

AGENDA ITEM NO: 13.0.

Meeting Title/Date:	Governing Body - 18 July 2017		
Report Title:	Competition Dispute Resolution Policy and Process		
Paper Prepared By:	Kevin Parkinson	Date of Paper:	July 2017
Executive Sponsor:	Kevin Parkinson	Responsible Manager:	Kevin Parkinson
Committees where Paper Previously Presented:			
Background Paper(s):			
Summary of Report:	<p>The CCG is committed to commissioning services that will improve the health of the local population and reduce inequalities. At times this may require formal procurement process. It is recognised that a clear and effective process, including a local Competition Dispute Resolution Process is key to this.</p> <p>The CCG's approach to dispute resolution is based on the principle that disputes should be resolved at the most local level possible.</p>		
Recommendation(s):	The Governing Body are requested to approve the Competition Dispute Resolution Policy and Process		
			Please Select Y/N
Identified Risks:			N
Impact Assessment: (Including Health, Equality, Diversity and Human Rights)			N
Strategic Objective(s) Supported by this Paper:			Please Select (X)
To Improve the health of our population and reduce inequalities in health			X
To reduce premature deaths from a range of long term conditions			X
To develop care closer to home			X
To commission safe, sustainable and high quality Hospital Health Care			X
To commission safe, sustainable and high quality Mental Health Care			X
To improve capacity and capability of primary care services to respond to the changing health needs of our population			X
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NHS Morecambe Bay Clinical Commissioning Group Competition Dispute Resolution Policy and Process

V1.5

Version No.	Amended By	Date Reviewed	Date Approved	Next Date for Review
1.1		March 2009		March 2010
1.2	B Thomas	29.07.13		August 2014
1.3	S Hall	12.02.14		August 2014
1.4	K Parkinson	19.02.14	Governing Body 18 March 2014	18 March 2016
1.5	K Parkinson	July 2017		

1. INTRODUCTION

The CCG is committed to developing the market for healthcare services in order to commission services that will improve the health of the local population and reduce inequalities. It is recognised that a clear and effective process, including a local Competition Dispute Resolution Process is a key part of this goal.

The CCG's approach to dispute resolution is based on the principle that disputes should be resolved at the most local level possible:

- The first port of call for the provider is the CCG who have clear processes in place for resolving the dispute locally.
- If the dispute is not successfully resolved at this level, the complaint should then be directed to NHS England.
- If the complaint is still not successfully resolved, it may be referred to NHS Improvement.

The CCG will uphold the national principles for system management when dealing with disputes of this type. These are as follows:

- Transparency
 - Communicate the process and decision making criteria widely and in advance.
 - Engage all relevant stakeholders in the development of this process.
 - Enforce declarations of interest.
 - Publish findings within NHS England.
- Objectivity
 - Base analysis and the decision on objective information and criteria.
 - Maintain an audit trail.
- Proportionality
 - Only begin the formal dispute process on matters of material importance to the CCG.
 - Resources used must be proportionate to the significance of the dispute.
- Non-discriminatory
 - The panel must not favour one part of the system over another.
- Accountability
 - The CCG will provide its Governing Body, NHS England and NHS Improvement (if applicable) information relating to the dispute/s considered and the outcome.
- Subsidiarity
 - Wherever possible the dispute should be managed by the CCG.
- Consistency
 - Internal coherence and consistency in dealing with disputes.
 - Consistency across CCGs.
- No double jeopardy

- Providers should not be held to account differently by different institutions.

2. ACCEPTANCE CRITERIA FOR COMPLAINTS

The CCG will only accept complaints that meet the following criteria:

- The content of the dispute is covered by the principles and rules for co-operation and competition.
- There is a full and frank disclosure of all relevant and applicable information.
- A panel (refer to Stage 4) is best placed to resolve the issue i.e. over the other regulators including the Office of Fair Trading (OFT), and the Advertising Standards Authority (ASA), NHS Improvement or NHS England.
- The issue is not a 'reserved matter' under the Principles and Rules for Co-operation and Competition, as defined in the National Panel's Rules of Procedure (to be published on the national panel's website).
- If legal proceedings are already underway, the panel will take a view on a case by case basis as to whether it will hear the case through the CCG Dispute Resolution Procedure.
- The dispute is not trivial, inappropriate, vexatious or an abuse of the panel's procedures.
- There is adequate time for the panel to review the complaint appropriately, for example, if there are time-critical issues.
- CCG is the commissioner, or the lead commissioner for the service in question.

3. THE PROCEDURE

Stage 1:

Making the Complaint

Any complaint must be submitted to the CCG's Chief Officer. The complaint will be assessed against the acceptance criteria set out above. The complaint will be acknowledged within three working days.

Stage 2:

Assessment

Following the receipt of the complaint, the CCG will make an assessment of the following factors

- i. If the complaint is not deemed to meet the acceptance criteria, the complainant is notified that the complaint will not progress and what further information is needed (if any).
- ii. Whether the complaint should be fast tracked to another organisation, including the ASA, OFT, NHS England, NHS Improvement. In which case, the claimant is informed of the course of action and the process the complaint should follow.
- iii. Where the complaint is in scope and not subject to fast tracking, it will proceed to the next stage. In most cases this part of the process will be carried out within five working days.

Stage 3:**Lead Director Review**

The Lead Director for this process is the CCG's Chief Finance Officer/Director of Governance. Following triage, the Lead Director will review the complaint to determine whether a swift resolution can be achieved without need to call the panel. The Lead Director may call a meeting of the parties concerned to discuss the matter informally and without prejudice.

Stage 4:**The Panel**

If the complaint cannot be resolved by the Lead Director, the panel (refer to paragraph 4) will formally review the complaint. In most cases this will be based on a consideration of documentary evidence, although the CCG may invite representations in person if they deem this to be necessary.

Stage 5:**The Decision**

Once the panel has made the decision, it will write to the complainant notifying them of the decision, explaining the rationale and where necessary the course of action. It will also notify NHS Improvement and NHS England of the dispute and the outcome.

If the complainant does not believe that the case has been satisfactorily resolved it can enter the NHS England's Dispute Resolution Process. In most cases, this stage of the process is expected to take no longer than 20 days.

While the timescales set out for each stage above are illustrative, the process as a whole will take no longer than three months.

4. MEMBERSHIP OF THE CCG PANEL

The membership of the CCG panel will normally have the following core members:

- Chief Finance Officer/Director of Governance;
- Executive GP; and
- Lay Member of the Governing Body.

The CCG may choose to vary membership but will consist of at least one Executive Director must be on the panel and it must be chaired by a Lay Member.

The Chair of the panel will also be able to call on other expertise and advice to provide advice depending on the nature of the case.

5. RIGHT OF APPEAL TO NHS ENGLAND

The CCG anticipates that most complaints will be successfully resolved. However, if the complainant is unsatisfied by the results of this procedure, they can refer the complaint to NHS England. Appeals to the NHS England must be made within three months of the complainant being informed of the CCG decision.

Any complaint to be made must be made in the first instance by means of the electronic form available via the NHS England Competition Dispute website.

The NHS England Dispute Resolution Process will adhere to the core system management

principles and the panel will hear complaints and disputes which, are thought by the complainant to contravene any of the 10 principles and rules of cooperation and competition and have already exhausted CCG processes.

The NHS England Competition Dispute Resolution Process covers:

- Disputes directly arising from the principles, actions/behaviours and rules.
- The *Principles and Rules for Cooperation and Competition* (PRCC) <https://www.gov.uk/government/publications/principles-and-rules-for-cooperation-and-competition>.
- Disputes that have a direct impact on the Principles and Rules.
- Disputes related to the Code of Practice for the Promotion of NHS-funded Services outside the remit of the ASA.

The stages of the process are as follows:

The Complaint and Triage Stage (approximately eight working days)

Where more information is required to support the triage process, the clock will be stopped whilst that information is gathered from relevant parties. Therefore, the elapsed time may constitute more than eight working days.

Mediation Stage (circa 12 working days)

If there is no mediation process, or if the mediation fails to resolve the dispute within the two-week period, the complaint then is processed through the Competition Dispute Resolution Panel to resolve. However, certain situations may require a fast track straight to the national Co-operation and Competition Panel.

Panel Stage (usually within 25 working days)

If the NHS England Board upholds the complaint, they will write to both parties with the rationale for the decision and the expectations for both parties in resolving the dispute along with an action plan to ensure resolution is observed. Similarly, if the case is rejected, the parties will be informed of the reasons why and what can be learned from the experience.

6. REFERRAL TO NHS IMPROVEMENT

Who can make a complaint?

Anyone may contact NHS Improvement to raise their concerns if they consider that:

- a commissioner may have breached or is going to breach the National Health Service (Procurement, Patient Choice and Competition Regulations) December 2013 or the relevant provisions of the National Health Service Commissioning Board and CCGs Responsibilities and Standing Rules Regulations 2012;
- a licensed health care provider may have breached or is going to breach the choice or competition conditions of the provider licence;
- a provider of health care services in England may be infringing or is about to infringe Chapter I or Chapter II of The Competition Act 1998 or Articles 101 or 102 of The Treaty on the Functioning of the European Union; and/or
- a particular aspect of the health care sector in England is not working well for people who use health care services.

A complaint could be made by an organisation that is a health care provider, a commissioner, a patient group, a representative body, or an individual user of health care services.

Advice prior to making a complaint

NHS Improvement encourages any person wishing to make a formal complaint to the Cooperation.

Competition Directorate to get in touch first with us and discuss the complaint. For this type of contact, please email: cooperationandcompetition@monitor.gov.uk

Guidance on the content of formal complaints

To help us decide whether to investigate a formal complaint, NHS Improvement requires the organisation or person making the complaint (the complainant) to provide a detailed submission including, where available, the following details:

- name, address, telephone number and email address of the complainant;
- name and job title of the person(s) authorised to represent the organisation or person raising the complaint;
- contact details for the party that is the subject of the complaint (the respondent);
- a statement of why, in the opinion of the complainant, the conduct in question is inconsistent with one or more of the instruments governing choice and competition in the health care sector and any supporting evidence, where available;
- an explanation of how the complainant's business has been affected by the alleged activity and/or how people who use health care services have been adversely affected by the alleged activity;
- a description of the services involved;
- an outline of the relationship between the complainant and the respondent; and
- a chronology outlining relevant events.

What can you expect from NHS Improvement after making a complaint?

NHS Improvement will consider on a case-by-case basis whether we shall investigate a complaint according to our prioritisation principles. Our prioritisation principles are explained in the NHS Improvement's *Enforcement Guidance* and will be covered in the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284474/ToPublicEnforcementGuidance28March13_0

NHS Improvement shall contact the complainant within three working days of receiving the complaint to acknowledge receipt of the complaint and to outline next steps.

NHS Improvement shall set out in future guidance how we expect to involve complainants formally in our investigation process.

Where can you find further information about the rules that relate to choice and competition in the NHS?

Monitor's NHS Provider Licence

Monitor's NHS Provider Licence places obligations on providers of NHS-funded services who hold a licence to support patient choice and, where it is against the interests of people who use health care services, not to engage in anti-competitive behaviour.

National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013

The National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations places obligations on commissioners to ensure that they adhere to good practice in relation to procurement, protect the right of patients to make choices and do not engage in anti-competitive behaviour.

National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012

National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 place obligations on commissioners regarding patient choice.

NHS Improvement's concurrent powers to make market investigation references

NHS Improvement has the concurrent powers with the OFT to make a market investigation reference to the Competition Commission under the Enterprise Act 2002, if NHS Improvement has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom. NHS Improvement's concurrent powers to make market investigation references apply in so far as they relate to activities which concern the provision of health care services in England.

NHS Improvement's concurrent powers to enforce competition law

NHS Improvement has concurrent powers with the OFT to apply and enforce provisions of the *Competition Act 1998* and the *Treaty on the Functioning of the European Union* that prohibit anti-competitive practices (agreements, decisions or concerted practices that have the object or effect of preventing, restricting or distorting competition) and conduct which amounts to the abuse of a dominant position in relation to the provision of health care services in England.

NHS Improvement's guidance explaining how it expects to enforce these rules

- *Choice and competition licence conditions: guidance for providers of NHS-funded services*
- *Guidance on Monitor's approach to market investigations in the healthcare sector in England*
- *Guidance on the application of the Competition Act 1998 in the healthcare sector*

Contact details for making a complaint

Enquiries, Complaints and Whistleblowing Team
NHS Improvement
Wellington House
133-155 Waterloo Road
London
SE1 8UG

Email: enquiries@improvement.nhs.uk

Telephone: 020 3747 0990

CONTRACTUAL DISPUTE RESOLUTION

It is important to differentiate between the proposed new approach for dealing with disputes relating to the co-operation and competition principles and the arrangements for resolving NHS contractual disputes. Where a dispute arises between NHS partners regarding contractual arrangements it is not proposed to change the existing arrangements set out in legally binding contracts.