough how worthwhile it is to provide the CCG with a detailed analysis of the financial information you have to hand.

The more comprehensive and robust this analysis is, the more difficult it is for the commissioner to ignore and hence the more powerful it will be. This approach also lays the foundation for formal challenges in the future.

[Insert a summary of your costs here or by reference to an attached document]

4. The CCG's overarching duties

As the CCG will be aware, it is subject to extensive duties arising from the NHS Act 2006 and the Regulations and Guidance issued pursuant to that Act and other legislation. We would remind the CCG in particular of the following.

*** Guidance note:** CCGs are subject to a wide-ranging and complex framework of legislation and guidance which is meant to create a strong foundation upon which good commissioning of services for people with a learning disability are based. Unfortunately, many CCGs do not routinely follow the rules to which they are subject, and depending upon the circumstances, the following specific overarching duties can be called in aid in connection with your argument with the CCG.

4.1 Transparency and fair dealing

Provisions regarding transparency and fair dealing are common threads throughout the regulatory framework to which you are subject. We would draw your attention in particular to paragraph 9 of the NHS Standard Contract 2021/22 Technical Guidance. For example, paragraph 29 headed "Contracting fairly" says as follows:

"29.3 an effective working relationship is more likely to be possible where commissioners and providers … :

- *are open and transparent in sharing information, ensuring early communication of new or changed intentions, emerging problems or potential disputes;*
- *take their contractual responsibilities seriously, but use contractual levers and processes in a reasonable and proportionate way; and*
- *tackle difficult decisions about financial pressures in a way which focuses on actions which will generally remove cost or increase efficiency… rather than producing short term opportunistic gains for one party at the expense of the other."*

Transparency is also a key feature of the General Conditions of the NHS Standard Contract. The National Framework for NHS Continuing Healthcare and NHS Funded Nursing Care (2018) states at paragraph 176:

"*CCGs should ensure clarity regarding the services being commissioned from providers, bearing in mind that those in receipt of [CHC] continue to be entitled to access the full range of primary, community, secondary and other health services. The services that a provider of [CHC] services are expected to supply should be clearly set out in a service specification or contract between the provider and the CCG."*

4.2 Constructive engagement

The National Tariff Payment System (September 2021) ("**the National Tariff**") sets out rules in connection with the determination of pricing for services. One of the principles that Rule 1 on page 25 establishes is that of constructive engagement, see section 4.1.3, paragraph 56 which states as follows:

"Providers and commissioners must engage constructively with each other to decide on the … payment approach that delivers the best value for patients …"

4.3 Best interests of the patient

The same Rule also stresses that the best interest of the patient must be paramount. At paragraph 53 of the National Tariff, the CCG is required to have considered, in the context of assessment, the following:

- that it has obtained sufficient information to make a proper assessment; and
- whether it has used properly qualified/experienced individuals to assess the information; and
- that it has followed an appropriate process to arrive at a conclusion.

Other factors the CCG must take into account in how it delivers the appropriate quality of service and how risk should be allocated within the agreement in a way that best protects the interests of the patient include: that the individual's personal wishes must be taken into account when deciding how to meet those needs and that a reasonable choice of

providers should be offered. The CCG is also required to give its reasons for any proposed changes in writing and to offer advocacy support where appropriate.

4.4 Price setting

The CCG will be aware that section 115 of the Health and Social Care Act 2012 sets out what it needs to do in terms of setting prices for CHC services. The service which is the subject of this letter is not specified under the National Tariff but the National Tariff does provide guidance on how prices for such services are to be set. In setting prices, the CCG is obliged to be transparent and to engage constructively with us in connection with setting prices. The CCG should only set prices based on having sufficient information about the local marketplace and having undertaken proper assessments using assessors qualified to do so. Relevant factors set out, for example, in Rule 2 of the National Tariff, at paragraph 63, include the necessity for the CCG to have comparative information about provider costs and to take into account specific costs when determining prices. This would extend to the cost pressures we face in connection with the staffing costs both generally and specifically; the need for the use of agency staff; and increases driven by changes in the law such as the National Insurance Levy, increases in National Living Wage and pension obligations. [The provider should, ideally, refer here to data which it is sending with the letter.]

*** Guidance note:** Consider including some text of your own, linking the particular issue you face with the CCG's failures to meet their statutory obligations.

[Insert your comments here]

5. Request for further information

*** Guidance note:** This section is designed to require the CCG to respond to requests for information which reinforces the fact that their commissioning decisions are under scrutiny. Referring to the Freedom of Information Act 2000 will prevent the CCG from ignoring the request and will start a clock ticking on the provision of information - the CCG has 20 working days to respond. It is often necessary to consider carefully the exact nature of the questions so as to draw out worthwhile information. The following are examples and specific advice may be required if the answers you require are not forthcoming.

The following request is being made under the Freedom of Information Act 2000. Please provide us with:

1. The method or mechanism which has been adopted to set fee levels for older peoples' services for [period] and the data on which those calculations were based.
2. Details of the comparative data the CCG has obtained in connection with this type of service.
3. The CCG's policies on [fee setting for CHC for older peoples' services] [amendments] [fee reviews] [etc.].

*** Guidance note:** Include here any other requests for information or materials relevant to the specific case, for example as above how the CCG has come up with its figures and what consultation has taken place to support these.

[Insert further requests under the Freedom of Information Act here]

6. Exit from the agreement

*** Guidance note:** The following section is for use where an arrangement is untenable and you have a right in the contract to exit the arrangement or where you at least want to threaten to terminate the service. You must check your contract with the CCG before including this section to confirm that termination without cause is permitted and what the relevant notice period is. An alternative form of words is provided where the contract has no specific notice period.

[We refer to clause [insert number] of our contract with you. Under this we may end the service provided with [insert number] [months'] [weeks] notice. [Unless our requests in relation to fee levels for this service are met, we will have no choice but to consider exercising this right.] [Please treat this letter as notice of the termination of the contract which will come to an end on [date].]

[We do not believe there are any current written terms applicable to our contract with you or, if there were, we consider they have expired. We are, therefore, entitled to give you reasonable notice of the termination of the contract. We consider [3 months] notice to be reasonable and the contract for the [services] will, as a result of this notice, come to an end on [date].

[If our services continue beyond the expiration of the notice period given by virtue of this letter our services will be provided at the full cost to us of providing the service which we estimate to be [£] per week. Following termination of the contract we will invoice the CCG for our services and provide a breakdown of the invoice showing the actual costs incurred in connection with the provision of the service for the remaining time that the CCG commissions the services from us.]

*** Guidance note:** the following paragraph is for use when the CCG fails to respond where you have advised that you can no longer deliver care safely.

We are terminating this contract for [set out reasons which may be either for want of a fee review, the fee just being inadequate generally or because you are no longer able to offer the service due to the increased needs of the individual you support etc]. [As we are no longer able to provide this service and it is a matter of the safety and best interest of the individual that they are moved to an appropriate service as soon as possible. We will draw matters to the attention of the local Safeguarding Adults Board should the CCG not take prompt steps to deal with a move to a more appropriate location in a timely manner. We are of course more than happy to collaborate in that process in line with our own obligations to the individual, but you will appreciate that we have no powers to re-assess their needs nor to commission alternative services.

7. Quality and safety of our services

*** Guidance note:** It may be worth saying something about maintaining quality services and the safety of these for service users. For example:

Ultimately our position on fees is based on the value we place on the quality of the services which we provide to the people we support and our workforce.

The weight to be attached to high quality services is reflected in both the legislative framework and the Care Quality Commission's regulatory regime and is something we are unwilling to jeopardise.

We are not prepared to compromise on the quality of our services or endanger the well-being of the people we support by accepting fee rates which undermine either of these principles. We do not consider the CCG should be acting in a way that could increase such risks and prejudice the interests of the people it commissions services for.

8. Summary

*** Guidance note:** Conclude with a bullet point summary of the points you have made in the letter and/or next steps, for example requesting a meeting, further information or giving a deadline by which you will service notice on the contract. If you are planning to initiate legal proceedings this will also be the part of the letter that threatens the CCG with such action. Please note that if legal proceedings are to be initiated we suggest you seek advice as a more formal letter before action is also likely to be required after this letter has been sent.

[Insert summary here]

*** Guidance note:** Always include a deadline by which you require to hear from the CCG so that you can escalate matters if they do not respond and what action you will take on failure to do so. This could be as short as 7 days in an emergency. Typically a response within 14 days would be reasonable.

We look forward to hearing from you in relation to the above at your earliest convenient and in any event no later than [date].

Yours sincerely,

[Insert name of Signatory]

[Insert job title]