

ABM University Health Board	
Date of Meeting: 29th March 2018 Name of Meeting: Health Board Agenda item: 2 (viii)	
Subject	Update on Funded Nursing Care
Prepared by	Samantha Lewis, Assistant Director of Finance
Approved by	Samantha Lewis, Assistant Director of Finance
Presented by	Lynne Hamilton, Director of Finance

1. Situation

This report provides the board with an update on the position regarding Funded Nursing Care (FNC) following the 2017 Supreme Court Judgment and provides advice to the Board on the work underway since the Judgment to ensure compliance.

This report requests Board approval of the revised FNC rate.

2. Background

2.1 Background Information

Funded Nursing Care (FNC) refers to the NHS funding of Registered Nursing (RN) care within care homes, where the need for nursing input has been assessed as necessary. The (then) Welsh Assembly Government introduced FNC in 2001 to address the anomaly that nursing care in Care Homes was potentially chargeable. Prior to FNC being introduced, funding of nursing care in care homes was dependent upon a financial assessment, the outcome of which dictated whether the care was funded by the individual as a self-funder or by the responsible Local Authority.

Initially funded by WG, a £100 flat rate contribution covered the RN costs provided to an individual and any continence products that may be necessary. The flat rate was the equivalent of approximately 7.5 hours of RN input per resident per week. The funding for FNC was provided via a vote transfer from Local Authorities.

WG transferred the FNC model and funding to HBs in 2007. Uplifts were provided annually in line with the general allocation uplift from WG. In those years where there was no resource uplift from WG, no uplift was made to the FNC rate.

In 2012, recognising the concerns of Providers that the rate had not kept pace with increasing costs on the care sector, CEOs established an FNC Group with a remit to consider the current FNC rate and whether that remained appropriate. The Group initially undertook a small scale survey to capture the functions undertaken by a registered nurse in care homes over the course of several days. This identified significant periods of time when the registered nurse was not involved in either direct or indirect nursing duties, and led to the commissioning of a larger study of 256 care

homes via Laing & Buisson. Independent Care Sector Providers were engaged with the commissioning and design of the work, via Care Forum Wales, throughout this process.

Laing & Buisson reported back in July 2013. Based on a 25% response rate their report concluded that, within the parameters set by the FNC Group, the average cost per resident was higher than that currently paid by HBs. Based upon this, HB Boards all approved a staged uplift to the rate over two years, increasing the hours funded from 7.5 hours to 7.62 hours.

2.2 The Legal Proceedings

Despite the work undertaken by HBs, and the uplifts subsequently made in response to the outcome of this work, a number of Providers felt that certain aspects of the RN time currently excluded by HBs should have been included in the FNC rate and therefore challenged the decisions relating to the setting of the FNC rates, initially via correspondence between Solicitors, and then via **Judicial Review** proceedings. The court proceedings were issued in September 2014 and heard in the High Court in February 2015. Local Authorities joined the proceedings as Interested Parties and supported the Providers' arguments. Welsh Government were also named as an interested party but, whilst their Counsel was present at the High Court, he took no active part in proceedings.

Despite a concession made by Health Boards during the hearing that 'stand by time' should be included in the FNC rate, the Judgment concluded that, in defining the services that they had to provide under the legislation, the Health Boards had adopted a task-based approach and restricted services to the tasks that only a registered nurse could perform. The Judge held that it was necessary to meet care home residents' needs to have a registered nurse on site at all times to deal with specific nursing and medical requirements. The Health Boards were responsible for providing such a nurse, and responsibility was not diminished simply because the nurse might not be performing the specific tasks that only a registered nurse could perform at all times.

HBs appealed the Judgment to the **Court of Appeal** and the Hearing took place in late 2015. Again, Local Authorities were Interested Parties in support of the Providers and WG once again adopted a neutral stance and took no active part in proceedings. The Secretary of State for Health in England also intervened in the proceedings at this point in support of the HBs' arguments.

The Court of Appeal found on a 2:1 basis (one Judge adopting a neutral position) in favour of the HBs position.

Following the Court of Appeal Judgment, Providers indicated they would take no further legal action but Local Authorities sought, and were subsequently granted, permission to appeal to the Supreme Court.

The **Supreme Court** hearing took place in early 2017 with LAs now the Appellants. The Secretary of State for Health was once again an Intervener supportive of the HBs argument. WG again took no active part in proceedings. The Supreme Court handed down its Judgment in August 2017.

The Judgment describes the interface between health and social care as 'a difficult and controversial policy area'. The Supreme Court also noted that surprisingly there was little previous case law to support their deliberations.

In allowing the appeal the Supreme Court rejected the arguments of both the HBs and LAs and determined that both parties had misinterpreted s49(2). Instead, the Court provided its own view of what services should be included in the FNC rate.

The Court concluded that *"nursing care by a registered nurse" covers (a) time spent on nursing care, in the sense of care which can only be provided by a registered nurse, including both direct and indirect nursing time as defined by the Laing and Buisson study; (b) paid breaks; (c) time receiving supervision; (d) stand-by time; and (e) time spent on providing, planning, supervising or delegating the provision of other types of care which in all the circumstances ought to be provided by a registered nurse because they are ancillary to or closely connected with or part and parcel of the nursing care which she has to provide".*

The remainder of the personal care provided by registered nurses which does not fall within the definition above is to be funded by LAs.

There is no further avenue for appeal and the decision of the Supreme Court is the final Court ruling on this matter. The Judgment applies in England as well as Wales.

Over the course of the legal proceedings, HBs have continued to make annual uplifts to the FNC rate in line with the Inflationary Uplift Mechanism previously approved by all HBs.

3. Assessment

3.1 Determination of basis for FNC rate

The Supreme Court Judgment ("the Judgment") effectively quashed the decisions taken by HBs to set the FNC rate initially in 2014, and subsequent decisions uplifting the rate. The Court has determined that these decisions do not reflect the requirements of s49. HBs therefore need to retake decisions based upon those factors which the Court has determined should be included.

Work has been underway across all parties over recent months to consider how the FNC rate needs to be calculated and set. This work has involved both HBs and LG representatives and has been facilitated by WG. Professor John Bolton was commissioned by WG to consider the Judgment and the options for parties to consider as to how to meet the Court's requirements. Professor Bolton considered the Laing & Buisson (L&B) Report to be appropriate as the basis for this work, rather than the work commissioned by the Department of Health from Mazars. There are a number of reasons why the L&B model was determined the most appropriate:

- The L&B Report was undertaken in Wales and reflects the Welsh context;
- The Courts have not been critical of the methodology or findings in the L&B Report, instead they viewed the application of the findings to be incorrect;
- The L&B Report had a 25% response rate whereas the Mazars work in England had only a 10% response rate;

- The time calculated for personal care provided by the registered nurse was higher in the L&B report than the equivalent finding from Mazars. HBs have therefore opted for the higher amount;
- The Mazars work was undertaken in England and their view is the findings are not directly reproducible in Wales. A further piece of work would need to be commissioned taking several months and incurring additional costs.

Professor Bolton concluded there were two main options, both of these reflected the Court's view that HBs fund: direct and indirect RN care; stand by time; paid breaks, registrant supervision time. The option of choice provides a 50:50 split in the costs between the HBs and LAs of the time spent on other types of care which is ancillary to, or closely connected with, nursing care¹.

3.2 Establishment of FNC rate

The current FNC rate is £149.67 per person per week which is the financial equivalent of the current 8.09 hours of RN input per person, per week funded².

All parties³ have supported the recommendation made by the WG led Steering Group that HBs will be responsible for an additional 0.38 hours for paid breaks and registrant supervision; and 50% of the additional 0.77 hours identified in L&B for time spent on personal/social care⁴. The remaining 50% of the personal/social care time will be borne by the LAs.

HBs are therefore responsible for an additional 0.765 hours which equates to an increase of £13.08 to the FNC rate, per person, per week; so the new FNC rate would be £162.755. LAs are responsible for an additional 0.385 hours which equates to an additional £6.59 per person, per week; which will be an increase on their current rate.

Given the Supreme Court quashed the 2014 decisions taken by HB Boards, the uplift will apply from 1 April 2014 – backdating will therefore be necessary.

3.3 Next steps

In addition to uplifting the FNC rate, there are a number of other strands of work that will need to be progressed. These will include:

- Backdating the revised rate to 2014. Significant work has already been undertaken by finance colleagues across HBs to ensure data is available on

¹ The alternative option would have required negotiation with individual LAs regarding the proportion of personal care time which is ancillary to or closely connected with nursing care. .

²This is made up of the 7.5 hours of funding transferred from WG in 2007 when the funding was rolled out to HBs, a further 0.12 hours uplifted post 2013 L&B report, plus an additional 0.47 hours per person, per week for stand by time which was conceded at the High Court hearing.

³ A Steering Group established by WG with LA, HB, WLGA and NHS Confed Wales representation.

⁴ This is the component that will be shared between health boards and local authorities.

⁵ This is based on the current hourly rate of £17.10 per hour.

numbers funded and the funding period – the two factors necessary to calculate the amount of backdated funding;

- Developing a process that will provide HB Boards with assurance that the factors being funded are provided to staff working within Care Homes – for example paid breaks. Work will need to be done to identify how corporate assurance can be provided without placing disproportionate demands for evidence upon Providers;
- Processes to identify and reimburse self funders who may, post Judgment, have funded some services that should have formed part of the FNC rate;
- Compliance with the Cost order issued by the Court;
- Working with WG to consider the necessary changes to Policy that result from the Supreme Court Judgment.

3.4 Conclusion

Board members will be aware from previous papers received and considered over recent years of the legal challenges that have been underway regarding FNC.

Whilst the outcome of the Judgment in 2017 was that the Appeal was allowed, the Court clearly rejected the arguments of both the HBs and LAs and determined that both parties had misinterpreted s49(2). The Court therefore provided its own view of what services should be included in the FNC rate. This means the inclusion of paid breaks, registrant supervision time, and a proportion of the personal care that it is appropriate for the registered nurse to undertake because it is ancillary to the plan of care must be funded by HBs. The remainder of the personal care provided by registered nurses will be funded by LAs – this has been considered and an apportionment of 50:50 with LA partners has been agreed for this element only.

This paper sets out the implications of the Judgment, namely that the previous decisions have been quashed and HBs need to retake decisions that reflect compliance with the Judgment. In financial terms, this will require the HB FNC rate to rise from its current £149.67 to £162.75, and for the LAs to increase their rate by £6.69. It will be the responsibility of the HBs to fund the increase in the FNC rate only.

Processes will need to be put in place to backdate the additional requirements to 2014 along with appropriate and proportionate assurance mechanisms that the additional components identified by the Court are actually being provided. HBs will also need to identify and reimburse any self funders who may have funded some services the Court has now determined the NHS should have funded. Work is underway to develop these processes via a Technical Group. Funding for the retrospective payment has been provided to the HBs by Welsh Government.

4 Recommendations

The Board are asked to:

- **Note** the background provided and the legal challenges regarding FNC that have taken place over recent years;
- **Note** the Judgment of the Supreme Court that quashes the previous HB decisions and finds both HB and LA arguments regarding what should form the FNC rate to be incorrect, instead providing its own definition;

- **Note** the implications of this for HBs and LAs, including the need to uplift the FNC rate in order to ensure compliance with the Judgment;
- **Note and approve** the recommendation that the FNC rate that is the responsibility of the HBs to fund be uplifted to £162.75;
- **Note** the work underway to develop processes to manage reimbursement and the need to consider the current policy model in discussions with WG.