

Explanatory Memorandum to the Code of Practice on the National Framework for the Commissioning of Care and Support in Wales under the Social Services and Well-being (Wales) Act 2014

This Explanatory Memorandum has been prepared by the Health, Social Care and Early Years Group and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Code of Practice on the National Framework for the Commissioning of Care and Support in Wales. I am satisfied that the benefits justify the likely costs.

Dawn Bowden MS
Minister for Social Care
11 June 2024

PART 1

1. Description

The Code of Practice on the National Framework for the Commissioning of Care and Support in Wales (“The Code”) establishes a framework for the commissioning of care and support in Wales by local authorities, local health boards and NHS Trusts.

The Code sets out national principles and standards which commissioners must follow when commissioning services for care and support for their local populations. It also seeks to rebalance the basis upon which the provision of care and support services are commissioned, by focusing on outcomes and social value and by shifting from price towards quality and focusing on outcomes.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

This Code addresses errors identified in the draft Code laid on 19 March 2024 and subsequently withdrawn.

3. Legislative background

The Code is issued under section 145 of the Social Services and Well-being (Wales) Act 2014 (“the 2014 Act”). It also constitutes guidance under section 169 of the Act and guidance under section 2 of the NHS (Wales) Act 2006 (“the 2006 Act”).

To ensure that the Code has comparable force in relation to local authorities Local Health boards and NHS trusts, the Welsh Ministers will direct Local Health Boards and NHS Trusts under the NHS (Wales) Act 2006 to exercise their functions in accordance with the requirements contained within this Code when exercising their respective function.

The 2014 Act provides the legal framework for improving the well-being of people who need care and support, and carers who need support, and for transforming social services in Wales. It introduced a comprehensive and integrated approach to social services, emphasising the well-being of individuals and communities.

The 2006 Act establishes a legal framework for the organisation and delivery of healthcare services in Wales.

The Code follows the Senedd’s draft negative procedure and will be brought into force in September 2024 with the making of an Appointed Day Order.

4. Purpose and intended effect of the legislation

The Code is a key component of the broader Rebalancing Care and Support Programme, alongside the establishment of a National Office for Care and Support (“The National Office”), which will oversee the implementation of the

National Framework. The strengthening of Regional Partnership Board arrangements, supporting stronger partnership working and the integration of services, is another component of the overarching programme.

The Rebalancing Care and Support Programme aims to readjust the care and support market in the following ways:

- Away from complexity, towards simplification.
- Away from price, towards quality and social value.
- Away from reactive commissioning, towards managing the market.
- Away from task-based practice, towards an outcome-based practice.
- Away from an organisational focus, towards more effective partnership and co-production with people for better outcomes.

The Code lays out the principles and standards for commissioning practices in Wales. Commissioning involves making decisions about what services are needed to respond to the care and support needs of children and young people, families, adults and unpaid carers in Wales. It also involves making decisions about the capacity, location, cost and quality of services alongside those who will be receiving and delivering these services.

The Code consolidates good practice on commissioning, providing a framework to help shift the commissioning of services away from price towards quality and social value, and re-orientate reactive commissioning practices towards managing the market and focusing on outcomes.

The Code applies to the commissioning of care and support services within the context of the 2014 Act to meet the care and support needs of local populations by a local authority, local health board or NHS Trust. It applies in relation to internally provided or externally commissioned services, including regulated and non-regulated services. This Code applies to the 'care and support' element of a package of care arranged and funded by a local health board or NHS trust where the individual has been assessed as having a 'primary health need' (as opposed to a need for local authority care and support) or in need of nursing care.

The National Office will be established within Welsh Government and one of its functions will be a national commissioning function which will support the implementation and management of the Code. Implementation of the Code will begin in September 2024.

The Welsh Government will also put in place and keep up to date a 'toolkit' of resources such as notable practice examples, case studies and evidence, commissioning tools, template clauses, to support commissioners in the delivery of this Code. This toolkit will be available by the date the Code comes into force and managed and kept up to date by dedicated staff within the National Office.

5. Consultation

A 12-week consultation was held on the Rebalancing Care and Support Programme between 22 May and 14 August 2023. The Welsh Government issued a Written Statement on the date the consultation launched, which was widely disseminated to various organisations via email and promoted on social media. The consultation was featured in Social Care Wales newsletters and highlighted at the Welsh Government stand at the National Eisteddfod. Two engagement events were also conducted – an online event in June and an in-person event in July – allowing representatives from local government, NHS, third sector, and independent sector organisations to seek clarification directly from Welsh Government officials before submitting formal responses.

The majority of responses agreed that the principles and standards would positively contribute to more consistency and reduced complexity in commissioning processes, whilst acknowledging the inherent complexities within the social care market. The principles of prioritising individuals' needs, co-production, transparency in decision-making, and fair pricing and work principles were particularly welcomed. However, concerns were raised about implementation challenges, including resource limitations and varying capabilities across commissioning teams. Calls were made for clearer guidance, adequate funding, and enhanced training for commissioners, as well as the development of tools and toolkits to support implementation.

Further information on the consultation can be found at:

<https://www.gov.wales/rebalancing-care-and-support-programme>

Amendments to the Code

The draft Code submitted for consultation has been enhanced to reflect the consultation responses. This includes strengthening of provisions including changing guidance to a statutory requirement e.g. in relation to commissioners encouraging providers to complete and return the annual Social Care Wales workforce data collection and use and keep up to date their information on the Care and Support Capacity Tracker is now a requirement. The amended Code also includes minor revisions to make the Code clearer and more concise and up to date in line with wider policy developments.

The Code has been reviewed extensively with regards to how it can promote and support the upholding of equalities and human rights in particular children's rights. It is acknowledged there were detailed suggestions on how this can be achieved in the consultation responses, however, based on the existing duties in the Act and other equalities legislation a careful balance has tried to be achieved to align with those duties whilst strengthening the ways in which the Code supports human rights in the specific context of commissioning. Standard 10 relating to equalities and human rights has for example, in response to the Children's Commissioner, been enhanced with additional provisions requiring statutory partners to:

- have regard to the 'THE RIGHT WAY - A Children's Rights Approach for Social Care in Wales – A Children's Rights Approach is a principled and

practical framework for working with children, grounded in the UN Convention on the Rights of the Child¹;

- have regard to the [Corporate Parenting Charter](#)²;
- find ways in which their statutory duties relating to equalities and human rights can be extended to providers through contracts and service specifications and
- undertake Equalities Impact Assessments for commissioning and procurement exercises.

In the course of considering the consultation responses and amendments to the Code it has been identified that the toolkit will play an important part in supporting commissioners to deliver their duties. The Welsh Government will be working with the Children's Commissioner and the Equalities and Human Rights Commission to develop specific tools in this regard.

6. Regulatory Impact Assessment (RIA)

PART 2 – REGULATORY IMPACT ASSESSMENT

The Code contains 7 principles and 10 standards which have been grouped into the following three themes for the purpose of assessing the costs, benefits and risks as part of this regulatory impact assessment:

Theme 1: Commissioning underpinned by the key values within the 2014 Act (co-production, collaboration, early intervention and long-term planning)

Standards

- Standard 1 emphasises achieving well-being outcomes, co-production with individuals, collaboration, early intervention, prevention, and long-term planning.
- Standard 2 supports this theme by stressing the need for collaboration, co-design, and continuous improvement in the commissioning cycle.

Principles

- Principle 1 emphasises the importance of fostering caring, compassionate, and equal relationships through inclusive co-production between commissioners and care providers, citizens, and people in need of care and support.
- Principle 3 highlights the necessity for collaboration among leaders and commissioners, urging them to share risks, resources, and assets to enable positive risk management and enhance population well-being, with a focus on community involvement.

¹ <https://www.childcomwales.org.uk/wp-content/uploads/2024/02/202402-Childrens-Commissioner-for-Wales-Right-Way-Social-Care-English.pdf>

² <https://www.gov.wales/corporate-parenting-charter>

- Principle 6 stresses the need for proactive planning for both present needs and future generations, advocating for forecasting and preventive measures to ensure sustainable outcomes in the medium to long term.

Theme 2: Evidence-Informed Decision Making

Standards

- Standards 3 and 4 focus on the importance of evidence in commissioning. Standard 3 highlights the collation of relevant and accurate data, while Standard 4 emphasises evidence-informed decisions regarding commissioning and procurement plans.

Principles

- Principle 2 stresses accountable leadership in health and social care, advocating transparency and evidence-based decision-making, while urging continuous improvement in learning systems to minimise data duplication.
- Principle 7 highlights the need to collect evidence from care recipients and carers to inform service outcomes, advocating measurement based on experience and outcomes. It promotes a culture of ongoing learning and improvement, utilising both narratives and numerical data to identify and embed effective practices.

Theme 3: Value-Based Commissioning and Ethical Practices

Standards

- Standard 5 highlights measuring 'value' by considering people's experience and outcomes, quality and safety standards, environmental impact, additional social value, and cost.
- Standard 6 emphasises ethical commissioning that is underpinned by Fair Work principles.
- Standards 7 to 10 collectively stress understanding the full costs, using regional or national benchmarks, transparency in setting fee rates, keeping financial and contract standing orders under review, and proactively addressing inequalities and promoting human rights.

Principles

- Principle 4 focuses on delivering high-quality, safe care and support that achieves meaningful outcomes for individuals and enhances social value. It ensures that commissioning practices consider legal, procurement, and regulatory responsibilities, as well as factors such as equality, human rights, and environmental impact.

- Principle 5 highlights the importance of fair work practices and pricing structures in ensuring the sustainability of care and support services. It aims to improve the status, well-being, and working conditions of health and social care workers across all sectors, with the goal of achieving equality in terms of esteem and employment conditions.

6. Options

Two options have been considered in the analysis of the costs, benefits, and risks of creating a National Framework for the Commissioning of Care and Support in Wales which commissioners would be bound by at local, regional and national level.

These are:

- **Option one: do nothing - do not create a National Framework for the Commissioning of Care and Support in Wales**

This option reflects the current position. Under this option, the Welsh Government would not create a National Framework for the Commissioning of Care and Support in Wales. Instead, commissioners would rely on existing provisions within the 2014 Act to make decisions about what services are needed to respond to the care and support needs of people in Wales.

- **Option two: create a National Framework for the Commissioning of Care and Support in Wales**

Under this option, a Code of Practice would be created under the 2014 Act to create a National Framework for the Commissioning of Care and Support in Wales in Wales.

COSTS

- **Option one: do nothing - do not create a National Framework for the Commissioning of Care and Support in Wales**

This is the baseline option and, as such, there are no additional costs under this option. The current costs of the existing system would however continue to be incurred.

- **Option two: create a National Framework for the Commissioning of Care and Support in Wales**

Theme 1: Commissioning underpinned by the key values within the 2014 Act (co-production, collaboration, early intervention and long-term planning)

The requirements within this theme largely reinforce those within the 2014 Act

relevant to commissioning, including:

- the importance of working with people who need care and support, and carers, to fully understand what care and support people need and what matters to them;
- collaborating with organisations including local authorities and health boards, as well as service providers; and
- the importance of prevention, early intervention, and long-term planning, which aims to delay the onset of more complex needs for care and support.

We do not consider that the requirements in this part of the Code go further than those within the 2014 Act, as this aspect of the Code re-emphasises the need to commission services in alignment with existing legal requirements. As such, we do not expect there to be additional costs arising from this aspect of the Code, which reinforces to commissioners the standards and principles they need to apply when commissioning services. However, we are aware of the gap between the aspirations in the 2014 Act and the consistency in how these principles have been implemented since the 2014 Act came into force. As described in the final evaluation report for the 2014 Act³ published in March 2023:

Our evidence suggests that the implementation of the principles has progressed further in some local authorities than others – and within them, in some service areas than others. For example, as demonstrated within the co-production report, the implementation of “robust arrangements... for encouraging the involvement of people” in “the co-production of the design and operation of services” was far from consistent, and in the case of some authorities and services, still in the very early stages.

In terms of partnership working, the evaluation stated:

Fully integrated working on a consistent basis.. remains elusive, and multi-agency working continues to prove challenging for organisations and the workforce.

This demonstrates that, whilst the Code will not place additional requirements on commissioners, the implementation of these principles and standards may give rise to additional aspects to be considered and taken into account when commissioning for local authorities, local health boards and NHS Trusts who have not yet fully realised the aspirations within the 2014 Act.

Theme 2: Evidence-Informed Decision Making

There are existing mechanisms in place for commissioners to collate relevant and accurate information to ensure that commissioning is based on meaningful data and demonstrate that commissioning plans are based on evidence-

³ [From Act to Impact? Final Report of the Evaluation of the Social Services and Well-being \(Wales\) Act 2014 \(gov.wales\)](https://www.gov.wales/government/evaluation-of-the-social-services-and-well-being-act-2014)

informed decisions.

Local authorities and local health boards are already required by the 2014 Act to work in partnership to produce population needs assessment reports and market stability reports, for example. Effective co-production will also contribute to the qualitative evidence of what is valued by people who receive care and support, and what works.

The Welsh Government already funds the Care Homes Wales project, which enables commissioners to access real-time data about the number of available places in care homes. The system aims to reduce costs in terms of commissioners' time in contacting individual services to obtain this information. We understand that this online facility has not been fully utilised by commissioners and providers. The Code recommends that this is adopted as part of the commissioning process.

We do not consider that the requirements in this part of the Code go further than existing requirements and therefore we do not expect there to be any additional costs associated with this theme.

Theme 3: Value-Based Commissioning and Ethical Practices

The guidelines within this aspect of the Code state that commissioners should consider the broader value of services over costs. This means taking into consideration a range of factors, including:

- The quality and safety of services;
- How well services can support people to achieve what matters to them;
- The pay, terms and conditions for staff working at commissioned services;
- The environmental sustainability of services;
- Other regulatory responsibilities including equalities and human rights law.

Local authority and health board commissioners should also work together with providers to determine fair and sustainable fees for contracted services. This reinforces the existing Programme for Government commitment to pay social care workers the Real Living Wage (RLW) as a minimum.

As stated in the Social Care Fair Work Forum: annual progress update 2023⁴, current commissioning arrangements tend to result in pay levels that remain at the statutory minimum rather than enabling uplifts to the Real Living Wage. This means people who work in the sector experience low pay and often variable contractual arrangements which conveys an impression that caring is not a role that is valued or one to aspire to.

As part of this work, the Welsh Government worked with local authorities and health boards to identify the cost of implementing this commitment in 2023-24 (year 2), estimating the cost would be £70m, based on the RLW rising to £10.90

⁴ [Social Care Fair Work Forum: annual progress update 2023 \[HTML\] | GOV.WALES](#)

per hour from 1 April 2023. Welsh Government funding was made available to support this. However, we recognise this uplift only applied to registered workers in care homes and domiciliary care, as well as personal assistants funded through a direct payment, and that paying a fair wage is only one element of fair work principles, which include terms and conditions and progression frameworks.

Fully implementing all aspects of this part of the Code is therefore likely to have cost implications for local authority, local health board and NHS Trust commissioners. This was highlighted in many of the consultation responses, including the WLGA, who stated:

Ahead of the 2023-24 budget settlement it was assessed that councils were already facing a potential gap of £802 million over the next two years due to cost pressures (and inflationary and increased energy prices) which will inevitably have an impact on the capability and capacity of councils to deliver services. For social services alone local authorities were facing a total cumulative pressure of £407.8m for 2023-24 and 2024-25... These stark financial challenges mean that without additional funding being provided there will be a significant implementation challenge, particularly around some aspects of the proposals such as fair work and fair pricing.

While a number of consultation responses raised the likelihood of financial implications, none provided an indication of the potential scale of the cost increase. The additional cost to public bodies for complying with this theme is therefore unknown at this stage. In recognition of the aspirational and long-term nature of these policies, many of the principles and standards within this part of the Code are guidelines rather than requirements.

Establishment of the National Office for Care and Support

There will be costs involved in the establishment of the National Office which will support the implementation of the Code, in addition to its other functions. The staffing cost allocation for National Office when it is established is anticipated to be £465K, which will be resourced by a mix of existing Welsh Government staff transferring into the National Office and recruitment.

An additional £25-30K from the social care reform budget will be used to raise awareness and provide training on the National Framework for local authority, local health board and NHS Trust commissioners. These costs will be met by the Welsh Government. The toolkit will be hosted on a digital community platform hosted by Social Care Wales which is one of Welsh Government's sponsored bodies therefore this is cost-neutral for the platform itself and training for staff in its usage.

There will be costs involved in terms of time for commissioners to familiarise themselves with the content of the Code. The National Commissioning Board has estimated that between 100 and 150 people from local authorities, health boards and NHS Trusts will need awareness training. We estimate that this will take around 3 hours per individual. The Annual Survey of Hours and Earnings (ASHE) provides figures on hourly earnings for different occupations across the

different regions. The below table sets out the figures for the two most relevant occupations in the survey data. Using this data we estimate that the cost range for commissioners to undertake this training will be between £5,600 and £14,100.

Occupation	Median gross hourly salary	Including on-costs (30%)	Cost to undertake training on Code
Administrative Occupations: Government and Related Organisations	£14.34	£18.64	£5,600 - £8,400
Health and Social Services Managers	£24.08	£31.30	£9,400- £14,100

BENEFITS

- **Option one: do nothing - do not create a National Framework for the Commissioning of Care and Support in Wales**

Under this option, local authority, local health board and NHS Trust commissioners would not have to familiarise themselves with the requirements within the Code, which may save them time in the short term. However, as many of the requirements are already embedded within the 2014 Act, they will still be required to fulfil these functions without the benefit of support from the National Office or the toolkit. Overall, we do not consider it beneficial to maintain the status quo.

- **Option two: create a National Framework for the Commissioning of Care and Support in Wales**

Theme 1: Commissioning underpinned by the key values within the 2014 Act (co-production, collaboration, early intervention and long term planning)

The requirements in this theme bring together the key principles within the 2014 Act relevant to effective commissioning, including supporting people to achieve their well-being outcomes, co-production, collaboration, early intervention, and long-term planning. The benefits of these principles are well documented, as set out in the EM/RIA for the Social Services and Well-being (Wales) Bill⁵ but we know from the evaluation of the 2014 Act that there remains a gap between these principles and how consistently and effectively they are implemented across Wales.

Whilst the 2014 Act refers to the requirements to assess people's care and support needs and plan services to meet these needs, it does not specifically refer to the role of commissioning. The Code consolidates the key principles and standards for effective commissioning into one document, providing a

⁵ [Microsoft Word - Explanatory Memorandum - COMPLETE - FINAL for INTRO - 23012013.doc \(senedd.wales\)](#)

framework for this role. It also provides more detail about how commissioners must and should plan to meet the needs of people who need care and support in Wales, with a focus on building relationships. This aims to create a renewed focus on these aspects of the Act and support commissioners to apply these principles more consistently and effectively across Wales. A toolkit will also be produced alongside the Code to provide additional resources to support commissioners to meet these requirements.

Theme 2: Evidence-Informed Decision Making

Whilst commissioners are already required to collate relevant and accurate data to inform how services should be planned to meet people's needs, the Code sets this out in one place, providing clarity about what data commissioners must and should collect as part of this process. It highlights existing tools that can be used to support them to gather this information, such as the Care Homes Wales project. This aims to provide clarity and support for local authority, local health board and NHS Trust commissioners, leading to greater consistency and quality in the data that is gathered as part of the commissioning process.

The Code also demonstrates how evidence gathering is linked to co-production and working in partnership with other organisations, stressing that evidence should be gathered through stories *and* numbers. This helps to reinforce the importance of building relationships as part of the commissioning process. Ensuring decisions are based on sound evidence will help people to be cared for and supported in a way that meets their needs and preferences.

Theme 3: Value-Based Commissioning and Ethical Practices

This aspect of the Code sets out how value-based commissioning and ethical practices are aligned to the broader Welsh Government objectives including rebalancing social care, tackling inequalities, and promoting environmental and sustainable practices. It lists the relevant legislation and good practice that commissioners should take into consideration when determining whether a service can meet this broader definition of social value, including equalities and human rights legislation.

The Code also provides guidance about what social value means in the context of commissioning, which will ensure commissioners have a shared understanding of this and how to work towards this goal. This should lead to greater consistency in commissioning practices and ultimately aims to incentivise providers to create more sustainable, ethical, and higher quality services.

RISKS

- **Option one: do nothing - do not create a National Framework for the Commissioning of Care and Support in Wales**

Under option one there is a risk that, without a National Framework for the Commissioning of Care and Support in Wales bolstered by support from the

National Office and the toolkit, there will continue to be inconsistent commissioning practices across Wales that do not meet the objectives of the Rebalancing Care and Support Programme.

- **Option two: create a National Framework for the Commissioning of Care and Support in Wales**

Theme 1: Commissioning underpinned by the key values within the 2014 Act (co-production, collaboration, early intervention and long-term planning)

There are risks associated with co-production and partnership working including raising expectations for people which may not be met, time and capacity limitations within organisations, as well as managing different organisational structures, processes and funding. There also remains a risk that the continued rise in demand for acute social services makes it more difficult to direct resources towards supporting preventative services.

However, these requirements are already embedded within the 2014 Act and are not as a result of creating a National Framework for the Commissioning of Care and Support in Wales. Creating a National Framework supported by the National Office and a toolkit should mitigate some of these risks by providing greater clarity and guidance on how to effectively meet these objectives.

Theme 2: Evidence-Informed Decision Making

As many of the requirements within this theme consolidate existing requirements around data collection and evidence informed decision making, we do not consider there to be any risks associated with these requirements.

Theme 3: Value-Based Commissioning and Ethical Practices

There is a risk that the significant resourcing issues across social care will prevent commissioners from being able to fully implement this part of the Code, which aims to rebalance the commissioning of services away from cost, towards social value. Moving away from a focus on cost-minimisation could increase commissioning costs and worsen already strained budgets, potentially reducing the volume of care that can be provided.

We acknowledge that the principles and standards outlined in this section of the Code may be ambitious and challenging in certain respects, requiring comprehensive system-wide adjustments over time. These considerations will be factored into the biennial review of the Code, and, where deemed necessary, addressed through the periodic introduction of supplementary non-statutory commissioning guidance.

Conclusion

Based on an appraisal of the costs, benefits and risks of both options, option two is the preferred option.

7. Post implementation review

The National Office for Care and Support (“the National Office”) will review the Code every 2 years to ensure that it remains current and aligned to the aspirations of commissioning practices.