

**IS THERE A FUTURE FOR PROCUREMENT  
WITHIN THE NHS?**

**David Lock QC**

**September 2018**

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## What is this talk about?

- A serious challenge to the idea that procurement can be operated within the NHS
- Examining a case that – in practice – virtually all procurement exercises are unlawful
- Comes with a health warning:
  - Arguments failed in R (Shepherd (On Behalf of 999 Call NHS)) v National Health Service Commissioning Board [2018] EWHC 1067 (Admin)
  - Listed for 2 days in Court of Appeal 20-22 November 2018
  - Permission decision is “encouraging”

## What is the ACO case all about

- NHS commissioners and providers
- Providers divide into:
  - Acute care providers
  - Community care providers
  - Mental Health providers
  - Primary care services
- Some services commissioned by CCGs – others by NHS  
England

## How are NHS providers paid?

- Primary care:
  - Annual payment per person
  - Vast variety of top up payments
- Acute care is mainly on National Tariff
  - Emerged from Payment by Results
  - Tariff payment per patient per episode
  - Coding industry, currencies and SUS
- Mental health and community services on block contracts

# The problems with block contracts?



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## Mental health patients forced to travel hundreds of miles

By Johnny O'Shea  
BBC News

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Chloe receives treatment at a centre in Pontypridd

**People with mental health problems are being sent far from home for treatment, with some having to travel hundreds of miles.**

NHS figures show 25 patients a month are treated in hospitals more than 186 miles (300km) away while 255 a month travelled more than 62 miles (100km).

## What are the National Tariff rules?

- Key to National Tariff is s115 of Health and Social Care Act 2012

### **Price payable by commissioners for NHS services**

(1) If a health care service is specified in the national tariff (as to which, see section 116), the price payable for the provision of that service for the purposes of the NHS is (subject to sections 124 and 125) such price as is determined in accordance with the national tariff on the basis of the price (referred to in this Chapter as “the national price”) specified in the national tariff for that service.

(2) If a health care service is not specified in the national tariff, the price payable for the provision of that service for the purposes of the NHS is such price as is determined in accordance with the rules provided for in the national tariff for that purpose.

## Specified services

- Covered by s115(1)
- Price is determined in accordance with the national tariff
- Also has to be “on the basis of” the national price
- Subject to a single exception under s124/5:
  - Requires Monitor’s express approval
  - Upwards only price revision
  - Strict test before price increase is permitted

## Non-specified services

- No national price set in the National Tariff
- Can be based on service provided and not just on the basis of price for treatment provided to an individual patient
- Rules of national tariff must be followed before the price is fixed
- That gives third parties a key say in price fixing process



## But where facts are for the public body..

- Challenge to the factual assessment can only be on the basis the factual conclusion was Wednesbury unreasonable
- *R (AC) v Berkshire West Primary Care Trust & Anor* [2011] EWCA Civ 247
- *“The appellant in this case was seeking NHS funding for a surgical operation where the PCT had reasonably concluded (as the judge found and was, in my view, entitled to find) that there was an absence of evidence that it was likely to be clinically effective to improve the appellant's health”*

## Why should third parties have a say in price fixing process



- This is where it gets complex!
- Third parties have an interest in ensuring that providers of NHS services are properly funded
- National Tariff rules designed to ensure that patients and clinicians have a clear say before the price is fixed

## What are the rules of the NT?

“326. Commissioners and providers must apply the following three principles when agreeing a local payment approach:

- a. the approach must be in the best interests of patients
- b. the approach must promote transparency to improve accountability and encourage the sharing of best practice, and
- c. the provider and commissioner(s) must engage constructively with each other when trying to agree local payment approaches”

The detailed application of the rules including public and clinician engagement.

## Variations under s 116(2)

- Section 116(2) provides:

“The national tariff may provide for rules under which the commissioner of a health care service specified in the national tariff and the providers of that service may agree to vary—

(a) the specification of the service under subsection (1)(a), or

(b) the national price of the service

## Variations under s 116(2)

- But is s116(2) a substitute for s124/5 or a way of agreeing a contract variation before approaching Monitor
- What is the meaning of “or”
- What is the point of s124/5 if variation is an alternative?
- What about the repeated promises in parliament to rule out price competition?

## So what was the ACO case about?

- Attempt by NHS England to introduce a new contract
- Single payment to cover acute, community and primary care services
- Kerr J ruled it was lawful after ½ day hearing
- Permission to the Court of Appeal and listed for 2 full days
- Potential to rewrite NHS contracting and procurement law.

## Possible Outcomes?



- Win for NHS England
- Partial win for the claimants
- Entire win for the claimants
- But consequences may be far reaching ....