

## Contracting Arrangements for Extra Care Housing

This factsheet explores the contractual frameworks that are required in Extra Care housing. It looks at contracting from both purchaser and provider perspectives and provides guidance on the contractual issues to consider in relation to housing management, support and care provision within an Extra Care housing setting.

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## Other Housing LIN publications available in this format:

- Factsheet no.1:       **Extra Care Housing - What is it?**
- Factsheet no.2:       **Commissioning and Funding Extra Care Housing**
- Factsheet no.3:       **New Provisions for Older People with Learning Disabilities**
- Factsheet no.4:       **Models of Extra Care Housing and Retirement Communities**
- Factsheet no.5:       **Assistive Technology in Extra Care Housing**
- Factsheet no.6:       **Design Principles for Extra Care**
- Factsheet no.7:       **Private Sector Provision of Extra Care Housing**
- Factsheet no.8:       **User Involvement in Extra Care Housing**
- Factsheet no.9:       **Workforce Issues in Extra Care Housing**
- Factsheet no.10:      **Refurbishing or remodelling sheltered housing: a checklist for developing Extra Care**
- Factsheet no.11:      **An Introduction to Extra Care Housing and Intermediate Care**
- Factsheet no.12:      **An Introduction to Extra Care Housing in Rural Areas**
- Factsheet no.13:      **Eco Housing: Taking Extra Care with environmentally friendly design**
- Factsheet no 14:      **Supporting People with Dementia in Extra Care Housing: an introduction to the the issues**
- Factsheet no 15:      **Extra Care Housing Options for Older People with Functional Mental Health Problems**
- Factsheet no 16:      **Extra Care Housing Models and Older Homeless people**
- Factsheet no 17:      **The Potential for Independent Care Home Providers to Develop Extra Care Housing**
- Factsheet no 18:      **Delivering End of Life Care in Housing with Care Settings**
- Factsheet no 19:      **Charging for Care and Support in Extra Care Housing**
- Factsheet no 20:      **Housing Provision and the Mental Capacity Act 2005**
- MCA Information Sheet 1: Substitute Decision-making and Agency**
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- MCA Information Sheet 4: Statutory Duties to Accommodate**
- Case Study Report:   **Achieving Success in the Development of Extra Care Schemes for Older People**

## **CONTRACTING ARRANGEMENTS FOR EXTRA CARE HOUSING**

<b>Contents</b>	<b>page</b>
<b>Introduction</b>	<b>2</b>
<b>Models of Extra Care Housing</b>	<b>2</b>
<b>What is Partnership?</b>	<b>3</b>
<b>What is 'Contracting' &amp; how does it relate to 'Commissioning'?</b>	<b>4</b>
<b>Fair Contracting</b>	<b>6</b>
<b>Risk</b>	<b>7</b>
<b>Outcome Based Contracting</b>	<b>7</b>
<b>Inter-Agency Partnerships</b>	<b>8</b>
<b>'Separate' versus 'Integrated' models of Extra Care</b>	<b>9</b>
<b>Funding Issues</b>	<b>10</b>
<b>Procurement Processes</b>	<b>11</b>
<b>Other Contracts</b>	<b>12</b>
<b>Future Issues</b>	<b>15</b>
<b>Key Contract Clauses</b>	<b>17</b>
<b>Summary: Hints for Commissioners &amp; Providers</b>	<b>20</b>
<b>References</b>	<b>22</b>

## **INTRODUCTION**

This Housing Learning and Improvement Network (LIN) factsheet explores the contractual frameworks that are required in Extra Care housing. It looks at contracting from both purchaser and provider perspectives and provides guidance on the contractual issues to consider in relation to housing management, support and care provision within an Extra Care housing setting. It does not deal with the procurement of buildings or maintenance services.

It is not a legal guide, and both purchasers and providers would be well advised to seek legal advice when negotiating contracts; but we hope that it will be helpful in identifying what to look out for, and in formulating instructions to lawyers, as well as addressing the possible future implications of Individual Budgets and Direct Payments.

From a purchasers' perspective contracting cannot be considered in isolation from commissioning. Much helpful guidance is available on commissioning and contracting for health and social care services: this factsheet aims to signpost this material and draw out the significant considerations for Extra Care housing.

## **MODELS OF EXTRA CARE HOUSING**

There is still some debate about what facilities and services are required to qualify for the title Extra Care Housing. Most agree that a scheme must offer 24 hour care on-site and that the level of care available should provide a genuine alternative to a care home. Although the term 'Extra Care' is now widely used, terminology does vary, both within and between sectors: the terms 'very sheltered housing', 'enhanced sheltered housing', 'assisted living', 'continuing care', and 'retirement villages' may all, depending upon context, describe similar packages of services. Extra care schemes vary in size from around 20 units to villages with over 300 units and the size of scheme and the range of services provided may affect the approach to contracting. (Further information on the range of Extra Care housing models will be available on the CSIP sponsored website, [www.extracarehousing.org.uk](http://www.extracarehousing.org.uk))

Tenure is most commonly an assured tenancy, but shared equity and leasehold options are gaining ground in the not-for-profit sector, whilst private sector Extra Care schemes are also starting to appear. The focus of this factsheet reflects the fact that block purchasing of care and support will more often be connected with social rented stock, since means-testing means that leaseholders and shared owners are often responsible for purchasing their own care and support packages. However, consideration will also need to be given to the impact of Individual Budgets and Direct Payments in future care contracting arrangements.

One of the key differences between Extra Care schemes is whether the care, support and housing management are delivered as a combined service by one provider or whether there is a separation between care provider and housing/support provider (or some other variation). This may be driven by the approach taken to the procurement of these services and it will also affect the contracting arrangements.

This factsheet aims both to highlight the key issues that need to be addressed in relation to particular approaches, and to consider the impact that choices about procurement may have upon operation of a scheme and its service users.

All Extra Care housing is by nature a fusion of housing, support and personal care (which may also include day care and leisure activities) and in some cases it includes nursing care and health screening. It frequently involves more than one organisation in service delivery and several organisations, including housing provider, Supporting People authority, social care commissioner and Primary Care Trust may be involved in commissioning and funding. Partnership is therefore central to Extra Care housing and the contracts that express and define the nature of that partnership need careful consideration. Partners need to be clear about the nature of the relationship they want before negotiating contracts, but equally the process can sometime assist in defining that relationship and, during the life of the project, the contracts can influence the development of the relationship between the parties.

## **WHAT IS PARTNERSHIP?**

Partnership is a term that is used in various different ways in different contexts. Most 'partnership' agreements contains a clause specifically excluding the notion of a legal partnership! This is because 'partnership' has a specific meaning in legal terms, with far-reaching implications, but this is not the kind of relationship that most partner organisations want to create.

Organisations working together in partnerships are by no means unique to Extra Care housing; they have become a commonplace means of attempting to achieve public purposes and enhance accountability in areas of joint or interconnecting services. Glasby and Peck (2006)<sup>1</sup> comment that combinations of organisations that are referred to as partnerships may incorporate elements of networks, hierarchies and markets. Aspects of each of these are brought to the concept of a partnership: from networks comes multi-agency collaboration; from hierarchies, the delegation of responsibilities; and from markets, defined contractual relationships. Indeed it is important to be clear about whether the relationship is a true partnership i.e. whether it is reciprocal and open ended, or "...merely a contractual relationship adorned with the rhetorical flourish of being termed a partnership"<sup>1</sup>

The principles of joint commissioning between health and social care are well established, although in some areas the practice is less so; but involving a wider range of partners, including housing and Supporting People is less common. In some areas there are commissioning boards that bring together a wider range of partners to jointly *commission* services. Inter-agency partnerships have also been established to *deliver* services but usually on a larger scale. It is the number of potential partners and funding streams, the provision of both buildings and services and the relatively small scale (where individual schemes are concerned) that makes contracting for Extra Care housing challenging.

## WHAT IS 'CONTRACTING' AND HOW DOES IT RELATE TO 'COMMISSIONING'?

'Commissioning' may be defined as the strategic process of specifying, securing and monitoring services to meet people's needs. In other words it is about understanding and managing the market. Helpful guidance on commissioning can be found in the following publications:

- *Commissioning Framework for health and well-being: Department of Health*<sup>2</sup>
- *Key Activities for Social Care Commissioning: CSIP*<sup>3</sup>
- *Fair Commissioning – a good practice checklist*<sup>4</sup>
- *Commissioning e-book*<sup>5</sup>

The process of acquiring specific goods or services from third party suppliers under legally binding contracts may be referred to as 'purchasing' or 'procurement'. Contracting is sometimes seen as synonymous with procurement although strictly speaking the actual contracts are part of a wider procurement process.

Procurement is important for commissioners because it can improve services, help achieve best value, increase efficiency and encourage innovation. It should link with quality management and performance management. Approaches to procurement can also affect the types of organisations that are involved in providing services. There are now important legal requirements (arising from the European Union's Directives and implemented in the UK by means of Regulations) which must be taken into account. It should be noted that social care services are listed as "Part B" services" within the Public contract regulations. This means that the procurement of social care by a local authority is not required to follow the same prescribed EU procurement process in all respects that the procurement of other goods and services must follow.

The Institute for Public Care has produced a model that highlights the interface between commissioning and contracting (IPC/CSIP 2006) (see Figure 1) This factsheet concentrates on the web of contracting arrangements that are required, but the model demonstrates the point that developing the right kinds of contract arrangements should be considered from the start as part of a commissioning strategy and a wider procurement strategy.

**Figure 1:**



Source: Institute for Public Care

As the market for social care continues to develop, commissioning and contracting is getting more complex and more difficult, for a number of reasons:

- The scale of demographic change and the demand for greater choice will mean that new approaches to commissioning and contracting will be needed
- It is increasingly recognised that services contracted for by cost and volume don't necessarily deliver the outcomes that are needed. To do so requires more understanding and greater levels of partnership in delivery
- Practice based commissioning, direct payments and individual budgets will have an impact to a greater or lesser extent depending upon how widely they are taken up.
- With many local authorities no longer being major providers of care services, knowledge of the sector has shifted to providers. This means that, increasingly, commissioners will require the knowledge that only providers will possess, to purchase services effectively.

The foundation for good procurement is the quality of relationships between commissioners and providers and this will depend to a large extent upon the kinds of contractual relationships that are established and how they are operated. In some areas there is a history of poor relationships with providers. Some care providers rely on individuals purchasing care, with only occasional local authority spot contracts, because they do not have sufficient trust in the local authority to enter into a longer term contract.

Equally local authorities are sometimes unwilling to commit to the kinds of contracts that would give more security to providers and thus encourage capacity building. There is often suspicion on both sides about the desire to control, rather than an understanding of what each party needs to obtain from the relationship to make it work. There needs to be:

- a mutual understanding of costs
- agreed performance monitoring
- a tender price that allows for developmental activity and a reasonable profit/contribution to reserves
- a shared understanding of the benefits of the contract and the risks, on both sides

IPC/CSIP(2006)<sup>3</sup> note that the process of contracting and the way it is approached may have a profound effect upon providers' desire to be part of any commissioners' strategic plan. In the past there has been a focus in Community Care contracting on price setting and contract monitoring rather than seeking opportunities to involve providers in service design and encourage innovation and diversity. But this may have to change:

*"...the growth of individuals purchasing their own care, likely to be increased through direct payments and individual budgets, will also have a major impact on the market. In this environment the need for contracts to be fair to both parties and reflective of a closer partnership than some tendering arrangements have allowed for in the past, will become paramount."*<sup>6</sup>

Communities and Local Government department (CLG) has produced "A Guide to Procuring Care and Support Services"<sup>7</sup>, which gives helpful guidance for Supporting People commissioners on the development of a strategic approach to procurement of care and support services, relating it to market development and providing a step by step guide to the management of a procurement programme. More recently, CLG has also produced a Supporting People outcome framework ([www.spkweb.org.uk](http://www.spkweb.org.uk))

The challenge in relation to Extra Care housing is not only to integrate commissioning and procurement, but also to achieve the integration of the various procurement processes for housing, support and social care to create one, seamless service.

## **FAIR CONTRACTING**

There is an increasing recognition that contracting processes should be fair. The European Union Directives promote transparency and impartiality, but there also needs to be fairness to all parties – purchasers, providers, service users and tax payers. As noted above, the procurement relationships between commissioners and providers will have a significant impact upon the delivery of services and this relationship will be affected in large part by perceptions of fairness in contracts. Providers should be involved at the earliest possible stage and the contract written jointly, or at least with representatives of the provider sector. Related to fairness is whether there is a burden of unnecessary bureaucracy and administration imposed, for example onerous monitoring requirements. These themes are explored in the CSIP(2005): "A Guide to Fairer Contracting: Part 1"<sup>8</sup>

## **RISK**

Good contracts must not only recognise risk but seek to reduce it and share it equitably between the parties. If too much risk is placed on the provider the commissioner may believe that the risk has been passed on, but may have unwittingly increased the risk of complete failure, through liquidation or closure of the service.

Some of the key risks for purchasers and providers in relation to the provision of Extra Care housing are explored below.

## **OUTCOME BASED CONTRACTING**

Outcomes are a key theme in the Government White Paper “Our Health Our Care Our Say”<sup>9</sup> and in current thinking regarding the measurement of performance in support and social care services. This is in response to the difficulty that traditional measures of inputs and outputs, or even client satisfaction, don’t necessarily measure results. A focus on outcomes should ensure that services are more effective in providing what the service user needs and what the commissioner wants to achieve by paying for the service.

*“If outcomes are so important then presumably there are a wide number of examples... Yet strangely this is not true. Indeed, outcome based commissioning appears to be more of an aspiration than a reality”*: Kerslake (2006)<sup>10</sup>.

This also seems to be true of Extra Care housing: there is increasing use of outcomes in writing individual care plans, but little evidence of this being linked into the contracting mechanisms. This is probably because it requires very clear objectives to be agreed for services and, even having done that, it is not always easy to define and measure the related outcomes. Individual quality of life outcomes for service users may be so individual that it is difficult to aggregate them into a measure of the performance of the provider. At the other end of the spectrum, trying to relate the impact of one Extra Care scheme to broader outcomes for the local population may have limited validity. Yet it is the sum of all the individual outcomes that actually creates the wider community outcomes.

The focus should really be at an individual level, because it should be about working with service users to define the outcomes that they want, rather than imposing what commissioners want or what providers believe is good for their services users. Experience shows that these individual outcomes can generally be related back to the government agendas of independence, care at home, community engagement and active lifestyles.

Outcomes are more difficult to measure than inputs and outputs and therefore more tricky to link into performance measures. Care will be needed in defining measures or monitoring assessments and in the early stages there should be room for re-negotiation, as experience on both sides develops.

Examples of typical outcomes for Extra Care housing will include quality of life improvements, health improvements, increases in independence levels and achieving

Examples of typical outcomes for Extra Care housing will include quality of life improvements, health improvements, increases in independence levels and achieving 'home for life' (i.e. avoiding the need to move on when frailty increases). One commissioner and provider have negotiated a contract whereby if a resident's independence increases and this leads to a reduction in the care level required, payment continues at the higher level for one year, as an incentive to the care provider to promote independence.

## **INTER-AGENCY PARTNERSHIPS**

In many areas, joint commissioning structures have been set up. There are special challenges associated with the governance of interagency partnerships and these can make the contracting arrangements more complex. Clarity regarding governance relates directly to effective risk management, monitoring and control. Whilst successful partnership often comes down to good working relationships between individuals, it is important to have clarity about the organisations involved and where the accountabilities lie, especially in the event of things going wrong.

In some areas the challenges of contracting have led to the establishment of a service delivery partnership. This is not a legal entity, but rather a partnering approach which replaces traditional contractor-supplier relationships, whilst still meeting the requirements of procurement regulations. Culley (2006)<sup>11</sup> comments that experience indicates that this is a challenging and time consuming process for both purchasers and providers, which is therefore not appropriate to small scale commissioning exercises. The same experience is often reported by small providers of involvement in framework agreements. It may therefore be a useful approach for large scale Extra Care programmes but not for procuring a one-off scheme.

There are also delivery partnerships of a more traditional nature between landlords and care/support agencies. There is a lot of experience of the operation of such agency relationships in the supported housing sector that is relevant to Extra Care schemes. There may be a contractual relationship whereby housing management and/or support services are sub-contracted under a management agreement. Alternatively, organisations may agree the parameters of their joint work on a project and express this in a non-contractual agreement such as a service level agreement. It will not be a contract unless goods/services are provided for a 'consideration' (usually money) and this will not be the case if the services provided (e.g. support) are funded by another party (e.g. the Supporting People Authority). Guidance for registered housing associations on such arrangements is provided by the Housing Corporation<sup>12</sup> and also by SITRA<sup>13</sup>.

## **'SEPARATE' VERSUS 'INTEGRATED' MODELS OF EXTRA CARE**

An integrated model of Extra Care has some contractual advantages. Since the care and support are provided by one organisation there is less complexity and therefore achieving a seamless service should be more straightforward. For example there do not have to be agreements or protocols to define where support stops and care begins and the arrangement should be easier for the residents to understand. There is the potential to establish one joint contract between the local authority (representing both Supporting People and Social Services) and the care/support provider and to create a single monitoring process to meet the requirements of both SP and Social Care.

There are other advantages too: The combined service, being larger, can justify a more senior manager on the site to lead the team and to represent the whole service externally. One primary relationship with other services such as health services and local voluntary groups, is simpler and can aid partnership working.

Even where housing and support are integrated, the contract framework may still need to take account of a separate *housing* provider, because many housing providers do not provide personal care services and not many care providers are experienced in developing and managing housing. There is then a need for a service level agreement or protocol that clearly defines the interface between care/support and housing management. There will be the question for the housing provider of how to provide a good quality housing management service without having a presence on site. For example: who should deal with the management aspects of out-of-hours building maintenance emergencies? At larger schemes there will be the question of who takes responsibility for the facilities and activities within the building such as restaurant, gym, shop, hair salon etc. and who bears the risk.

One option which addresses these unique management challenges, is to create an on-site Facilities Manager post to look after both the facilities and the housing management. Another approach is to create a housing office on site, but experience has shown that this can mitigate against the creation of a seamless service. A better option is to have one office for housing, support and care staff, which facilitates the creation of one staff team, even though the team members have different employers.

The key point for housing providers is that whilst care and support and even facilities management may be carried out by other agencies, there are particular risks associated with delegating housing management functions, especially since care providers may not have staff versed in the technicalities of tenancy law. Nevertheless there are precedents for delegating housing management (e.g. in the supported housing sector). A Management Agreement will be required which deals with the contractual issues regarding rents, service charges and management charges; and if the housing provider is a Social Landlord, it will need to ensure compliance with regulatory standards. Failure to define and subsequently monitor housing management standards could have serious implications for the housing provider.

Greater control over housing management issues is one advantage of the 'separate model', in which the housing and support tasks are carried out by the housing provider and there is a separate care provider.

Various issues can arise over the interface between care and support, which need to be carefully defined in a service level agreement (or protocol) between the housing/support provider and the care provider. For example:

- Care staff may be required to assist residents in the restaurant, but this may not automatically be written into care plans
- The care provider may have a presence in the building out of hours and be expected to take responsibility for property related emergencies, yet this may not be written into the care contract, which will be with the social services authority not the housing provider.

Negotiating and drafting such an agreement requires careful consideration of how the whole service should operate. This process itself is useful in promoting understanding between the parties and thus avoiding subsequent tensions. The difficulty with these agreements is that they are not contracts (the contractual relationships are with the purchasing authority) and therefore ultimately have no 'teeth'. Our research indicates that there is more potential for dispute and difficulty with the separate model of Extra Care, but equally there are many examples where the model works well. Ultimately schemes succeed or fail on the quality of the relationships between individuals, irrespective of agreements - contractual or otherwise. However, these relationships can be assisted by clarity and good communication.

## **FUNDING ISSUES**

Flexibility and realism are the keys to dealing with funding issues in contracts. There is still a tendency for some authorities to commission on the basis of a basic domiciliary-care style of service. This can prevent the scheme being 'greater than the sum of its parts', which is the whole point of Extra Care housing. It also makes outcome approaches more difficult to implement. Providers need the flexibility to be able to increase and decrease care hours as individuals' needs fluctuate. Many contracts allow for a few hours' flexibility without having to seek immediate authority from the care manager. Some providers and commissioners have gone further and developed broad care levels, linked to needs levels but without the requirement to account for the number of hours of input to each individual. Either way, there is a need for a few core hours to be funded, to deal with basic care provision, scheme cover and, critically, night cover. This is becoming more widely accepted as commissioners learn how Extra Care works. Typically there will be some form of "core and flexi" budget whereby every resident is funded for a few hours of care through the core and then the flexi part is determined on the basis of assessed care needs.

Most Extra Care is commissioned through a block contract, which sometimes does not cover all placements and is combined with a spot contract element for additional places over and above the block element. Spot contracts tend to hold greater risks for providers, although being locked into an unfavourable block contract can carry significant long term risks.

There can be pressures on commissioners to purchase care at the higher end of the spectrum and contracts need to be clear about the need to retain a balance of ages and dependency levels in an Extra Care scheme. There can also be pressure to commission lower levels of care for individuals than are really needed, owing to budget constraints.

There is no easy contractual answer to this: openness, integrity and experience on both sides of the relationship are required to ensure that care needs are assessed and reviewed realistically. This pressure can also occur with self-funding residents, who will also want to try to keep the costs of care as low as possible.

The chief risk for providers is the manner in which the contracts deal with inflation, and particularly increases in staffing costs. Wages generally increase faster than the Retail Price Index so using RPI to calculate the uplift in the contract price can cause significant pressures as costs increase year on year. The Wanless social care review<sup>14</sup> found that pay rates for social care jobs have risen faster than inflation and the average earnings index. This is rarely reflected in contractual arrangements, yet it is a critical issue. The quality of Extra Care provision is primarily governed by the quality of the care staff employed, so it is essential that providers are able to attract good quality personnel. The level of financial risk borne by the provider is also fundamental to the long term security of the service.

As the population ages, there will be greater pressure on a diminishing social care workforce and these risks are likely to increase. At present, there are many new entrants to a developing Extra Care market and it will take time for both commissioners and providers to develop a full understanding of what is workable. For providers, who tend to bear the brunt of this area of risk, negotiating realistic funding terms in contracts depends upon having both experience and a position of strength in the market, in order to be able to resist pressure on fees. Unfortunately, commissioners have limited budgets, and may not even receive an inflationary uplift in the funding available. A compromise solution is to allow for realistic increases in costs and then apply a factor for efficiency savings; but such an approach cannot work indefinitely.

Further information on funding care in Extra Care housing is contained in the Housing LIN Technical Brief No.2<sup>15</sup>:

([http://www.icn.csip.org.uk/library/Resources/Housing/Housing\\_advice/Funding\\_Extra\\_Care\\_Housing\\_July\\_2005.pdf](http://www.icn.csip.org.uk/library/Resources/Housing/Housing_advice/Funding_Extra_Care_Housing_July_2005.pdf) )

## **PROCUREMENT PROCESSES**

Since there are several elements to any Extra Care scheme, there is scope for a different approach and timescale for the procurement of each element: building, support service and care service. The decisions taken may then affect the procurement and contractual arrangements for the other elements.

As noted above, social care services are listed as “Part B” services” within the Public Contract Regulations. Nevertheless, many authorities follow the same processes as for Part A services, as it is seen as good practice in order to promote competition and achieve efficiency and Best Value targets.

However, if commissioners are not experienced in Extra Care housing a conventional tendering approach carries the risk that the service specification will not identify the key elements of a successful service and the procurement process will not distinguish between the strengths and weaknesses of different approaches. It may therefore, by default, result in procurement largely on price.

The service specification is a critical document and not only at tendering stage: it will usually be appended to the contract to define what service is being contracted for and to identify the key quality standards by which performance will be measured. It is therefore advantageous for the specification to be developed in consultation with providers; otherwise, it may not be as well developed as it could be. Without dialogue, there may be a tendency for large, established providers to respond by delivering their standard model, which may not be the approach that the commissioners want, whilst the innovative ideas of a smaller provider may be overlooked.

Extra Care is a complex service and lends itself to a negotiated or partnering approach, to allow for maximum dialogue to create the best design at development stage; and a feedback loop which takes account of learning and applies it to new schemes that are developed subsequently. Partnering approaches can also promote economies of scale, better integration of services and increased community benefits, which may be difficult to achieve through a conventional competitive tendering approach for each new scheme.

Where a housing provider (or housing and support provider) is appointed first, it is important that they are involved in the selection of the care provider and the development of the contractual relationships. Otherwise there is a risk that the contracts will develop separately and not be fully integrated. They will need to be assured that the care provider is one that they can work with and that the approach is one that will dovetail with their approach to housing and support in order to create a seamless service rather than two separate services in the same building. One authority pays a consultancy fee to the housing provider for their input to the procurement of the care service.

Many commissioners have developed overarching inter-agency agreements to describe the model of Extra Care and the roles that the various parties will play. They are useful in describing objectives and facilitating joint working, which is so important in developing and managing Extra Care housing. However, even though many are written like contracts ultimately they will not have any real force if things start to break down. Remember that to create a contract, goods or services must be provided by one party to the other, for a 'consideration'. It is therefore the contractual documents between the individual parties that actually define the relationships, and have 'teeth'. It is important to understand the whole framework of contractual agreement and ensure that the various individual documents interface with each other. One example of the framework of agreements needed for an Extra Care scheme is illustrate in Figure 2.

## **OTHER CONTRACTS**

In addition to the main funding contracts with the commissioners there are other key contracts which need to be considered when providing Extra Care schemes and the status of these agreements needs to be understood by all parties, since they may have an impact upon the risks inherent in other contracts. For example, the security offered by a tenancy agreement increases the risk to the housing provider if the care and support contracts do not allow for the flexibility to adjust the care input to enable the resident to maintain their tenancy.

## **Tenancy Agreement**

This will be the main contract in place between the landlord and the service users. The standard tenancy agreement in use is an Assured Tenancy Agreement. The agreement will need to detail the rent and service charges payable and it is particularly important that the service charges reflect and properly specify the cost of the communal facilities available.

## **Lease**

Where schemes include leasehold units there will need to be a lease in place between the service user and the landlord/freeholder. Particular attention needs to be paid to any service charges passed on to leaseholders as the service charge regulations relating to freeholders are quite complex and carry significant financial risks for housing providers. However in seeking to reduce such risks providers must take care to ensure that their leases comply with the Unfair Terms in Consumer Contracts Regulations 1999.

## **Support / Care Agreements**

This is the contract in place between the service user and the support/care provider. Where there are separate organisations providing support and care each will have to have a contract in place with the service user. The contract will need to specify the level and frequency of care/support provided. It will also need to specify the full cost of delivering the service and identify any amount that the service user has to pay. Where the service user does have to make a contribution themselves the contract should specify how and when the payments must be made.

## **Contracts for Services**

Landlords will need to have contracts in place for the provision of services such as; cleaning, gardening, window cleaning. Some Extra Care schemes have meals provided through a franchise arrangement with catering companies and such arrangements will also need to be covered by a contract. (For further information, see forthcoming Housing LIN factsheet – available from the Housing LIN website:

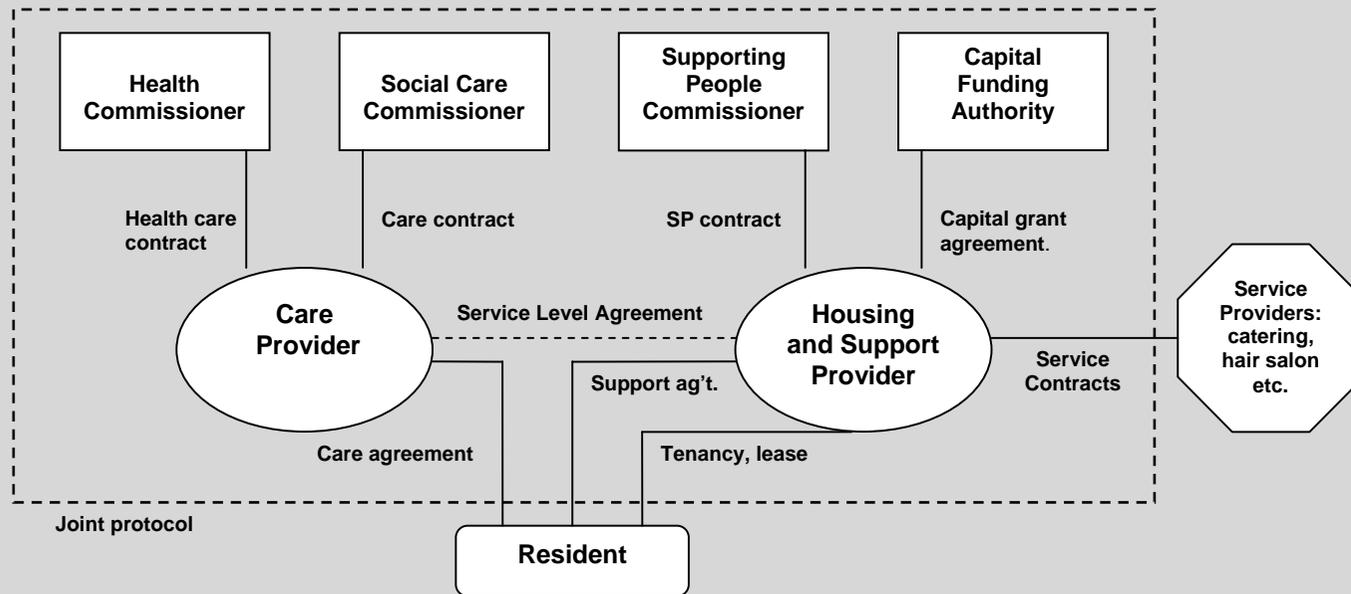
<http://www.icn.csip.org.uk/housing> )

## **Contracts for Servicing Equipment**

Landlords will need contracts in place for the servicing of any equipment, including specialist equipment, on the premises e.g. fire fighting and fire detection equipment, warden call systems/telecare equipment, boilers, lifts, laundry equipment, baths and bathing equipment, hoists, etc.

As with all contracts attention needs to be paid to the detail of the contract. Landlords need to be clear whether contracts cover servicing or servicing and repair in the contract price. In addition landlords will need to accrue funds to replace equipment as necessary.

**Figure 2: One example of a contracting framework for Extra Care Housing.**



## **FUTURE ISSUES**

### **Healthcare issues**

Increasing emphasis in government policy on health promotion, coupled with changes in the way healthcare is delivered, could lead to extended models of Extra Care housing over the next decade. Already some extra-care schemes provide “step down” or rehabilitation rooms for those coming out of hospital but not yet able to return home. Over the next few years we could also see the development of clinical practice rooms within Extra Care projects, delivering a range of out-patient services from routine monitoring (blood pressure, diabetes checks etc) to minor surgery. There are currently restrictions on the use of units capital-funded by Social Housing Grant for purposes such as intermediate care, which need to be taken into account in developing contracts for these kinds of services.

These developments would bring the Primary Care Trusts, and practice-based commissioning groups, into the commissioning and contracting frameworks. PCT's are already “spiritual” if not legal partners in Extra Care contracts, through their role on the SP Commissioning Body. However, at the moment only a few existing Extra Care schemes have direct contracts with the PCT.

### **Development of joint contracting arrangements**

A significant number of local authorities have entered into single contracts for care and support services, but few have tackled the issue that care and support services operate within different legal frameworks with different monitoring requirements. From a provider perspective, a single contract is a step forward from having a number of separate contracts, but the ideal would be for the contract to contain one set of requirements for monitoring arrangements and for service reviews.

As contracts move towards outcome based approaches, it should be easier to identify a single set of monitoring requirements which meet the needs of the different commissioners. These may be more sophisticated and more difficult to monitor than inputs, but will provide a better quality of information for commissioners, whilst removing some of the burden of dual reporting from providers. At present, even though there is a move towards outcome monitoring of Supporting People services many authorities still require monitoring of inputs too.

### **Impact of direct payments and individual budgets**

With the current low take-up of direct payments, particularly from the older client group, some commissioners and providers think that direct payments and individual budgets will have little impact on Extra Care housing. Nevertheless, it is worth giving some thought in the contract as to how both parties will cope if a number of people within a scheme take up the option of direct payments and buy in their support from elsewhere. Both providers and commissioners may also need to think about the implications for contracts if a number of different providers are accessing the scheme. Issues which will need to be tackled include: information sharing, whether other care providers have access to facilities within the scheme, insurance and liability. There is also the challenge for the main provider of how to maintain the viability of the core services.

For many providers and commissioners, there are already issues with the viability of care contracts, especially where there are smaller schemes and the contracts are scheme specific. Some local authorities are considering creating care (and support) contracts which retain the core of the contract for those living within the scheme, but also allow services to be provided to those living in their own homes in the surrounding community. This has the advantage of spreading the overheads of the care and support contract over a wider client base, making it more cost-effective, and enables the provider to remain viable where demand from within the scheme varies. This model is more challenging to manage, requiring greater supervision to ensure the same standards are achieved, incurring more travel/down-time, needing a higher calibre of staff and greater co-ordination, all of which need to be recognised when negotiating contracts.

However there is the added advantage that these contracts may encourage those in the local community to make use of the facilities provided *within* the scheme, providing more customers, and 'marketing' the scheme to a wider range of potential future residents. Accessing services within the scheme may also help those living outside the scheme to continue living independently for longer; for example someone could access the assisted bathing facilities where it is no longer feasible for them to be bathed at home. The advent of individual budgets could offer opportunities for Extra Care schemes to "sell" their services more pro-actively, which could also include meals and social/health-related activities. This again may assist schemes to remain viable and to assist a wider range of older people, but will inevitably make the contracting arrangements more complex.

For further information on Individual Budgets, visit: [www.individualbudgets.csip.org.uk](http://www.individualbudgets.csip.org.uk)

### **Role of Local Area Agreements**

Local Area Agreements should reflect local priorities from the perspective of the customer rather than the service provider. Many local area agreements (LAAs) contain targets around maintaining independence of older people, preventing or delaying hospital admission, and increasing take-up of welfare benefits. They promote joint working between local authorities and other providers, including health. As such, LAAs have been a useful tool to promote the potential role of Extra Care housing to a wider audience. From April 2009, Supporting People funding will be channelled through LAAs, giving more scope for SP monies to be integrated with other funding streams, but increasing the risk that the support focus of the funding is lost.

As LAAs develop they may help to highlight additional services which Extra Care housing can provide. LAAs can also bring access to additional revenue funding, although this will be time-limited and aimed at developing new services rather than on-going support. It may be appropriate to consider whether reference is made in the contract to the role of the project in helping to achieve the LAA targets. It may even be appropriate to consider a performance incentive, especially where these are "stretch" targets which result in increased funding to the local authority if achieved.

For further information on LAAs and the implications for housing with care providers, see the forthcoming Housing LIN briefing – available from the Housing LIN website: <http://www.icn.csip.org.uk/housing>.

## KEY CONTRACT CLAUSES

Guidance on the clauses that need to be considered in care contracts is provided in “A guide to Fairer Contracting” (CSIP - 2005). The guidance is aimed at care home and domiciliary contracts, and since Extra Care housing is a hybrid of care home, domiciliary care and sheltered housing, much of the guidance is relevant. However, some of the unique aspects of Extra Care housing give rise to further considerations, which are explored in the table below:

Clause	Comments
Partnership statement	Both parties will want to express their intention to work together according to agreed objectives, whilst excluding the creation of a legal partnership or agency agreement. Other documents that form part of the contract, e.g. the service specification, should be referred to in this clause. In extra care housing there will often be other parties providing services who will also be party to these shared objectives and may be instrumental in allowing the parties to the contract to achieve them. (See comment on joint protocols)
Third Party Rights	It is normal to exclude third party rights to avoid the provisions of The Contracts (Rights of Third Parties) Act 1999 in care and support contracts. However in Extra Care housing there may need to be provision for third parties involved in the framework of agreements (e.g. housing or support provider) to have certain rights to enforce terms of the contract. Clarity in 3 <sup>rd</sup> party rights at the beginning will make it much easier down the line if there is any disagreement over boundaries.
Duration and termination of services	Both commissioners and providers will want to see duration of the contract clearly stated, and grounds for termination set out. Both parties will need to consider the balance between the security and stability of a long term contract against the potential risk of being locked into an unfavourable contract.  Renewal of the contract on a different basis or with a different provider may have wider implications. For example contracting with a new care or support provider when these functions were previously carried out by the housing provider will have implications for the remaining part of the service in terms of staffing, management and partnership, since the housing provider will still be involved but may have to re-think their approach and may find that the remaining part of the service is not viable without being part of the whole.
Trial period	It is reasonable to include for a fully paid trial period for new residents but many extra care contracts do not allow for them. Providers need to ensure that any trial periods allow for full

	<p>payment and to consider the basis on which the unit is let during the trial period and/or budget for rent/lease charges during the trial periods, since there may be problems with paying for double housing costs whilst other accommodation is retained.</p>
Care/service reviews	<p>Commissioners will be looking for as much certainty over price as possible, but will recognise that care needs can vary over time. Agreeing parameters for varying the number of hours support given will enable providers to respond immediately to short term changes in need, without incurring financial risk. Since there will not be a standard level of care as in most care homes, there also need to be mechanisms within the contract for agreeing longer term variation in care levels for individual residents. Commissioners will want to ensure that the total cost of care stays within agreed boundaries but hard and fast quotas at different care levels are unworkable: some flexibility will be necessary to fill vacancies, without placing the provider in default of agreed quotas.</p>
Price determination and review	<p>Commissioners need to be mindful of the need to give providers certainty over future increases, even though they themselves will not be certain over the level of budget they will have year on year. Many contracts make a provision for increases based on RPI, although it is accepted that salary increases are often above this. There may be a compromise position whereby the increase is linked to salaries but there is also an expectation of an annual efficiency saving. If this is the approach taken, the level of efficiency saving must be achievable. What is important is that providers are confident that the initial contract price allows for a range of contingencies, an appropriate contribution to organisational overheads and some element of profit/contribution to reserves/service development funds.</p>
Complaints	<p>Complaints: commissioners will want to strike the right balance between allowing providers to deal with complaints from service users in accordance with their own procedures without the need to refer on, and a “safety net” that allows users to come to them if they are unhappy with the service. Where there are separate housing/support and care providers, consideration needs to be given to the integration of the procedures of the different organisations, so that there is one channel for complaints.</p>
Default clauses	<p>Commissioners need to see strong default clauses in contracts in order to protect service users, but clauses on default should apply equally: i.e. either party should have the right to notify the other of default under the contract. There may be complications in Extra Care housing where there is a</p>

	third part providing an element of the service.
Dispute resolution	Contracts should encourage informal approaches to dispute resolution; legal approaches are always expensive and time consuming! However, legal mediation may be a sensible alternative if informal approaches have been unsuccessful. The dispute resolution procedures will need to take account of the potential for disputes between two providers where there are separate housing, support or care providers, as well as disputes involving the two parties to the contract.
Assignment and sub-contracting	Commissioners generally wish to avoid assignment and subcontracting of contracts and certainly it should only be with the express permission of the commissioner. However even where this is the case and the subcontractor is an approved contractor there will be greater risks for both the commissioner and the primary provider because the level of control is reduced.
Hospital admission or other temporary suspension of the service	Care providers need to ensure that they do not suffer unreasonable financial penalties for unannounced or unforeseen absences. The contract should allow for payment for the retention of services during reasonable periods of holiday and / or hospital admissions. Since many of the core services and staff cover cannot be reduced in Extra Care housing when a service user is absent, any reduction in care fees should be based on the savings that can realistically be made as a result of the absence. This may be different from the assumptions usually made for absence/suspension of service under domiciliary care contracts.
Death of a service user	In domiciliary care contracts it would be reasonable to continue to pay for a period to reflect the fact that staff time will have been pre-scheduled by the provider, but then to cease payment. In Extra Care housing, as in a care home, there will also be issues concerned with liaising with the family about clearing the deceased's effects from the accommodation. Core services cannot be reduced and the unit cannot immediately be relet and these factors should be taken into account in specifying a reasonable period after death that care and support fees should continue to be paid.
Confidentiality, sharing of information	These clauses will need to take account of all providers where there is a split between housing, support and care.
Monitoring, quality systems etc.	Commissioners are likely to be moving towards outcome monitoring but many will continue to want input information and may also want the assurance of 'quality systems'. However, given the complexity of Extra Care housing and the

	number of regulatory and funding regimes there are to cope with, commissioners need to be careful about adding to what is already a burdensome framework of requirements! They should consider whether they can join up and streamline monitoring requirements.
Nominations	Commissioner and provider will both wish to have clarity on how new residents are nominated and what criteria are used. Maintaining the balance of needs is paramount, so that the scheme always has an element of those with lower needs as well as those with higher needs. However there needs to be flexibility to cope with urgent cases where the needs level may not exactly fit the profile or quota. But providers also need to be able to refuse nominations where the care requirements of an individual cannot be catered for at the scheme. Where the contract price is determined by a fixed number of care/support hours per week / month it is essential that providers have the flexibility to maintain a balance of needs levels.
Voids	Provision for voids will be a particular issue where there are spot contracts or with cost and volume contracts. Some block contracts also do not provide for full payment for voids. Whilst the provider may have the freedom in theory to sell the placement to another organisation in practice it is not always easy. Care / support providers and housing providers need to ensure that there is as much protection as possible in the contract for void losses. They also need to ensure that they make adequate budget provision for voids.

## **SUMMARY: HINTS FOR COMMISSIONERS AND PROVIDERS**

The nature of extra care housing means that effective partnership working is one of the keys to success. The contracts should therefore reflect a true partnership approach. The initial approach to commissioning and procurement will influence the subsequent contracting arrangements, which in turn will affect the nature of the relationships.

Commissioners will find it helpful to involve providers at an early stage. The complexity of Extra Care housing provision suggests that negotiated or partnering approaches to procurement are likely to be most effective: this is reflected in the experiences of both providers and commissioners who have developed Extra Care housing. Traditional tendering processes carry the risk of procurement being driven primarily by price, and the service not fully reflecting the commissioner's intentions.

A focus on outcomes for service users can be used to build a framework which forms the basis of the performance monitoring under the contract. But outcomes can be difficult to measure and so far most commissioners and providers have little experience of using them in contracts. Therefore there needs to be plenty of scope for adjustment and re-negotiation in the early stages.

Successful partnerships depend primarily upon strong personal relationships and good communication. Whilst one cannot legislate for relationships, they can sometimes be facilitated through appropriate contractual requirements – for example meeting and reporting frameworks, and arrangements that promote team working across organisational or functional boundaries.

It is helpful to spend time establishing the nature of the relationship that should be expressed in the contracts, before handing the matter over to the lawyers. Non contractual agreements (or joint protocols) can be helpful in establishing the objectives, but the good intentions expressed in them are not a substitute for the contracts between the individual parties. Time spent on negotiating fair, well worded contracts will pay dividends in the future, especially if things start to go wrong.

It is often at the interface between different organisations or different elements of the service that difficulties arise: for example there may be tensions between the purchaser and the provider over nominations; or disputes between providers about which tasks are 'care' and which are 'support'. Careful thought needs to be given these detailed operational issues when negotiating contracts.

Commissioners and providers need to recognise the power relationships that exist - and their implications. For example, a powerful purchasing position may result in a cheaper service but it may not lead to a better quality service, or to a healthy market in the longer term. Providers may be in powerful position in relation to service development and can use this to good effect, rather than just fulfilling the letter of the contract.

In the future contracts will need to give careful consideration to the implications of Direct Payments and Individual Budgets and how the viability of core services can be maintained if Extra Care is purchased through these mechanisms.

Ultimately successful contracting will depend upon both parties recognising the importance of an outcome-focus, of putting the service user first, and paying attention to clear communication. It is also essential that throughout the negotiation and subsequent operation of the contracts that both parties act with fairness, flexibility and integrity.

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