September 2011

RESPONSE TO OPINION OF STEPHEN CRAGG PUBLISHED BY 38 DEGREES, ON THE APPLICATION OF PROCUREMENT AND COMPETITION LAW TO THE NHS

1. This note sets out the Department's response to the legal opinion ("the Opinion") on the application of procurement and competition law as published on the 38 Degrees website.

2. The Department does not agree with some of the conclusions drawn from the legal analysis about the likely effect of the provisions of the Health and Social Care Bill.

Intent

3. Our response to the advice should be seen within the context of what we are trying to achieve through the Bill. Our aim is to improve health outcomes for patients and value for taxpayers' money. We therefore want to see NHS services provided by the best providers and for patients to have more choice and control, with competition on quality.

4. We have therefore focussed on:
   - protecting patients rights to choice;
   - ensuring good value for taxpayers' money;
   - addressing collusion and other abuses that act against patients interests.

5. We see competition law as there to protect the interests of patients (and consumers more generally) against abuses that would harm those interests, not to promote competition as an end in itself or to promote the interests of private providers. We believe that this is a good thing for NHS

patients and an important safeguard against potential abuses by vested interests.

6. We therefore want to ensure that there are effective means of redress where a commissioner or provider of NHS services is engaged in collusive behaviour or abuses a dominant position against the interests of patients.

7. We think that Monitor, as a dedicated health sector regulator, would be better placed than the OFT to lead on applying competition law in the NHS. Monitor's overriding statutory duty would be to protect and promote patients' interests and we have amended the Bill to make clear that Monitor would not have a duty to promote competition for competition's sake. A key benefit of our proposal is that Monitor would have greater knowledge and expertise (compared to OFT) in determining where restrictions on competition were acting against patients interests vs. where there may be overriding benefits to patients of limiting competition – for example, by concentrating specialist services in regional centres or in providing services through a clinical network.

Applicability of procurement law to the NHS

8. We agree that current procurement law has always applied to, and will continue to apply to the procurement of goods and services by NHS providers, and that the commissioning of clinical services (not just those subject to patient choice) is also subject to procurement rules. This has been clearly set out in, for example, successive versions of the PCT Procurement Guide provided by the previous Government. The provisions of the Bill do not change the requirement to comply with procurement law, nor do they change that law.

The potential impact of regulations on commissioners

9. We do not agree that the provisions for there to be regulations relating to procurement would have a detrimental effect on commissioners, or allow Monitor to act in an arbitrary way to impose requirements. Only the Secretary of State (not Monitor) could impose Regulations on commissioners and the Bill proposes that this would be subject to Parliament's affirmative resolution procedure. Nor do we agree that sector-specific regulations would add complexity and result in additional costs in complying with procurement and competition rules. Sector-specific regulation would establish a clear and coherent set of rules, which would be enforced by Monitor - a dedicated, sector regulator.

10. The expectations of commissioners and providers of NHS services will be very similar to what they are now. And we will demonstrate continuity with the current system by retaining the Principles and Rules for Cooperation and Competition (PRCC), introduced by the previous Government.

Capacity and capability of commissioners to comply with procurement law

11. We recognise that all commissioners (including current PCTs) face a challenge in ensuring they comply with procurement law. We do not, however, accept the conclusion that the transfer of responsibility for commissioning clinical services from PCTs to commissioning consortia will inevitably result in "a real risk that there will be a deficit of incumbent expertise in the new consortia to cope with the regulatory burden", nor that "the government … has wholly underestimated the increasing rather than diminishing complexity in the area and has had no or little regard to the administrative and financial burdens arising from the regime."

12. Our grounds for rejecting these arguments are that:

- We have long been aware of the need to ensure that commissioners are compliant with procurement law and good practice, and have addressed this through clear rules (the Principles and Rules of Cooperation and Competition- 'PRCC'), guidance and oversight (through the Cooperation and Competition Panel – 'the Panel'). We have committed to retaining the PRCC intact and also the Panel as a discrete entity within Monitor;
- The phased implementation of patient choice of Any Qualified Provider should over time reduce the complexity of NHS clinical services procurement and the need for local competitive tendering;
- The advice does not take into account the arrangements already being put in place to support clinical commissioning groups (CCGs), nor the actions they will take to secure the necessary expertise;
- The advice recognises that commissioners (PCTs) currently join forces to procure goods and services. CCGs will be able to do this too. Many CCGs will look to develop more collaborative and federated models where they share expertise and resources with other commissioning groups, whilst others will choose to buy in support from external sources, such as existing shared business service arrangements;
- During the transition, PCT clusters will be working with emerging clinical commissioning groups to help them to get ready and put in place the right skills, relationships and other arrangements that they need. They will also be considering how they can work more collaboratively to offer high-quality, affordable and responsive support services to CCGs.
- We have already begun to engage with Pathfinders and PCT clusters to ensure that the emerging models for functions like procurement, and other areas like back office functions are developed in a way that best preserves existing skills and expertise, whilst driving the necessary economies of scale. We will be publishing more details of our vision and expectations for commissioning support shortly.

The applicability of domestic and European competition law to the NHS

13. We have never said that competition law doesn't apply to the NHS or that the Bill would prevent it applying. On the contrary, we have consistently said that competition law would apply where it applies, with or without this Bill. However, we have also acknowledged that there is legal uncertainty as to when competition law would apply in the NHS due to the absence of relevant case law.

12. We do, however, disagree with the conclusions drawn in the opinion from the BetterCare case, namely that "it is more likely than not that a Court or Tribunal … would now conclude, as in BetterCare, that PCTs are undertakings for the purposes of competition law." Our grounds for not accepting this conclusion are:
    - PCTs and CCGs are purchasers, undertaking a statutory function carried out under the principle of solidarity, namely social in nature and not an economic activity;
    - PCTs have separated their commissioning and provision functions and, moreover, in future, CCGs will be solely commissioners;
    - OFT's policy note published after the resolution of the BetterCare case that, in their view, if an entity is in a position to generate anti-competitive effects, it will not be an undertaking for the purposes of competition rules if the subsequent related supply of goods or services (for which the purchases are made) do not themselves constitute economic activities and the entity does not itself directly provide the services;
    - The Court of Justice's decision in the case of FENIN.

Delivering the aims of the Bill

14. We do not agree with the assertion that the Bill would do nothing to stop 'cherry picking' by private companies. We have amended the Bill to include specific provisions to combat 'cherry-picking'. For example, by requiring Monitor to take account of variations in the range of services provided by different providers, when setting the national tariff.

15. Nor do we agree that it would be impossible for the Secretary of State to direct that certain services remain available to the local community. We have proposed amendments for Commons Report that would reinstate full Local Authority scrutiny and rights of referral over disputed service changes. In the rare event of a foundation trust being unsustainable in its current form, the Secretary of State would have power to intervene in individual cases where he considered that commissioners had failed to secure continued access to NHS services in line with their general duties.

The impact of the Bill

16. Lastly, we do not agree that the Bill would lead to a system geared heavily in favour of private companies. The previous Government favoured private companies by excluding NHS organisations from bidding for new contracts and paying Independent Sector Treatment Centres inflated prices, sometimes guaranteeing payments even where patients chose to be treated elsewhere. We have included provisions in the Bill to outlaw this kind of favouritism, which would apply to Monitor, the NHS Commissioning Board and Secretary of State.

END