Can NHS bodies lawfully move away from a "Payment by Results" contract?

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The NHS's Sustainability and Transformation Plans have attracted a large amount of interest from patient groups, Member of Parliament and the media. There are significant problems throughout the health and social care system as both commissioners and hospital trusts struggle to deliver services to an appropriate standard in the face of ever increasing volumes of patients who require NHS treatment for multiple, complex conditions. Difficult issues require radical solutions, but there is a real question as to whether what is currently proposed is lawful.

The present system requires commissioners to enter into standard "Payment by Results" (**PbR**) contracts with providers. A PbR contract between an NHS commissioner and an NHS "provider" (the hospital trust) is compulsory for all services provided to NHS patients[1].

Monitor (now part of NHS Improvement) is obliged [2] to publish a National Tariff[3] . This sets the price paid by NHS commissioners to hospital trusts for supplying specific services to NHS patients. This National Tariff applies to the vast majority of procedures carried out by acute hospitals. Every hospital trust which provides these specific services for an NHS patient has to be paid the price set out in the National Tariff, under section 115(1) of the Health and Social Care Act 2012 (**2012 Act**).

The 2012 Act does permit commissioners and hospital trusts to agree a different price for a service from the National Tariff, but this is a complex procedure and requires Monitor's express approval. Monitor can only give that approval if it is satisfied that it would be

[1] See Part 5 of the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012.
[2] The requirement is in section 116 of the Health and Social Care Act 2012.
[3] The present national tariff is at https://www.gov.uk/government/publications/nhs-national-tariff-payment-system-201617

uneconomic for the hospital trust to provide the service for the NHS if it was paid the price under the National Tariff.

Some NHS commissioners and hospital trusts are discussing the possibility of moving away from PbR contracts to a “block contracting” arrangement where the hospital trust is paid a fixed amount of money by a commissioner to treat all the patients which the commissioner refers to the hospital trust in a particular year. New forms of contract are being discussed as part of the creation of these "Accountable Care Organisation" arrangements. There are strong arguments that the 2012 Act makes such contracts unlawful. That said, there have not been any legal challenges to date and so the courts have not yet ruled on this.

A move away from a PbR contract might give some financial certainty to the hospital trust because there would be a set income within a defined financial year. But there would also be no control over the number of referrals, so this would also involve massive financial risks for hospital trusts. They would have to continue to provide the services however large the numbers of patients referred to them.

The more significant legal problem is that these contracts, which move away from the National Tariff payment system, would breach the rigid rules set out in the 2012 Act. Payment of the National Tariff is a legal requirement for these services. It is therefore difficult to see how commissioners and hospital trusts could lawfully enter into a contract with any other form of payment arrangement.

NHS commissioners and hospital trusts have a general duty to act lawfully. So unless the government repeals the relevant parts of the 2012 Act, any NHS commissioner or hospital trust which enters into an acute services contract in any form other than the standard NHS Acute Services contract (which is the PbR contract) will run the risk of acting unlawfully.

We understand that the draft proposals are still in the course of being put together. Great care will be required in reviewing and finalising any proposals, and in engaging with the NHS

trusts and the wider stakeholder group (including the patients and the communities which the NHS serves), to ensure that the very real problems which the NHS faces are not compounded by a failure to deal with what the 2012 Act presently requires.