

**21Forward Plan reference number:** To be inserted

<b>Report title: Funding for Adult Social Care: COVID 19 Response</b>	
<b>Report to:</b> Councillor David Finch, Leader of the Council	
<b>Report author:</b> Nick Presmeg - Executive Director for Adult Social Care	
<b>Date:</b> 21 October 2020	<b>For:</b> Decision
<b>Enquiries to:</b> Laura Davis-Hughes, Head of Finance - Adult Social Care	
<b>County Divisions affected:</b> All Essex	

## **1. Purpose of Report**

- 1.1 To set out how to spend the £14.7m received by Essex County Council (ECC) from Central Government as part of the Infection Control Fund – Round 2.
- 1.2 To ensure there is a process of assurance to demonstrate that spend has been appropriate in relation to these funds, in line with Government expectations.

## **2. Recommendation**

- 2.1 Agree that 80% of the first instalment of the Infection Control Fund Round 2 received from central government (£5.85m) is made available to the market in two ways;
  - (a) to all eligible registered care home beds in Essex based on the number of Care Quality Commission (CQC) registered beds, in the sum of £338 per bed (£4.2m)
  - (b) to all eligible registered domiciliary, supported living and extra care providers based in Essex on the number of service users they support, in the sum of £172 per service user (£1.65m).
- 2.2 Agree that any remaining balances on the 80% funding will be reinvested in those providers accessing this element of the fund, with prior agreement from the Department for Health and Social Care (DHSC) where needed, as set out in the guidance meaning that the per bed and per service user elements stated in 2.1 may change after this point as the data is cleansed and updated over time.
- 2.3 Agree that the first instalment of money will be paid immediately to each eligible provider upon the provider entering a legally binding commitment to:
  - (a) Complete and update the national capacity tracker (for residential care providers) or CQC homecare survey (for community care providers) at least once per week and at least in two consecutive weeks before any initial payments are received

- (b) Only spend the money for infection control purposes as set out in the grant conditions of the Adult Social Care Extension to Infection Control Grant Determination 2020/21 No. 31/5186 from the Department of Health and Social Care
- (c) Only spend the money on expenditure relating to infection control due to the COVID-19 outbreak in Essex care homes which they would not otherwise have incurred
- (d) Apply open book accounting methods to demonstrate how the money has been spent
- (e) Return any money paid where they cannot demonstrate that the money has been spent as permitted by 31 March 2021
- (f) Minimise third party charges (for example, costs to avoid the use of public transport)
- (g) Confirm that in no circumstances is any element of profit or mark-up applied to any costs or charges to be reimbursed as part of this scheme.
- (h) Return a reporting template, as set out by the Council, to the Council by 13 November detailing how the money has been spent until 31 October and how it is planned to be spent until 31 March
- (i) Agree to monthly returns of the reporting template thereafter.

2.4 Agree that when the second instalment of infection control funding Round 2 is received by ECC, 80% of the instalment (£5.85m) is made available, on the same basis as the first, to operators, once they can demonstrate they have spent the first instalment appropriately and who have completed their final spend templates for Round 1. The second instalment will not be paid until this has been completed unless the Cabinet Member for Health and Adult Social Care agrees otherwise.

2.5 Agree that the remaining 20% of funding (£2.9m across both instalments) be committed to:

- (a) provider social media recruitment campaign (£20,000)
- (b) day care providers and other community providers in Essex (£2.9m)

Any money not claimed will be allocated back to those eligible providers who wish to receive it and who accept the terms and conditions on the same basis of the initial allocation.

2.6 Agree that the final allocation mechanism of the 20% funding element in point 2.5 (b) above be delegated to the Executive Director Adult Social Care in consultation with the Council's S151 Officer.

2.7 Agree that the provision for provider expenses through a claims process made under decision FP/690/05/20 be used to support the additional internal costs of administering this fund. These are estimated to be £250,000 at this time.

### **3. Summary of Issue**

#### **Context**

- 3.1 The Adult Social Care Infection Control Fund was first introduced by the Government in May 2020 and was initially worth £600 million nationally, a further round of funding has now been introduced worth £546m to extend the fund until March 2021. The purpose of this fund is to support adult social care providers, including those with whom a local authority does not have a contract, to reduce the rate of COVID-19 transmission within and between care settings, in particular by helping to reduce the need for staff movements between sites. For Essex County Council the allocation amount was £16.3m in round 1 and is £14.7m in round 2.
- 3.2 For the allocation of the first round 75% for each Council was based on the total number of CQC registered beds in its area (as well as an area cost adjustment), which for Essex was 12,430 beds. For round two the same basis has been used for the amount that should be allocated to care homes and this is now based on 12,457 beds. During the first round we found that there are some homes in Essex which are closed for business but that were part of the above number of 12,430 beds. The Council did not pass any money on to these providers as they were not able to spend it on the required purposes, this money instead moved over to the 25% allocation, a similar approach to that of other Councils at the time. It is proposed that for round 2 we instead re-invest any balance on the 80% allocation back into the other beds that are being used so that the funding per bed for each provider can increase by this reallocated amount.
- 3.3 It is important that the money is spent on the purposes intended by the Government for COVID-19 infection control measures as other expenditure may be unlawful state aid. It is therefore proposed that the first instalment of money is paid when the provider has entered a legally binding commitment to use the grant funds only to do those things set out in 2.3.
- 3.4 Support provided to care providers by local authorities using the grant paid to them from the Adult Social Care Infection Control Fund may constitute state aid unless they fall within the Services of General Economic Interest (SGEI) or de minimis exemptions. Therefore, the Council will need to carefully consider how the amounts to be paid are calculated and enter into agreements with care providers to provide assurance that this is not unlawful state aid.
- 3.5 The first round of Infection Control Fund was distributed to 379 care homes and 378 domiciliary providers. The totality of the fund received was £16.3m. At the end of the first round there was a balance of £20,851 that had not been allocated to providers. Providers were required to complete spend templates and return to ECC setting out how this money was spent in Round 1 and will be required to do the same in Round 2. A significant number of providers have not completed their Round 1 final returns, although these were due by 23 September. The summary of those that were received show that:

- 19% was spent on measures to isolate residents in care homes
- 35% was spent on actions to restrict staff movement within care homes
- 5% was spent on paying staff full wages while they were isolating
- 41% was spent on other methods of infection control such as using technology and equipment, replacing furniture and carpets to those wipeable and washable, structural alterations to homes to support isolation and, for domiciliary providers, PPE.

It should be noted that at the time of writing only around half of those providers had given ECC their return and therefore the proportional split above assumed for the whole market is based on approximately half of that market's spend. It is therefore proposed that the second instalment of Round two funding will not be paid unless providers have submitted their final Round one return..

- 3.6 The Executive Director for Adults and the interim Head of Care are comfortable that the legal agreement, together with other processes in place, give the assurance that this Round 1 funding was spent appropriately. These processes allow for scrutiny of spend and recovery of funds, if not used as requested. This scrutiny will be carried out by sample auditing the final returns later in this financial year pending COVID-19 restrictions still being in place at that time.

#### **4. Options**

- 4.1 Option 1. To only allocate this funding to those providers that submitted their Round 1 spend templates (not recommended)

The providers have signed agreements stating that they will provide this reporting and the evidence of spend and contractual remedies are in place to recoup funds that aren't spent on infection control, however only 50% have actually done so.

The market is not in a stable position and many providers may require this funding to support them with their infection control efforts. Essex has benefited from these controls and the number of outbreaks in homes has reduced. Holding back funding would put the continuation of these efforts at risk, although homes have promised to provide this information and should be able to do so.

The DHSC guidance asks that all Round 2 funds are passed to the whole market not just those who have provided final returns in relation to Round 1 spend. Equally, the guidance does not require a funding agreement to be signed and the Council has been advised that it would be acting unlawfully if it did not put one in place, so the Council is already exceeding the requirements of the guidance.

- 4.2 Option 2 To allocate the first instalment of funding to the whole market (as set out in the recommendations above) but with a requirement on the providers who have not returned their final Round 1 spend template to do so before they receive instalment two of this Round two funding (Recommended option)

The agreement provides some protection to the council from misuse of funds by requiring providers to open themselves up to open book arrangements and to submit reports on how they have spent the funds, sample audit will be carried out when practical later in the year.

The requirement to submit all previously requested spend templates before receiving instalment two of this Round two funding gives the Council some confidence on appropriateness of spend until those audits can take place.

- 4.3 Providers were required to provide all previous spend templates by 23 September. However, there are two reasons for recommending we continue with the first instalment of Round two release of funds;

1) That we recognise there is a tight turn around to get templates back to the Council by 13 November to fulfil our reporting requirement to DHSC on 23 November, albeit that if we failed this would be as a result of the market failing to comply with the terms of the agreement

2) That approval of recommendation 2.7 in this decision will allow us to increase our resource to be able to more proactively engage with the market to ensure all outstanding spend information is received to be able to hold the market to account on use of these funds and to demonstrate safe and lawful use of public money.

## **5 Reason for Using Urgency Powers**

- 5.1 On 17 September 2020, the government announced that an additional £546m will be issued nationally to support providers through round 2 of the Infection Control Fund (previous round was received in May and July 2020). This will be received in two instalments again; 50% in October and 50% in December. Government have made it clear that they are asking local authorities to pass 80% of the first instalment of this to providers as soon as possible, the Local Authority Circular states that 'DHSC expects local authorities to transfer the first instalment to providers within twenty working days' and so an urgent decision is required to enable that to happen as the first instalment of funds were received on 2 October.

## **6 Financial Implications**

- 6.1 The Adult Social Care Infection Control Fund has been extended until 31 March 2021 from its original end date of 30 September 2020, with an extra £546m of funding nationally. This is a new grant, with revised conditions from the original Infection Control Fund.
- 6.2 The funding to the Council is received as a grant paid under section 31 of the Local Government Act 2003 ring-fenced exclusively for actions which support adult social care providers in reducing the rate of COVID-19 transmission within and between care settings; the total value is £14.7m.

- 6.3 A first instalment of £7.4m was received by the Council on 2 October and is required to be passed on to the market as soon as possible, no longer than twenty days from receipt of funds. This includes £4.2m for care homes allocated based on CQC registered beds, and £1.65m for community care providers (domiciliary care, extra care and supported living) allocated on the basis of CQC registered service users. Within this are allocations for the private market that the Council has not previously had dealings with (unless through the first round of the Infection Control Fund), and arrangements will need to be made with each provider to ensure that a payment can be made to them. The 20% balance of the first instalment the Council has discretion over the use of.
- 6.4 The second instalment will only be paid to ECC if the authority has written to the DHSC by 31 October 2020, confirming that it has put in place a winter plan, and that it is working with care providers in the area on business continuity plans, and it is also contingent on the DHSC being satisfied that the first instalment is being used in accordance with the conditions of the grant; used for infection control measures only. Clawback provisions apply to this fund including that the provider must repay any amounts not used for infection control measures.
- 6.5 There is a further condition that the first instalment will only be paid to ECC if residential care providers have completed the Capacity Tracker at least twice consecutively and committed to do so weekly until 31 March 2021, and similarly for community care providers completing the CQC homecare survey with the same frequency and commitment. Currently not all providers are using these trackers. If, however, some providers continue not to use it and are therefore ineligible to receive their allocation of the 80% one of two things will happen either 1) Government will claw back or not provide the full allocation to the Council in the knowledge that some providers won't receive it or 2) the Council still receives the full allocation and moves whatever balance of the 80% is left over in to the per bed or service user amount for the other providers receiving these funds.
- 6.6 The guidance sets out that the remaining 20% be used to support care providers taking additional steps to tackle the risk of COVID-19 infections but still includes the private market. However, it states that this can be allocated at the local authority's discretion. Recommendation 2.5 sets out how the Council proposes to spend this element of the fund.
- 6.7 The Council carries the financial risk of fraud through grant agreements with providers and will therefore need to manage this risk and put in place effective processes to ensure an efficient recovery of funds in the case of fraudulent payments. The Infection Control Fund guidance refers to local authorities having access to Spotlight, a digital assurance tool, to provide assurance alongside other checks. ECC does not have access to Spotlight, which is generally not available at County Council level, though enquiries are being made with the Cabinet Office as to potential access.
- 6.8 Learning from the first round of funding we know that it has been quite a burden on staff to administer the fund and therefore additional short-term resources will

be bought in to -ensure we have the capacity to manage these arrangements until 31 March 2021, currently estimated to cost £250,000, recommendation 2.7 requests the claims pot set up under decision FP/690/05/20 be used to fund this additional cost.

- 6.9 There is no net cost of this decision to the Council (if recommendation 2.7 is agreed) as all funds are coming straight from Government and for this specific purpose only. There is a financial risk that if, after payments are made to providers, the DHSC is not convinced that this funding has been spent according to the grant conditions, that subsequently it requires the repayment of the whole or any part of the grant monies and the Council is unable to claw back those funds from providers. The contractual terms set up with each provider will mitigate, but cannot eliminate, this risk.

## **7 Legal Implications**

- 7.1 The proposals in this report involve making additional payments to suppliers based on claims. These are voluntary payments to care home owners, some of which have no commercial relationship with the Council, in order to defray additional expenditure, they incur in relation to infection control in response to the COVID-19 outbreak.
- 7.2 The legal basis for this payment is section 1 of the Localism Act 2011 which allows the Council to do anything that a natural person could do. Whilst there are some exceptions to the power, none of them apply here.
- 7.3 The Council must comply with all grant funding conditions when accepting and paying out grant monies and will require all grant recipients to comply with those conditions.
- 7.4 Such payments must be considered against the state aid rules and the Treaty on the Functioning of the European Union (TFEU). The TFEU still applies to the UK under the withdrawal agreement between the UK and the EU.
- 7.5 Local authorities must comply with relevant state aid legislation when making allocations of the grant. The grants may be permitted State Aid as a Service of General Economic Interest (SGEI).
- 7.6 Commission Decision 2012/21/EU sets out a summary of the decision in *Altmark* in which the European Court of Justice found that public service compensation will not be considered State aid where four cumulative criteria are met:
- a) The recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.
  - b) The basis on which the compensation is calculated must be established in advance in an objective and transparent manner.

- c) The compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit.
- d) Where the undertaking that is to discharge the public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs that a typical undertaking, well-run and adequately provided with the relevant means, would have incurred.

7.7 DHSC has stated that it considers that the measures, when applied as set out in the grant funding and associated conditions, are covered by the SGEI Decision 2012/21/EU for the following reasons:

- SGEIs are those services that the state wishes or needs to provide for the public that would not be adequately delivered solely by market forces.
- The measures to be funded by the grant will help reduce the incidence and spread of COVID-19 and are over and above that which care providers would normally be expected to provide on a market basis.
- Due to their potential to limit the transmission of COVID-19 and therefore prevent loss of life, these measures are of particular importance to care users, workers and their families, as well as being in the general public interest.
- The services required would not normally be provided by the market at the level or quality required during the COVID-19 pandemic. To secure provision of these services, compensation needs to be provided to incentivise and enable an undertaking or set of undertakings.

7.8 The DHSC has determined the level of the fund and the per bed/per user allocation to account for the COVID-19 control measures that are desired. While the DHSC view is not legal authority on the matter of state aid, its rationale is demonstrative of the considerations that would establish the grant as an SGEI and, therefore, not state aid.

7.9 The Council can choose to rely on the SGEI Decision to make lawful payments of the grant funding but must ensure they comply with its requirements. Open-book accounting methods specified in grant funding conditions will allow the Council to check that the funding has been used for the specified, SGEI purposes. If relying on SGEI, then Commission Decision 2012/21/EU must be referenced in the grant documentation.

7.10 DHSC has also noted that there are three other options for funding within de minimis thresholds which could be considered before relying upon the SGEI Decision 2012/21/EU. However, because of the size of some of the care



providers, many of whom operate much more widely than Essex and the fact that they will be in receipt of similar funding from multiple sources (particularly for services provided in areas outside of Essex), none of these are likely to be appropriate for the distribution of this grant.

## **8 Equality and Diversity Implications**

8.1 The Public Sector Equality Duty applies to the Council when it makes decisions. The duty requires us to have regard to the need to:

- (a) Eliminate unlawful discrimination, harassment and victimisation and other behaviour prohibited by the Act. In summary, the Act makes discrimination etc. on the grounds of a protected characteristic unlawful.
- (b) Advance equality of opportunity between people who share a protected characteristic and those who do not.
- (c) Foster good relations between people who share a protected characteristic and those who do not including tackling prejudice and promoting understanding.

8.2 The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, marriage and civil partnership, race, religion or belief, gender, and sexual orientation. The Act states that 'marriage and civil partnership' is not a relevant protected characteristic for (b) or (c) although it is relevant for (a).

8.3 The recommendations in this report are designed to ensure that the Council meets the need of social care users, most of whom are disabled. In view of the urgency of this decision a full equality impact assessment has not been undertaken but we do not believe that there will be a significant adverse impact on any people with a protected characteristic.

## **9 List of Appendices**

None

## **10 List of Background Papers**

None

<b>I approve the recommendations set out above for the reasons set out in the report.</b>	<b>Date</b>
<b>Councillor David Finch, Leader of the Council</b>	<b>21 October 2020</b>

**In consultation with:**

<b>Role</b>	<b>Date</b>
<b>Cabinet Member for Adult Social Care and Health</b> <b>Councillor John Spence</b>	20 October 2020
<b>Executive Director of Adult Social Care</b> <b>Nick Presmeg</b>	14 October 2020
<b>Executive Director for Finance and Technology (S151 Officer)</b> <b>Stephanie Mitchener on behalf of Nicole Wood</b>	20 October 2020
<b>Director, Legal and Assurance (Monitoring Officer)</b> <b>Paul Turner</b>	20 October 2020

**Exemption from call in**

I also agree that it is in the best interests of the Council for this decision to be implemented urgently and therefore this decision is not subject to call in (paragraph 20.15(xix) of the constitution applies).

**Councillor Mike Mackrory – Chairman of the Corporate Policy and Scrutiny Committee**

**Dated: 21 October 2020**