



## **Co-operation & Competition Panel: NHS Great Yarmouth & Waveney conduct complaint**

### **UNISON Phase 1 submission – January 2010**

#### **Introduction**

1. UNISON is the major trade union in the health service and the largest public sector union in the UK. We represent more than 450,000 healthcare staff employed in the NHS, and by private contractors, the voluntary sector and general practitioners. There is also a wider interest in the NHS among our total membership of more than 1.3 million people who use, or have family members who use, health services.
2. UNISON previously submitted a response to the Co-operation & Competition Panel (CCP) consultation on its draft interim guidelines in April 2009. The union's purpose in producing a submission to this conduct complaint case is threefold: firstly to question the validity of the CCP accepting this as a case requiring investigation; secondly, if the CCP does investigate the case, to argue that the PCT in question has not breached the *Principles and Rules of Co-operation and Competition* (PRCC); and thirdly to emphasise that if the CCP does investigate the case it must make clear that it has no relevance beyond Great Yarmouth & Waveney (GYW).

#### **Validity of CCP decision to accept case as a conduct inquiry**

3. It is UNISON's contention that the CCP is exceeding its remit in deciding that the submissions made by the NHS Partners Network (NHSPN) and ACEVO meet the acceptance criteria for a conduct inquiry.
4. Moreover, the CCP has no jurisdiction to hear a direct challenge to government policy, so the suggestion in the letters of complaint from both NHSPN and ACEVO that the case has "system-wide implications" – because it would challenge the government's "preferred provider" policy – is irrelevant and should render the complaints invalid. The complaints are open about their political motivation, as confirmed by the involvement of ACEVO in challenging the "preferred provider" policy in the pages of Prospect magazine in November 2009.<sup>1</sup> Both NHSPN and ACEVO are national organisations and neither has made it clear who the local complainant providers are in this case, if indeed there are any.
5. There are also procedural considerations about the ability of the CCP to be involved in this type of case. Notice has been given by David Nicholson's "preferred provider" advice (included with ACEVO's complaint letter) that guidance will be published to supersede *Necessity – Not Nicety*, along with a revised version of the *PCT Procurement Guide*. The CCP must be aware of the imminent publication of these documents that, in light of the "preferred provider" policy, will be substantially

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<sup>1</sup> *Progress magazine*, 23 November 2009, [www.progressonline.org.uk/Magazine/article.asp?a=4990](http://www.progressonline.org.uk/Magazine/article.asp?a=4990)

different from their predecessors. It is therefore inappropriate for the CCP to accept the case, as they will be making judgements based on guidance shortly to be rendered obsolete. The PRCC themselves are also in the process of being reviewed which is particularly important, as this is the document that the CCP exists to uphold. (All the more so given that the CCP's own guidance has still not been finalised, despite consultation on its draft interim guidelines closing in April 2009.)

6. On a technical point, paragraph 9 of the CCP's Rules of Procedure states that: "*Where a complaint relates to conduct to which the PRCC apply, complainants should use all reasonable endeavours to engage with parties at a local level, including appropriate engagement with the relevant SHA(s), prior to referring the matter to the CCP.*" There is certainly no evidence from either the NHSPN or ACEVO letters that this has taken place. In fact the letters include a timetable of events in support of their case which state that they will merely inform the PCT of their intention to complain (the ACEVO letter including this notification to Dr Jathanna at GYW). It does not appear that "all reasonable endeavours" have been taken locally. The complainants' allegations of "collusive behaviour" appear to be little more than an add-on as an attempt to justify their decision to go direct to the CCP, and it is not clear with whom the PCT is alleged to have colluded.

#### **Validity of content of conduct complaint**

7. If the CCP does, however, decide to continue investigating this case, it is UNISON's contention that the PRCC have not been breached by the PCT. The examples of breaches quoted by NHSPN and ACEVO amount to a selective reading of the PRCC; the more important parts of the PRCC, ignored by the complainants, actually support the actions of GYW.
8. The complainants allege that the PCT's actions will not allow them to secure the "best providers", in line with the PRCC. This definition is clearly subjective, but the latest government policy is the best guide to interpreting this phrase, and government policy is that the NHS is the "preferred provider" of care. The PCT has therefore adopted an entirely reasonable position that deems NHS organisations will be the best providers of care for GYW.
9. Secondly the PRCC, and therefore also the CCP, do not exist solely to enforce competition; co-operation is supposed to be valued equally. Principle 2 of the PRCC states that "*providers and commissioners must cooperate to ensure that the patient experience is of a seamless health service, regardless of organisational boundaries, and to ensure service continuity and sustainability*". In the case of GYW, the PCT has therefore deemed that cooperation will be better served by keeping services within the NHS.
10. But the most important defence of the PCT's actions can be drawn from Principle 4 of the PRCC that confirms the power of PCTs to decide for themselves which services should be subject to competition (outside of acute elective services): "*For all other services it is for individual PCTs, as commissioners and public sector contracting authorities, to decide and agree with their respective SHA which services should be subject to direct competition, the extent of such competition, and how this should be secured.*" It is not the role of the CCP to challenge government policy, which has been very deliberately geared towards devolving more and more decision-making to PCTs in recent years and which this Principle supports.

11. It should also be noted that the PCT had not started down a formal procurement route when it decided to proceed with an NHS-only procurement process. As both complainant letters make clear, all that had taken place was an information day for potential providers, which is part of the market testing pre-procurement phase.

### **Implications of conduct inquiry**

12. UNISON is clear therefore that this complaint should not be heard in the first place, but that if it were the CCP should find in favour of the PCT, which has not breached the PRCC as alleged by the complainants. Most important of all, however, is the need, regardless of the outcome of the case, for the CCP not to be seen to be meddling in politics or making new policy, for which it has no remit.
13. As noted above, the attempt by the complainants to make this case into a challenge to the government's "preferred provider" policy is utterly spurious. But whilst it is clear from the media coverage – and the comments to the media by the complainants<sup>2</sup> – that NHSPN and ACEVO consider their case to be a political challenge to government policy, this complaint can be treated as nothing more than a one-off case at the PCT in question. It is beyond the remit of the CCP to judge on any of the "system-wide implications" that the complainants allege.

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<sup>2</sup> See for example, *The Guardian*, 6 January 2010, "Burnham faces private healthcare sector challenge over NHS bias", <http://www.guardian.co.uk/society/2010/jan/06/nhs-challenge-private-healthcare-sector-competition>