



Royal College  
of Nursing

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# RCN Policy Unit

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## **Competition in the NHS in England**

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## Introduction

The Department of Health (DH) in the NHS of England has provided new guidance on competition in the NHS. This briefing provides an overview of three pieces of guidance all published on the 25th March 2010:<sup>1</sup>

- PCT procurement guide for health services
- Commercial skills for the NHS
- Principles and rules for cooperation and competition

## Context

A number of policies directly or indirectly affect competition in the English NHS. On the provider side these include policies on choice, where choice includes independent sector<sup>2</sup> providers of health care<sup>3</sup>, policies on central tendering from the independent sector (IS) (such as the Independent Sector Treatment Centre programme<sup>4</sup>) and local policies about the circumstances when local NHS hospitals may purchase health care from independent sector providers in order to meet waiting time targets. On the commissioning side these include World Class Commissioning competences which includes “stimulating the market”<sup>5</sup> and the Transforming Community Services (TCS) programme<sup>6</sup> which may include the independent sector in the provision of some services alongside a range of other organisational forms. The guidance from the DH is in addition to these initiatives and will further influence the degree of competition in the NHS in England.

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<sup>1</sup> These are all available from this weblink:

<http://www.dh.gov.uk/en/Managingyourorganisation/Commissioning/Systemmanagement/index.htm>

<sup>2</sup> The RCN defines the independent sector as “encompass[ing] individuals, employers, and organisations contributing to needs assessment, design, planning, commissioning and delivery of a broad spectrum of health and social care, who are wholly or partially independent of the public sector. This includes care homes, private hospitals and charities” See RCN, The independent sector in health and social care in England in 2009 and prospects for the future, 2010:

[http://www.rcn.org.uk/\\_data/assets/pdf\\_file/0010/296686/The\\_Independent\\_Sector\\_in\\_health\\_and\\_social\\_care\\_in\\_England\\_in\\_2009\\_and\\_prospects\\_for\\_the\\_future.pdf](http://www.rcn.org.uk/_data/assets/pdf_file/0010/296686/The_Independent_Sector_in_health_and_social_care_in_England_in_2009_and_prospects_for_the_future.pdf)

<sup>3</sup> Department of Health, Patient Choice: [http://www.dh.gov.uk/en/Healthcare/PatientChoice/DH\\_469](http://www.dh.gov.uk/en/Healthcare/PatientChoice/DH_469)

<sup>4</sup> For more information on the ISTC programme please see RCN, The independent sector in health and social care in England in 2009 and prospects for the future, 2010:

[http://www.rcn.org.uk/\\_data/assets/pdf\\_file/0010/296686/The\\_Independent\\_Sector\\_in\\_health\\_and\\_social\\_care\\_in\\_England\\_in\\_2009\\_and\\_prospects\\_for\\_the\\_future.pdf](http://www.rcn.org.uk/_data/assets/pdf_file/0010/296686/The_Independent_Sector_in_health_and_social_care_in_England_in_2009_and_prospects_for_the_future.pdf)

<sup>5</sup> Department of Health, World class commissioning competencies:

<http://www.dh.gov.uk/en/Managingyourorganisation/Commissioning/Worldclasscommissioning/Competencies/index.htm>

<sup>6</sup> See RCN, Transforming Community Services: [http://www.rcn.org.uk/support/transforming\\_community\\_services](http://www.rcn.org.uk/support/transforming_community_services)

## Role and extent of competition to be locally determined by commissioners

The latest guidance replaces previous guidance including *Necessity not Nicety – a new commercial operating model for the NHS* and the previous *Principles and Rules for Cooperation and Competition*.

The policy and guidance stress the local decisions that will need to be taken by commissioners must include appropriate engagement with staff and Trade Unions, and respecting the policy and legal frameworks.

Key points from the latest guidance are set out below.

### ***Commercial Skills for the NHS<sup>7</sup>***

This guidance sets out the approach to improving services for patients and achieving Value for Money (VfM). These will be aided by supporting staff locally to develop appropriate commercial skills and facilitating access to specialist commercial expertise and infrastructure at both regional and national level.

In essence, the Department of Health (DH) is providing guidance which should help commissioners do a better job of commissioning and delivering services. This should benefit patients and the public more generally as tax payers who are ultimately funders of the NHS. However, the aim of delivering better quality must take place in a tightening financial environment. This means in basic terms doing a lot more, from less.

The DH highlight the need to:

- **Maximise efficiencies in backroom functions**
- **The need for more commercial style approaches** (although not necessarily meaning the use of commercial providers) in the light of the separation of commissioners and providers including ‘good’ contract management for those already providing services, and ‘good’ procurement if new/different services are required (and this could be delivered by the NHS or other providers)
- **The common sense approach of working with existing providers to improve services**, including providing 2 opportunities to improve
- **The importance of staff engagement** in any scenario of needing to improve or procure services. DH state that *“Early and substantial engagement of staff and their trade union representatives, where applicable, is required and is principally the responsibility of employers”* (p8). In addition, the DH state that *“NHS providers and their staff can*

<sup>7</sup> Department of Health, Commercial Skills for the NHS, 2010, [http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/@ps/documents/digitalasset/dh\\_114573.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_114573.pdf)

*expect to be engaged constructively by their commissioner(s) to work in partnership with them in addressing concerns about the performance of services and required service improvements, giving them fair and reasonable opportunities to improve and lead change.”(p10) Proposals for social enterprise under the Right to Request policy needs to include “appropriate and sufficient engagement with the staff affected.” (p10)*

- **Where there are procurements that there will be opportunities for NHS, independent and third sector organisations to bid on a fair and equal basis.**
- **Cooperation between commissioners and providers** as part of responding to the financial challenges facing the NHS. This includes benchmarking and contractual approaches to improving performance and practice based commissioning (PBC).
- **Stimulating providers via ‘good’ procurement.** Commissioners will be able to draw upon regional Commercial Support Units and national Procurement Investment and Commercial Division (PICD) and Strategic Commissioning Development Unit (SCDU) within DH. NHS PASA will close.

## ***PCT procurement guide for health services***<sup>8</sup>

This guidance sets out a framework to aid commissioners in their decisions about procurement. This can mean a new contract with both an existing, or a new provider. The framework includes important principles including:

- transparency,
- proportionality,
- non-discrimination; and
- equality of treatment.

The guidance makes it clear that it is the responsibility of commissioners, within the legal and policy framework, to decide what to procure and from whom. DH state that *“It remains a matter for PCTs to determine when and how to use procurement as a tool for securing commissioning requirements and the onus is therefore on PCT boards to demonstrate a rationale for their actions and decisions” (p1).* In line with *Commercial Skills for the NHS*, this guidance also stresses the challenges facing the NHS and therefore the need for commissioners to be effective in securing high quality, efficient services.

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<sup>8</sup> Department of Health, PCT procurement guide for health services, 2010, [http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/@ps/documents/digitalasset/dh\\_114740.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_114740.pdf)

The guidance outlines the importance of separate activities to be undertaken by commissioners including:

- **Contract management;** in essence to ensure that providers who currently deliver services meet the requirements as set out in their contract with the commissioner.
- **Procurement;** which can occur for different reasons including additional choices for patients; new service models; significant increases in capacity and where existing contracts are due to expire or be terminated (eg where contract management is unable to address underperformance). There are different models for procurement (eg competitive tender through to single action tender) and the appropriate choice depends upon the specific circumstances. All procurement decisions must be underpinned by a rationale including appropriate documentation.

Such activities need to respect the legal framework and also draw upon wider support and guidance as appropriate, including for example support from Commercial Support Units, and guidance on conflicts of interest. It is also important that commissioners engage with staff and their Trade Unions as legally required under the NHS Constitution, and via local and regional Social Partnership Forums (SPF) across a full range of commissioning activities. The guidance includes a specific Annex on this topic. It highlights that *“additional choices for patients; new service models; significant increases in capacity and where existing contracts are due to expire or be terminated (eg where contract management is unable to address underperformance). (p26) and further that “It will be good practice for PCTs to publish policies for engaging staff in the ongoing development and refinement of commissioning strategies and ensuring that providers undertake effective workforce planning.” (p26)*

## ***Principles and rules for cooperation and competition***<sup>9</sup>

A revised set of principles and rules for cooperation and competition have been set out. These are the principles and rules that commissioners should meet and the principles and the rules that the Cooperation and Competition Panel (CCP)<sup>10</sup> will assess claims against when they hear cases where there is a complaint.

The 10 principles and rules are set out in full on the following page<sup>11</sup>:

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<sup>9</sup> Department of Health, Principles and rules for cooperation and competition, 2010:

[http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/@ps/documents/digitalasset/dh\\_114575.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_114575.pdf)

<sup>10</sup> Find out more about the CCP from, RCN, The Co-operation and Competition Panel in England: One Year On: [http://www.rcn.org.uk/\\_data/assets/pdf\\_file/0017/311804/02.10\\_The\\_cooperation\\_and\\_competition\\_panel\\_in\\_England\\_-\\_one\\_year\\_on.pdf](http://www.rcn.org.uk/_data/assets/pdf_file/0017/311804/02.10_The_cooperation_and_competition_panel_in_England_-_one_year_on.pdf)

<sup>11</sup> Source: Department of Health, Principles and rules for cooperation and competition, 2010:

[http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/@ps/documents/digitalasset/dh\\_114575.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_114575.pdf)

<b>Obligations on commissioners</b>	<b>Cooperation and agreements</b>	<b>Conduct of individual organisations</b>	<b>Mergers and vertical integration</b>
1 Commissioners must commission services from the providers who are best placed to deliver the needs of their patients and populations.	4 Commissioners and providers must cooperate to improve services and deliver seamless and sustainable care to patients.	7 Providers must not refuse to accept services or to supply essential services to commissioners where this restricts commissioner or patient choice against patients and taxpayers' interests.	10 Mergers, including vertical integration, between providers are permissible when there remains sufficient choice and competition or where they are otherwise in patients and taxpayers' interests, for example because they will deliver significant improvements in the quality of care.
2 Commissioning and procurement must be transparent and non-discriminatory and follow the PCT Procurement Guide.	5 Commissioners and providers should encourage patient choice and ensure that patients have accurate and reliable information to exercise more choice and control over their healthcare.	8 Commissioners and providers must not discriminate unduly between patients and must promote equality.	
3 Payment regimes and financial intervention in the system must be transparent and fair.	6 Commissioners and providers should not reach agreements which restrict commissioner or patient choice against patients and taxpayers' interests.	9 Appropriate promotional activity is encouraged as long as it remains consistent with patients' best interests and the brand and reputation of the NHS.	

The rules are not legally enforceable but are expected to be followed by all commissioners and applied across all types of providers (eg NHS, commercial or third sector). The DH provides a rationale and set of expected actions against each principle. In determining whether or not a principle has been breached, the CCP will primarily rely on a Cost Benefit Analysis (CBA) to see whether or not the benefits are outweighed by the costs of action taken by commissioners. This brings economic tools to the heart of policy decisions.

## **Tell us what you think**

This briefing is intended to provide a brief review of the DH guidance and the Policy Unit would like to receive comments/feedback from as many members as possible on this important issue - [policycontacts@rcn.org.uk](mailto:policycontacts@rcn.org.uk)

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