Health Board Report

FUNDED NURSING CARE

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Purpose of the Health Board Report

This paper provides the Board with an update on NHS Funded Nursing Care (FNC) and the required actions arising following the outcome of the Judicial Review proceedings relating to the Funded Nursing Care and the Rate for 2014/15, 2015/16 and 2016/17.

Governance

Link to Health Board Strategic Objective(s)

The Board’s overarching role is to ensure its Strategy outlined within ‘Cwm Taf Cares’ 3 Year Integrated Medium Term Plan 2015-2018 and the related organisational objectives aligned with the Institute of Healthcare Improvement’s (IHI) ‘Triple Aim’ are being progressed, these in summary are;

- o improve quality, safety and patient experience.
- To protect and improve population health.
- To ensure that the services provided are accessible and sustainable into the future.
- To provide strong governance and assurance.
- To ensure good value based care and treatment for our patients in line with the resources made available to the Health Board.

This report focuses on all the above objectives, but specifically on providing strong governance and assurance and improving quality, safety & patient experience.

Supporting evidence


Engagement – Who has been involved in this work?

This work has been undertaken locally and nationally through the FNC Task Group.
### Health Board Resolution (insert √) To;

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**Recommendation**

The Health Board is asked to:
- **DISCUSS** and **APPROVE** all the recommendations outlined at the end of the report.

### Summarise the Impact of the Health Board Report

**Equality and diversity**

The WG CHC guidance directs professionals to ensure "Individuals and their families/representatives must be fully involved and informed throughout the assessment process.

**Legal implications**

Board members will be aware of the related legal implications, including the Judicial Review proceedings between all LHBs across Wales and Care Home providers.

**Population Health**

This work considers the needs of residents requiring nursing placements within care homes providing this service.

**Quality, Safety & Patient Experience**

The work undertaken and the recommendations aim to ensure the quality of care, safety and patient experience is paramount.

**Resources**

The report highlights a number of financial and other resourcing issues which impact on operational delivery.

**Risks and Assurance**

The work provides the Board with assurances around its responsibilities for Funded Nursing Care and also provides an outcome following the recent Judicial Review proceedings and related judgements.

**Health & Care Standards**

The 22 Health & Care Standards for NHS Wales are mapped into the 7 Quality Themes but within a Governance Framework. These being:
- Staying Healthy;
- Safe Care;
- Effective Care;
- Dignified Care;
- Timely Care;
- Individual Care;
- Staff & Resources


The work reported in this summary and related annexes take into account many of the related quality themes including safe and effective care.

**Workforce**

CTUHB has a team of nurse assessors who visit Nursing Homes to undertake assessments and reviews into care, which inform the associated work referred to within this report.

**Freedom of information status**

Open
FUNDING NURSING CARE

1. SITUATION / PURPOSE OF REPORT

This paper provides the Board with an update on Funded Nursing Care (FNC) and the required actions following the Judgement handed down by the Court of Appeal on 4 February 2016, which found in favour of Health Boards. Board Members will be aware of the briefing provided by the Chief Executive at the March 2016 meeting and the related recommendations approved by the Board, along with the agreement that the full report be received by the Board at its May 2016 meeting.

2. BACKGROUND / INTRODUCTION

The detailed history and timeline of the FNC litigation has been set out fully for the Board in previous papers and briefings. These papers have reflected the work undertaken by the FNC Task Group in considering the Funded Nursing Care (FNC) weekly rate in Wales. This work included the commissioning of a report from Laing & Buisson in 2012/13 that sought to quantify the appropriate cost for care by Registered Nurses in Care Homes. Based on the Report findings, Health Boards in Wales increased the FNC rate as a two stage uplift:

- An increase to the FNC rate by £9.03 per resident per week for the financial year 2013/2014, backdated to 1 April 2013;
- An uplift of £18.05 per resident per week from 1 April 2014.

Additionally, Health Boards also provided a 10% uplift in the component of the FNC rate that funds continence products, and agreed to implement an Inflationary Uplift Mechanism to apply annually to the FNC rate. This would provide Care Homes with assurance that the FNC rate would be uplifted annually linked to wage increases given to nursing staff of a similar grade within the NHS.

Solicitors acting for a small number of Care Home providers sought to challenge the above changes by arguing that the uplifts did not reflect the true cost of Registered Nursing (RN) input. They also argued that the Inflationary Uplift Mechanism was not an appropriate way to set the rate in the future, but the challenge to the continence increase was dropped. Correspondence between solicitors did not resolve the challenges and eventually judicial review proceedings were issued by eleven Care Home providers against all the seven Health Boards in Wales. Board members will recall that 21 of the 22 Local Authorities in Wales joined the proceedings as Interested Parties, in support of the Care Homes. The judicial review hearing took place in February 2015, the outcome being that Mr Justice Hickinbottom decided that the approach adopted by the Health Boards, based upon his interpretation of Section 49 of the Health and Social Care Act, was flawed. As a result Judgement was handed

1 The exception being Cardiff County Council
down in favour of the Claimant Care Homes and the supporting Local Authorities.

During the initial trial, Health Boards conceded (rightly in the view of Mr Justice Hickinbottom) that the standby time component of the RN time, that had previously been excluded from consideration when setting the rate, would be the Health Boards' responsibility, given the statutory requirement for a RN to be on site all the time. This resulted in the Mr Justice Hickinbottom concluding that the decisions taken by the Health Boards were flawed as they did not include standby time. The Judge did not reach a formal finding on the legitimacy of the Inflationary Uplift Mechanism as it was unnecessary for him to do so given he had found the rate to be flawed, but he observed that he would have found it difficult to conclude the Inflationary Uplift Mechanism was in itself unlawful or that the process adopted was wrong.

3. ASSESSMENT / GOVERNANCE AND RISK ISSUES

The Appeal

After considering their position and the Judgement carefully, Health Boards instructed their solicitors to seek permission from the Court of Appeal to appeal the Judgement. Permission to appeal was granted and the appeal hearing took place on 12 November 2015 before Lord Justices Laws, Lloyd-Jones and Elias.

Welsh Ministers did not participate in the appeal, despite being Interested Parties. Instead, a letter was sent to the Court of Appeal immediately before the hearing stating Welsh Government wished to remain neutral. However, the Secretary of State for Health in England was given leave to intervene in the appeal, an application which followed discussions between it and the Health Boards. It filed written submissions in support of the Health Boards' position and also instructed a barrister to provide oral submissions at the appeal.

The Local Authorities were represented at the Appeal, and as at the first instance hearing in February 2015, they supported the Care Homes position.

The hearing concentrated on the interpretation of the relevant legislation and, despite being listed for two days, it concluded at the end of the first day. The formal Judgement was handed down on 4 February 2016 and by a majority of two (Laws LJ and Lloyd-Jones LJ) to one (Elias LJ), the Court of Appeal found in favour of the Health Boards, overturning the decision of the first instance court. The Court of Appeal found the Health Boards' interpretation of Section 49 of the Health and Social Care Act 2001 to be correct. Elias LJ did not find in favour of either party and adopted a neutral position.

The Care Home providers and the Local Authorities applied for permission to appeal the Judgement to the Supreme Court, but the Court of Appeal rejected

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2 This refers to the time when a RN is present but is not undertaking any duties. The time allocated to this by Laing & Buisson was 28 minutes per resident per week. It was disputed that in fact, there are times when RN do nothing, but the concession accepted that if that was the case, the time involved fell to be paid by the Health Boards.
their written Application. The Care Home providers have recently indicated they do not propose to seek permission to appeal from the Supreme Court itself whilst the Local Authorities are seeking permission to appeal. They have to do so within 28 days of the Judgement being handed down (4 February 2016). When that application has been served the Health Boards will have 14 days in which to file objections to it. A verbal update will be provided at the Board meeting should the position have developed further by then.

**Costs**

It was not possible for all parties to agree the costs apportionment for either the first instance hearing, or the Court of Appeal hearing. Therefore, all parties filed written submissions as to the Costs Orders they considered appropriate, for the Court of Appeal to consider and make a decision. Based on the submissions, the Court of Appeal made an Order for costs in the following terms:

- the Care Homes were not awarded any of their costs either for the first instance judicial review hearing, or for the Court of Appeal hearing;
- the Care Homes were ordered to pay 50% of the Health Boards' costs of the proceedings for the first instance hearing;
- the Care Homes and the Local Authority Interested Parties were ordered to each pay 50% of the Health Boards' reasonable costs of the appeal (i.e. 100% of the costs assessed on a standard basis if not agreed);
- the Health Boards do not have to pay any of the costs of the other parties for either hearing.

**The Effect of the Judgement**

The Court of Appeal confirmed that Health Boards were right to concede that they are responsible for RN "standby" time where it exists. That concession enabled the Health Boards to win the argument that Section 49 requires a distinction to be drawn between nursing and personal/social care services and that whilst the NHS is responsible for nursing care, it is for the Local Authorities to pay for personal and social care.

It is only when Registered Nurses are unable to undertake any tasks, that they may be regarded as being on "standby" and, by virtue of Regulation 18 of the 2002 Regulations (which require attendance by a Nurse 24/7 for the purpose of the care home's registration), the NHS would be obliged to meet that cost.

Laing and Buisson's work in 2013 included an attempt to identify standby time. Based on the limited analysis forms submitted in response to their questionnaire, Laing and Buisson calculated the average "standby time" at night per resident per week to be 0.47 hours (approximately 28 minutes) which they calculated had an associated cost of £5.69 per resident per week. Health Boards therefore now have to meet their obligations and fund the standby time component, backdated to 1 April 2014, the date of the decisions which have been quashed. The Court did not find, however, that the additional costs claimed by the Care Homes, of some £22 per resident per week, claimed by the Care Homes should be paid by Health Boards.
Given the 2013/2014 uplifts were approved by Boards as an interim position pending appeal, they, along with the continence uplift and Inflationary Uplift Mechanism, need to be retaken following the Appeal.

**Next Steps**

Health Boards are obliged to pay standby time back dated to 1 April 2014 and going forward. Welsh Government officials have confirmed that in addition to accruing funding to cover the 2014/15 year, appropriate claims will also be funded, non recurrently for 2015/16, meaning a provision can be made in the 2015/16 accounts. If these allocations are made there will be sufficient funds to cover the non recurrent costs plus minor inflation (of 0.76% for 14/15 and 1% recurrently for 15/16) for both financial years. Welsh Government officials have confirmed that they have not set aside any new funding for 2016/17 to meet the recurrent costs. Any decision to review this in the future would need to be supported by evidence and consideration of a full range of factors relevant to that decision.

The Department of Health has recently commissioned work to consider the FNC rate in place in England. It is possible this work will offer opportunities for Health Boards to consider developing alternative models in the future.

The 2014 Decision to set the FNC rate at £140.90 per week was made by Boards as an interim measure pending the outcome of the Appeal. Boards will therefore need to decide whether the rate should continue, whether it should be increased by standby time and whether the Inflationary Uplift Mechanism (IUM) should be maintained and applied in 2016/17, in addition to the increased continence product payment.

The ongoing financial implications of including both the standby time and applying the IUM are likely to be just under £1.6M recurring.

There will also be a residual impact upon Continuing Healthcare (CHC) fee levels, particularly for those Health Boards which use a formula of residential fee plus the FNC rate to set their minimum CHC rate.

**Summary and Conclusions**

The judicial review hearing at first instance found in favour of the Care Home providers, despite a concession by the Health Boards being made that standby time should be included in the calculation as to what makes up the FNC rate. Local Authorities joined the proceedings as Interested Parties and supported the Care Home providers. Welsh Government joined as an Interested party but adopted a neutral stance and did not actively participate in the hearing apart from having a Barrister present with a watching brief.

Health Boards appealed the Judgement to the Court of Appeal. The Local Authorities, as Interested Parties in the appeal, continued to support the Care Home providers, whilst Welsh Government was not represented in Court. The
Secretary of State for England intervened in the appeal as an Interested Party and supported the Health Boards.

The Court of Appeal considered carefully the Health Boards' interpretation of Section 49 of the Health and Social Care Act and concluded the Health Boards were correct in their interpretation, and that any time the RN spent providing personal/social care was not the responsibility of the Health Boards to fund. The Court of Appeal confirmed that the Health Boards were correct to concede that the standby time component should be funded by the Health Boards.

A costs order has been issued by the Court and Health Boards have to fund 50% of their costs for the first instance hearing (the other 50% being paid by the Care Home Providers), but they do not have to pay any contribution towards the costs of either the Care Homes or the Local Authorities. The Health Boards' full reasonable costs for the Appeal have to be met by the Local Authorities and the Care Homes in equal shares.

At the time this report is being drafted, Local Authority solicitors have indicated by email that they will be seeking permission to appeal, but the Care Home Providers have confirmed they will not be taking matters further.

Chief Executive Officers (CEOs) have considered matters and support the proposals in this paper for the Board to consider. CEOs have also agreed that they will formally write to Welsh Government, seeking its support in moving forward in partnership with Local Authorities to consider more effective options for the future.

In the meantime, and following the Court of Appeal Judgement, Health Boards now need to take a number of actions:

- To retake the decision taken by the Board as an interim measure in 2015 to set the FNC rate at £140.90 per week;
- To retake the decision taken by the Board as an interim measure in 2015 that the 10% uplift in the continence component of the FNC rate continue;
- To retake the decision taken by the Board in 2015 as an interim measure that the Inflationary Uplift Mechanism be applied annually;
- To agree that the standby component (found by Laing & Buisson to be £5.69 per person per week) be included in the FNC rate, backdated to 1 April 2014, with inflationary uplifts applied as appropriate. Boards will note that Welsh Government has agreed to fund appropriate costs of the backdating and inflationary uplifts, but not the costs of the standby time component moving forward;
- To quantify the knock on impact of the standby time inclusion on the CHC rate in place locally;
• To continue to support the work of the FNC Task Group in considering whether alternative models may be more appropriate in future. This will be informed in part by the work currently being commissioned by the Department of Health;

• To support the CEOs in seeking to establish a dialogue with Welsh Government to resolve this matter and in moving forward with partner Local Authorities.

4. **RECOMMENDATION**

Members of the University Health Board are asked to:

- **NOTE** the favourable outcome in the Court of Appeal, including the favourable costs order and that the Local Authorities, as Interested Parties, have indicated they propose to seek permission to Appeal to the Supreme Court;

- **CONFIRM** that the interim FNC rate of £140.90 will continue;

- **NOTE and ACCEPT** the requirement for Health Boards to meet their obligation to fund the standby time that was conceded as part of the first instance hearing and the need to back date standby payments to 1 April 2014, noting that funds have been accrued for the 2014/15 period and Welsh Government is in agreement that appropriate claims for 2015/16 will be met. The recurring financial impact of the uplift has not been provided for by Welsh Government as new money in 16/17 and is therefore unlikely to be funded as a new additional allocation;

- **NOTE and ACCEPT** the recommendation that the Inflationary Uplift Mechanism continue to be applied at this stage as an appropriate mechanism to ensure the FNC rate is uplifted in line with inflation;

- **NOTE** the knock on financial implications for Continuing Healthcare depending on the local funding model;

- **NOTE** that Chief Executive Officers (CEOs) have supported a proposal that the FNC Task Group progress work to consider the need for the development of a revised model, to consider all necessary factors, noting the possible opportunities that may arise out of the work commissioned by the Department of Health;

- **NOTE** that CEOs have agreed to formally write to Welsh Government on behalf of CEOs seeking its engagement in the development of a revised model of care.