

TRANSFORMING THE MARKET FOR SOCIAL CARE

The purchase process
Contracting for services
by the local authority

5

One in a series of seven papers on market facilitation

PREAMBLE

Government activity since the publication of the 2006 White Paper *Our health, our care, our say* has increasingly focused on the demand side of the social care transformation equation. It has done this by encouraging better estimates of demand through the new local joint strategic needs assessments (JSNAs) and through promoting a shift in who acts as the purchaser of care via direct payments and personal budgets.

However, recognising that accurate estimates of demand are important and giving people greater control over the services they receive can be both empowering and ethically sound, it also needs to be recognised that if social care is to be transformed then the supply side of care also has to change. Some believe this will occur through users flexing their new purchasing muscles, others argue that this has not been true in the past and in a market where increasingly demand is chasing static or diminishing supply, combined with diminished government funding, then this is unlikely to be true in the future.

Consequently, the importance of local authorities influencing supply is increasingly recognised. The government circular *Transforming Adult Social Care* lays down a requirement that authorities develop a clear approach towards the social care market.

“Councils will also be expected to have started, either locally or in their regions, to develop a market development and stimulation strategy, either individually or on a wider regional basis with others, with actions identified to deliver the necessary changes.”

This set of papers lays out an approach designed to underpin the market development and stimulation strategy sought by the transformation circular, and in the context that the future role of the local authority towards the market should be one of ‘facilitation’. The seven papers outline the following.

- The background to market facilitation.
- A model of market facilitation.
- The views of local authority commissioners and providers towards the market and current policy issues.
- An exploration of whether the focus of the relationship between commissioners and providers within the market should be on outcomes or outputs.
- An improved approach to contracting where the local authority still acts as a purchaser.

- A set of principles by which individuals may contract for services.
- An annotated bibliography detailing some of the key documents relevant to the development of the social care market.

Each of the papers is designed to be free-standing but contribute overall to a new approach to facilitating the social care market.

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We are particularly indebted to managers from local authorities in Bath and North East Somerset, North Yorkshire, Thurrock, Hartlepool and Somerset and Care UK for their involvement and the contribution they made to the development of the outcome-based contracting material in Paper 4. We would also like to express our thanks to the managers who contributed to the discussions outlined in Paper 3.

The views expressed in the papers are entirely attributable to the Institute of Public Care. They are not necessarily the views of the Care Services Improvement Partnership or the Department of Health or those of the local authorities that participated in the activities that have led to their publication.

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Care Services Improvement Partnership 

INTRODUCTION

Since the introduction of the National Health Service and Community Care Act 1990, local authorities have had the main responsibility for arranging the purchase of services for people in need of care and support. This is changing considerably with the introduction of arrangements under the *Transforming Adult Social Care* circular.

Nonetheless local authorities:

- will still arrange residential care which currently is outside the direct payments and individual budget arrangements
- may continue to arrange care for many people in the community, either because they request the local authority to do this, or because their physical or mental condition makes them unable to make their own care arrangements
- may define contracts where either through geography or because of the specialist nature of the service there is only one provider
- may also make an overarching agreement with a provider where a pre-determined volume of service is underwritten, and where the local authority holds the overall contract, but where the service user defines with the provider the care arrangements required and hence the specification of the individual service.

Therefore, there is still a considerable need that contracts made by local authorities with providers are fair and just to both parties and reflect the needs and wishes of service users. It is also important that criticisms made in the past about local authority contracts continue to be addressed and contracts improved.

Dr Stephen Ladyman, the former Minister for Community Care, when launching the Better Commissioning Learning and Improvement Network in March 2004, asked that commissioners and providers build upon the principles of partnership working established in *Building capacity and partnership in care*. The minister saw commissioning and contracting as needing to pass four tests of fairness and said:

“It has, above all, to be fair to people using services and to ensure they get good quality care, in the right place, in

the right quantity, at the right time. Inevitably that will almost always mean they have been involved in designing the package of services they are receiving. Secondly, it has to be fair to tax payers and ensure that the services they are supporting are giving value for money and being targeted at the right priorities. Thirdly, and this is the part we sometimes forget, it has to be fair to providers, ensuring that they receive a fair return for their services and they have not been set impossible objectives or given tasks for which they are not funded. Last but not least, it has to be fair to commissioners, councils and primary care trusts who are entitled to choose between the services on offer and pay a price that they can afford, to get the quality that they need.”²

In addition the then Office of the Deputy Prime Minister (ODPM) set out a target in the 2004 *National Procurement Strategy for Local Government* that by 2006 it wanted to see local government:

‘Delivering significantly better quality public services that meet the needs of all local citizens through sustainable partnerships they have forged with a range of public, private, social enterprise and voluntary sector organisations’

Section A of this paper explores the general terms and conditions that go into contracts and makes suggestions regarding model clauses that may be used. Section B looks at how services might be specified.

However, contracting is changing. Consequently, Paper 4 in this series explores contracting for services on the basis of outcomes, while Paper 6 looks at some of the practical issues in service users writing their own contracts.

1 | Building capacity and partnership in care Department of Health 2001

2 | Stephen Ladyman 2004

www.dh.gov.uk/en/News/Speeches/Speecheslist/DH_4077577

Contracting principles

The dialogue between commissioners and providers should be ongoing before a contracting process begins. Providers need to be involved at the earliest possible stage so that their input can help to shape contract clauses and/or specifications. Ideally a contract should be written jointly between the two parties or, for similar types of service and arrangements, written with representatives of that providing sector. In addition, users' views should be sought on all aspects of service delivery and they should be consulted before any major change is made to contract arrangements that directly affect them.

If commissioners and providers are to develop the trust and security on which to build relationships, they must have confidence in each other. Commissioners should be certain that providers will deliver services to at least a minimum standard and will ensure an acceptable and appropriate quality of service for those using the services and fund these services appropriately. Providers need to have confidence that commissioners will not try and enforce pernicious terms and conditions.

Commissioners also need to ensure that potential and existing providers are not discouraged by having to face a bureaucratic and expensive contracting process or having to cope with unnecessary burdens. A disproportionately complex approach to the contracting process should be avoided as this may damage commissioner/provider relations and may not achieve desired outcomes.

Sharing risk

Good contracting calls for a recognition of risk. Fair contracts seek to ensure that each signatory to the contract bears some of the risk. Yet it is often in this area that contracts fail. Risk becomes more (or less) significant depending on the likelihood of the risk happening and the impact of the risk when it does. One function of a good contract is to seek to reduce both the impact and likelihood of risk to acceptable levels and to define what each party must do to make this possible. The contract may also wish to establish ways of

responding when risks remain high and require resolution. Risk to the service user must also be borne in mind. If there is too much risk placed on a provider then there is, for example, the possibility of home closure and service users losing where they live. Providers who are risk adverse may use this as an excuse to lessen the service they offer when service users most need it. Although much overstated health and safety grounds are often used to limit services for users, equally giving users free choice can sometimes be a disguise for not intervening appropriately and necessarily.

In writing contracts, commissioners might, with the co-operation of their providers, undertake a risk assessment in relation to the service they want so that they can assess the risks they are seeking to accept or assign. It remains unusual to see explicit risk assessments by either side in any contracting process.

Where models of service are changed at the request of commissioners to meet changes in local patterns of need, it is reasonable for providers to expect commissioners to share some of the risks associated with the introduction of new service types or reflect in the price any additional risks passed on to the provider. Agreement needs to be reached, in a spirit of collaboration and partnership, over the proportion of risk borne by the commissioner and the provider to introduce a new form of service and to overcome slow take-up of a new service until it is bedded in, or the burden of 'double-running' while one form of service is phased out and another phased in. It will be in the interests of individual service users already in the service to ensure that this process is properly managed and may involve short-term additional costs to support overheads of continued operation, as a service is wound down.

In order to provide existing services or introduce new services, commissioners may wish to offer incentives to providers to encourage them to adopt a new approach. Such incentives might include offering guaranteed volumes of work or time-limited premiums on the cost of care in order to offset any additional costs to the providers in changing their services.

Good tendering practice

Tendering for services is the process which often draws adverse criticism from service providers, many of whom feel that some tendering practices are adversarial, antagonistic and militate against more trustful relationships developing between public and independent sectors.

For many providers the methods by which contracts are awarded and work allocated are not always clear. It is incumbent upon commissioning bodies to ensure that their methodologies are clear, consistent and conveyed to any potential provider and that there are no covert means by which providers can be excluded from the process. Tendering processes can seem particularly onerous to smaller or inexperienced providers especially if the amount of the contract is for relatively small sums. Equally commissioners should not be inhibited or reluctant to commission services simply because they do not readily fit into a competitive tendering process.

In devising their tendering processes, commissioners are bound by standing orders and financial regulations which govern their conduct. It is important that these standing orders and financial regulations reflect the particular nature of contracting to allow the process to be geared to best outcomes for the end users and not to relate to the sorts of methods suitable for procuring goods and supplies.

One mechanism for improving choice and control, even where users are not the direct purchasers, is to ensure that they are consulted over the qualities and competencies of anyone allocated the business of providing the service. In some cases, particularly when services are of a very personal or familial nature, it is appropriate for service users to be included in the selection process. Commissioners may need to ensure that their standing orders are sufficiently flexible to enable this involvement.

Commissioners must ensure that all contact and dialogue with providers is open, equal and shared, to avoid any collusive or complicit relationships developing, however inadvertently. Contravention of this requirement is normally grounds for termination of any contracted arrangement.

In order to test the market, purchasers might consider the benefits of a preferred provider list, entry to which is open at all times rather than using periodic re-tendering. This may give greater stability in the market and enable greater provider diversity, user choice and competition.

Re-tendering/reallocation of contracts can cause disruption, distress and distortion to providers and their workforce and also to service users. The sudden loss of a large contract may put some providers out of business. Equally, the sudden acquisition of a large contract might mean a service is under-resourced to meet demand. Extended contract periods can work as barriers to new market entry where there is a single dominant purchaser and may work against effective competition.

Within the tendering arrangements there is a decision to be made about how any switch from an old to a new provider might be made. It may be preferable that a new provider only takes on new service users from the date at which the contract is awarded although this may make it difficult over time for the old provider to maintain a viable service. Wherever there is a potential change of provider, negotiation should take place between the old and new provider and the commissioners as to the best arrangements for transferring the care of service users.

Due weight should be placed on continuity of service provision, proven delivery and long-term supplier commitment. The continued operation of a range of local providers who have a track record of delivering in accordance with requirements is essential for market stability. Recognition of providers who have been prepared to 'go the extra mile' is also appropriate. Such considerations may outweigh potential but unproven financial gains from untried providers.

It is the responsibility of the commissioner to give explanatory feedback to any unsuccessful provider, in order to help that provider better prepare themselves for any future tendering work.

Price and price review

The pricing of contracts is among the most contentious and difficult areas of contracting in social care. While agreeing an initial price is properly an act that forms a part of the tender process the contract will need to refer to a number of price issues of ongoing importance to both service purchasers and providers. For instance, contracts need to be clear about the price agreed as a part of the tender process, by whom it is to be paid, when and in what circumstances it will be paid (or withheld) and how and when it will be reviewed.

The ability to reach satisfactory conclusions on this issue has enormous implications in a market where staff can be difficult to recruit and retain, where regulation and legal requirements are changing, often quickly and certainly within the lifetime of most contracts, and where the quality and flexibility of care is essential to the service user and their families as well as underpinning government policy in extending choice and empowerment.

The price of the contract will be formed in recognition of a number of different pressures.

- The financial position of the local authority and its responsibilities to council tax payers and service users under Best Value considerations (see appendix 2).
- How tightly the service is defined and what room for discretion is allowed for within the contract.
- The actual cost of providing the care service including:
 - ◇ Staffing costs in relation to the national minimum wage, local market conditions, and on-costs for employing staff, which may include access to pension schemes, levels of holiday entitlement, travel costs and other key terms and conditions as well as statutory requirements and costs for companies in relation to National Insurance etc.
 - ◇ Costs of meeting administrative regulatory and legal requirements, including the reasonable costs of safe storage of data and files, any necessary IT systems, health and safety, Criminal Record Bureau, Protection of Vulnerable Adults/Children checks.
 - ◇ The costs of managing and training of staff, including induction and ongoing development, supervision, team meetings, specialist training etc. This may include particular efforts made to improve

staff recruitment and retention. Purchasers may choose to exclude some of these costs from overall price and pay for training via some other local consortium available to a range of providers.

- Any elements of reward for risk and investment in the development and management of the service and towards future improvements in service delivery. This could include past or current investment in buildings and adaptations or equipment, or future investment (eg in developing a specific service or IT system) although these may be negotiated outside the main agreement (eg initial start-up costs). All costs and pressures that are known at the time of pricing should be discussed.
- In the case of a contract renewal or price review, the consequences of any potential change for the service user, the provider and the commissioner.

The ease or difficulty with which prices and pricing mechanisms are agreed within the contracting process will be an indication of the maturity of the relationship between commissioning bodies and providers. This will often need to be developed through better understanding of the real pressures each side faces. There are always likely to be tensions as providers attempt to meet and surpass regulatory requirements and purchasers try to ensure that the finances at their disposal are used to best effect without any excess profits being made at the public expense. Openness and reasonableness are the keys to being able to discuss this part of the contract.

Open book accounting

“Open book accounting is a method of providing transparent accounting methods that allows providers to describe their expenditure whilst enabling commissioners to understand all aspects of service delivery and forward investment. Resultant discussions provide a means of arriving at a better understanding and resolution of pricing issues. It can also provide a mechanism for year-on-year negotiations in a rapidly changing marketplace. It assumes mutuality of purpose and a mature attitude from both parties together with a willingness to resolve sometimes difficult discussions.”³

Open book accounting is a process that can assist commissioners and providers to reach a transparent partnership arrangement and demonstrate their commitment and confidence to each other through sharing information on income and expenditure. It is particularly useful where there is no market comparator so a fair price has to be agreed on the basis of the costs incurred. This approach could also be applied in relation to setting a fair price for specialist or small providers.

The commitment between commissioners and providers to enter into this way of working is best made early in their relationship. This will help both parties describe the type and depth of information to be made available to each other. The purpose of this arrangement will be to enable:

- mutual understanding of costs
- agreed performance monitoring
- initial tender promises and costings to be given developmental consideration by both sides
- an agreed process for deciding upon future expenditure and investment
- a clear description of the benefits of developing a contract
- an agreed approach for considering the costs of the provider's risk and hence reward.

Service user involvement

Where new contractual arrangements are being proposed or price/contract reviews being conducted, it is always good practice to involve service users and to focus on how any new arrangements can improve choice and control.

Some key principles should be considered.

- Make sure the choices that are being offered and the timing of involvement genuinely allows users to influence the outcome of the process and that involvement is not just a token gesture.
- Ensure that involvement is conducted at a pace and using approaches that allow full participation.
- Where people need preparation to think of questions or to discuss the process, allow plenty of time for this to take place.
- The basis of involvement needs to be clear. Are people

representing just their own views or those of a wider group? How might the results of any consultation exercise be presented back to providers?

- Service users should not be used as 'tricks', sprung on providers to see how they will respond. Providers should be informed in advance when service users will be present and the role they will play.
- Service users should know in advance how any scoring mechanism for tenders will be used and what information will be fed back to providers.

Writing the contract

The contract needs to cover the legal necessities, avoid ambiguity, inaccuracy and inconsistency, and spell out the precise intention of the parties. It also needs to have an agreed format that reflects the risks and rewards assumed by both the commissioner and the provider of the service. Where lawyers have not written contracts the parties should seek legal opinion in relation to the contracts to ensure that they are properly drafted before they are signed.

Guidance published by the Office of Fair Trading⁴ indicates that contracts between individuals and providers of care should be particularly clear and offer no scope for misinterpretation or abuse by any party to the contract. Many of the principles in that guidance hold true for contracts between commissioners and providers.

⁴ | Unfair terms in care home contracts Office of Fair Trading 2003

Table 1 Characteristics of good and bad practice in writing contracts		
TOPIC	GOOD PRACTICE	POOR PRACTICE
Language	<p>Written in clear and concise language which avoids jargon as far as possible, but should contain a glossary that explains particular legal terms used within the body of document.</p> <p>Offers explanatory guidance for different audiences in terms of service providers and recipients – definition of terms.</p> <p>Is clear about which documents form the contract, ie an agreed model of care and any specification(s) that relate to the contract, a pricing schedule, a monitoring and reviewing schedule, a risk assessment/agreement and any further contractual requirements (for example where there may be a licence to occupy premises or shared access to IT systems).</p>	<p>Document is filled with legal jargon and technicalities.</p> <p>Document is excessively long and filled with references to other sub-sections and clauses.</p> <p>No glossary to explain technical terms or definition of terms.</p> <p>Contract is in a muddle with no clarity as to which sections are about the arrangements which are about the price and which relate to the quality and standard of service to be delivered.</p>
Fairness	<p>Contracts reflect working together between commissioners and providers. They should acknowledge and protect the interests of both.</p> <p>All parties should have a reasonable and equal opportunity to negotiate amendments, terminate, extend or renew a contract, if appropriate.</p> <p>Whatever the relationship is between the commissioner and provider it should always minimise jeopardy to a service user.</p>	<p>Contracts reflect only the interests of commissioning organisations (whether in price setting or review or in making other unreasonable demands on providers). This may mean it becomes impossible for providers to run a sustainable and quality service, or would discourage reasonable providers from making applications.</p> <p>There is no requirement on the provider to give the rationale behind requests for price increases.</p> <p>Excessive and unreasonable monitoring demands, particularly if retrospectively imposed.</p>

Table 1 Characteristics of good and bad practice in writing contracts CONTINUED		
TOPIC	GOOD PRACTICE	POOR PRACTICE
Legality and compliance with guidance	<p>Reference is made to key legislation with which both providers and commissioners should comply.</p> <p>There is clarity about who the contract is between and who it is for.</p>	<p>No reference is made to key legislation, or requirements under such legislation or guidance are duplicated in the document.</p> <p>Clauses designed to obscure their real purpose.</p>
Deliverability	<p>Requirements on providers and commissioners are proportionate and measurable.</p>	<p>Terminology and requirements are based on an ideal or expressed in non-specific or subjective language.</p>

Suggested clauses

The following pages describe a number of ‘model’ clauses that might be used in order to support good contracting practice and the rationale behind why they might be considered appropriate.

Partnership statement	Suggested clauses
<p>Any contract between the parties should underline their intention to work together towards the shared and agreed objectives as defined in the service specification. This should be done in an equal partnership and the contract may include a statement to this effect.</p> <p>It is important to ensure that the parties to the contract will not be treated as partners or agents.</p> <p>Any preamble should also state which documents form part of the contract.</p>	<ul style="list-style-type: none"> • The parties agree to work together in an open and trusting style with a view to ensuring best value is achieved and a fair price is paid for the services provided. • Nothing in this agreement is intended to create a legal partnership or legal relations of any kind between the parties (including but not limited to the Partnership Act 1890). Neither party shall have authorisation to make representations to act in the name of, or act on behalf of, or otherwise bind that party.

Third party rights	Suggested clauses
<p>The Contracts (Rights of Third Parties) Act 1999 enables a third party, who is not a party to the contract, to enforce terms against a party to that contract. The third party, which must be expressly identified in the contract, is given the same rights of enforcement as the parties to the contract.</p> <p>The parties to the contract can expressly exclude or limit third party rights in the contract.</p> <p>It is not recommended that residents or any third parties have the rights to enforce a contract which has been made between the commissioner and the provider. Without excluding third party rights, commissioners and the providers would not be able to rescind, vary or alter the contract without residents or a third party consenting to the changes. This is both impractical and can be expensive.</p> <p>There should, however, be clear statements within a service specification about exactly what service is being purchased and, via both the specification and adherence to national minimum standards, a clear guide for service recipients and their carers about the volume, type and quality of the service to be provided.</p>	<ul style="list-style-type: none"> • A person who is not a party to this agreement shall have no right pursuant to the Contracts (Rights of Third Parties) Act 1999 to enforce any terms of this agreement.

Duration	Suggested clauses
<p>There should be a clear duration to any block or cost and volume contract. This allows continuity for commissioner and service user, and confidence in investment for the provider.</p> <p>For contracts over a number of years there can be break points within the overall duration to allow mutual review of the terms and conditions. Such a review should not be left to the last minute and time should be left for re-tendering if required.</p> <p>Any extension of the contract must be properly negotiated and agreed by both parties. An extension</p>	<ul style="list-style-type: none"> • This agreement shall take effect on the [commencement date] and shall expire automatically on the [expiry date] unless it is renewed by agreement in writing between the parties [for a further term of [] years] from that date or is terminated in accordance with clause [] or is otherwise lawfully terminated. • In the event of an extension beyond the contract period both parties will wish to review any changes [] months prior to the expiry of the original contract.

Duration	Suggested clauses
<p>of a contract should not be used as a means of avoiding discussions about contract renewal, however. By agreeing not to vary the price beyond inflation this should encourage providers to renegotiate contracts with the commissioner.</p> <p>Contract renewal should include the opportunity for all parties to review thoroughly the terms of the contract and to propose adjustments. Renewals in particular, should include the opportunity for the cost and price of services to be considered, as for a new contract, without reference by either party to those applicable to the expired contract.</p> <p>Commissioners should not assume that automatic renewal on the existing terms is satisfactory to providers.</p> <p>In the undesirable event that a contract renewal is not agreed in time to ensure continuity of care for the service user, explicit agreement should be obtained from the provider as to how existing service users are to be treated. This should be of the shortest duration possible to enable proper renewal.</p>	<ul style="list-style-type: none"> • During any extension an increase in contract price will only be considered if the increase does not exceed the percentage change in the Office of National Statistics commercial price index (or other index specified in the contract) between the commencement date and date of giving such notice under clause [] above.

Trial period	Suggested clauses
<p>When a service user first moves into a care home, they should have a trial period to ensure that the service they receive meets their needs and they are content with the service. It also allows providers the opportunity to ensure that they are able to provide the service user with the care that they require.</p>	<ul style="list-style-type: none"> • The parties agree that the first [days/weeks] of each individual placement shall be regarded as a trial period in order to ensure that the service is satisfactory in meeting the needs of the service user and before both parties agree to a permanent service being in place. If either party wishes to terminate the placement during the trial period they may do so by giving one week's written notice to the other party. • The commissioner may in agreement with the provider extend the trial period on behalf of the service user after consultation with the service user [and/or] their representative.

Care/service reviews	Suggested clauses
<p>It is intended that most of the material on the content of service reviews will be included in Section B of the guide on service specifications. Some authorities may want to include some aspects of this material in their general contract document.</p> <p>It is important that any contract includes the provision to regularly review a service user's care needs to ensure that the service being provided is still appropriate. This is likely to be undertaken as part of the wider fair access to care services review (FACS) of the service user.</p>	<ul style="list-style-type: none"> • A care review shall take place at the end of the trial period and at least annually thereafter and also by agreement or at the reasonable request of any interested party. • A review must involve the person receiving services [and/or] their representative to help consider the needs of the service user. A representative of both parties to the contract must be present. • The commissioner shall ensure that a written report is made of every review meeting which, when agreed by both parties and the individual or their representative as a correct record, shall be distributed to all parties.

Price determination and review	Suggested clauses
<p>Overall, the contract needs clearly to identify the following issues:</p> <ul style="list-style-type: none"> • the automatic triggers for a price review • the circumstances in which either party may require a price review • the mechanism by which any price review is undertaken and agreed • the factors which are to be taken into account in the make-up of the price. <p>In addition there may be particular aspects of the agreement that need to be included where local circumstances dictate, eg where a TUPE⁵ agreement exists.</p> <p>A number of inflation measures exist (see Appendix 3) and it may be appropriate to use more than one of these in proportion to those parts of the contract affected. For instance inflation indicators on wage increases, eg the Average Earnings Index or the New Earnings Survey, could take account of 70% of the contract price to reflect the proportion of cost associated with staffing. The remaining 30% of the price may be judged against a more general indicator</p>	<ul style="list-style-type: none"> • The price to be paid by the commissioner shall be varied according to the provisions of this clause on the following events <ol style="list-style-type: none"> 1. Annually. 2. The care needs of the service user change. 3. There is a change to the care specification. 4. Changes in the cost of providing the service. 5. Annual review: The provider shall with effect from the date on which the annual price adjustment takes effect, being [date] in the first contract year and every 12 months thereafter for the duration of the contract, adjust the fee in accordance with clause [] below. The fee shall be adjusted by applying the inflation formula [include which formula is to be use] to the current fee. • On [date to be agreed] of the [year] and each subsequent year of the agreement ('the price review date') the price shall be varied in accordance with the following formula: <ol style="list-style-type: none"> a. []% of the price shall be determined by the percentage change in average gross weekly earnings indicated in the New Earnings Survey for SIC (1992) Code 853 Social Work activities, most

⁵ | Transfer of Undertakings (Protection of Employment) Regulations.

Price determination and review	Suggested clauses
<p>(say the General Retail Prices Index). Purchasers will need to decide which indicator(s) to use, in what proportions and for which month.</p> <p>Wherever dependency-based fees are agreed, further clauses should be added to cover legislative and/or specification changes as opposite in Clause 4. The contract should determine a process for reviewing dependency-based fees and ensuring that changes can readily be responded to. It would be equally important here to agree an arbitration process in the case of the parties not agreeing.</p> <p>In establishing ongoing costs it is incumbent upon providers to detail year-on-year efficiencies within their services.</p> <p>Commissioners may also require providers to ensure that changes to working practices take place to provide efficiencies where these are beneficial to service users and Best Value considerations.</p> <p>It should be noted by both commissioners and providers that the government is clear that the cost of CRB and POVA/POCA checks for staff should be met as part of the contract costs and not by staff themselves.</p> <p>Timescales for agreeing price and price review need to be realistic for both parties.</p> <p>If there is an unanticipated change in the law or regulation which affects the financial viability of providing the service, the parties should have the opportunity to discuss the effect the change of law will have on the contract and where appropriate vary the contract to take account of the change of law.</p> <p>Where the legislative change is substantial, and where the change was not known in advance, ie new case law, and hence could not be taken into account in the annual price review process then the party affected by the change should notify the other of the</p>	<p>recently published as at each review date (including [state date])</p> <p>b. []% of the price shall be determined by the average movement of the General Retail Price Index (excluding mortgages) over the previous 12 months.</p> <p>2. The price may be reviewed by either party at any time following an assessment/re-assessment of a service user's [care needs/category/dependency/dependency level] and a consequent change in service. The fee shall be varied from the agreed date of change in circumstances the [care needs/dependency/dependency level]. The commissioner shall each [period to be agreed], or sooner if possible, publish a list of prices, which will specify the price that it will pay for the provision of the service for each care category.</p> <p>3. In the event that the parties agree a variation to the obligations set out in the care specification, the price shall be adjusted to reflect any change in the costs of providing the service.</p> <p>4. The price may be changed in line with changes to the cost of providing the specified service. Such changes in price should be fair and reasonable, not lead to any deterioration in the quality of the service to be provided and may take into account any relevant legislative change or mandatory and statutory specification changes.</p> <ul style="list-style-type: none"> • Upon a price review being triggered in accordance with clauses 1, 2, 3, or 4 above, the proposed contract price for the period to the next price review date (or sooner if a further review is triggered) will be notified by one party to the other. The written notification and supporting cost breakdown (an 'adjustment notice') will be submitted not less than one month prior to the price review date. • In the event that either party does not agree to the proposed price change, the commissioner shall convene a meeting with the provider within [] days of the notification provided above.

Price determination and review	Suggested clauses
<p>need for a fee change in writing. The parties would then enter into discussions to consider the implications of the change and agree what action, if any, would be taken</p> <p>It may be appropriate to list the legislation which is pertinent to the contract and with which it is expected the provider organisation will comply.</p>	<ul style="list-style-type: none"> • If agreement has not been reached within [] days of the meeting being convened the parties will take immediate steps to appoint an independent arbitrator. • The cost of the independent arbitrator shall be apportioned between the parties in such proportions as the arbitrator thinks fit. Any decision of the arbitrator shall be final and binding on the parties to this agreement. Any price adjustment so determined will take effect from the price review date. • The provider shall comply with all statutes, orders and any regulations or by-law applicable to the performance of this contract. Failure to do so may be regarded as a material breach.

Payment terms/late payment	Suggested clauses
<p>Normally the resident will pay their assessed charge direct to the commissioner. Section 26(3A) of the National Assistance Act 1948, however, provides for an exception to this rule for residents placed by local authorities in independent sector homes, where the resident, the commissioner, and the person or organisation managing the premises all agree. In this circumstance the resident may pay direct to the provider organisation the amount that he or she would otherwise pay to the commissioner. This will leave the commissioner responsible for paying the home the remainder of the cost. Authorities should note, however, that they remain responsible for the full amount should the resident fail to pay the home as agreed. (Charging for Residential Accommodation Guide 1.023 and 1.024)</p> <ul style="list-style-type: none"> • Where the commissioner pays gross, payment for the full cost of care is then a straightforward matter between the commissioner and the provider, with arrangements for the commissioner to collect the service user's contribution and/or any third-party 	<ul style="list-style-type: none"> • Where a third party contributes part of the agreed gross price of a care home placement, this arrangement is between the third party and the commissioner. Any proposed change in the gross price must be agreed between the provider and the commissioner. No requirement may be made by the provider on the third party to increase their payment without such an agreement and if such a requirement is made, the commissioner will not be liable for payment in the event that the third party defaults on payment. • The provider shall at the end of every [name a time period] submit an invoice to the commissioner for [number of weeks] payment, taking account of any existing balance. This payment will be made in advance/arrears. The commissioner shall pay a

Payment terms/late payment	Suggested clauses
<p>contribution (LAC (2004)20 3.5.1) falling outside this arrangement and subject to separate processes.</p> <ul style="list-style-type: none"> • Where the commissioner is paying net of the service user's contribution and any third-party contribution, they must set up separate arrangements to ensure payment of these contributions is made to the provider without fail. In the case of default, responsibility for full payment falls to the commissioner. <p>Any understanding agreed with the service user and/or any third-party contributor must be clearly recorded and agreed.</p> <p>Irrespective of the method used for payment, the contract between commissioner and the service provider should be explicit as to what has been agreed. Prices should shown as net of VAT and this should be clearly stated.</p> <p>It may well be appropriate to include in any contract a provision for a clear payment structure based on the submission of standard agreed form invoices. Commissioners and providers should agree an acceptable format for submitting invoices.</p> <p>Where part of a consolidated invoice is in dispute, this should not delay payment of all the remaining amounts not in dispute. Where 'rounding' in multiple unit invoices creates differences in pennies on the total invoice, it is not acceptable to refuse payment, especially as such calculations are generally the result of computerised or automatic invoicing systems which will be costly to manually override. Internal financial mechanisms may require a revised invoice for the undisputed part or a credit note, in order to be able to deal properly with the commissioner's accounting processes.</p> <p>Late payments can lead to serious cash flow problems for providers, they can reduce profits and threaten their viability and survival. If providers are continually paid</p>	<p>properly submitted invoice within 14 days of receipt.</p> <ul style="list-style-type: none"> • Where the calculation or amount of one or more parts of an invoice is disputed, all other undisputed parts of the invoice shall be paid promptly and within normal payment terms. • In the event of a delay or default by the commissioner in making payment of greater than [number of days] from receipt of an invoice, the provider shall be entitled to interest on any payment overdue at a rate per annum equivalent to []% above the Bank of England base rate (the base rate) current on the date upon which such payment first becomes overdue. • In the event of overpayment by the commissioner a refund shall be made by the provider within 28 days of notification of the overpayment. • In the event of a delay or default by the commissioner in making payment of greater than [number of days] from receipt of an invoice, the provider shall be entitled to interest on any payment overdue at a rate per annum equivalent to []% above the Bank of England base rate (the base rate) current on the date upon which such payment first becomes overdue.

Payment terms/late payment	Suggested clauses
<p>late they may raise unit costs to reflect the cost of finance required, or go out of business.</p> <p>Commissioners should include provision for interest if they fail to pay on time, or ensure that their payment cycle is in advance of the provider incurring costs of sales. Providers are legally entitled to charge interest on late payments under the Late Payment of Commercial Debts (Interest) Act 1998, even where explicit provision is not made within the contract.</p>	

Hardship	Suggested clauses
<p>In the event of either party getting into difficulties, that party should have the right to approach the other to request relief. This will enable parties to openly discuss their respective difficulties with a view to agreeing an amicable and effective compromise.</p> <p>Commissioners receiving such approaches should not reduce the rate of referrals for service or withdraw service users from the care of the provider unless it is clear that there would be a risk to their safety or it is apparent that the service is in danger of imminent closure.</p> <p>In many cases, where financial difficulties would result only in the appointment of an administrator and care would continue, premature action could precipitate the problem. Unless explicit reassurance is stated in the contract, providers may be unwilling to confess to problems of viability until it is too late.</p>	<ul style="list-style-type: none"> • In the event that either party considers that it is no longer able to provide or purchase a viable service, that party may serve a written notice to the other stating that it is unable to continue to provide or avail itself of the service and the reasons why it considers itself unable to do so. • Each of the parties shall be entitled to serve a material change notice within six months of becoming aware of any material change in circumstances which affects them. • Upon service of a material change notice the commissioner and the provider shall each use all reasonable endeavours to negotiate and agree a variation to this agreement or other mutually acceptable solution within the material change negotiation period. • Upon receipt of a notice under clause [] above or a material change notice the parties shall meet within [days] for the purpose of agreeing a course of action. If the parties fail to agree a course of action, either party may refer the matter to mediation in accordance with clause []. This is without prejudice to any right either party may have to terminate in accordance with clause [].

Complaints	Suggested clauses
<p>It is important that both commissioners and providers have transparent complaints policies and that those using services and their representatives know how to access the complaints process should it become necessary.</p> <p>A provider needs to be aware of all complaints made in order to comply with its duty of care towards both residents and staff.</p> <p>Where the provider is part of a national or regional organisation with a national procedure, agreement should be reached with the commissioner as to the compatibility of their complaints procedure and the commissioner's requirements.</p> <p>Complaints procedures and notices should take into account any disabilities or language or communication difficulties that service users and their carers/relatives may have.</p> <p>Commissioners should check that complaints procedures clearly state the right of appeal to the commissioner's own procedures and to the care regulator.</p> <p>Commissioners will also find it useful to discuss with providers any accumulation of concerns that did not become formal complaints as part of contract monitoring.</p>	<ul style="list-style-type: none"> • The provider and commissioner shall each operate a complaints procedure that satisfactorily meets all statutory and legal requirements. • The provider shall agree a complaints procedure with the commissioner and display or distribute notices in the places and in a form approved by the commissioner, giving information as to how complaints about the provision of services may be made. • The commissioner shall notify the provider promptly of any complaints it receives in connection with the service provided under this agreement, in order that the provider may make timely investigations, unless the commissioner has reason to believe that the safety of the complainant or any other person would be compromised by such notification. • Where it is agreed that the provider is investigating or dealing with a complaint received from any source, the commissioner shall not intervene or carry out separate investigations unless and until they have reason to believe that the provider's investigations are inadequate or incomplete. The commissioner shall inform the provider in the event that it intends to intervene or it commences its own investigation. • The provider shall deal with any complaints received from whatever source in a prompt, courteous and efficient manner. The provider shall keep a written record of all complaints received in connection with the service provided under this agreement and of the action taken in relation to such complaints. Such records shall be kept available for inspection by the commissioner at all reasonable times upon request. • The provider shall notify the commissioner in writing in accordance with the agreed complaints procedure of all complaints received in connection with any service it provides and of all steps taken in response to such complaints.

Complaints	Suggested clauses
	<ul style="list-style-type: none"> • A record of any complaints and their outcomes must be maintained for inspection by the commissioner on request. • The provider and the commissioner shall take all reasonable steps to ensure that no detriment is suffered, either by the complainant, the provider or by any other person who is not the subject of a substantiated complaint as a consequence of any complaint.
Variation	Suggested clauses
<p>The contract should ensure that both parties can agree variations to the contract.</p>	<ul style="list-style-type: none"> • Either party may propose a variation to the terms of this agreement. No alteration to this agreement shall be effective unless it is in writing and signed by the [authorised/nominated] representatives of both parties. • Acceptance of a proposed variation shall not be unreasonably withheld or delayed. Where agreement cannot be reached as to a proposed variation, the matter may be referred to mediation and, if required, to arbitration, in accordance with the terms of this agreement.
Default	Suggested clauses
<p>There must be clear ways to determine when a party has defaulted on the contract and how this can be resolved.</p>	<ul style="list-style-type: none"> • If any party is in default of their respective obligations under this contract, the other party shall notify in writing the way in which the party is in default and if appropriate the matter shall be considered at a meeting of the parties. • Where, despite any action taken the party is still in default, the aggrieved party may issue a default notice specifying the default and the action to be taken to rectify it. The notice shall state a reasonable period of time within which the required action is to be taken. If the default is not remedied within this period to the reasonable satisfaction of

Default	Suggested clauses
	<p>the other party, the aggrieved party shall refer the matter to the dispute resolution procedure in accordance with clause [].</p>
Exerting undue influence	Suggested clauses
<p>These are fairly standard clauses in most contracts. Attention should be given to the sub-clause dealing with proportionality.</p>	<ul style="list-style-type: none"> • The provider shall not offer, give or agree to give to any agent or employee of the commissioner or their families or other connected persons: <ul style="list-style-type: none"> ◇ any gift or consideration of any kind ◇ any inducement or reward for any act in relation to the obtaining or performance of this or any other contract with the commissioner ◇ or show or not show favour or disfavour to any person in relation to this or any other contract with the commissioner. • The provider shall not: <ul style="list-style-type: none"> ◇ enter into this or any other contract with the commissioner in connection with which a reward or fee has been paid or has been agreed to be paid unless before this agreement is made particulars of any such arrangement have been disclosed in writing to the commissioner. • If the provider, its employees or agents, or anyone acting on its or their behalf, does any of the prohibited acts or commits any offence under the Prevention of Corruption Acts 1889 to 1916, with or without the knowledge of the provider, the commissioner shall be entitled to: <ul style="list-style-type: none"> ◇ terminate this agreement; ◇ recover from the provider the amount or value of any such gift, property or lease or consideration or commission. • In exercising its rights or remedies under this clause, the commissioner shall: <ul style="list-style-type: none"> ◇ act in a reasonable and proportionate manner having regard to such matters as the gravity of, and the identity of the person performing the prohibited act, the extent to which such an act

Exerting Undue Influence	Suggested clauses
	<p>may have been solicited by any person in the employ of or acting on behalf of the commissioner;</p> <ul style="list-style-type: none"> ◇ give all due consideration, where appropriate, to action other than termination of this agreement, including (without limitation) requiring the provider to procure the dismissal of an employee where the prohibited act is that of such employee.

Dispute resolution	Suggested clauses
<p>The parties should work together with a view to resolving disputes. At no time should any services provided be disrupted, delayed or suspended during a dispute between the commissioner and provider. The general principle of dispute resolution is that attempts should be made to resolve the problem at the earliest and most informal opportunity, and at the point nearest to service delivery, by those directly involved. Only if this fails should the matter be referred in an escalation process through the management structures and dispute or complaints procedures in an attempt to find a resolution acceptable to all parties.</p> <p>There may be instances when this is not considered the best way of resolving an intractable situation (as perceived by one of the parties). Instead the ability to terminate the contract may be preferable with remedies still being open through any contract law proceedings.</p>	<ul style="list-style-type: none"> • The parties shall negotiate, in good faith, a settlement of any complaint(s) arising in connection with the agreement. The parties shall attempt to resolve any complaint(s) by a meeting between the agreed representatives within a reasonable period of time but not exceeding [14 days]. • In the event that the parties are unable to resolve the complaint(s) at this meeting or within 14 days thereafter, the complaint(s) shall be referred by the agreed representatives to more senior representatives of each party, who shall meet together within 28 days of such a referral, with a view to resolving the complaint(s). • If the parties cannot resolve the dispute through the above process, the dispute may be settled by mediation and/or arbitration. This is without prejudice to either party's right to terminate the agreement in accordance with clause [] and [] of this agreement, and/or either party's right to issue legal proceedings. • Either party may refer any dispute to mediation in accordance with the Centre for Effective Dispute Resolution model mediation procedure⁶ by giving written notice ('the mediation notice') to the other party. Any agreement reached in mediation shall be in writing and be final and binding on the parties. • If either party refuses at anytime to participate in the mediation procedure and/or the dispute is not

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Dispute resolution	Suggested clauses
	<p>resolved within 60 days of service of the mediation notice (or such longer agreed period), then either party may refer the matter to arbitration for final decision.</p> <ul style="list-style-type: none"> • The arbitrator will be independent and be agreed by both parties. Such agreement will not be unreasonably withheld by either party. • The arbitrator shall be entitled to make such decision or award as he/she thinks just and equitable having regard to all the circumstances of the dispute. Costs of the arbitration shall be apportioned between the parties by the arbitrator as he/she thinks fit. Any award or decision of the arbitrator shall be final and binding on the parties. • Performance of the contract should not be suspended, ceased or delayed while a dispute is referred to mediation/arbitration or legal proceedings are commenced and the parties shall fully comply with the requirements of the contract at all times.

Indemnity	Suggested clauses
<p>Contracts should recognise that both parties carry responsibilities and liabilities for service provision. Both commissioner and provider need to consider which party should be responsible for which risks. Generally, the commissioner will require protection in the form of an indemnity from the provider if the provider is negligent in providing the service. Similarly, the provider will require indemnification for the negligence of the commissioner. The parties should consider limiting the level of indemnity in accordance with insurable losses. Any system of agreed damages should be proportionate to the breach and relate only to direct financial losses incurred by the aggrieved party.</p>	<ul style="list-style-type: none"> • The provider shall be liable for, and shall indemnify the commissioner, its employees, servants or agents from and against all liability to the maximum extent permitted by law in the case of: <ul style="list-style-type: none"> ◇ death of, or personal injury, to any person ◇ breach of a statutory duty or obligation arising under this contract ◇ loss of, or damage to any property belonging to the commissioner and/or its employees, servants or agents ◇ in respect of any claim, action, proceedings, damages costs, demands, expenses and charges (including all legal expenses) and any other liabilities whatsoever arising out of, or in connection with this agreement caused directly

Indemnity	Suggested clauses
<p>Contracts should never contain penalty clauses (which under contract law are unenforceable). Nor should such clauses be included on the basis that they would never be enforced for minor infringements. Contract clauses should only exist where there is an intention to enforce them.</p>	<p>or indirectly by the negligence or omission of the provider except where the provider is able to demonstrate that such death, personal injury, loss or damage was not caused or contributed to by its negligence or default, or the negligence or default of its staff or sub-contractors, or by any circumstances within its control.</p> <ul style="list-style-type: none"> • Subject to clause [], the provider shall not be liable for, or obliged to indemnify the commissioner, its employees, servants or agents, for any injury, loss, damage, cost or expense caused by: <ul style="list-style-type: none"> ◇ any act, omission, or negligence or wilful misconduct of the commissioner or by the breach by the commissioner of its obligations under this contract ◇ the provider acting on the instruction of the commissioner or on incorrect information provided by the commissioner ◇ any claim in excess of the level of the provider's required insurance cover as detailed in clause [] of this contract. • The provider to effect and maintain with a reputable insurance company policies of insurance providing adequate level of cover in respect of all risks incurred by the provider or likely to be incurred arising out of the contract including but not limited to death/personal injury or loss of or damage to property. Policies shall include cover in respect of financial loss arising from any advice given or omitted to be given by the provider. • Provider to hold employers' liability insurance in respect of staff in accordance with legal requirements for the time being in force. • The term of insurance shall not relieve the provider of any liabilities under the contract. It shall be for the contractor to determine the amount of insurance cover to satisfy any liability. • Subject to clause [], the commissioner shall

Indemnity	Suggested clauses
<p>It will be necessary to exchange personal information about service users to facilitate the provision of appropriate care. The provider will also need to provide potentially commercially sensitive information to commissioners. The contract must allow for this but ensure that both parties pay due regard to the need for confidentiality.</p> <p>Service users and carers should know that this is</p>	<p>indemnify the provider against all liability for death of or personal injury to any person; loss of or damage to any property; and actions, costs, claims, demands, charges and expenses (including legal expenses on an indemnity basis) that may arise out of or in consequence of:</p> <ul style="list-style-type: none"> ◇ the commissioner’s performance of or failure to perform its obligations under this contract ◇ any act or omission, the negligence or wilful misconduct of the commissioner ◇ where not otherwise compensated for under this contract, a breach by the commissioner of its obligations under the contract. <ul style="list-style-type: none"> • An indemnity by a party under any provision of this contract shall be without limitation to any indemnity by that party under any other provision save that no party shall be entitled to recover twice in respect of any one loss. • If either party wishes to make a claim under this clause [] against the other party, the claiming party shall give notice of the claim as soon as reasonably practicable, setting out full particulars of the claim. The parties shall follow the dispute resolution procedures set out in clause []. • Neither party shall be liable to the other for any loss of income or any type of special indirect or consequential loss.

Confidentiality	Suggested clauses
<p>It will be necessary to exchange personal information about service users to facilitate the provision of appropriate care. The provider will also need to provide potentially commercially sensitive information to commissioners. The contract must allow for this but ensure that both parties pay due regard to the need for confidentiality.</p> <p>Service users and carers should know that this is</p>	<ul style="list-style-type: none"> • Each party shall: <ul style="list-style-type: none"> ◇ comply with the requirements of the Data Protection Act 1998 and the Freedom of Information Act 2000 ◇ treat as confidential and secret all information relating to individual service users, carers or any employees of either party and safeguard it accordingly ◇ treat as confidential any information obtained

Confidentiality	Suggested clauses
<p>happening. They should also know if information is to be shared with third parties, for example in the case of inspections or perhaps where the ownership of a home is about to be transferred.</p>	<p>from the other party under or in connection with this agreement and clearly identified as confidential by that party</p> <ul style="list-style-type: none"> ◇ Not use any confidential information otherwise than for the purposes of this contract ◇ Not disclose any confidential information to any third party without the prior written consent of the other party, except to such persons and to such extent as may be necessary for the performance of this agreement. <ul style="list-style-type: none"> • The provisions of clause [] above shall not apply to any information which was in the possession of the party concerned without restriction as to its disclosure, before receiving it from the disclosing party or which is or becomes public knowledge (otherwise than by breach of this clause []). • The obligations imposed by this clause [] shall continue to apply after the expiry or termination of this agreement. Unless otherwise specified in writing in relation to a particular item of confidential information, the obligations imposed by this clause [] shall apply in respect of each item of confidential information for a period of [to be agreed] years from the date on which that item was created, or indefinitely. • Neither party shall advertise or publicly announce this contracting agreement without the prior written consent of the other party, including its partners. Such consent should not be unreasonably withheld or delayed.

Assignment and sub-contracting	Suggested clauses
<p>It is not uncommon for service providers to either sell or change partnership arrangements with regard to their business. Equally contracts should cover the use of agency staff.</p>	<ul style="list-style-type: none"> • Neither party shall assign their obligations under this contract without the prior written consent of the other party. Such consent should not be unreasonably withheld or delayed. • Where a contract is assigned it does not release

Assignment and sub-contracting	Suggested clauses
	<p>either party from the requirements of the confidentiality clauses [] or any obligation or duty attributable to the party under the contract or these conditions.</p> <ul style="list-style-type: none"> • Neither party shall sub-contract their obligations under this contract, without prior consent in writing of the other party. Such consent should not be unreasonably withheld or delayed. • Where consent is given to placing of sub-contracts, copies of each new sub-contract should be sent immediately to the client upon issue. • A party to this agreement shall be responsible for the acts and omissions of its sub-contractors as though they are one of its own. • Clause [] does not exclude the use of agency staff in cases of emergency or other planned absence. It would be expected that agency staff do not constitute more than [%] of staff on duty during any given week.

Going into hospital or other temporary suspension of a service	Suggested clauses
<p>Where someone is admitted to hospital and is not receiving care for a period, either in their care home or in their own home, there needs to be agreement between the commissioner and provider on the holding of that service for the service user's return, the number of days for which this is reasonable, and the continuation of fee payment.</p> <p>These arrangements are likely to vary in response to planned, unplanned, brief or longer absences. Whichever party first becomes aware of a planned or unplanned absence must let the other party know as soon as possible.</p>	<ul style="list-style-type: none"> • If the service user becomes absent from their home where they receive domiciliary care services or from their care home and the absence is unplanned, then the provider shall formally notify the commissioner's nominated representative within one working day or less of the period of absence commencing. • Where an absence is unplanned, then upon the giving of this notification the parties shall review the individual's continued requirement for the service. • Where the absence is pre-planned and the period of absence is expected to exceed eight continuous days, the party first made aware that the absence will occur shall inform the other party in writing.

Going into hospital or other temporary suspension of a service

Such variations would normally be notified, or confirmed, in writing unless this is impracticable.

It would be reasonable for the commissioner to at least pay for wasted time that may arise from a carer's visit to a service user's home when neither party have been made aware of an absence.

It would be reasonable to have different arrangements for holding a residential care room pending the service user's return compared to holding a domiciliary care service, as the former is a person's own home.

In a care home a person's room should never be used by another service user without consent being given by the user and both parties.

Suggested clauses

- If the individual is absent from their care home, the provider shall ensure that their room is kept available for them during their temporary absence. The commissioner will continue to pay fees in full during that period of absence. Where the absence exceeds a period of [] days the commissioner and provider may agree in writing a reduction in the price or a suspension of the contract.
- If the individual is absent from their own home and is therefore not requiring domiciliary care services, the provider shall ensure that they are able to restart the service when the person returns home after their temporary absence. The commissioner will continue to pay fees in full during that period of absence for up to [] days. Where the absence exceeds this period the commissioner and provider may agree in writing a reduction in the price or a suspension of the contract.

Termination

Only when dispute procedures have been exhausted should formal contract enforcement termination occur. There may of course, be instances where termination is not associated with dispute or breach, eg if a business is closing down.

The contract should allow both provider and commissioner the ability to terminate, possibly by way of a break clause, on reasonable grounds and in accordance with procedures which have been agreed by both parties. Both parties should minimise any damaging effects on the users of the service caused by termination.

The notice period for withdrawing from the agreement should be the same for all parties and

Suggested clauses

- Either party may terminate the whole of this agreement by giving [] months' notice in writing or such other period as may be mutually agreed. During the period of notice both parties shall co-operate to ensure that the interests of service users are met under whatever new arrangements may be proposed.
- The commissioner may terminate the agreement immediately by written notice in the event that the provider:
 - ◇ being a body corporate summons a meeting of its creditors, makes a proposal for or becomes subject to a voluntary arrangement, is unable to pay its debts within the meaning of section 123 Insolvency Act 1986

Termination	Suggested clauses
<p>clearly stated. Both parties should have the right to terminate the agreement by giving written notice.</p> <p>The contract should be clear as to when termination is intended to apply to the whole agreement and when only to an individual service order within a contract, or individual contracts within a service level agreement.</p> <p>The Office of Fair Trading guidance on unfair terms in care home contracts explicitly refers to the termination of contracts, both on the part of the provider and the person receiving the services. It is critical that all parties have protection, although the service user is not a party to the contract between commissioner and provider.</p> <p>Contracts should be proportionate in assigning rights of termination. For example; a breach of a critical contract term should not attract the same response as a minor procedural infringement. In most circumstances dispute resolution would be tried first.</p> <p>In terms of material breach it may be that the commissioner would wish to include either specific legislation or a more global clause dealing with compliance. Clauses may be included with regard to national minimum standards.</p>	<ul style="list-style-type: none"> ◇ has a receiver, manager, administrator or administrative receiver appointed over its assets, undertakings or income, passes a resolution for its winding up (other than for the purposes of voluntary reconstruction or amalgamation), is the subject of a petition for its winding up or otherwise ceases to trade ◇ being a partnership or individual enters into any composition or arrangement with its creditors, has a bankruptcy order made against it, is the subject of an interim order under Section 253 Insolvency Act 1986, has an interim receiver appointed under Section 286 Insolvency Act 1986, is unable to pay its debts within the meaning of Sections 267 and 268 Insolvency Act 1986 or otherwise ceases to trade. <ul style="list-style-type: none"> • Where the provider has undergone a change of control within the meaning of Section 416 of the Income and Corporate Taxes Act 1988, which impacts adversely and materially on any part of the contract, the commissioner may only exercise rights under this clause within six months of a change of control occurring and shall not be permitted to do so where it has been agreed in advance to any change of control that occurs provided to notify the commissioner immediately when a change of control occurs. • Both commissioner and provider reserve the right to terminate the contract with immediate effect if a material breach occurs which restricts or prevents the whole or any material part of the agreed service from being delivered or where the breach is capable of remedy, the provider fails to do so within [] days of written notification by the commissioner. The written notice, which should be served within [] months of the breach occurring or the commissioner becoming aware of the breach, whichever is the later, should specify the nature of the breach and the required action for it to be remedied.

Termination	Suggested clauses
	<ul style="list-style-type: none"> • For the purpose of this agreement, the following issues are considered to be a material breach: <ul style="list-style-type: none"> ◇ minor repeated and/or serious non-compliance with the provisions of the Health and Safety at Work etc. Act 1974, and any subsequent health and safety regulations by the provider ◇ operation of the home without insurance cover as required under clause [] ◇ non-compliance with the requirements of race relations, equal opportunities legislation and disability discrimination legislation by the provider ◇ evidence of the deliberate misuse of drugs and/or medicines by the provider when delivering services to individuals under this agreement or negligence by the provider in permitting such abuse by any of the provider's staff ◇ evidence of the deliberate abuse and/or mistreatment of individuals by the provider or negligence by the provider in permitting such abuse by any of the provider's staff ◇ the provider offers improper inducements or exerts unreasonable pressure upon potential individuals or their relatives, or others with an interest, to attempt to encourage the potential service user to go into the home ◇ the provider has been convicted of an offence under the provisions of the Care Standards Act 2000 and regulations thereto and any subsequent amendments ◇ the provider has committed an offence under the Prevention of Corruption Acts 1889–1916 ◇ persistent use of unqualified or untrained staff or agency staff over the amount specified in clause []. • The provider may terminate this agreement by written notice in the event that: <ul style="list-style-type: none"> ◇ the commissioner fails to make payment, or is persistently late in making payment in which case the provider shall be entitled to terminate upon 28 days' notice

Termination	Suggested clauses
	<ul style="list-style-type: none"> ◇ the commissioner has committed a material breach of the commissioner’s obligations under this agreement and, where the breach is capable of remedy, the commissioner fails to remedy such breach within 28 days of service of a written notice by the provider specifying the breach and requiring it to be remedied, provided that any such notice is served within three months of the breach occurring or the provider becoming aware of the breach, whichever is the later ◇ the provider proposes to discontinue the operation of the home/domiciliary care service and no arrangements acceptable to the commissioner have been made for the transfer of it as a going concern in which case the provider shall be entitled to terminate upon three months’ written notice ◇ the home/domiciliary care service ceases to be registered under the Care Standards Act 2000 in which case the provider shall be entitled to terminate upon 28 days’ written notice.

Termination of individual contracts	Suggested clauses
<p>See definition of terms for the distinction between an individual placement agreement and an individual purchase agreement.</p>	<ul style="list-style-type: none"> • The commissioner or the provider may require the removal of a service user and terminate an individual [placement/purchase] agreement upon 28 days’ written notice if any of the following apply: <ul style="list-style-type: none"> ◇ The service user’s health or well-being would be seriously prejudiced by their continued presence in a care home. ◇ The mental and/or physical condition of the service user deteriorates, or the needs of the service user change, to the extent that the provider can no longer provide the care within the home to meet that person’s needs. ◇ The service user is in breach of the individual placement agreement to an extent that the individual placement agreement is terminated. ◇ The [care home/domiciliary care provider] is unable to provide the care required under the Care Standards Act 2000 and associated regulations and standards.

Termination of individual contracts	Suggested clauses
	<ul style="list-style-type: none"> • If a termination notice is served the commissioner will pay the fee to the provider for the duration of the notice period. • Should the agreement be terminated in accordance with clause [], by the provider the commissioner will be responsible for the costs of transferring the service user to an alternative provider. • In the event of any termination of the agreement or placement for whatever reason, the provider will with utmost good faith collaborate with the commissioner to ensure there is a smooth transition and transfer of any service user from the provider's accommodation or domiciliary care service to the alternative accommodation or service.
Death of the person using services	Suggested clauses
<p>If a person is receiving domiciliary care then the payment should cease at the end of an agreed period from the date on which the death is notified to the provider, as the worker(s) concerned will have been scheduled and will need to be paid. Where the provider's staff discover the death, they may be required to take appropriate action or remain in attendance for longer than was originally scheduled. The contract should make allowance for this extended requirement, although for domiciliary care the level of provision is unlikely to be as high.</p> <p>If the person was in a care home, there should be a period during which fees may still be liable to allow the family to have time to clear their relative's effects from the room. The agreement should state the period.</p> <p>Such terms should be clear and prominent so that all parties to the contract are fully aware of their obligations. The key point is the reasonableness of the parties in each situation.</p>	<ul style="list-style-type: none"> • The individual contract shall terminate automatically after [x] days from the date on which the provider becomes aware of the individual's death. The contract may be extended, however, for a short period of up to [x] days to allow providers to deal with any outstanding matters.

Force majeure

The contract should include ‘force majeure’ provisions. These clarify that neither party should be liable for any failure to meet the terms and conditions of the agreement which are as a result of an event beyond their control. In other words, where there is no practical means available to the parties concerned to avoid such failure or delay.

Suggested clauses

For the purposes of this clause:

- ‘Force majeure’ means any event or occurrence which is outside the control of the party concerned and which is not attributable to any act or failure to take preventive action by the party concerned including, but not limited to, any Act of God, fire, flood, lightning, war, preparation for war, hostilities, insurrection, revolution, act of terrorism, riot or civil commotion, epidemic or other nature disaster, failure of supplies or power, fuel, transport, explosion, impact of aircraft or articles dropped from aircraft, equipment, raw materials or other goods or services, and shall only be treated as events of force majeure to the extent that these events were beyond their control; force majeure does not include any industrial action occurring within the provider’s organisation or its sub-contractor’s organisation.
- Any failure or delay by the provider in performing its obligations under this agreement which results from any failure or delay by an agent, sub-contractor or supplier shall be regarded as due to force majeure only if that agent, sub-contractor or supplier is itself impeded in complying with an obligation to the provider by force majeure.
- Neither party shall be liable to the other party by reason of any failure or delay in performing its obligations under this agreement which is due to force majeure where there is no practicable means available to the party concerned to avoid such failure or delay.
- If either party becomes aware of any circumstances of force majeure which give rise to any such failure or delay or which appear likely to do so, that party shall promptly give notice of those circumstances as soon as practicable after becoming aware of them and shall inform the other party of the period for which it estimates that the failure or delay will continue.

Force majeure	Suggested clauses
	<ul style="list-style-type: none">• Notwithstanding the foregoing, each party shall use its reasonable endeavours to perform its obligations for the duration of the force majeure event. If, however, such event prevents either party from performing all of its obligations under the contract for a period in excess of [] months] either party may terminate the contract by notice in writing with immediate effect.

Jurisdiction	Suggested clauses
<p>It is normal to state in a contract the jurisdiction to which the contract is subject. Commissioners that have placements across the Scottish border may need to determine which jurisdiction applies.</p>	<ul style="list-style-type: none">• The contract shall be considered as a contract made in England and subject to English law.• Subject to clause [] (dispute resolution), the courts of England and Wales shall have exclusive jurisdiction to determine any disputes that may arise out of or in connection with this contract.• If any provision of this contract becomes or is declared invalid this shall not impair or affect any other provision.

INTRODUCTION

Section A of this paper dealt with some of the general terms and conditions that are often used in contracts between commissioners and providers and what might constitute good or improved practice in developing such documents. This section looks at the elements of those contracts that will vary from one service to another and often from one provider to another – those that specify exactly what service is to be delivered.

Sometimes specifications are a part of the contract, sometimes an annex or appendices, sometimes they are separate documents altogether. This positioning of the specification may be chance or it may represent how much the commissioner wishes the provider to be contractually bound into defining what they are providing. Wherever located, specifications are a vital part of the relationship between commissioners, providers and service users.

As in Section A this part of the paper deals with specifications developed through traditional commissioning processes and based on defining a set of outputs or processes. This is as compared to documents which specify outcomes but give providers much greater discretion over how a service is delivered. In some contracts it is not uncommon to see both outcomes and outputs/processes being defined. Contractually this may be hard to deliver. For example, would the provider be defaulting on the contract if they met the overall outcomes to be achieved but not by the route specified in the contract, or vice versa, where the process was followed but it did not deliver the expected outcomes? Consequently, it is important to be clear about which elements of the specification are contractually binding as compared to describing general outcomes or values.

The other common issue in specifications is the relationship between each individual contract for a service as compared to national standards. The review of specifications that contributed to this paper revealed wide variations from one local authority to another. Some include national standards as part of the specification. Some picked the items that presumably were most favoured locally while other (much briefer) contracts

simply referred to the need to be compliant with all national standards and regulations.

Content

The following are usually seen as key functions of a service specification.

- To set the value base within which the service should be provided.
- To describe the nature and parameters of the service to be bought.
- To define the people for whom that service should be provided.
- To set standards to which the service should be delivered.
- To define where and what elements of discretion are given to the provider.
- To define and describe what control service users might have with regard to the content and delivery of the service.
- To describe the monitoring arrangements to determine whether or not all the requirements are being met.

Who should be involved in developing specifications?

Specifications should be developed with the involvement of all the key stakeholders in the provision of the service:

- commissioning partners
- service users/potential users
- service providers.

Commissioning partners

The purchasing process, including letting contracts, should fall out of a commissioning strategy, drawn up with commissioning partners. In purchasing domiciliary care and care home places, such partners are likely to be at least the primary care trust and the housing department but ideally the wider group of agencies involved in local strategic partnerships. In so far as contracts should then be delivering the aims of the strategy, those partners have a contribution to make to the specification, particularly in ensuring that it is likely to deliver joint outcomes, and to dovetail appropriately with the services for which they are directly responsible.

INTRODUCTION

Service users

Service users should have an active role in specifying preferences in the way their care is delivered. While this is most obvious in individual care planning, existing and potential service user input should also be sought in the development of specifications for tenders and for subsequent pre-purchase agreements.

“Systematically and rigorously finding out what people want and need from their services is a fundamental duty of both the commissioners and the providers of services. It is particularly important to reach out to those whose needs are greatest but whose voices are least often heard.”⁷

There are a number of ways of doing this and each has a place.

- Specific involvement of users in tender processes.
- Reference to existing local user surveys and consultations.
- Use of the literature/existing research into what older people say they want.

When planning for the involvement of service users, however, it is important for the authority to be clear on which of the four main types of engagement it is using.

- Communication – providing information
- Consultation – ideas, suggestions and feedback
- Negotiation – securing agreement
- Participation – working together

Whichever process is used it should make sense and feel worthwhile to the user group, allow for good representation, be appropriate to the types of engagement (as set out above), be cost-effective to the authority and, of course, likely to deliver usable results.

If using existing local information that has recorded service user/potential service user views, it is important to take account of the following.

- The specific purpose of that consultation, and the ways in which people were asked for their views.

- That sometimes questions are fairly open-ended and that, in the case of some service user groups, they may have low expectations and little inclination to complain. Therefore, to interpret a high rate of ‘satisfaction’ with a service as signifying that a service specification was meeting all requirements is likely to be inaccurate.

In the case of older people there is already a large body of research relating to key service quality issues identified by service users from a range of studies, such as those by Help the Aged⁸, Social Policy Research Unit⁹, Joseph Rowntree Foundation¹⁰. It is important and cost-effective for commissioners to consider such national source material before embarking on any specific local consultation.

Service providers

While it is necessary to take account of European Union and the authority’s own standing orders around procurement and to ensure fairness within a tendering process, it is possible and valuable outside that process to engage with existing providers, or potential providers, through open forums in considering the development of specifications. This may be particularly important when considering moving away from a cost and volume approach to service purchase and into purchasing provision based on the outcomes it is desired the contract should achieve.

National minimum standards and service specifications

Given that existing service specifications currently represent a range of relationships with national minimum standards (NMS) it is legitimate to ask the question, what are specifications intended to achieve over and above NMS in terms of outcomes and standards to be achieved and monitored? The following are a sample of statements in current specifications uncovered in preparing this paper.

- Authority A has dispensed with specifications completely for care homes and domiciliary care on the basis that they are no longer needed since the introduction of NMS.

7 | Commissioning with service users and carers: Involving people who use services in the commissioning process Care Services Improvement Partnership 2006

8 | Our Future Health: Older People’s Priorities for Health and Social Care Help the Aged 2000

9 | Making home care for older people more flexible and person centred Social Policy Research Unit 2005

10 | The report of the Older People’s Enquiry into ‘that bit of help’ Joseph Rowntree Foundation 2006

INTRODUCTION

- Authority B makes frequent references to NMS throughout and makes clear that this is the key point of reference for all aspects of the services provided, and restates this several times through the document with otherwise brief details under a series of key sections.
- Authority C states that “the service provider will at all times meet the requirements of the NMS for care homes” at the end of a 40+ page spec but nonetheless still covers the same ground, in detail.

All also expressly state that providers should be registered and abide by regulations, even when they then reproduce them.

The principle of having a service specification comes from a time before national regulation of services, and from a corporate approach to contracting that would expect to need a full description of what is to be purchased, for whom and to what quality. The NMS does not set out a description of the service to be bought and for whom, however, as this is not a function of the regulator for the purchaser. Therefore, these two aspects clearly need to be a key part of contract specifications.

The benefits of commissioners and providers working in partnership to achieve improvement is one that is not part of NMS and may usefully be included in specifications, either in a general section on partnership working, or more specifically in the setting of systems to financially acknowledge excellent service, where funding and the local market permits.

For the quality elements of standards, however, the practice advocated in this paper, and used within the suggested specification below, is that specifications only need to contain an explicit requirement that the provider has, and keeps, registration and abides by the regulations, taking NMS into account and providing the services set out in their own statement of purpose.

Style and format of service specifications should be based on seven fundamental principles.

- **Efficiency:** enabling commissioners to achieve quality services at value for money.
- **Sustainability:** embodying a general approach to a proper working relationship which fosters sustainable, long-term provision (where appropriate) in the interests of service users.
- **Proportionality:** achieving what is necessary or highly desirable in the simplest possible way. Document length should be reduced as much as possible and the ‘kitchen sink’ approach abandoned.
- **Suitability:** reflecting the service that is required and the actual agreement between parties.
- **Simplicity:** plain English wherever possible, with clear explanations of jargon.
- **Fairness:** reflecting a fair and proper balance between commissioner and provider, with risk properly allocated.
- **Equality:** contracts should be the same for every sector.¹¹

The proposed format for a specification for a care home contract and a specification for a domiciliary care contract are set out in the rest of this document.

¹¹ | Report of the third sector commissioning task force: part II, outputs and implementation Department of Health 2006

1. SERVICE SPECIFICATIONS FOR DOMICILIARY CARE

Introduction	Suggested wording
<p>This section explains the purpose and status of the document and outlines the key elements:</p> <ul style="list-style-type: none"> • relationship with national minimum standards (NMS) • partnership approach • direction of travel being toward outcomes. <p>It needs to set out in brief what it contains and how it is to be used.</p> <p>The approach taken in this specification is that there is no benefit to repeating in a specification the quality requirements that are already laid on providers by the Care Standards Act and domiciliary care regulations. The CSIP <i>Guide to Fairer Contracting Part One</i>¹² covers clauses on dispute resolution and termination.</p> <p>Basing the specification as far as possible on the outcomes to be achieved should enable a joint approach to determining how they can best be met, and avoid an over-reliance on the prescription of processes and outputs. This should save time and resource for both commissioners and providers and deliver a more focused service to users.</p> <p>The concept of a partnership relationship (although not a legal entity) informs the whole of the CSIP guide.</p>	<p>This document sets out a service specification relating to the provision of domiciliary care for [appropriate service user group] in [] authority. It describes the key features of the service being bought and should be read in conjunction with the terms and conditions section of the contract.</p> <p>The purpose of domiciliary care is to enable service users to remain in their own homes, living as independently as possible.</p> <p>It is a requirement that all providers will be registered with the care regulator and will maintain registration throughout the duration of this contract. Therefore, the regulations required for registration (and their associated standards), and the monitoring of the achievement of those regulations and standards, are not duplicated in this specification. The authority expects all providers to operate at a ‘good’ quality rating from the regulator and strive for excellence. An ‘adequate’ rating will trigger the requirement for contract review and an agreed action plan for improvement. Contractual position on dispute resolution and termination is set out under the terms and conditions section of this contract.</p> <p>The commissioners wish, in partnership with service users and providers, to move towards an outcome-based approach to the purchase and provision of service and this document reflects that direction of travel.</p> <p>[] authority wishes to work in partnership with care providers in delivering a high quality of home care to its service users. The aim is to maximise the use of available resources by establishing longer-term, more integrated relationships with service providers.</p> <p>By signing up to a ‘partnership approach’, [] authority and service providers are making a commitment to:</p> <ul style="list-style-type: none"> • Share key objectives • Collaborate for mutual benefit • Communicate with each other clearly and regularly

¹² | A Guide to fairer contracting Care Services Improvement Partnership 2005

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Introduction	Suggested wording
	<ul style="list-style-type: none"> • Be open and honest with each other • Listen to, and understand, each other's point of view • Share relevant information, expertise and plans • Avoid duplication wherever possible • Monitor the performance of both/all parties • Seek to avoid conflicts but, where they arise, to resolve them quickly at a local level, wherever possible • Seek continuous improvement by working together to get the most out of the resources available and by finding better, more efficient ways of doing things • Share the potential risks involved in service developments • Promote the partnership approach at all levels in the organisations (eg through joint induction or training initiatives) • Have a contract which is flexible enough to reflect changing needs, priorities and lessons learnt, and which encourages service user participation.

Required service outcomes	Suggested wording
<p>A general outcome for the service may help commissioners and providers concentrate on the purpose behind commissioning it. It also helps in maintaining a focus above that of particular tasks and times. Specific outcomes for each service user would be detailed on their care plan, and could be used to describe what is being bought for each individual.</p> <p>Reference to the outcomes as set out in the White Paper <i>Our Health, Our Care, Our Say</i> will ground the specification in the national agenda for purchasers and be helpful to providers who will be inspected against these outcomes by the care regulator.</p>	<p>Service users are able to remain in their own home and to achieve and maintain their potential in relation to physical, intellectual, emotional and social capacity.</p> <p>The implementation of this contract should contribute to the following outcomes for service users which are also those sought by the White Paper, <i>Our Health, Our Care, Our Say</i>, and to which the care regulator will be inspecting:</p> <ul style="list-style-type: none"> • exercising choice and control • improved health and emotional well-being • personal dignity and respect • quality of life • freedom from discrimination and harassment • making a positive contribution • economic well-being

1. SERVICE SPECIFICATIONS FOR DOMICILIARY CARE

Core principles	Suggested wording
<p>The purpose of core principles is to confirm the overall approach to be adopted in delivering the service.</p> <p>For some authorities there will already be a set of values or principles that should apply to all contact with service users. In that case they would be used in the specification.</p>	<p>This set of principles should apply to all contact with service users and their carers.</p> <ul style="list-style-type: none"> • To treat people as individuals and promote each person’s dignity, privacy and independence. • To acknowledge that all care workers are visitors in the service user’s home and should act accordingly. • To acknowledge and respect people’s gender, sexual orientation, age, ability, race, religion, culture and lifestyle. • To maximise people’s self-care abilities and independence. • To recognise people’s individuality and personal preferences. • To provide support for carers, whether relatives or friends, and recognise the rights of other family members. • To acknowledge that people have the right to take risks in their lives and to enjoy a normal lifestyle. • To provide protection to people who need it, including a safe and caring environment.
Service description Tasks to be carried out	Suggested wording
<p>Assuming that a non-outcomes based approach is being adopted then it is necessary to set out the type of tasks expected to be undertaken.</p> <p>Any such list, however, must be identified as indicative and not exhaustive, as the overriding factor should be outcomes to be achieved.</p> <p>The specification is giving an overall description of the types of service that will be commissioned during the life of the contract, but the service to individuals will be commissioned through individual referrals and described on the person’s care plan.</p> <p>The range of tasks described will depend on local factors. For example, there may be agreements negotiated with PCTs about carers undertaking some limited health care tasks with appropriate training and</p>	<p>The tasks and support to be undertaken with and for service users are likely to include the following. This list is neither exhaustive nor needed in all cases, however, and will depend on which tasks are identified as most likely to meet agreed service user outcomes.</p> <p>Personal care</p> <ul style="list-style-type: none"> • Assisting the service user to get up or go to bed • Washing, bathing, hair care, denture and mouth care, hand and fingernail care, footcare (but not any aspect of footcare which requires a state registered chiropodist) • Catheter care (external) • Dressing and undressing • Toileting, including necessary cleaning and safe disposal of waste • Food or drink preparation • Eating and drinking, including associated kitchen

1. SERVICE SPECIFICATIONS FOR DOMICILIARY CARE

Tasks to be carried out	Suggested wording
<p>supervision.</p> <p>The level at which the FACS eligibility criteria has been set, and how the prevention agenda is being pursued locally, will also affect the likelihood or not of practical domestic tasks being undertaken.</p> <p>The possible tasks identified here are those for a broad-based domiciliary care service. Where the model is being used for a more specialist service, such as for a particular ethnic group, night sitting, or short term rehabilitation, the tasks described would need to reflect that.</p>	<p>cleaning and hygiene</p> <ul style="list-style-type: none"> • Attending day care, hospital appointments etc • Assisting with shopping and handling their own money, including accompanying the service user to the shops • On behalf of the service user, shopping, collecting pensions, benefits or prescriptions, paying bills or other simple errands • Dealing with correspondence • Caring for children or other dependents • assisting with taking medication which has been prescribed to them in accordance with agreed protocols. <p>Cleaning and housecare</p> <ul style="list-style-type: none"> • Cleaning the home, which may include vacuuming, sweeping, washing up, polishing, cleaning floors and windows, bathrooms, kitchens, toilets etc and general tidying, using appropriate domestic equipment and appliances as available • Making beds and changing linen • Lighting fires, boilers etc • Disposing of household and personal rubbish • Cleaning areas used or fouled by pets • Assisting with the consequences of household emergencies, including liaison with local contractors • Washing clothes or household linens, including fouled linen, drying, necessary ironing, storage and simple mending. <p>Skills development</p> <p>Where appropriate, assisting the service user to develop or maintain their own skills in any of the areas covered.</p> <p>Visiting services</p> <p>To check on someone's continuing well-being or to alleviate isolation.</p> <p>Other services</p> <p>Assisting the service user to access community-based services such as laundry, gardening, shopping,</p>

1. SERVICE SPECIFICATIONS FOR DOMICILIARY CARE

Tasks to be carried out	Suggested wording
	<p>home decoration, household odd jobs, etc.</p> <p>Tasks will exclude nursing care which is the responsibility of the health service, except where this has been specifically agreed locally.</p> <p>Where it is agreed as appropriate to meet the agreed outcomes for service users, the care task may include staff spending time talking to, relating with, and understanding the lives of service users.</p> <p>The way in which the service is provided should respect the ethnic and cultural background of the service user.</p>

Service volume	Suggested wording
<p>Where the specification relates to a block contract, it may set out the number of hours being purchased. This can allow flexibility over the life of the contract and can instead be done in a side letter to the contract.</p>	<p>xxx is purchasing xxx hours of domiciliary care over xxx time period.</p>

Service user groups	Suggested Wording
<p>This tells the provider who the service is for. The example is for older people.</p> <p>If specialist services are to be provided, the client groups need to be specified</p> <p>The specification should note that direct payment/individual budget recipients may choose to use this service.</p>	<p>The service users will be people who meet the eligibility criteria of the local authority, and are physically frail, and/or may have learning or other cognitive difficulties, mental health problems, or disabilities [or other descriptions as appropriate].</p> <p>If specialist services are to be provided, the client groups need to be specified.</p>

1. SERVICE SPECIFICATIONS FOR DOMICILIARY CARE

Hours of service availability	Suggested wording
<p>To be effective in maintaining people at home, and to afford a reasonable quality of life, domiciliary care services need to be available flexibly. The expectations should set out to enable the provider to ensure that they are able to recruit and support care staff to deliver the service.</p> <p>If services are being commissioned outside the core hours, this also needs to be stated.</p>	<p>The service will be available as required seven days a week between the hours of 07.00 to 22.00.</p> <p>Waking nights and sleep-ins from 22.00 to 07.00.</p>
Geographical coverage	Suggested wording
<p>Some contracts will be for delivery of service across the whole of a local authority area, others for particular districts or zones. The latter will often apply, for example, in large shire counties. There may be differential payment for covering difficult areas such as rural, to reflect the additional travelling time or recruitment problems – any such payment issues would be covered in the terms and conditions.</p> <p>The geographical area to be covered should be made clear to the provider. It is also important for commissioners to make clear to care managers, or other commissioners of individual care packages, the referral route for each address to ensure that the correct provider is approached. It should not be left to the provider to gatekeep the referral routes.</p>	<p>The service provider will cover the xxx local authority area in its entirety.</p> <p>OR</p> <p>This service covers xxxx district only.</p> <p>AND</p> <p>No referrals should be accepted for service users from outside this area unless by specific agreement with the service commissioner.</p>
Accessing the service	Suggested wording
<p>It needs to be clear to providers from the specification where referrals will come from, the information they can expect to accompany them, and the relevant timescales and criteria around acceptance or rejection of referrals and the commencement of the service.</p> <p>Referrals are likely to be via the statutory care management route. An increasingly common</p>	<p>Each service user's individual needs will be identified through an assessment completed by a care manager from the commissioning team.</p> <p>A care plan will be produced, with input from the service user, to identify how these needs will be met and the outcomes to be achieved.</p> <p>Where domiciliary care is seen as an appropriate</p>

1. SERVICE SPECIFICATIONS FOR DOMICILIARY CARE

Accessing the service	Suggested wording
<p>alternative is through a ‘brokerage’ service. The range of potential sources needs to be stated if it is likely to be wider than this.</p> <p>Each local authority will have their own forms and procedures for making referrals and agreeing a service for individual service users. The framework specification sets out the broad requirements.</p> <p>It is appropriate to state the commissioning basis for the service, and to link to the terms and conditions which will be set out in more detail in the other main contract document.</p> <p>It is in the service users’ interests for the service provider to have the discretion to respond to urgent increased levels of need.</p> <p>Recipients of direct payments or individual budgets may choose to purchase from this provider. If so, they may also wish to receive their service according to the terms of this specification. This should be noted although falling outside the formal contractual relationship between the provider and the local authority.</p>	<p>option there will be an initial telephone conversation with the provider to determine whether they can offer a service to the service user.</p> <p>Any agreed service will be confirmed by the care manager/broker in writing within xx hours. Other than in exceptional circumstances of confidentiality, the care plan will be shared with the provider. In any event, the commissioner will provide sufficient information about the individual, their needs, agreed outcomes and the expected service response, to enable the provider to deliver the appropriate service.</p> <p>Within x days for non-emergency or x hours for emergency referrals, the provider must notify xxx local authority whether or not it accepts the referral in question.</p> <p>Communication in writing includes by electronic means.</p> <p>The provider will accept referrals from the commissioner subject to:</p> <ul style="list-style-type: none"> • capacity within the contract • the service commissioned being in accordance with registration requirements • the service commissioned being in accordance with this specification • the service user accepting the conditions of the service provider. <p>If the provider believes that the person’s needs fall outside their expertise, or outside the agreed price, this should be discussed with the commissioner.</p> <p>Services shall be commissioned in the following way.</p> <ol style="list-style-type: none"> a) The specific outcomes to be achieved for the individual service user by their package of care shall be agreed between care manager, provider and service user. b) To achieve the outcomes, a number of hours will be agreed to be delivered during a week. Actual tasks, delivery times and the duration of each visit

1. SERVICE SPECIFICATIONS FOR DOMICILIARY CARE

Accessing the service	Suggested wording
	<p>shall be agreed between the service user and the service provider in accordance with the service user's care plan. The commissioner must agree that the agreed times and tasks appear appropriate to the delivery of the outcomes set.</p> <p>Service providers should signal the need for review of the arrangements to the local authority upon significant change to the service user's condition or in the way that the service user would prefer to have their service provided. In those circumstances service providers may need to deploy extra care worker time, to an extent not exceeding xx% of the weekly volume of service agreed in the individual placement agreement, without the prior consent in writing of the local authority.</p> <p>Individuals who have received direct payments or individual budgets may also approach the provider directly. They will enter into their own contract, but this specification should be offered as an option.</p>
Service standards	Suggested wording
<p>As stated in the introduction, standards will be those set by the Department of Health and inspected by the care regulator. The specification should reference the relevant document.</p>	<p>The commissioners require the provider to meet those regulations and standards set out in domiciliary care, national minimum standards.</p>
Monitoring and review	Suggested wording
<p>The review of individual packages against the outcomes initially expected of the placement is a key element of contract monitoring and the commissioner needs to have systems in place to aggregate the result of these reviews.</p> <p>In this section, it is important to note that the formal monitoring role is held by the care regulator and that the local authority will review all reports and provider self-assessments.</p>	<p>Formal care management reviews will be requested by the service commissioner and will be held within a reasonable time, with consideration of the time commitments of the participants, the date of the last formal review, and the urgency of the need.</p> <p>A formal review will be held as often as the service commissioner feels is necessary, or as requested by the service user, but at least annually.</p> <p>The review will involve the service user, the service</p>

1. SERVICE SPECIFICATIONS FOR DOMICILIARY CARE

Monitoring and reviewings	Suggested wording
<p>This process will link directly to issues of material breach/compliance.</p> <p>CSIP guidance on fairer contracting addresses issues of invoicing. While standards will be addressed through regulation, commissioners may wish to assure themselves that they are receiving the service paid for. This may be done electronic monitoring, or through timesheet sampling and spot checks. The specification should reflect this.</p> <p>The specification has already stated a commitment to partnership working, and there should be regular service development meetings involving commissioners and providers, as well as other points of contact with service users and carers which will provide valuable feedback on the service.</p>	<p>provider or designated representative and the service commissioner’s representative.</p> <p>Such other people that appear necessary and are wanted by the service user may be invited by agreement. Consideration will be given to ensure convenience and adequate notice for all participants wherever possible.</p> <p>The review will address the extent to which the initial outcomes required of the placement are being met. The service user’s care plan will be amended as appropriate following the review.</p> <p>The commissioners will review all inspection reports for the agency.</p> <p>The provider should supply to the commissioner a copy of its annual self-assessment produced for the care regulatory body within one week of its submission to the regulator.</p> <p>Where any issues are raised that cause concern, these will be discussed with the provider.</p> <p>The commissioner will undertake occasional checks to assure themselves that the service user is receiving the service as commissioned and that the invoicing is accurate.</p> <p>The commissioner’s representatives may wish to visit the agency office from time to time. Reasonable notice will be given except where there may be any reason for concern about the welfare of service users.</p>
<p>Any requirement for data collection to enable the local authority to submit data for national monitoring needs to be stated, where possible specifying the frequency/timescales around this, to give providers adequate notice of what is required.</p>	<p>The performance of the local authority is monitored against national indicators. To facilitate this, the commissioners require the provider to submit annual data on size of care packages. This will be required by week [xxx].</p>

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Appendix 1 – Legislation

As providers of services, and as employers, domiciliary care agencies are governed by a complex range of legislative requirements and standards. Commissioners should not need to restate providers' obligations but it is helpful to spell out the commissioner's expectation that providers will meet these obligations. The spec may list the key Acts and regulations but should make clear that this is not exhaustive and that as new legislation is introduced, or existing legislation amended, that should also be taken account of by the provider.

In the spirit of partnership it can also be noted that the commissioner will also be operating within their own legislative framework.

As stated in the introduction, the spec does not replicate NMS. The requirement on providers to meet these standards does need to be made explicit.

Legislation, and any associated case law, guidance and codes of practice which providers must take account of will include, but is not limited to the following.

- National Care Standards Act (2000)
- NHS and Community Care Act (1990)
- Health and Safety at Work Act (1974) and all subsequent guidance
- The Human Rights Act 1998
- Sex Discrimination Act (1975)
- Race Relations Act (1976), Race Relations Amendment Act (2001) and all subsequent guidance
- The Data Protection Act (1998)
- Chronically Sick and Disabled Persons Act (1970)
- Disability Discrimination Act (1995) and as amended 2005
- Food Safety Act (1990)
- Carers Recognition and Services Act (1995)
- Community Care (Direct Payments) Act (1996)
- Health and Social Care Act 2001
- Rehabilitation of Offenders Act (1974)
- Equal Pay Act (1970)
- The Working Time Regulations (1998)
- Management of Health and Safety at Work Act Regulations (1999)
- Manual Handling Regulations (1992)
- Control of Substances Hazardous to Health (COSHH)
- Reporting of Injuries, Diseases, and Dangerous Occurrences Regulations (1995) (RIDDOR)
- Lifting Operations and Lifting Equipment Regulations (1998)
- Provision and Use of Work Equipment (1999)
- Freedom of Information Act 2000
- Mental Capacity Act 2005

All providers of domiciliary care must meet the requirements of the Care Standards Act 2000 as reflected through the national minimum standards and regulations for domiciliary care, published by the Department of Health in 2003 (including all associated legislative frameworks, requirements, policies and documentation) and any subsequent amendments or re-enactments to them.

The commissioner should also operate within the relevant legislative requirements.

**2. SERVICE SPECIFICATIONS
– CARE HOMES**

Introduction	Suggested wording
<p>This section explains the purpose and status of the document and outlines the key elements:</p> <ul style="list-style-type: none"> • relationship with NMS • partnership approach • direction of travel being towards outcomes. <p>It needs to set out in brief what the document contains and how it is to be used. If the contract is for care home with nursing, this specific element can be added to the ‘purpose’ paragraph.</p> <p>The approach taken in this specification is that there is no benefit to repeating in a spec the quality requirements that are already laid on providers by the Care Standards Act, care home regulations and the quality rating process.</p> <p>Moving the specification to the outcomes to be achieved should enable a joint approach to determining how they can best be met, and avoid an over-reliance on the prescription of processes and outputs. This should save time and resource for both commissioners and providers and deliver a more focused service to users.</p> <p>The concept of a partnership relationship (although not a legal entity) informs the whole of CSIP guidance on fairer contracting.¹³</p>	<p>This document sets out a service specification relating to the provision of care homes for [appropriate service user group] in [xxxx] authority. This is a pre-placement agreement. It describes the key features of the service being bought, and should be read in conjunction with the terms and conditions section of the contract.</p> <p>The purpose of the service is to provide accommodation, care, support and stimulation to those people who can no longer live in their own homes.</p> <p>It is a requirement that all providers will be registered with the care regulator and will maintain registration throughout the duration of this contract. Therefore, the regulations required for registration (and their associated standards), and the monitoring of the achievement of those regulations and standards are not duplicated in this specification. The authority expects all providers to operate at a ‘good’ quality rating and strive for excellence. An ‘adequate’ rating will trigger the requirement for contract review and an agreed action plan for improvement.</p> <p>The commissioners, in partnership with service users and providers, wish to move toward an outcome-based approach to the purchase and provision of service and this document reflects that direction of travel.</p> <p>[xxxx] authority wishes to work in partnership with care providers in delivering a high quality of care to its service users. The aim is to maximise the use of available resources by establishing longer-term relationships with service providers.</p> <p>By signing up to a ‘partnership approach’, [xxxx] authority and service providers are making a commitment to:</p> <ul style="list-style-type: none"> • Share key objectives • Collaborate for mutual benefit • Communicate with each other clearly and regularly • Be open and honest with each other • Listen to, and understand, each other’s point of view

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**2. SERVICE SPECIFICATIONS
– CARE HOMES**

Introduction	Suggested Wording
	<ul style="list-style-type: none"> • Share relevant information, expertise and plans • Avoid duplication wherever possible • Monitor the performance of both/all parties • Seek to avoid conflicts but, where they arise, to resolve them quickly at a local level, wherever possible • Seek continuous improvement by working together to get the most out of the resources available and by finding better, more efficient ways of doing things • Share the potential risks involved in service developments • Promote the partnership approach at all levels in the organisations (eg through joint induction or training initiatives) • Have a contract which is flexible enough to reflect changing needs, priorities and lessons learnt, and which encourages service user participation.

Required service outcome	Suggested wording
<p>A general outcome for the service may help commissioners and providers concentrate on the purpose behind commissioning it. It also helps to maintain a focus above that of particular tasks and times. Specific outcomes for each service user would be detailed on their care plan, and could be used to describe what is being bought for each individual.</p> <p>Reference to the outcomes as set out in <i>Our Health, Our Care, Our Say</i> will ground the specification in the national agenda for purchasers and be helpful to providers who will be inspected against these outcomes by the care regulator.</p>	<p>Service users have comfortable and safe accommodation in which they can maximise their potential in relation to physical, intellectual, emotional and social capacity.</p> <p>The implementation of this contract should contribute to the following outcomes which are also those sought by the White Paper, <i>Our Health, Our Care, Our Say</i>, and to which the care regulator will be inspecting:</p> <ul style="list-style-type: none"> • exercising choice and control • improved health and emotional well-being • personal dignity and respect • quality of life • freedom from discrimination and harassment • making a positive contribution • economic well-being.

**2. SERVICE SPECIFICATIONS
– CARE HOMES**

Core principles	Suggested wording
<p>The purpose of these is to confirm the overall approach to be adopted in delivering the service.</p> <p>For some authorities there will already be a set of values or principles that should apply to all contact with service users. In that case they would be used in the specification.</p>	<p>This set of principles should apply to all contact with service users and their carers.</p> <ul style="list-style-type: none"> • To treat people as individuals and promote each person's dignity, privacy and independence. • To acknowledge and respect people's gender, sexual orientation, age, ability, race, religion, culture and lifestyle. • To maximise people's self-care abilities and independence. • To recognise people's personal preferences. • To provide support for carers, whether relatives or friends, and recognise the rights of other family members. • To acknowledge that people have the right to take risks in their lives and to enjoy a normal lifestyle. • To provide protection to people who need it, including a safe and caring environment.
Service description	Suggested wording
<p>This should be an overall description of the type of service being commissioned.</p> <p>It is important to set out the type of tasks expected to be undertaken. This is the detail of the service being commissioned from, and needs to be clear to, the provider.</p> <p>Any such list, however, must be identified as</p>	<p>The service provided in care home accommodation should include a single room (unless service users wish to share), personal toilet facilities, full board, personal care, [add nursing care where appropriate], supervision on a 24-hour basis, and daytime activities. Exceptions can be made where agreed on the service user's care plan as prepared or agreed by the service user's care manager/budget holder and the service user.</p> <p>The care home should offer older people the opportunity to enhance their quality of life by providing a safe, manageable and comfortable environment, plus care, support and stimulation.</p> <p>The tasks and support to be undertaken with and for service users are likely to include the following, however this list is not exhaustive, nor needed in all cases.</p> <ul style="list-style-type: none"> • To help the service user with self-care when this is difficult because of his/her frailty or disability.

**2. SERVICE SPECIFICATIONS
– CARE HOMES**

Service description	Suggested wording
<p>indicative and not exhaustive, as the overriding factor should be the outcomes to be achieved.</p>	<ul style="list-style-type: none"> • To help the service user retain his/her self-respect and dignity when he/she meets, sees, or is seen by others within the home (this includes the staff of the home). • As part of an agreed programme of rehabilitation designed to assist service users to re-establish lost skills or develop new skills in personal care, this may include enabling service users to assist with tasks around the home. • As well as specific personal care tasks, providers should make it a clear and acceptable aspect of the work of their staff that part of the personal care task is for staff to spend time talking to, relating with, and understanding the lives of service users. • Each service user should be assisted in such a way so that any distress or discomfort is avoided or minimised, paying due regard to his/her health, safety and dignity and encouraging the development of personal skills and the exercise of choice and control. <p>In addition, and in the context of a person-centred approach, the care home will assist with social/spiritual/emotional needs such as:</p> <ul style="list-style-type: none"> • orientation within the home and outside • companionship • games/intellectual stimulation • socialising with friends/family • arrangements for worship • fitness activities. <p>The way in which the service is offered should be appropriate to the ethnic and cultural background of the service user.</p> <p>For each individual service user, the determining factor will be the outcomes to be achieved. The service user, and where appropriate their relative/friend, should always be central to discussions as to how those outcomes should be achieved.</p>

**2. SERVICE SPECIFICATIONS
– CARE HOMES**

Service volume	Suggested wording
<p>Where the specification relates to a block contract, it may set out the number of hours being purchased. This can allow more flexibility over the lifetime of a contract and is sometimes instead done in a side letter to the contract.</p>	<p>xxx is purchasing xxx care home places over xxx time period.</p>
Service user groups	Suggested wording
<p>The key eligibility criteria and groups of people for whom the service is relevant describe those for whom the service is being bought.</p> <p>The examples given here are for older people, other care groups would be described as appropriate.</p>	<p>xxxxx local authority has a statutory responsibility to ensure the provision of appropriate accommodation for people who are no longer able to live independently in the community due to the effects of age, disability or infirmity.</p> <p>Service users will be assessed through the care management process as requiring care in a residential setting.</p> <p>Service users will have an assessed need for assistance and attention during the day and at night.</p>
Accessing the service	Suggested wording
<p>The commissioner and the provider both have responsibilities in ensuring an appropriate and smooth admission process. This involves a timely process, initial checking that the home is suitable, effective communication of key information about the service user, their strength, needs and preferences, and the development of an agreed set of outcomes and ways in which they will be achieved.</p> <p>It is vital that the requirement for the care plan to be the product of a mutual process, where individual preferences have been discussed, is reflected in the wording of the specification.</p> <p>Given the high proportion of care home residents with cognitive impairment it is important to make clear that capacity to make decisions is not dependent on capacity to communicate in usual ways.</p>	<p>The local authority, the provider, the service user and carer (where appropriate) must be satisfied that the service user could have their needs met, and achieve the agreed outcomes, by living within the home concerned.</p> <p>The provider will enable the service user and carer (this includes relative, friend, advocate) to visit the care home prior to admission and to talk to existing residents to ensure the service user is satisfied with their choice.</p> <p>The care manager and service user/carer will together draw up and agree a community care plan (where funding is by the local authority), and this must be forwarded to the provider. This care plan will identify the outcomes intended to be achieved by the care home service.</p>

**2. SERVICE SPECIFICATIONS
– CARE HOMES**

Accessing the service	Suggested wording
	<p>Service users will be referred and the admission process commenced with minimum time delay (target – xx hours). All admissions will be completed within x working days from the point at which the provider has informed the local authority of the vacancy occurring (unless service user circumstances require a variance).</p> <p>A full care plan will be drawn up by the provider not more than x weeks after admission. This will be drawn up with the service user. This care plan will include the outcomes from the community care plan and will describe in detail the way they are to be met for that service user. Attention will be given by the provider to ascertaining the special needs and interests of the service user. This care plan should also include a risk assessment.</p> <p>This care plan will be agreed by the provider, the local authority and service user. An outline care plan will be in place from the time of placement and will be agreed by the provider, the local authority and service user. Care plans will be reviewed annually as a minimum by the commissioner.</p> <p>Where the service user has a cognitive impairment, every effort should be made to engage with them in the best way to discover their views and preferences in accordance with the Mental Capacity Act Code of Practice.</p> <p>Residents should be made aware of the availability of advocacy services.</p>
Service standards	Suggested wording
<p>As stated in the introduction, standards will be those set by the Department of Health and inspected by the care regulator. The specification should reference the relevant document.</p>	<p>The commissioners require the provider to meet those regulations and standards set out in care homes for older people national minimum standards.¹⁴</p>

¹⁴ | National minimum standards for care homes for older people Department of Health 2003

**2. SERVICE SPECIFICATIONS
– CARE HOMES**

Monitoring and review	Suggested wording
<p>The review of individual packages against the outcomes initially expected of the placement is a key element of contract monitoring and the commissioner needs to have systems in place to aggregate the result of these reviews.</p>	<p>Care management reviews may be requested by the service user, the commissioner and by any persons involved and will be held within a reasonable time with consideration of the time commitments of the participants, the date of the last formal review, and the urgency of the need.</p>
<p>Monitoring of the home for its meeting of NMS will be undertaken by the care regulator and the commissioners can view those reports and provider self-assessments.</p>	<p>A formal review will be held as often as the service commissioner feels is necessary, but at least annually.</p>
<p>This process will link directly to issues of material breach/compliance which are dealt with in CSIP guidance on fairer contracting.</p>	<p>The review will involve the service user, the service provider or designated representative and the service commissioner’s representative.</p>
<p>The specification has already stated a commitment to partnership working, and there should be regular service development meetings involving commissioners and providers, as well as other points of contact with service users and carers which will provide valuable feedback on the service.</p>	<p>Such other people that appear necessary and are wanted by the service user may be invited by agreement. Consideration will be given to ensure convenience and adequate notice for all participants wherever possible.</p>
<p>Requirements for the provider to notify the commissioner on the death of a service user are set out in the terms and conditions part of the contract. Unless the commissioner wishes to spot check that this is happening with unfamiliar providers there may be no other need to monitor that the service being paid for is the service being given.</p>	<p>The review will address the extent to which the initial outcomes required of the placement are being met. The service user’s care plan will be amended as appropriate following the review.</p>
	<p>The commissioners will review all inspection reports for the home. The provider should supply to the commissioner a copy of its annual self assessment produced for the care regulator.</p>
	<p>Where any issues are raised that cause concern, these will be discussed with the provider.</p>
	<p>Any compliance issues will be dealt with as set out in the contract terms.</p>
	<p>The commissioner’s representatives may wish to visit the home from time to time. Reasonable notice will be given except where there may be any reason for concern about the welfare of service users.</p>

DEFINITION OF TERMS

Average Earnings Index – means the Average Earnings Index for Health and Social Work as published by the Office for National Statistics (or by a government department or other body upon which duties in connection with such index devolve).

Best Value – See Appendix 2

Change of law – unanticipated changes in the law which have a material adverse effect on the agreement (generally financial) following the commencement of the agreement where the change is affected by community law, domestic legislation or case law, and affecting services of a similar nature to those set out in this agreement.

Commissioner – for the purpose of these guidelines the term commissioner is used to mean the local authority, or any combination of statutory agencies entering into contracts with independent providers for the provision of community care services as defined by the NHS and Community Care Act 1991. It also includes all employees or agents of such commissioner(s). It used to mean the purchasing authority in this document throughout.

Compliance with laws – contract terms and conditions should comply with applicable legislation and the general common law.

Confidential – designated or intended to be kept secret: the contract should allow for such information to be produced if it is relevant to the contract.

Contract – the agreement between the provider and the commissioner consisting of these conditions and any attached schedules, the invitation to tender and any other documents or parts thereof specified by the commissioner.

Council – see Purchasing authority.

Default – any breach of the obligations of either party (including but not limited to fundamental breach or breach of fundamental term) or any default, act, omission, negligence, or statement of either party, its

employees, agents or sub-contractors in connection with or in relation to the subject matter of the contract and in respect of which such a party is liable to the other.

Default notice – notice served by one party claiming that the other has defaulted on the contract detailing the default, the steps needed to be taken to rectify the default and the applicable timescales for rectification.

Dispute resolution – attempts to address any disagreement between the parties to the contract in a way that avoids escalation and termination of the contract.

Extension – increasing the period of the contract beyond the termination date initially agreed between the parties

Force majeure – any event or occurrence which is outside the control of the party concerned and which is not attributable to any act or failure on their part to take preventive action.

Hardship – difficulty by either party to a contract in carrying out the terms of that contract.

Increase in Average Earnings Index – the percentage increase (if any) in the Average Earnings Index between the commencement date and [month before price review date] in the first contract year and thereafter the annual increase in the Average Earnings Index between [month before price review date] in the previous contract year and [month before price review date] in the current contract year for the duration of the contract.

Individual placement agreement – an agreement between a commissioner and a provider over the placement of one individual outside any general agreement about terms and conditions.

Individual purchase agreement – see also Pre-placement agreement below – an individual purchase agreement is an agreement between the commissioners and a service provider to provide a service for an individual service user normally within the terms of a pre-placement agreement.

DEFINITION OF TERMS

Key managers or workers – individuals of the respective parties who will be responsible for the operational aspects of the contract.

Law – any statute, by law, regulation, order, regulatory policy, guidance or industry code, rule of code, or directives, or request of any regulatory body, delegated or subordinate legislation or notice of any regulatory body and case law.

Local authority – see Purchasing authority

Material change in circumstance – a change in circumstances which has a significant effect or is likely to have a significant effect on the services provided, the manner in which they are provided or the costs of providing the service to the service user.

Partnership statement – any contract between the parties should underline that the parties' intentions are to work together in partnership and detail what the underpinning principles of that partnership are. Contracts should avoid the use of the word 'partnership' which is a legally defined status under the Partnership Act 1890, which neither party intends.

Primary care trust – NHS health body responsible for the provision of primary and community services, and the commissioning of acute services for patients living within their local area. There will be a number of PCTs within each wider strategic health authority area.

Pre-placement/Pre-purchase agreement (PPA) – see also individual purchase agreement (IPA) above – a PPA is a general agreement on contract terms and conditions between the commissioners and a service provider prior to the placement of any individual with that provider under an IPA.

Provider – any body or agency providing a service under the terms and conditions of the contract described. Provider also means any staff employed or agencies acting on behalf of that body.

Purchasing authority/commissioner – the legal body

which is issuing the contract. In the case of a single authority this will be the named local authority, as if it is on behalf of a consortium of purchasers, the lead commissioning organisation.

Retail Prices Index (RPI) increase – the percentage increase (if any) in RPI between the commencement date and [month before the price review date] in the first contract year and thereafter the annual increase in RPI between [month before price review date] in the previous contract year and [month before price review date] in the current contract year for the duration of the contract.

Review – a reassessment of the individual service user's needs and whether the service they are receiving is achieving the outcomes intended for that individual when it was first set up.

Service user – the individual receiving the care service and named in the care plan and/or assessment. The term service user unless otherwise specified shall also include reference to any person acting under a power of attorney, as next of kin or as an advocate or friend to the person.

Service specification – the description of the services to be provided under the contract and attached as the specification schedule.

System partners – all of the associated organisations who are or should be involved in the system of providing non-acute care services to older people. These may include local authority social services and housing, health and the independent sector.

Termination – The ending of a contractual agreement between commissioner and provider, whether of a whole service, or just of the provision to one individual service user.

Third party contribution – in certain circumstances, councils can make placements in more expensive accommodation than they would usually expect to pay for, provided a resident (in very limited circumstances) or a third party is able and willing to make up the difference

DEFINITION OF TERMS

(to top up). A third party in this case might be a relative, a friend, or any other source. (LAC (2004)20 para 3.2)

Variation – an alteration to the terms of the contract agreement.

BEST VALUE

The aim of the Best Value process is to secure continuous improvements in performance, and to deliver services which bear comparison to the best. The Best Value (Exclusion of Non-Commercial Considerations) Order 2001 SI No 1909 was inserted into section 17 of the Local Government Act 1988 and came into force on 1 April 2000. It applies to all local government services, including social services.

The regulations permit commissioners to consider certain criteria such as the terms and conditions enjoyed by providers' care workers when selecting a contractor. Effectively, they can require contractors to apply minimum pay and conditions which need to be reflected in the fees paid. This will be desirable, since recruitment and retention of good quality staff has a significant effect on the capacity and quality of service delivered.

Commissioners must ensure that their services are responsive to the needs of citizens, are efficient and of high quality and provided within a clear policy framework. They must prepare annual Best Value performance plans, setting out their strategic objectives and corporate priorities. Over a five-year period commissioners should review all their services to consider new approaches to service delivery and set demanding performance targets that will deliver continuous improvement. Therefore, commissioners should work closely with providers to plan strategically for service provision in their area. Councils will want to ensure that the services they commission and purchase meet Best Value requirements and providers will want to ensure that they have developed and can support those services. Commissioners may consider offering a higher price for a higher quality of care in order to encourage care providers to develop and improve their services.

The Local Government Act 1999 promotes Best Value through placing local authorities under a statutory duty to show continuous improvement in the areas of economy, efficiency and effectiveness. This offers local authorities a new opportunity to achieve their statutory duties by working in partnership with providers. The objectives of Best Value will be best achieved by the following.

- Developing better contracts through establishing a contracting framework enabling partnership working, which makes use of a broader range of contract types.
- Improving contract processes thereby ensuring that tendering for services takes place where necessary and appropriate.

Some commissioners have used their market powers to drive prices down and squeeze as much as possible from providers in the short term. Some providers have used market position to exploit prices and have not always delivered good quality services, sometimes because of commissioner pressure for them to keep doing more and more. In the long term this approach will prevent the development of the high-quality services commissioners want, and will remain expensive in terms of high transaction and monitoring costs.

In order to move forward and to allow providers to provide a quality cost-effective service for which they make an acceptable return, commissioners and providers need to better understand the pressures each faces. They need to base their relationship on a partnership approach rather than the traditional adversarial arrangements.

**POTENTIAL MEASURES TO
BE USED IN PRICE REVIEWS**

Average Earnings Index: means the Average Earnings Index for Health and Social Work which is the JVVR AEI: mth and ex bonus: Health and Social Work NSA (July 1999-100) as published by the Office for National Statistics (or by a government department or other body upon which duties in connection with such index devolve).

Increase in Average Earnings Index: means the percentage increase (if any) in the Average Earnings Index between the commencement date and [month before price review date] in the first contract year and thereafter the annual increase in the Average Earnings Index between [month before price review date] in the previous contract year and [month before price review date] in the current contract year for the duration of the contract.

Increase in Retail Prices Index (RPI): means the percentage increase (if any) in RPI between the commencement date and [month before the price review date] in the first contract year and thereafter the annual increase in RPI between [month before price review date] in the previous contract year and [month before price review date] in the current contract year for the duration of the contract.