



15 July 2013

NHS VOLUNTARY SECTOR PROVIDERS FORUM CONSULTATION RESPONSE

Substantive Guidance on the Procurement, Patient Choice and Competition Regulations

On behalf of the above members of the recently established NHS Voluntary Sector Providers Forum (VSPF), I am pleased to be able to respond to Monitor's Consultation on the Substantive guidance on the Procurement, Patient Choice and Competition Regulations.

Our response focuses on a number of key points:

- I. The need for greater recognition of the current and potential role of the voluntary and community sector in the NHS
- II. The need to remove any remaining ambiguity about the intent of the regulations
- III. Concerns regarding the potential unnecessary use of competitive tendering and bundling and their potential impact on voluntary sector providers
- IV. Apparent differences between the content and intent of the guidance and other relevant guidance.

The role of the Voluntary and Community Sector in the NHS

1. The Voluntary and Community Sector already operates extensively within the health and social care sector, yet its contribution is often overlooked. A recent King's Fund report showed that the NHS currently spends around £3.4 billion annually on services from the voluntary and community sector. The sector has a strong track record of delivering high quality services and working with local communities to support individuals to manage their own health needs.

The 18 members of the VSPF provide a wide range of services including palliative care, children's services and support for people with specific conditions. The forum also includes key representative bodies for health and social care charities and third sector organisations. Member organisations which have signed up to this particular



consultation response currently hold more than 700 NHS contracts with a value of over £700 million per annum.

Community-focused charities provide excellent examples of how health inequalities can be tackled at a local level. It is often our organisations' detailed understanding of local need, the trust we gain from these communities and our ability and willingness to work holistically across multiple services that enables us to be so effective.

Our starting point

2. We welcome the opportunity for charitable providers including social enterprises to continue to develop our role in providing NHS services. We have been concerned by elements of the debate about application of the regulations and therefore welcome the development of the guidance on the Procurement, Patient Choice and Competition Regulations as we believe this will support commissioners in interpreting and applying the regulations. We believe it is important that the guidance sets out clearly what is required of commissioners and clarifies the way in which competition and procurement should work in the reformed NHS. Therefore, the remainder of this response sets out a number of suggestions which we believe will provide greater clarity about what is expected of commissioners.

Strengthening the draft guidance

3. Our overarching comment is that the guidance needs to be strengthened to remove any remaining uncertainty about the intent of the regulations.
4. The charitable and voluntary sector is a major provider of NHS services and therefore has huge potential to provide more vital high quality services in the future. However, there is no meaningful reference to the voluntary sector in this consultation document at all. The guidance should make clear the diversity of potential providers and include case studies which include charitable, third sector providers.
5. We also believe that Monitor should undertake further work to ensure that there is an appropriate understanding of the current and potential role of the voluntary sector, both amongst relevant Monitor and other regulatory bodies and commissioners. We are keen to work with Monitor to support this work.



6. During the recent parliamentary scrutiny, several members of the VSPF, including Help the Hospices, Marie Curie Cancer Care, National Voices, Sue Ryder, and Together for Short Lives, shared a briefing with Peers that detailed our concerns about The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 (known as the Section 75 Regulations).

Their primary concern was that the regulations as they are worded could have an unintended impact on voluntary sector providers of health services. This is because the regulations could be interpreted to mean that commissioners will have to use competitive tendering for almost every contract. Given the administrative and financial burden this would place on Clinical Commissioning Groups, many would seek to bundle services when contracting. The specialism that charities and social enterprises bring (and specifically our binding charitable objectives) means that a number of these organisations would be unable to bid for such large contracts.

We are therefore concerned that this could lead to charitable providers being forced out of the market. This would be a real loss for patients, families, and carers. Many voluntary sector providers contribute charitable funds they raise towards patient care on top of the money that they receive from the NHS. They also provide social value to the local community beyond the people they support. If voluntary sector providers were forced from the market, the NHS would struggle to close the gap left by the absence of charitable funding. Alternatively, patients would experience less comprehensive services.

As the briefing made clear, we know that the Government does not want to exclude voluntary sector providers from delivering NHS services. The Prime Minister and senior ministers have repeatedly stated they want voluntary providers to play a vital role in the newly reformed NHS. Earl Howe, Government health spokesman in the Lords, recognised that concerns had been expressed regarding the regulations yet stated that the Government remained “absolutely committed to the undertakings given during the passage of the 2012 Act” and was confident that the regulations adhered to the “letter and the spirit of those undertakings”.

We support the appropriate use of competition; where it can help to improve quality. However, we believe that the approach has to be sensitive to the needs



of the voluntary sector. We think that the guidance should help provide confidence to commissioners about how to use competition appropriately and therefore needs to be very clear and, more clearly reflect, the statements made by Ministers during the parliamentary process.

7. We also believe that the guidance should take into account and make reference to both the Public Services (Social Value) Act 2012 and Localism Act 2011. The guidance should set out what commissioners need to do to comply with both pieces of legislation in order to recognise the value of the voluntary sector in providing NHS-funded services.

Considering social value when procuring services could have a huge impact on community wellbeing and maximise the value of money spent, especially during a period of austerity and budget cuts.

8. We welcome Monitor's assertion that competition and integration are not mutually exclusive and that competition does not and should not have to be at the expense of beneficial coordination as supported by Monitor's new provider licence. We believe that the fact that Monitor will step in where integrated care is not being delivered, in spite of decisions and efforts made by commissioners, further supports this. We think that it is clearly vital that services are commissioned in a transparent way. We also believe that the guidance requires further realistic and rigorous examples of how competition and integration relate to each other, including examples where one outweighs the other.

We are concerned that the risk for commissioners of being seen to act against competition rules will hinder them in putting together consortia themselves and they will instead leave it to the commercial sector and others to do so.

9. We welcome the fact that the Procurement, Patient Choice and Competition Regulations underline the primacy of Regulation 2. It notes that when considering Regulation 3, commissioners must ensure that they procure services from providers most capable of achieving the objectives in Regulation 2 that provide best value for money. This underlines the importance of ensuring that providers can deliver high quality services whilst considering value for money. We believe that this is the core message which should sit at the heart of the guidance and should be repeatedly stressed throughout the document.



10. We specifically welcome the emphasis on *'Proportionality'* - that commissioners' actions must be proportionate to the value, complexity and clinical risk associated with the provision of the services in question, instead of requiring everything to be tendered.
11. Regarding the *'General review of services provision'*, we think it is essential that commissioners should ensure that their engagement with each of the prospective providers is consistent with their obligation to act transparently and to treat providers equally under the Procurement, Patient Choice and Competition Regulations. In particular, the commissioner will have to ensure that potential providers have a reasonable opportunity to express their interest in providing the services in question.
12. We think it is also vital for service providers to be able to help in designing services without leading to a conflict of interests. In many areas voluntary organisations and community groups are increasingly being viewed by commissioners only as service providers, or potential service providers, which can result in the sector being excluded from discussions about service design due to a perceived conflict of interest.
- The vital role of voluntary organisations and community groups in engaging with often unheard of groups, contributing to needs assessments, shaping service design and acting as a voice for local communities, is often overlooked.
- Despite a general shift from 'core' grant funding to contracts for the delivery of services, we think it is vital that the guidance also highlights commissioners' ability to grant funds to voluntary and community groups.
13. Furthermore, we think there is a disconnect between the content of the draft guidance and that relating to the 'Competition Act'. We welcome the fact that the latter seems to place more emphasis on commissioner choice instead of the need for competitive tendering.
14. Furthermore, we think that there is a direct conflict between the *'Substantive guidance on the Procurement, Patient Choice and Competition Regulations'* and Monitor's draft guidance for *'Providers of NHS-funded services: Licence conditions – choice and competition'*.



The guidance on 'Section 75' states that "Patients are able to choose between any Care Quality Commission (CQC) registered provider with a standard NHS acute contract. Any provider with an NHS contract and CQC registration is therefore eligible to provide these services and, as such, commissioners do not need to run a competitive tender process in order to select which provider or providers to enter into a contract with."

The guidance on 'License conditions', however, states that "If patients' rights to choice are extended under the NHS Constitution in future, then these rights would also be protected under the choice license condition. This extension of choice is being phased in over time under the Any Qualified Provider (AQP) scheme."

Regarding 4.2 in the 'Section 75' guidance on '*Decisions on whether to seek offers for new contracts*', under '*Circumstances where it may be appropriate not to publish a contract notice and/or competitive tender*', we believe that this specifically risks excluding small charitable providers that do not provide services as AQP and therefore are in direct conflict with competition rules.

15. We appreciate the opportunity to continue our dialogue with Monitor and would welcome the regulator introducing guidance on how commissioners can work specifically with the voluntary sector in future.

We would welcome the opportunity to further engage with Monitor to ensure that the voluntary sector continues to play a vital part in providing high-quality NHS services in future. If you require any further information please contact:

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