# Tool 10: Outcomes-based home care – contract contents

This document is part of the Home Care Outcomes-based Commissioning Toolkit developed by the National Commissioning Board for Wales to assist home care commissioners and providers to move the home care service towards a more outcomes-based approach. This is an outline document that will be developed further as the project moves forward.

Don't forget that procurement approaches and models are now subject to the provisions of the Public Contracts Regulations 2015 (PCR) which have made fundamental changes to the way social care (and other 'light touch') services can be procured, so make sure you check these regulations when considering your approach. See guidance by LEC for further information about the PCR.

## 1 Core Material: Overarching principles of this toolkit

The provision of social services in Wales is governed by the Social Services and Well-Being (Wales) Act 2014. The Act is accompanied by a Code of Practice and guidance on the exercise of social services functions and partnership arrangements. The Code of practice stipulates that:

*"In order to seek to promote the well-being of people who need care and support and carers who need support, local authorities need to understand what matters to people and the personal outcomes they wish to achieve".*

The provision of health services in Wales is the remit of NHS Wales under the direction of the Welsh Government. Local Health Boards have responsibility for all commissioning and provision of health services in their area. The Welsh Government have produced an Outcomes Framework for the NHS in Wales that it describes on its website as follows:

*"The NHS outcomes framework includes only outcomes and outcome indicators that have been determined to measure health related well-being. A delivery framework is in place to support the delivery of health and well-being by health boards and health trusts. "*

Generally, the toolkit identifies that there are three models of outcome-based commissioning:

- **Model 1: Outcome Based Care Planning:** (Using outcomes as the basis for planning and reviewing a care package).

- **Model 2: Reward for Achieving Outcomes and customer satisfaction:** Again, Individual focused but concentrating on the financial aspects of meeting outcomes.
- **Model 3: Population based accountability for Outcomes:** Responsibility for the provider(s) for meeting the outcomes of a group of people across a defined geographic area.

## 2 Purpose of this tool

Contract law in the UK is a very well developed and all local authorities will have their own legally-qualified specialists to advise on this growing area of activity and this tool does not seek to replace the role of local authority legal advisers. Rather, the purpose of this tool is to provide an outline of what is involved in a contract and to identify some of the considerations that may be relevant to an outcomes-based contract.

## 3 Contract Law overview

This overview is a generic description of contract law. It should be noted that home care contracts for multiple packages of care may be based on a model where the local authority and the provider enter into an overarching contract and individual purchases of care packages are made under this especially if models 1 or 2 are adopted. The terms of this type of arrangement is often known as a call-off arrangement. This is a standard approach in many local authorities for home care (and other) services. Typically, local authority home care procurements will include a number of variants to the standard approach described below.

There are many resources that will provide an overview of contract law. Much of the information here is taken from the ''Law: plain and simple"[1] website. Some of it has been tailored for these services by Léonie Cowen. The main aspects of the law on contracts are described there as:

- Formation of contract (offer, acceptance, consideration, intention). The offer will be part of the procurement documents and acceptance will be the outcome of the procurement process i.e. the award and any individual call-offs.
- Contents (terms, exclusions etc).
- Vitiating factors (misrepresentation, mistake, duress, illegality, etc.).
- Discharge (performance agreement, breach etc); and
- Contract period and length. This would be identified in the procurement documents and with an outcome based approach a long contract period is sensible (for example up to 15 years with break provisions) to allow for the development of longer term relationships between the local authority and provider.
- There are a number of other provisions which would typically be in a home care contract. By way of example only (this is not a comprehensive list) the specification, call off arrangements, pricing matrix, quality assurance / performance management framework, modification and variation provisions

[1] http://www.lawplainandsimple.com/legal-guides/article/contract-law-explained

(which must take into account the PCR) and termination of the individual purchase agreement and contract as a whole. Note, these are typical examples and the adoption of a particular commissioning model will affect the structure and content of the contract.

Other key points are the importance of both parties consenting to the contract and the difference between an 'offer' (capable of being accepted without further discussion) and an 'invitation to treat' (a willingness to negotiate on an offer).

Traditionally there has often been considerable variation between the contracts used by local authorities to commission home care, some of this reflecting the different procurement models used, but some of it simply reflecting different practice, perhaps arising out of local experience. A particularly comprehensive contract structure (pre-PCR) can be found below.[2] The terms in a contractual agreement are incorporated through definitive promises by reference to other terms or through a course of dealing between two people. English Contract Law allows plenty of freedom for people to agree the terms and content of a deal, although CPR may limit this freedom significantly.

What perhaps makes an outcomes-based contract different to those that we are used to is the notion of outcomes as the 'currency' (at least in part) of the contract. In effect, that notion affects all the aspects of contract law. Traditionally many local authority contracts have struggled to catch up with changing practices and policy. Whilst there may be some collaboration or co-production of the commissioning and procurement process this does not necessarily extend to the drafting of the contract conditions. A modern person-centred outcomes approach requires a longer contract period and a different approach to the contract drafting to support co-production and delivery. Rather than a 'task and finish' approach it will be based on the parties and service users working together to deliver agreed outcomes. The structure of the contract should be more modern with greater use of schedules, a collaborative different approach to quality assurance/contract monitoring, transformation, variations and modifications, fees and most of all to the specification which will form part of the contract.

## 4 Outcomes-Based contracting

As pointed out in '*Outcome-based contracting: Past, present and future'* (see resources, below): *'Outcome based contracting is not new. It's been used in parts of the outsourcing industry for years, most notably manufacturing.'*

That document also helpfully lists the key ingredients for successful outcomes-based commissioning, which has an impact upon the contracting arrangements. They are:

- Focus on those services which can directly influence business outcomes.
- Objective performance measurement.
- Greater supplier control over service delivery.

[2] https://www.kirklees.gov.uk/beta/adult-social-care-providers/pdf/domiciliary-care-services-adults-contract-kirklees.pdf

- Understanding the customer's business.
- Greater transparency and better governance.

Any contract used for outcomes-based home care has to incorporate these key ingredients. The same collection outlines the challenges associated with outcomes–based contracting. They are:

- How to measure contract performance.
- Specifying business outcomes that are high level enough to achieve the benefits of outcome-based contracting but remain specific enough to measure is a challenge. This can be achieved by tying outcomes to measurable data and agreeing upfront how to best create a metric that indicates the outcome is being delivered.
- Creating mutual incentives like gain-shares (a mechanism for sharing the benefits achieved by changes to the way that the services are delivered) or other payment mechanisms can also help to improve supplier collaboration.
- How to share risk (of success as well as failure). This requires a definition and understanding of what risk means within the context of home care services (and any other services being procured). Thereafter a risk matrix can be designed and reviewed regularly as a core project tool throughout the commissioning and procurement process. It is also recommended that the parties should consider the whether the model is delivering as anticipated as part of an annual quality assurance review. A series of different types of risk should be identified as part of the commissioning and procurement process and their impact analysed during the evaluation of tenders. These risks range, for example, from sharing safeguarding and general service delivery risk to commercial risk such as the risk of increase in staffing costs and changes in regulation through to change of service requirements and volume risk. This last example is particularly relevant to Model 3. The interrelation between risk, who takes the risk, pricing structures and matrices are particularly important to providers/suppliers where inadvertent acceptance of a risk can have a major financial implication (e.g. redundancy risk if TUPE does not apply at the end of the contract). Finance functions [What does this mean?] can be wary of suppliers after historic experience of poor performance - especially in long term contracts where threat of competition to an incumbent supplier is low. This customer attitude can also foster a lack of trust or willingness in suppliers to meet the challenge of delivering outcomes rather than outputs, resulting in contracts that focus on granular tasks and actions. Looking at how to explore sharing risk for delivering the agreed outcomes should be considered, whether by using gain/loss share, or other mechanisms and incentives, in order to drive good performance.

As indicated above, this toolkit should not be viewed as a source of legal advice, but the templates below do offer some insights into regard to the outcomes based contracting of Home Care Services, under each of the three models featured within the Toolkit.

## 4.1 Model 1: Outcome Based Care Planning: (Using outcomes as the basis for planning and reviewing a care package)

| | Area of Contracting | Comments |
|---|---|---|
| 1. | Formation of contract | If the commissioners are looking to secure outcomes from the contract, that needs to be highlighted in the offer that they put to the providers (usually through the issuing of an 'Invitation to Tender'. Where the commissioners are looking to ensure the quality of the service by looking at other measures as well, that also needs to be clearly stipulated in the offer. It is important to get this right at the outset, and to clarify it with further information before the closing dates for bids if there is any confusion or questions asked about it. |
| 2. | Contents | The Terms of the contract need to make clear it includes outcomes as an element and the expectations placed upon the provider as a result of this. It seems important that both parties should have a shared and agreed view as to how the activities of the provider are likely to lead to the expected outcomes, although that may need to be worked out on an individual basis (with each agreed care plan therefore becoming part of the contract).<br>The contract also needs to include reference to other aspects and measures of performance that will be used – it would be unwise to solely seek to base a home care contract upon the achievement of outcomes, as this would not leave opportunity to ensure quality assurance in any way. It would also mean that providers would not be paid until outcomes could be identified. Although the use of Social Impact Bonds is growing, it seems unlikely they could be used in this context |
| 3. | Vitiating factors | There have been a number of cases recently where providers have 'handed back' contracts on the basis that there has been misrepresentation, for example in terms of the volume of service users agreeing to transfer to a newly-procured service.<br>Again, in terms of an outcome-based contract it is important that misrepresentation does not occur, either by the commissioner or the provider (who may misrepresent their ability to move to a new model of service and deliver the service as specified). |

| | Area of Contracting | Comments |
|---|---|---|
| 4. | Discharge | Outcomes are generally much more difficult to both specify and measure than either inputs or outputs (the traditional measures). Where the outcomes being measured are those specified within individual care plans, it is especially important those staff with responsibility for drawing up care plans with service users are aware of the importance of having outcomes that are SMART in some way – otherwise the ability of the commissioners to performance manage the provider through the contract will be limited. This may be simpler and more straightforward where the outcomes being identified are more short-term and more readily visible, as with Re-aliment services, for example. |

## 4.2 Model 2: Reward for Achieving Outcomes and customer satisfaction:

Again, this is individual focused but is focused on the financial aspects of meeting outcomes. Where the contract is based in part on a reward element linked to individual outcomes then all the comments regarding Model 1, above will apply. Further comments, linked to the reward element are set out below.

| | Area of Contracting | Comments |
|---|---|---|
| 1. | Formation of contract | The Financial terms of the contract, and precise nature of the reward elements and how they will be applied needs to fully and clearly stated by the commissioner when the contract is put out to tender. It may be wise for the commissioner to seek from potential providers evidence that they fully understand the reward elements of the contract and how they will operate. |
| 2. | Contents | The contents of the contract would need to include the details of how outcomes would be rewarded and what payments would be made on the basis of them. |
| 3. | Vitiating factors | Existing providers, in particular may feel that a new approach is being forced upon them and is designed to disadvantage them. If the contract does not operate in the way they anticipated (particularly with regard to payment) they may see this as grounds for withdrawing from the contract. |
| 4. | Discharge | Disputes over payments can occur even when they are based upon outputs. This seems more likely when a provider is delivering a service but where the |

| | Area of Contracting | Comments |
|---|---|---|
| | | commissioner feels that the requisite outcomes have not been achieved, despite the activity having undertaken. Moreover, the shortfall in income that might accrue for providers could be very difficult for business viability and continuity |

Model 3: Population based accountability for Outcomes:
Responsibility for the provider(s) for meeting the outcomes of a group of people across a defined geographic area. Where there is a reward element to the contract linked to outcomes, then the comments from Model 2, above, apply here also, in addition to those set out below.

| | Area of Contracting | Comments |
|---|---|---|
| 1. | Formation of contract | The Invitation to Tender needs to be clear as to what population outcomes would be involved in measuring the provider's performance under the contract, and how they can be attributed to the provider's activity. |
| 2. | Contents | The Contract itself would need to reflect the fact that part of the expectations of the commissioner would be based around the activity of the provider affecting outcomes that sit outside of the immediate sphere of control of the provider. This has a risk for providers which providers will seek to cost and price for. |
| 3. | Vitiating factors | There may be a need to evaluate and review the effectiveness and appropriateness of the outcome measures being used. There may be a need to consider the impact of other factors that may affect the outcomes, especially if those other factors are subject to change and variation. The modification (or variation) clauses will need careful drafting to comply with the PCR. |
| 4. | Discharge | Again there will be a need to link up with those staff formulating care plans with service users to ensure that they are aware of the broader outcomes that are being used as a performance measure for the home care provider. Failure by those staff to take proper account of these elements of the contract could lead to performance not only being assessed as poor (and possibly in breach of the terms of the contract). |

Adopting an outcomes-based approach adds a further level of complexity to the contractual arrangements, regardless of which model of outcomes-based commissioning is being used. Each model brings with it a different level of requirements in terms of the contracting process. However, the in terms of contracting the information provided under each model is general guidance only, and proper legal advice should be sought when drawing up each specific contract.

## 5 Further Resources

Law Plain and Simple – Contract Law explained (Webpage)
Kirklees Council - Contract for the Provision of Domiciliary Care Services for Adults (2015). It should be appreciated that this contract was drafted on the basis of pre PCR law.

Industry Insight – Outsourcing Yearbook 2016 - Outcome-based contracting: Past, present and future
Government Outcomes Lab – How To Guide – Procurement