

TRANSFORMING THE MARKET FOR SOCIAL CARE

The purchase process
Contracting for services
by individuals

6

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.

Acknowledgements

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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

Paper 5 in this series was about the tendering and contractual relationships where the local authority is purchasing care on behalf of individuals. This paper explores the arrangements that individuals may need to make where they are purchasing care themselves, either entirely with their own resources or by using funding from the local authority under an individual budget or a direct payment.

The paper divides into two parts. Section A sets out the policy and legal context of individual contracts and covers the various purchasing arrangements that may be in place. Section B looks at greater detail that individuals may need to consider in setting up any care arrangement.

Appendix 1 provides an example of a local authority individual budget payment agreement.

1. BACKGROUND

Central to the government's agenda for care is changing the relationship between the individual, the state and care providers. Current government thinking from the Green Paper, *Independence, well-being, and choice* (2005), the White Paper, *Our Health, our care, our say* (2006) and *Commissioning framework for health and well-being* (2007) to the recent local authority circular, *Transforming social care* (2008) is increasingly focused on influencing the power balance between the three parties to any care contract in favour of individuals having greater choice and control over their care services.

"...everyone who receives social care support, regardless of their level of need, in any setting, whether from statutory services, the third and community or private sector or by funding it themselves, will have choice and control over how that support is delivered¹."

The approach to delivering choice and control is essentially through fiscal means, ie, giving people a personal allocation of funding by which they can purchase the care they need. *Transforming social care* says:

"In the future, all individuals eligible for publicly-funded adult social care will have a personal budget (other than in circumstances where people require emergency access to provision); a clear, upfront allocation of funding to enable them to make informed choices about how best to meet their needs, including their broader health and well-being".

However, the development of personal budgets does not necessarily mean that the individual cannot ask the local authority to purchase on their behalf or for the authority to make arrangements for the individual about the care they have chosen. As the circular states:

"A person will be able to take all or part of their personal budget as a direct payment, to pay for their own support either by employing individuals themselves or for purchasing support through an agency. Others may wish, once they have decided on their preferred care package, to have the council continue to pay for this directly. The

approach, which may be a combination of both, will depend on what works best for them. The term personal budget will describe this transparent allocation of resources."

The policy also needs to be set in the context that with the increased numbers of older people possessing greater equity and personal wealth than many more people will be purchasing care from their own resources. This increase in individuals purchasing their own care, government clearly believes, will have a profound influence on the market.

Although not explicitly stated, the implication is that by an increased number of individuals purchasing their own care this will have the effect of bringing new forms of provision into the market place, and hence increasing the volume of available provision which in turn will help to keep costs down and drive forward quality.

1 | LAC (DH)(2008)1: Transforming social care Department of Health 2008

2. CONTRACT ARRANGEMENTS FOR THE INDIVIDUAL

Currently there are a number of arrangements for individuals purchasing their own care.

- A person may purchase care from their own resources. This could vary from an informal arrangement with a friend, neighbour or relative through to the purchase of a residential care home place.
- A person who has had an assessment from the local authority and has been found eligible for services may purchase community care² using a direct payment from an overall sum of money allocated to them in the form of a personal budget.
- A person may also ask the local authority to purchase certain services on their behalf using all or part of their personal budget allocation.

Each of the above arrangements may bring into play a variety of contractual relationships. For example, individuals informally purchasing care may have no document describing the relationship between the person who is providing care and the person receiving the service, yet there may be a variety of factors that need to be considered. Is the person employed, what insurance liabilities may be incurred, what happens if the individual providing care is not available?

Equally individuals purchasing a place in a care home may be uncertain of their legal rights and obligations. What care services are providers obliged to offer and which arrangements are legally binding and enforceable?

Informal purchase of care

There are many informal purchasing arrangements that occur between privately paying individuals and those offering a care service. These arrangements are effectively invisible to any regulatory body and are between the individual and the person(s) involved.

If the relationship is based on trust and mutual respect it may be an arrangement both parties benefit from. However there are issues such as the hours which people are caring for, how much they are being paid, if payments are being declared as taxable income and whether the care is of an acceptable and sustainable standard.

If the relationship is not based on mutual regard it may leave both parties open to abuse. For example the carer may be asking for payment above and beyond the service they are providing or conversely not being paid enough. Also an informal carer may be lifting inappropriately and hence physically damaging themselves or the individual they are caring for. A completely informal arrangement with no reference to any external body or contractual relationship clearly does have risks.

For individuals with a direct payment and who are buying services that do not need to be registered, such as domestic help, Age Concern advise³ that the individual still should have a contract to outline both parties' rights and obligations to protect their interests. This is important as the arrangement is only between the individual and the provider not the local authorities.

Employing a personal assistant (PA)

Research indicates that the vast majority of service users want to be supported to live in their own homes and to be as independent as possible and be supported to live their lives as they see fit.^{4 5 6}

Individuals may decide that employing someone to help them at home is a reasonable option. However they will be an employer and not a purchaser. This means that they are responsible for the personal assistant (PA) as an employer under employment law. This means that the individual will have to make arrangements, within the law, for a whole range of employment issues including health and safety of their employee, insurance, liability, police checks and ensuring the right tax code etc. This is a fair deal of responsibility and they will also have to develop constructive supervision skills to ensure that their needs/outcomes are being met by the PA.

Such relationships can be difficult as a guide to independent living suggests:

“Depending on your particular circumstances and the amount of time you spend together, your personal assistant may become the person who knows you best in the world. This may present you with the problem of maintaining an appropriate balance in your relationship.”

2 | Community Care (Direct Payments) Act 1996: policy and practice guidance
Department of Health 2000

3 | Help with care in your own home Age concern 2007

4 | Getting older people's views on quality homecare services Joseph Rowntree
Foundation 2001.

5 | Quality of Life in Older Age: Messages from the Growing Older Programme Help the
Aged 2004

6 | Anticipating Future Needs Toolkit Care Services Efficiency Delivery (CSED) 2007

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FOR THE INDIVIDUAL**

You have a business arrangement with your personal assistant, yet he or she may also in some respects be a friend. Keeping both these elements in harmony can be difficult⁷.

Another area of difficulty is that personal assistants have not been registered by the care regulator. This means that the actual quality of the care is not regulated. The arrangement can be potentially more risky, complicated, and have fewer safeguards against potential bullying, abuse, and neglect. There are also issues about how arrangements will work if the PA has to take unplanned time off work, such as sick leave or if the arrangements break down.

On an individual level safeguards can be put in place. For example when recruiting a PA it is important for the individual to state clearly in their specification what behaviour they expect from a PA and the tasks they wish them to undertake. This forms the basis of a contract which sets out the rights and responsibilities of both the individual employer and the employee. Most employment contracts do not need to be in writing although it is sensible to do so to avoid disagreements that may come later on. However under the Employment Rights Act 1996 workers are entitled, irrespective of the number of hours they work, to have a written statement of the main terms and conditions of employment within two calendar months of starting work.

The local authority has a role in supporting service users to employ PAs by investing more in advisory or advocacy organisations to assist individuals in dealing with employment issues, any conflict of interest or care concerns. The local authority also needs to ensure they have the capacity to respond to emergencies and a market of good flexible suppliers.

Domiciliary care

The biggest bulk of care at home is provided by domiciliary care agencies. There are 4,847 registered home care agencies, the majority privately run, providing support to people to live at home⁸.

This area will expand given people's desire to live at

home. Consumers who choose to contract with a care agency should know exactly what service they are getting for their money, how the service will be delivered, contingency plans in case of emergencies and the rights and responsibilities of both parties. There are four documents that set out the parameters of individually purchasing care from a domiciliary care agency. These documents are:

- Statement of purpose.
- Service user guide
- Individual service plan
- Individual service contract

These are required by law under the Care Standards Act 2000 regulations.

Statement of purpose and service user guide

Providers have a duty to ensure that their service is communicated to potential buyers. Individuals showing an interest in a service should be issued with a service user guide with a statement of purpose from the care agency. These documents should cover:

- aims and objective of the service
- nature of the service
- client group
- overview of assessment, planning and reviewing processes
- key contract terms and conditions
- complaints procedures
- quality assurance
- key policies and procedures
- hours of operation
- insurance
- Care Quality Commission and local authority and health authority contact details.

The statement of purpose and service user guide needs to be written in plain English and available in different formats, Braille for example, and large print, and the documents should also be made available in different languages if required.

The individual service plan.

A care agency must carry out an assessment and review of the service user's needs and produce an individual

7 | Employers Information The National Centre for Independent Living www.ncil.org.uk

8 | The state of social care 2007-08 Commission for social care inspection 2009

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service plan. The individual service plan sets out the detail of the care to be delivered. It should emphasis areas of flexibility needed, so that the service user can be as independent as possible, and any areas of risk or specialist care required. It is crucial that the service user is at the centre of all planning of care and their choices paramount.

The individual service contract

Each service user should be issued with a written contract by the agency within seven days of commencement of the service. The contract should specify the following⁹ (some of these areas may be addressed in the above documents).

- Name, address, and telephone number of agency (including out of hours arrangements).
- Individual contact numbers of their main carers and managers.
- Parameters of care established, for example what tasks carers will and will not do and activities that others may undertake. There should be specifications on where the care can be flexible.
- Circumstances in which the service may be cancelled or withdrawn (from both parties).
- What the fees are and who will pay them
- Rights and responsibilities of both parties (including insurance and liability).
- Specified arrangements for monitoring and review of needs and corresponding changes to the assessment and individual service user plan.
- Quality assurance, monitoring and supervision of staff;
- Supplies and/or equipment to be made available by the service user and by the agency.
- Health and safety responsibilities of both parties.
- Arrangements to cover holidays and sickness;
- Key holding and other arrangements agreed for entering or leaving the home.

The care agency should ensure changes of care assistants are kept to a minimum and prompt timing of visits. If care assistants are routinely late or timing unpredictable this prevents the service user planning their day at their will and hinders them from being in control of their lives. It also can cause disruption and

increase risks, particularly if the service user has dementia, where routine is important, or service users need medication at very specific times. Service users or the representative should ensure these needs and arrangements are specified in the individual service plan and check what the agency’s policy is on timing of visits and key workers.

An individual buying care is considered a consumer and is protected under the Unfair Terms in Consumer Contracts Regulations (UTCCR’s). The government’s consumer advice says a contract standard term is considered unfair if:

“Contrary to the requirement of good faith it causes a significant imbalance in the parties’ rights and obligations under the contract, to the detriment of consumers.”¹⁰

Standard terms in consumer contracts can also be considered unfair if they are not in plain and intelligible language. This means if there is doubt over what a term means the interpretation will be of one most favourable to the consumer.

Therefore service users need to be mindful that contracts may have unfair terms and conditions and if they are in any doubt should access specialist advice. The importance of advocacy, financial and legal advisory services will become increasing important in a personalised care system and is an area that the local authority will need to facilitate in relation to social care.

Purchasing residential care

The other option for individuals purchasing their own care is residential care.

Making the choice to move to a care home is a very difficult decision for individuals. Various research projects have shown that most people do not want to move to a care home should they become ill or disabled¹¹. Moving to a care home is an unattractive option for the majority and many older people see this as a very last resort¹². Despite this it is estimated that 410,000 older people lived in care homes throughout the UK in 2004.¹³ More recent statistics show:

9 | Domiciliary Care National Minimum Standards Regulations Department of Health 2003

10 | Consumer Direct www.consumerdirect.gov.uk

11 | Anticipating Future Needs Care Services Efficiency Delivery 2007

12 | Securing Good Care for Older people (The Wanless Social Care Review) King’s Fund 2006

13 | Care homes for older people in the UK – A market study Office of Fair Trading 2005

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“As at March 2008, over 18,500 registered care homes, run by private and voluntary organisations and councils, provided almost 450,000 places to adults of all ages”¹⁴.

For those that do make the move, decisions are often made at very difficult times in their life. Individuals are often in times of crisis, poor physical and mental health and under pressure by others to make a decision (for example hospital discharge)¹⁵. For privately funded care the costs are significant and involve major repositioning or selling of personal assets. The vast majority of older people will end their lives in a care home.

Given such a fundamental change in an individual’s circumstances it is vital that they have accessible and reliable information to make informed choices, safeguards that protect their interests and rights, fair and clear contract terms and access to complaints and compliments procedures.

Providers of care homes should provide a statement of purpose which outlines the aims, objectives, ethos of care, services and facilities and terms and conditions of the care home. Alongside this should be a service user guide for current and future service users. this is a requirement under the Care Standards Act 2000 regulations.¹⁶ Department of Health guidelines point out that when the service user makes a decision regarding the home of their choice the service user should be issued with a statement of terms/contract. It should cover the following:

- Rooms to be occupied.
- Services covered by the fee.
- Fees payable and by whom.
- Additional services (not included in set fee).
- Rights and obligations of the provider and the service user and who is liable if there is breach of contract.
- Terms and conditions of occupancy (including period of notice and basis of their stay .i.e. permanent, temporary or trial period).

Rights and obligations should be carefully considered. Service users will need to know what rights they have and obligations that the provider has to them relating to the following, for example:

- They are away from the care home, such as a hospital admission.
- There are changes in their physical and mental health.
- How valuables are secured and related insurance issues.
- The arrangements in the event of death. What are reasonable timescales for family to clear the room.
- The complaints procedures.

Like domiciliary care consumers, care home customers need to be wary of unfair terms and conditions in their contracts. The Office of Fair Trading (OFT) reports that unfair terms and conditions in care home contracts will most likely be around fees and fee review. This imbalance gives the provider potential scope for arbitrary fee rises. This is a major area of concern for service users, judging from the level of complaints received by the OFT about this issue. Moreover:

“...analysis of care home consumer contracts found problems in the majority of such contracts for older people funding their own care. In particular, nearly three-quarters of the contracts we analysed had fee related terms that were either unfair or unclear, and in 47 per cent of the contracts it was unclear who should pay what amount.”¹⁷

Older individuals who purchase their own care are potentially vulnerable to unfair terms and conditions in their contract. The local authority when planning for the whole population should consider how they can raise consumer knowledge¹⁸ and create avenues of support and redress. The authority may consider facilitating links with organisations outside of the sector to deliver on this such as community legal services and consumer organisations.

Legal rights and obligation under direct payments and personal budgets

At March 2008, 73,540 people of working age, older people and carers used direct payments and 4,800 adults had individual budgets¹⁹.

If an individual is receiving a personal budget as a direct

14 | The state of social care 2007-08 Commission for Social Care Inspection 2009

15 | Care Homes for Older People in the UK – a market study Office of Fair Trading 2005

16 | Care homes for Older People National Minimum Standards Department of Health 2003

17 | Care Homes for Older People in the UK – a market study Office of Fair Trading 2005

18 | A fair contract with older people? A special study of people’s experience when

finding a care home Commission for Social Care Inspection 2007.

19 | The state of social care 2007-08 Commission for Social Care Inspection 2009

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payment they will need to enter into a contract with the local authority. It should set the general rules on how the money should be spent, the amount, how it has been calculated (including contributions from the Individual under the fair charging assessment), when and how often the money shall be paid.

It should also clearly set out what records the individual is expected to keep, what will happen in an emergency, when a review will be held, how to feed back comments, complaints, and compliments to the local authority and conditions for terminating the agreement and timescales.

The agreement should be as clear as possible and presented in away that the individual service user will understand; this may require different formats with font and colour or presented in different languages.

The 'general rules' and 'record keeping' part of the contract provides scope for the local authority to influence the wider market as the authority can briefly set out some suggestions. Here are some examples.

- They can advise that the individual purchases from an accredited provider, though not ruling out unaccredited agencies.
- They can signpost at this stage any useful toolkits (local or national) that are helpful to the individual arranging their own care, for example, guides on the practicalities of employing someone.
- The local authority should emphasise the importance of record keeping as this is a key source of data capture. This information is important as it helps establish whether the buying arrangements are meeting the individual outcomes at a viable cost.

The previous section looked at the various buying arrangements that individuals can enter into, the different documents they should receive and what areas the documents should cover. This section will go into more detail about what should be in these documents and what areas should be given particular consideration by the individual before entering into a formal agreement.

1 EMPLOYING A PERSONAL ASSISTANT

Individuals who employ a personal assistant (PA) are employers and are required to produce a contract/written statement of employment under the Employment Rights Act 1996. The document should include the following.

Rights and responsibilities

The document should include the overarching rights and responsibilities of both the employer and employee²⁰. This may include a commitment from both parties to maximise independent living. The employer should state what they will not expect the PA to do in terms of tasks. For example, the document should state that the PA should not stay past agreed times/hours (except only in emergency situations). The document should also make clear that the employer will keep records on the PA's performance. The employee must agree to responsibilities regarding confidentiality, to complete duties specified and to arrive promptly for work. Both parties have responsibilities for health and safety.

Commencement of employment and continuous employment

If there are any breaks in employment concerning an employee this will affect a number of statutory employment rights. Both the employer and employee should be mindful of what the commencement of employment date is in the written statement in case it inadvertently interrupts any continuous employment rights. The rules regarding continuous employment are complex and if there are any doubts both parties should seek legal or specialist employment advice.

General details of the employment

The written statement should state clearly that the employee is employed as a personal assistant, what this entails and place of work.

Pay

How much the PA will be paid, and when, should be clearly specified. It should state whether payments will be made in arrears or in advance, and set out any premium rates for working bank holidays, weekends, or nights. It should also make explicit any deductions that may be taken from their employer's pay advises Acas.²¹

Pay levels have to be in line or above the national minimum wage²². As of October 2008 the main adult rate (22 years+) was set at £5.73 per hour. The minimum wage development rate (for 18-21 years old) was set at £4.77 and (for 16-17 year olds) it was £3.53.

Hours of work

Expected hours of work should be made explicit in the written statement. This should include the basic hours and outline any flexibility required for working outside of these. Overtime may be voluntary, compulsory, or guaranteed, and should be presented clearly so the employee knows exactly what level of commitment the post will entail.

The Working Time Regulations 1988²³ state that workers should not work more than an average of 48 hours a week over a 17-week period. For night work, employers should try and ensure that their PAs are working for no more than eight hours for each 24 hour period over 17 weeks.

If the employee wishes to work more than these limits this must be stated in writing and agreed upon, however the agreement should be able to come to an end²⁴. It is not advisable given the nature of PA work to work more than set hours. PA work can be physically and emotionally tiring and the need for good relationships is paramount for the arrangements to be a success. Too many hours could offset such a necessary balance. The employer should acquaint themselves with these regulations and ensure they are not acting unlawfully or putting their care arrangement in danger of early collapse from expecting too much from their PA.

Holidays

Under the Working Time Regulations 1988 workers should have at least four weeks, paid annual leave.²⁵ More generous allowances can be negotiated, however these need to be clearly stated in the written statement, as should arrangements for bank holidays, details over holiday pay, how this is calculated, and how it is accrued.

20 | A guide to finding and working with a personal assistant Spinal Injuries Association 2007

21 | Advisory Conciliation and Arbitration Service (Acas)

22 | National Minimum Wage Act 1998

23 | Working Times Regulations 1988 (amended 2002)

24 | Producing a written statement Acas

25 | Working Times Regulations 1988 (amended 2002)

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Sickness absence

If the personal assistant is ill they should be paid statutory sick pay for up to 28 weeks of absence due to sickness. This means that the employer has to operate a statutory sick pay scheme (SSP). According to HM Revenue & Customs²⁶ details of this have to be in the written statement or in a separate document. If the latter this must be clearly stated and referred to in the written statement.

The employer will need to know whether the person they are employing is exempt from statutory sick pay, calculate how much is due, pay them, keep records, and make arrangements to have pay recovered by deducting payments to the tax office. This is considerably complex for an employer especially in times of illness. Local authorities should ensure local services are developed to reliably assist the employer with this process on an ongoing basis or in specific times of illness/relapse.

Ending employment

The contract should state whether the employment is a permanent or temporary position. If the period of employment is for a fixed notice, the date when the employment ends should be clearly specified.

When ending the contract there should be reasonable periods of notice given by both parties. The legal minimum is a week's notice from the employee after a month of employment. The employer has to give one week notice within the first year (after a month of employment) and two weeks for two years of employment, three weeks for three years of employment and so on up to 12 years.

These notices can be extended as long as they are clearly referred to in the contract and agreed by both parties.

Disciplinary procedure

Local authorities need to be mindful that as these arrangements are between a PA and the employer they are not covered under care regulations and the only protection regarding concerns of conduct is under employment law.

The Employment Act 2002 requires that there has to be a disciplinary procedure (DDP) in place. Without a DDP any dismissal will be automatically considered unfair.

Any concerns about the employment should be discussed with the employee first and foremost; if there are still issues a written warning should be given. If issues are not resolved there are statutory disciplinary procedures that can be followed. This can be a standard DDP (which is a three-step process) or a modified DDP (a two stage process). Details of these have to be clearly stated in the written statement of employment.

Local authorities should consider facilitating local initiatives that can assist with issues around employment tribunal matters, whether this is through mediation, advocacy, advisory or information methods.

Tax

The employer has a legal responsibility to operate PAYE if their earnings are in line with or more than the National Insurance Lower Earnings Limit (LEL). For the tax year 2008-09 this was £90 a week, £390 a month or £4,680 a year.

Insurance

It is a legal requirement for employers to include employer's liability insurance to cover PA employees. Depending on the individual insurance deal this may cover other employees of other services that work in an employer's home. Employer's liability insurance insures the employer against the PA having an accident or becoming ill while working for them, in cases where they might be held liable.

Public liability insurance should also be taken out. This insures the employer against any damage or injury caused to someone else by the employer or the PA. The National Centre for Independent Living advises on their website that:

"Sometimes 'employer's liability insurance' and 'public liability insurance' can be included in a comprehensive household policy, however, many standard policies do

26 | HM Revenue & Customs www.hmrc.gov.uk

27 | The National Centre for Independent Living www.ncil.org.uk

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not cover this, so check carefully".²⁷

The National Centre for Independent Living also advises that employers consider personal accident insurance cover in case of personal accidents and injuries.

They also recommend considering legal costs insurance. There are insurance deals that can be bought to cover legal costs in case of an employment issue going to tribunal. The National Centre for Independent Living recommends employers taking out such insurance to save potential excessive legal costs.

It is also advisable that employers ensure their PAs are Criminal Records Bureau (CRB) checked. This is not a legal requirement however.

The local authority should make the above information clear and accessible to all who are thinking of employing a PA as it has considerable impact on the success or failure of a care arrangement.

2 CARE HOME AND DOMICILIARY CARE SERVICES

The individual buyer is a consumer when contracting for these services and the main areas of consideration are as follows.

Rights and obligations (including breach of contract)

The contract should set out the rights and obligations of both parties. They should be clearly set out, intelligible and not give undue advantage to either party.

The contract should be clear about what constitutes a breach of contract, when it may occur and who is liable and should not give the care home sole discretion on this.

Liability

Service users when purchasing domiciliary care or entering into a care home agreement should expect to be cared for well, have their possessions looked after, be safe, free from harm, have their needs/outcomes met, and enjoy a good quality of life. Care services have to ensure their services deliver on basic minimum standards as set out in the Care Standards Act 2000. Care services should not exclude liability for failure to meet with these standards.

In regard to care homes the Office of Fair Trading (OFT) reported:

“We have concerns about care homes using terms excluding their liability for failures relating to the care of the resident or the care of the resident's possessions or clothing.”²⁸

Therefore service users need to regard exclusion/limitation of liability clauses and disclaimers/exemption clauses with particular scrutiny. These clauses attempt to limit the service provider's legal liability for death, personal injury or other losses to the service user even though the provider may be at fault from an act or omission. These clauses are more than likely to be deemed unfair in a court of law and should be treated with caution by the service user when agreeing to a contract.

According to the OFT, terms of a contract may be considered unfair if they hinder a service user from seeking redress from the provider if they haven't met with their obligations of care. An example of this could

be a clause stating that the administration of medication is at ‘the resident's risk’ as these could be unfairly relied upon to exclude the care homes liability for its own negligence.”

Another area of caution is around care home residents belongings and valuables. Again, terms that use words such as ‘at your risk’ and the ‘management cannot accept any responsibility’ are not considered fair by the OFT as it gives scope for the care home to deny liability even though they may be at fault. Likewise the care home should take responsibility to look after belongings after a death until the family have retrieved them.

Payment of fees and charges

The contract should state exactly how much the fees will be and what services are included in the fee calculation. There must also be information on what is not included in the fee calculation such as optional extras. In a care home optional extras may include hairdressing, chiropody, newspapers, or private telephone. Contracts for domiciliary care may state that toiletries or cleaning products are not included in the service and will need to be provided by the service user so they can carry out tasks specified in the contract. The contract should state clearly who will pay the fees and how often.

There should also be fair terms regarding fee increases. This is more pertinent for people in care homes given that they are particularly vulnerable and reliant on a provider for their home. It is legitimate that price review and fee variation terms are within contracts. For example an individual's needs may change over time and this may cost the provider more to provide care. It is reasonable in such circumstances for the price to be reviewed and changed to reflect this.

The contract should state specific circumstances when fees may be reviewed and detail around what increases would be considered fair. Consumers need to be very cautious and look out for unfair terms and conditions regarding price review. An example of an unfair standard term would be for example:

“Fees may be reviewed from time to time²⁹

²⁸ | Guidance on unfair terms in care homes contracts Office of fair Trading 2003

²⁹ | Care Homes for Older people in the UK – a market study Office of fair Trading 2005

2. CARE HOME AND DOMICILIARY CARE SERVICES

This ambiguous term gives significant leeway to the provider to arbitrarily increase fees without any standard criteria.

It is of crucial importance that the individual or their representative should be able to understand what is in a contract. Where language is not plain or intelligible they should seek further clarification before entering into an agreement which may give unfair advantage to the provider.

This is particularly important in the care home market given the OFT's findings that 66% of care homes they reviewed had one or more fee-related terms that could be considered unfair.

Financial penalties

If residents in a care home default on a contract they may have to pay compensation. However, this should not be more than the amount needed to cover the loss caused to the care home. Any terms to the contrary should be treated with suspicion as they may be considered unfair. Also any interest charged on fee arrears should not be excessive or disproportionate: *"A rate excessively above the clearing banks' base rates is likely to be considered unfair."*³⁰

Disproportionate risk to the consumer

In regard to care homes it may be that the provider will require payment in the event of the resident's default from a sponsor. However if a service user representative is asked to 'waiver rights of surety' they should be circumspect about agreeing to this as they may not realise the extent of the liability. Any agreement that requires a sponsor to sign a guarantee should clearly state what this actual entails by explaining who is liable to pay the fees, in what circumstances the fees are payable and situations where the sponsor has liability under the agreement.

In the event of death

Although not an easy subject to broach on admission it is important that attention is paid to terms regarding arrangements in the event of death. Agreements should state how long fees will need to be paid for after the death of a service user. This is particularly relevant to

care home residents.

The service user, before agreeing to a contract, will need to make sure that what is specified in the contract is acceptable to them and this may be very different from one care home to another. For example, one care home may require fees to be paid until the end of the month, or a few weeks charged after death to allow for the deceased resident's family to clear out the room.

Trial periods

Any trial periods of a service should be clearly stated in a contract and, for the care home resident, the basis of their stay made explicit. It is reasonable and standard for care homes to offer a trial period in a care home to allow time for the resident to establish whether or not they want to stay before committing to a long-term contract. These agreements can be ended on both sides within 24 hours without reasons.

However any pre-payments made to cover a full temporary stay should be reimbursed if the stay is cut short for whatever reason. Service users should check services policy on refunds, which should be stated clearly in the contract.

Providers right to vary terms

A provider cannot vary terms of an agreed contract without the service user's consent.

However, care needs do change over time and a variation in service may be needed to effectively meet these changes. For service users with a care plan/support plan from social services, a variation should only be agreed with reference to a reassessment which can confirm a change in need, hence justify a variation, with service user consent. Those without a care plan/support plan should be consulted and the change only agreed with their consent.

In the event of a service user's needs changing, the care service should specify that it can either no longer provide the care or will vary the arrangements accordingly and sufficient notice should be given.

30 | Care homes for older people in the UK – a market study Office of Fair Trading 2005

2. CARE HOME AND DOMICILIARY CARE SERVICES

Care services and review

Service users in care homes or using domiciliary care should regularly have their care needs reviewed. Care needs should be reviewed after any trial period and then reviewed annually. If a service user's needs have changed reviews should be carried out when and as required.

Period of notice

Care services are required to give the service user and their next of kin a reasonable period of notice. The period of notice should give enough notice for the service user to make alternative arrangements. Period of notice should be specified clearly in the contract and notice required should apply to both parties. The contract should also state clearly how the service user will give notice.

Grounds on which an agreement can be ended and refunding of fees must be clearly set out in the contract. Acceptable reasons for ending a contract would include the following.

- Voluntary decision made by the service user.
- Need to move to another service where needs will be more appropriately met.
- The service user to go into hospital or another care environment at short notice.
- Death of the resident.
- Breach of contract or non-payment of fees.

If a service user is in serious breach of agreement the care service is able to cancel services earlier. However the same right should apply to the service user if the care service is in serious breach. If not, this may be considered unfair. Also:

*"Where the provider dissolves a contract in this manner they should not retain sums paid for services not yet supplied."*³¹

Confidentiality

The contract should make explicit that it will be necessary to exchange personal information to care for a service user appropriately not just among workers and

their managers but at times the local authority and other assessment agencies. The contract should refer to the agency's policies and procedures of confidentiality, which should outline circumstances where confidentiality may be breached and areas of redress.

The service user should be assured that their personal information will be treated within the strictest confidence during training and group supervision activities. National minimum standards guidance also says provision should be made for safe storage of personal information.

Complaints and compliments

Service users should be assured that their views and opinions will be listened to and acted upon in ensuring and improving quality of services. There should be good quality assurance mechanisms in place and these made explicit within the service user guide, statement of purpose and contract.

There should be a transparent complaints procedure which is accessible and straightforward. In the case of care homes the Office of Fair Trading recommends that contracts do not state that complaints in the first instance have to be in writing; instead the first port of call should be complaining in person.

31 | Guidance on unfair terms in care home contracts Office of Fair Trading 2003

Individualised budget payment agreement

This agreement is the document which tells you about your individualised budget payment – your money and how you will be paid.

1. Information about you and social services
2. Basis of the agreement
3. About the individualised budget payment
4. General rules on how to use the money
5. What records you should keep
6. Review of the individualised budget payment
7. If the arrangement should break down
8. Comments, complaints and compliments
9. Ending the agreement
10. Signatures

Information about you and social services

This agreement is between:

Oldham Metropolitan Borough Council (OMBC)
 Civic Centre
 West St
 Oldham

(Referred to in this agreement as 'we' or 'us')

and

Name and address of person receiving the individualised Budget Payment

(Referred to in this agreement as 'you')

and

Name and address of agent or chosen decision maker

Basis of the agreement

This agreement is made on the basis that:

An assessment of your needs for community care services has been completed and that you are eligible to receive support services as identified/shown in your care/support plan.

You are willing and able to secure the service detailed in your care/support plan yourself or with support (this may be through a nominated agent or chosen decision maker), and we are willing to make your individualised budget payment available to you to enable you to buy the support you need.

About the individualised budget payment

The amount of money you will be paid

You will be paid _____

This breaks down as shown below: -

From OMBC _____

The above OMBC amount has already taken into account and deducted any applicable charges through the fairer charging financial assessment.

From the following as applicable: -

	Yes	No
The Independent Living Fund		
Supporting People		
The Health Authority		
Continuing Health Care		
Access to Work		
Disability Facilities Grant		
ICES		

When you will be paid

The payments from OMBC will be made 28 days in advance, then following the standard 4-weekly cycle. The first payment will be made on _____

If agreed by both parties to be in your best interest the frequency of the payments may be altered. This can be discussed with your care manager/agent/chosen decision maker.

How you will be paid

The payment will normally be paid into your nominated bank account.

All money you receive for your support needs can be paid into this account including money from ILF or other sources. If you choose to use an agent your money can, by agreement, be paid directly to them for your services.

General rules about how to use the money

The individualised budget payment is to buy the services as detailed in your individual care/support plan. This support plan is flexible and you should contact your care manager/agent/chosen decision maker if you wish to change anything.

If you wish to use a care agency we recommend that you purchase care from a provider who is registered with the Care Quality Commission who inspect the standards provided by agencies nationally. There is a list of registered providers available.

You may also use your payment to purchase a service from an agency, which does not need to be accredited, for example a cleaning or ironing agency.

This does not stop you from purchasing the services directly from your own employed staff. If you do choose to employ your own staff we have a toolkit, which gives detailed advice on becoming an employer.

What records you should keep

You are responsible for using your allocated money wisely with the support of your agent/chosen decision maker. Any bank charges/legal charges/Inland Revenue costs will be your responsibility.

You will be required to use the individualised budget payment legally.

You will need to keep basic records, eg bank statements of what the money is spent on. This will help you, your agent/chosen decision maker and your care manager to review the services and your individualised budget payment at your annual review.

Annual review of the individualised budget payment

This will help you to look back over the year at what you have achieved and if your allocation will remain the same based on your needs.

Arrangements break down or your needs change

If things go wrong or your needs change you should contact your agent/chosen decision maker or your care manager.

If your allocation needs to change because of a change in your needs/circumstances we will give you four weeks notice.

Comments, complaints and compliments

You have the right to comment, complain and compliment under the council's social services department's complaints procedure about the operation of this agreement. A copy of the fact sheet can be found in the information pack.

Ending the agreement

Either yourself or ourselves may terminate this contract by giving four weeks notice in writing to the other party.

We may terminate this agreement with immediate effect if, after investigation, it is found you are using the money illegally or not in the best interests of the person receiving the individualised budget payment.

Before terminating the agreement we shall work with you and your agent/chosen decision maker to find a resolution to the issues wherever possible.

Signatures

Here both parties are signing up to the agreement, this means that all agree to work to the detail in this document.

3rd Party
Your agent or chosen decision maker
Signature
Date:

1st Party
Us - Oldham Metropolitan Borough Council
Signature on behalf of OMBC
Date:

2nd Party
You – the person receiving the individualised budget payment
Signature
Date: