



Issues Statement

NHS GREAT YARMOUTH & WAVENEY CONDUCT COMPLAINT

1. On 5 January 2010 the Cooperation and Competition Panel (CCP) accepted a conduct complaint submitted by the Association of Chief Executives of Voluntary Organisations (ACEVO) and the NHS Partners Network (NHS Partners) (together, the Complainants) in relation to the conduct of NHS Great Yarmouth and Waveney (GYW PCT).¹
2. ACEVO and NHS Partners have submitted that GYW PCT breached Principles 1 and 4 of the Rules for Cooperation and Competition (Principles and Rules) by taking a decision to restrict potential bidders to NHS organisations or NHS-led consortia for a competitive process being undertaken to divest its community services provider arm. We refer to that decision as “the Conduct”.
3. GYW PCT has responded that:
 - i. the independent sector has not been excluded from the process;
 - ii. the Principles and Rules should be interpreted in a manner consistent with Department of Health policy and in particular with reference to the Department of Health preferred provider policy; and
 - iii. there is no evidence to suggest that its provider services arm has been treated any differently in this process compared to other potential providers (see paragraph 9).
4. The CCP will in its initial inquiry phase, due for completion by 2 March 2010, decide whether the complaint should be dismissed or subject to further investigation. If the Panel considers that further investigation is warranted, it will proceed to Phase Two of its process, which will be completed by 28 June 2010.

ISSUES

5. The CCP will assess whether or not the Conduct is consistent with the following Principles and Rules:

Principle 1

Commissioners should commission services from the providers who are best placed to deliver the needs of their patients and populations

- i. ...
- ii. ...
- iii. *PCT provider services should be subject to these competition rules in the same manner as any other provider and be managed on equal terms to other providers.*

¹ www.ccp-panel.org.uk/content/cases/NHSGreatYarmouthWaveneyConductComplaint/100105-NoticeofAcceptance.pdf

Principle 4

Commissioners and providers should foster patient choice and ensure that patients have accurate and reliable information to exercise more choice and control over their healthcare

- i. ...*
 - ii. Providers, referrers to and commissioners of NHS services must not restrict choice via collusive behaviour or any other action.*
6. Our conduct guidelines set out a cost-benefit framework for the assessment of conduct under these Principles.² That is, where conduct gives rise to detriments (or costs) to patients or taxpayers as a result of a loss of choice or competition, then these will be weighed against any benefits to patients or taxpayers that may arise from the conduct. From this analysis the CCP will determine whether the conduct is likely to result in an adverse effect or a net benefit to patients and taxpayers.
7. We have identified the following issues arising from the Conduct, which we will consider:
 - whether GYW PCT can satisfy itself that it is commissioning services from the provider best placed to deliver the needs of its patients and population; and
 - whether the pool of credible bidders has been restricted such that this could be expected to lead to lower quality services to patients and/or a greater cost to taxpayers than would otherwise be the case.
8. No benefits to patients or taxpayers, attributed to the decision to restrict the pool of potential bidders to NHS organisations or NHS-led consortia, have been put to us in the submissions we have received to date.
9. Two other issues have been put forward as relevant to the CCP's consideration of this case and will be considered by the CCP, namely:
 - whether new policy has in some way amended the Principles and Rules or their application to the decision made by GYW PCT; and
 - whether GYW PCT, when restricting the procurement to NHS organisations or NHS-led consortia, was following instructions from the Department of Health and/or East of England SHA, and whether it was reasonable for them to do so.
10. Some submissions have suggested some form of collusion between GYW PCT and its provider arm, inconsistent with the Principles and Rules. Collusion occurs between two independent parties and we have not been presented with any evidence of this. In the absence of further submissions on this point we do not intend to look at this issue further.

CCP PROCESS

11. A number of submissions have suggested that it was not appropriate for the CCP to accept this conduct case because:
 - i. a local dispute resolution process was not entered prior to engaging the CCP;

² CCP, *Draft interim guidance on the assessment of conduct*, January 2009, available at www.ccp-panel.org.uk/reports-and-guidance/index.html.

- ii. the complainants are representatives of the healthcare providers affected by the conduct;
 - iii. the CCP does not have the remit to evaluate government policy; and
 - iv. CCP consideration of this issue may conflict with a policy review being undertaken by the Department of Health, including review of the Principles and Rules.
12. In relation to these points, we note that conduct complaints are made directly to the CCP following appropriate local engagement. The CCP is required to satisfy itself that there was appropriate local engagement, including with the relevant SHA, prior to accepting a complaint. There is no requirement for a formal dispute resolution process to be carried out locally prior to the CCP considering a conduct matter.
13. CCP conduct guidelines specifically provide for the possibility of representative organisations making complaints on behalf of their members to the CCP. Following a review of the interactions between the parties prior to the complaint, the CCP reached the view that its case acceptance criteria were met and decided to accept the case.
14. In accepting this case the CCP is not evaluating the merits or otherwise of Department of Health policy, but is reviewing the specific conduct of GYW PCT. To the extent that GYW PCT's conduct was constrained by government policy, this will be taken into account in the Panel's consideration of the case.
15. The CCP is aware that procurement guidance for PCTs and the Principles and Rules are under review. We consider that GYW PCT's conduct needs to be assessed in the context of the rules in place at the time of the conduct. To the extent that these rules are revised during the inquiry process, we will also consider whether GYW PCT's conduct would have been inconsistent with the revised rules.
16. The CCP welcomes any submissions on this issues statement by 4pm 24 February 2010.

12 February 2010