

IS THERE A FUTURE FOR PROCUREMENT WITHIN THE NHS?

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What is this talk about?

- Seeks to explore whether procurement law has any future within the NHS
- Examining concerns that – in practice – virtually all procurement exercises are arguably unlawful
- Comes with a health warning:
 - Arguments failed in R (Shepherd (On Behalf of 999 Call NHS)) v National Health Service Commissioning Board both at First Instance and at the Court of Appeal 20-22 November
 - Permission sought from the Supreme Court

What was 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

12 May 2017



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 two exceptions under s116(2) and s124/5:
 - S124/5 requires Monitor’s express approval
 - Upwards only price revision
 - Strict test before price increase is permitted
 - No limits to price variation under s116(2)
 - One system or 2 systems?

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

How 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
- Patients and the rest of the NHS have a clear interest in ensuring that providers are properly funded so as to ensure quality of services is maintained

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? Former says Court of Appeal
- And, “or” means “and
- What is the point of s124/5 if s116(2) 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
- Court of Appeal agreed
- Seeks to rewrite NHS contracting and procurement law.

What happens next?

- Permission refused for Supreme Court
- ACO contract lawful
- But also the rules about the procedures that have to be followed before prices are set remain in place
- So how does a price competition under a procurement exercise satisfy National Tariff rules?

Proposals for reform

- The NHS Plan published in January 2019
- Integrated Care Systems (“ICSs”) are central to the delivery of the Long term Plan
- One CCG per STP area
- Non-exec chair of ICS and board
- Duties to the ICS system to override duties to the provider alone – so why maintain separate provider organisations?

Legislative reform

- Flagged up in NHS Plan in general
- Much more detail in NHSE/NHSI Board Paper for 28 February
- At last some sensible proposals to unravel the legal primary of the market and competition over co-operation and planning left by the 2012 Act
- Essential plan is to remove all NHS contracts from scope of procurement and remove CMA oversight from the NHS

Timetable - guesswork

- Engagement period up to 25 April 2019
- NHSE and NHSI will produce final proposals and then liaise with DoH and Health Select Committee
- Final Bill anticipated in Queen's Speech in autumn of 2019
- Bill may become law in 2020 and maybe implemented in late 2020/2021.

Meanwhilethe current regime and uncertainties
remain

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Questions