

| The Better Care Fund  Template Agreement under Section 75 National Health Service Act 2006  Explanatory Memorandum  Updated May 2016 |
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**Contents**

| **Item** | **Page** |
| --- | --- |

[1 Introduction 2](#_Toc452476120)

[2 MAIN BODY OF THE AGREEMENt 4](#_Toc452476121)

[3 The Schedules 12](#_Toc452476122)

1. Introduction
   * + - 1. This is an explanatory memorandum to the attached template Section 75 Agreement. It is important to note that although this Agreement meets the requirements under Section 75 of the NHS Act 2000 (as amended) and is drafted in a way which meets the requirements under the provisions of the Better Care Fund as at May 2016, it does not compromise legal advice and no warranty is given.
         2. The template is a guide as to the sort of considerations which CCGs and Local Authorities may wish to take into account when drawing up their Section 75 Agreement as required under the BCF Pooled Fund arrangements. However, any party who is looking at the template to form the basis of a Section 75 Agreement should seek their own legal advice before the Agreement is entered into. Different circumstances will indicate the approach which is required, and advice should be taken about this. This agreement takes a particular type of approach; there are also other approaches which may be more appropriate for the parties to use.
         3. Parties should remember that the Section 75 Agreement is merely the way in which the parties evidence the agreement they have reached between them. The legal agreement is the end and not the start of that process. Nonetheless, it can be useful for parties to see an example of what such an agreement may look like to assist them in their discussions. There will of course be further issues which will be relevant to particular schemes and proper and full documentation covering all the relevant issues will need to be developed by the parties. Further legal advice will undoubtedly be necessary as a result.
         4. This explanatory memorandum should be read in conjunction with the draft Section 75 Agreement as well as the draft Deed of Variation for 2016/2017. It explains the purpose of the various clauses which are in the template. Parties looking at the template will also see that there are several footnotes which explain in more detail some of the considerations which the parties may wish to consider.
         5. Whilst this explanatory memorandum makes some reference to issues that the parties may wish to consider when reviewing their existing Agreements for 2015/16, the parties ought to undertake a review at local level on the basis of the terms of their existing Agreements and issues arising from the implementation of the local BCF plan for 2015/16 before deciding:

whether they need to enter into a new Agreement (which incorporates the suggested amendments set out in the revised template Agreement as appropriate at local level) or whether they will be varying the existing Agreement by entering the Deed of Variation;

what amendments are required to the main body of the Agreement and Schedules depending on their local arrangements.

* + - * 1. Finally, the template refers to the law and guidance which is in force in May 2016. Subject changes to the law or guidance may invalidate some of the provisions it contained, and once again parties will need to seek advice as to the effects of any subsequent changes.
      1. **MAIN BODY OF THE AGREEMENT**
         1. The Parties
* Name of CCG – If there are multiple CCGs in the area of a Council they can all be parties to the same Agreement; Schedules will then provide for any differences in the agreements between the CCGs and the Council.
* Local Authority ("Council")
  + - * 1. Agreement Date
* Date of the agreement.
* Date of service commencement – it is likely that this will take effect from 1 April 2016 (or later depending on the Agreement to be reached between the parties locally).
  + - * 1. Background
* Statement of aims, outcomes and targets.
* Statement to be included relating to the BCF and its aims and objectives. Note the partnership arrangements must be likely to lead to an improvement in the way in which the functions are exercised.
* There is a reference to working together to improve equality and efficiency of the services, meet the National Conditions and local objectives and make more efficient effect use of resources via the Pooled Fund. There may be other objectives.
* Other aims can be inserted.
  + - * 1. Interpretation
* This contains the definitions and interpretation clauses and is important. The definitions in this template relate to the template; where the template is altered different definitions will be likely to be necessary and if the agreement does not contain any of the terms these should be removed from the definition.
  + - * 1. Clause 2
* The parties will need to consider whether this will be a rolling contract or whether an expiry date is to be included. If a new agreement is being used then this will supersede the previous BCF Agreement.
  + - * 1. Clause 3 – General Principles
* The general principles behind the Agreement, which the parties sign up to about how they propose to work the Agreement. We have merely provided a list for consideration and parties will need to agree their own principles.
  + - * 1. Clause 4 – Partnership Flexibilities
* Whilst this Agreement sets out a range of flexibilities to incorporate a Framework approach, involving lead commissioning, integrated commissioning and joint commissioning, together with the essential Pooled Funds, the parties will have to decide which of the options they wish to put in place, and indeed whether they wish to put in place more than one in order to meet the requirements for the Pooled Fund under the BCF.
* This clause also provides for the delegations between the Council and the CCG to the extent that it is necessary for the delegations to be in place so that the parties can exercise each other's functions.
* In a number of Partnership Agreements it is difficult to identify where there is delegation of functions between the Partners or where a Partner is commissioning services in exercise of its own Functions as such we have included an optional clause in order for the Partners to summarise this. The Options are as follows:
  + - Lead Commissioning with Council as Lead Partner. In this option the Council will be commissioning services in exercise of both CCG and Council Functions. The CCG will have delegated its Commissioning Function in respect of those services to the Council.
    - Lead Commissioning with CCG as Lead Partner. In this option the CCG will be commissioning services in exercise of both CCG and Council Functions. The Council will have delegated its Commissioning Function in respect of those services to the CCG.
    - Aligned Commissioning with Council as Lead Partner. Here the Council is commissioning the Services in exercise of Council Functions. There is no delegation of Functions from the CCG. However, the CCG and Council are co-operating in identifying and aligning services that need to be provided.
    - Aligned Commissioning with CCG as Lead Partner. Here the CCG is commissioning the Services in exercise of CCG Functions. There is no delegation of Functions from the Council to the CCG. However, the CCG and Council are co-operating in identifying and aligning services that need to be provided.
    - Integrated Commissioning – both the CCG and the Council enter into a contract for the commissioning of services in exercise of both CCG and Council Functions.
    - Integrated Commissioning Unit – this can be either Lead Commissioning (one Partner hosts the Unit as Lead and all functions are delegated to that Partner) or Joint Commissioning (the staff of each Partner work together but retain their separate roles) or using a s.113 Arrangement where the staff act as Council officers when undertaking Council roles and CCG officers when undertaking CCG roles.
      * 1. Clause 5 – Functions
* The Functions which can be included within the Section 75 Agreement are set out in the 2000 Regulations. The parties should take opportunity to review the incorporation of any primary care arrangements pursuant to the latest statutory amendments to the 2000 Regulations and any local co commissioning arrangements.
* Each Scheme should have a detailed specification which sets out exactly what the Parties have agreed will be commissioned and how the commissioning arrangements will work. A template scheme specification is included in Schedule 1 of the Agreement.
* This Agreement can also be expanded to establish a Framework which can then incorporate other schemes and funding arrangements should this be desirable.
  + - * 1. Clause 6 – Commissioning Arrangements
* This sets out suggested provisions for integrated commissioning and the appointment of a Lead Commissioner and gives some suggested criteria as to duties and responsibilities of each of the parties in relation to this. Some of these are likely to require more work to agree than others; for example the way in performance management and contract monitoring is carried out.
  + - * 1. Clause 7 – Establishment of Pooled Fund
* The BCF arrangements require a Pooled Fund, and the Care Act 2014, Section 121 provides for this. There are various ways in which Pooled Funds can be managed but this clause provides for what the monies held in the Pooled Fund may be expended upon. The Clause also provides for the Host Partner and outlines the responsibilities of the host partner in relation to the Pooled Fund.
* There is a clause included to confirm what the parties intentions are at the Commencement Date in relation to Pooled Funds. I.e. will there be a single Pooled Fund for the whole Agreement or separate Pooled Funds?
* Will the parties be incorporating any new Pooled Funds to these arrangements for the next financial year or will the extending Pooled Fund(s) continue in operation as per the existing arrangements.
  + - * 1. Clause 8 – Pooled Fund Management
* This clause outlines the agreement in relation to who is to be the Host Partner and which officer will then act as the Pooled Fund Manager, and the duties and responsibilities of the Pooled Fund Manager. Where there is more than one Pooled Fund, this clause also provides for virement between Pooled Funds in accordance with the governance arrangements agreed.
* Parties to consider any practical issues arising from the management of the Pooled Fund(s) for 2016/17, which require amendments to the arrangements set out in Clause 8 or Schedule 1 of the Agreement to apply during the next financial year.
  + - * 1. Clause 9 – Non Pooled Funds
* These are optional between the parties and indeed can be notional funds with contributions identified but held separately. Transfers between partners for Non-Pooled Funds will be made by Section 76 or Section 256 of the 2006 Act. The template provides for the Host Partner to have responsibilities for establishing the support needed to enable the effective and efficient management of the Non-Pooled Fund.
  + - * 1. Clause 10 – Financial Contributions
* Parties will need to revise existing financial arrangements and consider the drafting notes in the template agreement.
* The parties will need to consider where the financial contributions are set out and how and where this needs to be revised. In addition, individual Scheme Specifications will need to be considered and revised where these set out the Financial Contributions.
* There are key questions to be considered in relation to how the parties will decide future financial years' contributions and how the parties will resolve any disputes in relation to those key decisions.
  + - * 1. Clause 11 – Non Financial Contributions
* Parties need to consider what elements necessary to perform their obligations will be re-charged to the Pooled Fund and what will be provided as a cost borne by the Lead Partner. For example, will any Partner be able to charge the Pooled Fund for any IT support, HR, audit, premises etc?
* The template Scheme Specification refers to non-financial contributions but Partners will need to consider whether they have included this in their scheme specifications.
* It may however be the case that the parties are able to agree some overarching principles which will apply to such non-financial contributions, which can be set out in Clause 11. For example, confirming that non-financial contributions will not be recharged to the Pooled Fund unless expressly agreed or set out in the Scheme Specification.
  + - * 1. Clause 12 – Risk Share Arrangements, Overspends and Underspends
* The risk share arrangements are set out in detail in Schedule 3 and deal with overspends and underspends in both Pooled and Non-Pooled Funds. The parties will need to identify the process by which potential overspends are identified, reported and the decision is taken as to the action to deal with the overspend and how this will be dealt with in an equitable manner. Parties can agree to apportion overspends, for example, in agreed or variable proportions.
* It is important that parties consider how underspends will be dealt with as well as overspends. For example, if an individual scheme does not progress, will the "underspend" in relation to that Individual Scheme become part of the contingency? Will the Lead Partner for that particular Individual Scheme be able to retain that element outside of the pooled Fund or be able to choose an alternative scheme? How will any contingency left at the end of the year be dealt with?
* Please also see comments at paragraph 2.3 below.
  + - * 1. Clause 13 – Capital Expenditure
* This provides that neither Pooled nor Non-Pooled Funds would normally be applied towards Capital Expenditure unless this is specifically agreed by the partners or where there is a capital payment required pursuant to the funding under the Better Care Fund Requirements (such as the Disabled Facilities Grant). There are problems in using Pooled Funds for capital on the termination of the fund.
  + - * 1. Clause 14 – VAT
* Local Authorities and the NHS have different VAT treatments and the parties must consider their positions relating to VAT as it may make some difference. This should be considered when the parties are deciding on the commissioning arrangements.
  + - * 1. Clause 15 – Audit & Right of Access
* The parties will each have responsibilities for audit and so the arrangement needs to provide for the responsibilities of the Host Partner relating to audit and the right of internal and external auditors to be given access to anything they need to carry out their duties.
  + - * 1. Clause 16 – Liabilities & Insurance & Indemnity
* The parties will need to consider and agree what will happen in relation to the acts and omissions of each other which contribute to losses or give rise to a claim for liability. The parties will also have a requirement to consider their respective insurance position and take advice from their own insurance providers. There are particular issues about the availability of NHSLA cover for Health Bodies who perform Council health related functions and Councils will need to take their own insurance advice on this. The clause also provides for the parties to always take reasonable steps to mitigate any loss for which one party may be entitled to bring a claim against the other in relation to the Agreement.
  + - * 1. Clause 17 – Standards of Conduct & Service
* This sets out the statutory duties of both Local Authorities and the CCGs and also relates to the approach the parties will take in relation to equality and equal opportunities.
  + - * 1. Clause 18 – Conflicts of Interest
* Given the range of responsibilities of both parties to the Agreement it is desirable for the parties to agree a policy as to how these are managed and set it out in a Schedule.
  + - * 1. Clause 19 – Governance
* The parties will have to agree their own approach to governance which relates back and is agreed by the Health and Wellbeing Board as an integral part of delivering the Better Care Fund.
* It is important for parties to consider what the governance arrangements were in 2015/2016 and how this worked. In particular:
  + - Was there sufficient oversight?
    - Was the decision making responsibility clear and agreed?
    - Were all decisions taken at the appropriate level by the right group?
    - Was it clear exactly who was reporting to whom and when?
    - Did the relevant groups meet up as required or was there issues in getting appropriate attendance
    - Are other groups required such as a finance sub-group?
    - Are there additional groups for all/some Individual Schemes and is it clear how these feed in to the main governance groups?
    - Is there an individual who is responsible for each Individual Scheme?
    - Is there an individual responsible for the BCF and how does this role fit in to the governance arrangements?
* There are a number of different variations to provide the appropriate governance arrangements. The template sets out one approach with an officer working group structure. This is the Partnership Board but whatever governance structure is chosen, the parties will need to determine carefully the terms of reference of the Governance Body, its particular functions and objectives and any delegation which is made from the parties to the representatives who sit on the Governance Bodies.
* The parties should consider whether any amendments have been made to the governance structure during the first financial year of operation and whether any of those amendments need to be set out in any amendments to Clause 19 or Schedule 2 (Governance).
  + - * 1. Clause 20 – Review
* The template provides for an annual review of the Agreements and this will need to be tied into the overall governance arrangements referred to above, and of course to the Health and Wellbeing Board and the requirements of the BCF Plan. The parties should consider what will this Annual Review cover? Presumably it will include consideration of how the partners are doing against the BCF performance targets? What else? Who will actually do the annual review?
* We would recommend that this Clause is expanded so that it is clear what assurance framework is in place. What are the monitoring requirements? How often does each Scheme/Sub Scheme need to report? Who does the reporting? Who do they report to? What is required?
* How often does the Health and Wellbeing Board want a report on BCF? Is this quarterly or more frequent? What information has been requested and was this sufficient?
* We would suggest that the parties consider the effectiveness of the current review arrangements and whether amendments to the structure of the review process should be set out any Clause 20, as well as how the outcome of such reviews are implemented by the parties and the Partnership Board.
  + - * 1. Clause 21 – Complaints
* The parties will need to consider whether they develop a joint complaint procedure to apply to the services delivered under the Agreement, or if they agree to use their own complaints procedure.
* Parties to consider how the complaints procedure adopted for the financial year 2015/16 has worked in practice and whether any amendments are required to the current approach including whether it is appropriate to adopt a joint complaints procedure.
  + - * 1. Clause 22 – Termination & Default
* This provides the arrangements for termination and default, and in the template it also provides for Individual Schemes to be terminated but the BCF Requirements continuing to be met (with optional drafting should the Scheme Specifications not set out how an Individual Scheme can be terminated).
* This is a very important clause, and the parties will need to take care to identify both the arrangements between themselves, and the arrangements which will apply to any service contract which are held by a lead Commissioner in relation to services which apply to the other party's functions. This would ideally be dealt with by a novation to the other party, or by the other party agreeing to act as an agent and the contract remaining in place; in any case the contractor must be brought into the discussion.
  + - * 1. Clause 23 – Dispute Resolution
* The template sets out a sample dispute resolution procedure; the parties will need to consider whether they are willing to consider arbitration, it incorporates the model CEDR Mediation procedure. However, the parties may agree other ways for dispute resolution.
* Do the parties need to make any amendments to this Clause on the basis of the practice application of the disputes resolution procedure during the first financial year of operation?
  + - * 1. Clause 24 – Force Majeure
* This provides for neither party providing for liability to the other in respect of a force majeure event and incorporates a provision for the parties to act in good faith towards each other.
  + - * 1. Clause 25 – Confidentiality
* This provides for the parties to keep confidential information strictly confidential and not disclosing it to other parties. The Clause also provides for when the parties may disclose such confidential information and for the parties not to use confidential information other than for the performance of their obligations under the agreement.
  + - * 1. Clause 26 – Freedom of Information Act and Environmental Information Regulations
* This provides for cooperation between the parties upon the receipt of requests for information under the respective Acts.
* Have the parties relied on these provisions during the first year of operation of the Agreement and would it be helpful to make any amendments on the basis of the practical application of this Clause?
  + - * 1. Clause 27 – Ombudsman
* The parties agree to cooperate with investigations undertaken by either the LGO or the Health Service Commissioner for England in connection with the Agreement.
  + - * 1. Clause 28 – Information Sharing
* A protocol for information governance should be agreed and set out in Schedule 8 to ensure that the Agreement complies with the law.
* The Parties should review of the information protocol incorporated at Schedule 8 and consider whether any amendments are required for 2015/2016 including in the management of their data sharing arrangements at a local level on the basis of the NHS number.
  + - * 1. Clause 29 – Notices
* This provides for the service of any notice required to be served under the Agreement.
* Do the parties need to review and update these provisions on the basis of the changes in contact details for sake of completeness (that may have already been confirmed in writing by each Party)?
  + - * 1. Clauses 30 - Variations

The parties should consider whether to adopt a more detailed variation procedure and consider how appropriate the procedure which they have implemented for the first financial year of operation has been in practice.

* + - * 1. Remaining Clause - Clauses 31 (Change in Law) to 39 (Governing Law and Jurisdiction)

These remaining Clauses are technical legal clauses dealing with matters such as change in law, the entire Agreement and the governing law, etc.

* + - 1. **THE SCHEDULES**

Because the Schedules set out the specific relationship between the parties, and are necessarily more detailed to relate to their specific Agreement, many of the Schedules in this template are not populated. The template does contain some suggested drafts where it is felt this would be of most use.

1. 1. Schedule 1 – Scheme Specification

The template is designed so that the individual service specifications are set out in appendices. In many ways, as can be seen from the template this repeats many of the provisions within the main Section 75 Agreement, but goes into more detail in relation to such matters as the individual service specification, etc. It may be the case that where many services are included within the Agreement, different appendices relating to each scheme are required.

For the next financial year of operations, the parties need to consider:

* any amendments to existing Individual Schemes and therefore, the associated Scheme Specification (for example, changes to the operational, financial or governance arrangements);
* the need to include any new Individual Schemes;
* how the parties will need to document their commitment to:
  + maintaining the provision of social care services;
  + their investment in NHS commissioned out-of-hospital services; and
  + adhering to their local action plan to reduce delayed transfers of care (DTOC) and improve patient flow,

in accordance with the latest Technical Guidance Annex 4.

* 1. Schedule 2 - Governance

The template relates to the particular Partnership Board approach adopted in the main Agreement but this is purely an example and there are many other approaches which the parties could agree.

Further to comments above at paragraph 1.22, do any amendments to the terms of reference to the Partnership Board (and any sub groups) need to be set out in Schedule 2? Have there been any changes in the overarching governance structure and the joint working arrangements between the parties that should be set out in amendments to Schedule 2?

* 1. Schedule 3 – Financial Contributions, Risk Share, Overspends and Underspends

The parties will need to consider carefully what they do in relation to both overspend and indeed any underspends that may apply and whether these are to be dealt with on a case by case basis or via a general apportionment approach.

This schedule ought to be reviewed for the next financial year of operation in the context of:

* issues arising from the implementation of the current risk sharing arrangements including the effectiveness of the procedure for dealing with the occurrence of Overspends or Underspends;
* amendments to take into account the changes to the payment for performance framework in relation to reducing acute admissions; and
* the requirements set out in the latest Technical Guidance Annex 4 for setting out a risk sharing arrangement that links with the local plan for delivering Non - Elective Admissions in 2016/17 as well as other specific and overarching requirements as set out in Paragraph 30 and Appendix 2 setting out matters that the risk sharing arrangements should address.
  1. Schedule 4 – Joint Working Obligations

The template provides some illustrative examples of what the parties may wish to agree to that they require to have reported, etc. Once again the parties will need to decide for themselves what they wish for the obligations to be on the lead Commissioner and the other parties.

* 1. Schedule 5 – Performance Arrangements

Please consider any amendments to this Schedule as included in the 2015/16 arrangements following the annual review of the operation of the same as well as the addition of any new Individual Schemes as part of Schedule 1.

* 1. Schedule 6 – Better Care Fund Plan

Would the parties like to set out the updated version of the current BCF plan here or rely on the proposed definition of Better Care Fund Plan in the template Agreement which incorporates any amendments to the same by reference.

* 1. Schedule 7 – Policy for the Management of Conflicts of Interest

Please see comments above at paragraph 1.21.

* 1. Schedule 8 – Information Governance Protocol

Please see comments above at paragraph 1.31.

* 1. Other Schedules

There may of course be other Schedules which the parties require as a result of their Agreement, which ought to similarly be subject to review as appropriate for the next Financial Year of operation.