



**CYFARFOD BWRDD PRIFYSGOL IECHYD  
UNIVERSITY HEALTH BOARD MEETING**

<b>DYDDIAD Y CYFARFOD: DATE OF MEETING:</b>	25 March 2021
<b>TEITL YR ADRODDIAD: TITLE OF REPORT:</b>	Funded Nursing Care: Methodology to apply for 2021/22
<b>CYFARWYDDWR ARWEINIOL: LEAD DIRECTOR:</b>	Jill Paterson, Executive Director of Primary Care, Community & Long-Term Care
<b>SWYDDOG ADRODD: REPORTING OFFICER:</b>	Jill Paterson, Executive Director of Primary Care, Community & Long-Term Care

**Pwrpas yr Adroddiad (dewiswch fel yn addas)**

**Purpose of the Report (select as appropriate)**

Ar Gyfer Penderfyniad/For Decision

**ADRODDIAD SCAA  
SBAR REPORT**

**Sefyllfa / Situation**

This report:

- Provides the Board with a summary of the position regarding Funded Nursing Care (FNC);
- Provides the Board with the recommended option for setting the FNC rate for 2021/22;
- Seeks formal Board approval for the methodology to be used to set the FNC rate for 2021/22.

**Cefndir / Background**

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. It is a statutory requirement set out in s49 of the Health and Social Care Act and the FNC rate covers both the costs of the services provided by the RN along with funding for continence products that may be necessary.

Legal proceedings instigated initially by Providers in 2014 challenged the way the FNC rate was calculated. These culminated in Supreme Court proceedings in 2017, when the Court rejected the arguments of both the HBs and LAs and determined that s49 had been misinterpreted. Instead, the Court provided its own view of what services should be included in the FNC rate<sup>1</sup>. The rate was subsequently adjusted to include paid breaks and clinical

<sup>1</sup> 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".

supervision time, with some of the RN time where care had been provided incidentally now being funded via the appropriate local authority<sup>2</sup>.

Comprehensive information regarding the 2017 Supreme Court Judgement has been shared in previous papers and briefings. A summary of the rate and how it is now broken down is attached as **Appendix 1** of this paper.

## Asesiad / Assessment

### **Setting the FNC rate**

Since 2014 HBs have used the Inflationary Uplift Mechanism (IUM) to set the FNC rate. This is made up of two components:

- The 'labour' component – i.e. time spent by the care home RN in providing direct and indirect care and supervision. This is funded at the mid-point of Band 5 on the Agenda for Change pay scale;
- The continence supplies component. This is uplifted annually in line with the Consumer Price Index (CPI).

The IUM was initially approved by Health Boards to operate for a period of five years then review. In 2019, Boards approved a proposal to extend the IUM for a further two years in order to allow WG to revise and reissue the FNC Policy Guidance (which has not been updated since 2004). This also allowed the IUM to continue to operate for the full three-year period covered by the NHS pay award.

It is of note that the IUM as a mechanism has not been subject to challenge during the legal proceedings. Instead, the legal proceedings focused on the services that should be included within the FNC rate.

The current extension to the IUM ends on 31 March 2021 and HB professional and finance leads for long-term care have worked to identify options that may be appropriate to apply from April 2021 onwards. It had been expected that a revised policy approach would have been in place to support this work - WG did commit to a FNC policy review following on from the legal action but this has yet to proceed. The impacts of COVID-19 upon policy makers is recognised but the work has been delayed for several years prior to this.

### **The 2021 Methodology**

The professional and finance leads for long-term care in all seven health boards have undertaken work to consider options for the methodology. In considering options, the leads were mindful of the Supreme Court definition of the factors to be included. A significant limiting factor in exploring wide options has been the lack of contemporary national policy guidance – the extant FNC Guidance was issued in 2004 and reflects neither the current policy landscape nor the outcomes of the legal challenges. HBs are therefore currently operating in a policy vacuum with associated inherent risks.

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<sup>2</sup> The additional cost pressures of the paid breaks and clinical supervision time were absorbed by HBs with no ongoing funding provided by WG. WG has provided ongoing funding to LAs to meet the costs of the personal care provided by the RN that each LA now funds.

The lack of a contemporary policy position; the long standing nature of the IUM as an appropriate mechanism; along with the significant challenges relating to the COVID-19 pandemic have all informed the consideration of options and led to the recommendation that the most appropriate approach for 2021/22 is to retain the IUM, with an explicit commitment to review when the policy position is revised.

This recommendation has been considered and ratified by both the lead Executive Director in each HB and also by HB CEOs.

WG colleagues have indicated that they intend to commence the policy review in the spring of this year, so the recommended extension of the current methodology should only need to apply for the 2021/22 year.

In reaching this recommendation HBs have been keen to seek the views of other key stakeholders, including:

- The National Commissioning Board (NCB)<sup>3</sup> was provided with a Note to inform and assist them in considering views, supported by a presentation at the October 2020 NCB meeting. No feedback or response was received;
- The lead LA Director was contacted separately to seek views on behalf of LA Directors. No response was received;
- The views of Providers have been sought via the Chief Executive of Care Forum Wales, their main representative body. Views were sought informally earlier in 2020 on two occasions, and again in December 2020 when the recommended option was shared for a view and comment. No response to the recommended option has been received, recognising though that COVID-19 related demands are impacting on the ability to respond rapidly, undertake wider work, and canvass views from members. The general views identified through dialogue though have been identified earlier in this paper.

## **Conclusion**

HBs need to consider the methodology used to calculate the FNC rate for 2021/22. The current methodology is the Inflationary Uplift Mechanism which calculates both the RN time and the costs of continence products.

The options to undertake a different approach are currently limited considerably by the lack of contemporary policy guidance to guide HBs in operating within policy expectations and requirements. A WG policy review has been delayed due to COVID-19 demands but WG has now committed to a review of FNC policy commencing in the spring of 2021. HBs will need to review the approach adopted to set the FNC rate following this to ensure compliance with policy.

The views of other interested parties have been sought in reaching the recommendation. Care Forum Wales, on behalf of Providers, recognise the limits due to the policy position but have identified the need to consider other factors as set out in this paper. A commitment to undertake further work once the policy position is confirmed will therefore be necessary.

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<sup>3</sup> A WG funded body that is accountable to the Minister and is comprised of a range of WG policy officials, HB representatives, local authority representatives, and the WLGA

An extension to the IUM for 2021/22 is recommended, with a commitment to review the methodology as soon as an updated policy position is available. Lead executive directors can provide Board members with further background information as necessary to support consideration.

### Argymhelliad / Recommendation

Given the lack of a contemporary policy position, along with the demands of COVID-19 which are limiting the capacity available to consider other matters, the Board is asked to:

- **Note** the need for HB Boards to review the methodology;
- **Note** the impacts of the COVID-19 pandemic and the lack of a contemporary policy position as key factors that limit the options available to HBs;
- **Note** the recommendation of HB professional and finance leads; lead Executive Directors; and CEOs that the Inflationary Uplift Mechanism be retained for 2021/22 with a commitment to review when the policy position is updated;
- **Consider** and **approve** retaining the Inflationary Uplift Mechanism as the recommended option for 2021/22, with a commitment to review the methodology when the policy position is available.

### Amcanion: (rhaid cwblhau)

#### Objectives: (must be completed)

Cyfeirnod Cofrestr Risg Datix a Sgôr Cyfredol: Datix Risk Register Reference and Score:	N/A
Safon(au) Gofal ac Iechyd: Health and Care Standard(s): <a href="#">Hyperlink to NHS Wales Health &amp; Care Standards</a>	Governance, Leadership and Accountability 7. Staff and Resources
Amcanion Strategol y BIP: UHB Strategic Objectives: <a href="#">Hyperlink to HDdUHB Strategic Objectives</a>	3. Growing older well 4. Improve the productivity and quality of our services using the principles of prudent health care and the opportunities to innovate and work with partners. 5. Deliver, as a minimum requirement, outcome and delivery framework work targets and specifically eliminate the need for unnecessary travel & waiting times, as well as return the organisation to a sound financial footing over the lifetime of this plan
Amcanion Llesiant BIP: UHB Well-being Objectives: <a href="#">Hyperlink to HDdUHB Well-being Objectives Annual Report 2018-2019</a>	8. Transform our communities through collaboration with people, communities and partners

<b>Gwybodaeth Ychwanegol: Further Information:</b>	
Ar sail tystiolaeth: Evidence Base:	Supreme Court legal proceedings (2015-2017) regarding s49 of the Health and Social Care Act.  NHS Funded Nursing Care (FNC) Policy  Continuing NHS Healthcare: The National Framework for Implementation in Wales
Rhestr Termiau: Glossary of Terms:	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. It is a statutory requirement set out in s49 of the Health and Social Care Act and the FNC rate covers both the costs of the services provided by the RN along with funding for continence products that may be necessary.  The <u>Inflationary Uplift Mechanism</u> (IUM) is made up of two components: <ul style="list-style-type: none"> <li>• The 'labour' component – i.e. time spent by the care home RN in providing direct and indirect care and supervision. This is funded at the mid-point of Band 5 on the Agenda for Change pay scale;</li> <li>• The continence supplies component. This is uplifted annually in line with the CPI.</li> </ul>
Partion / Pwyllgorau â ymgynhorwyd ymlaen llaw y Cyfarfod Bwrdd Iechyd Prifysgol: Parties / Committees consulted prior to University Health Board:	All Wales Long-Term Care Leads HDUHB Executive Team National Commissioning Board Local Authority Lead Directors Care Providers (via Care Forum Wales)

<b>Effaith: (rhaid cwblhau) Impact: (must be completed)</b>	
<b>Ariannol / Gwerth am Arian: Financial / Service:</b>	A decision not to retain a robust mechanism on which to base inflationary uplifts could be challenged by Providers as to how costs are assessed appropriately
<b>Ansawdd / Gofal Claf: Quality / Patient Care:</b>	No impact identified.
<b>Gweithlu: Workforce:</b>	A decision not to retain a robust Mechanism for the consideration of inflation in 2021/22 could result in challenge from Care Providers (industries); based on previous legal challenge (2014) regarding FNC rates.
<b>Risg: Risk:</b>	Risk of legal challenge
<b>Cyfreithiol: Legal:</b>	A decision not to retain an appropriate mechanism for the consideration of inflation in 2021/22 could result in legal challenge from Care Providers and / or Local Authority Partners. This is due to there being no contemporary policy guidance available (including the judgement of the

	Supreme Court) to guide Health Boards in setting FNC rates via alternate methods.
<b>Enw Da: Reputational:</b>	A decision not to retain an appropriate mechanism for the consideration of inflationary cost pressures in 2021/22 could result in political pressure / reputational damage, given current pressure experienced by care homes in ensuring business continuity for the remainder of the COVID-19 pandemic.
<b>Gyfrinachedd: Privacy:</b>	No impact identified.
<b>Cydraddoldeb: Equality:</b>	No impact identified.

## Appendix 1

### The Implications of the 2015 – 2017 Legal Proceedings

The implications of the Judgment were significant and, post Supreme Court, WG commissioned work to address these:

- The Judgment set out the Supreme Court's view on the services that should be included as part of the FNC rate. In doing this, the Court determined that some services the RN provides are incidental so should not be for HBs to fund – i.e. they are provided by the RN as a matter of convenience rather than a requirement. The funding for this component of the rate has been calculated at 0.385 hours per week and is funded either by the LA or is self-funded, whichever is appropriate.
- HBs have revised their approach to include the additional factors the Court determined should be provided for under the FNC rate. Including the paid breaks and clinical supervision time<sup>4</sup> led to an increase in the time funded by HBs (up to 8.855 hours per week) forming the basis of the calculation of the rate.
- The total RN time funded per resident per week is now 9.24 hours. This is made up of the 8.855 hours funded by the NHS and 0.385 hours funded by the LA/self-funder. The total FNC rate therefore is now made up of:
  - 8.855 hours of RN time funded by the NHS
  - 0.385 hours of RN time funded by the appropriate LA/self-funder
  - Funding to support any continence supplies that are necessary.

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<sup>4</sup> This was calculated by WG following work they commissioned.