

Health and Care Bill 2021: Provider Selection

Published 16 September 2021

In the next of our series of briefings on the Health and Care Bill, we look at the Government's plans to repeal the current NHS procurement rules and introduce a new provider selection regime for the arrangement of healthcare services.

Background

In February 2021, following the publication of *“Working together to improve health and social care”*, the White Paper setting out the legislative proposals for the Health and Care Bill, we considered the proposals for the new NHS procurement regime.

A key focus of the reforms is the delivery of high quality care through integration and collaboration between NHS organisations, with a strong emphasis on reducing bureaucracy. In summary, the proposals included a new primary duty to arrange services in the best interests of patients, taxpayers and the population, and they apply to all bodies responsible for arranging healthcare services for the purpose of the health service.

The proposals retain the use of competitive tendering to procure healthcare services, while giving commissioners increased flexibility to direct award contracts in specific circumstances where competitive tendering is unlikely to add value. It is proposed that commissioners' decisions must be justified by reference to *“key criteria”* (i.e. quality and innovation, value, integration and collaboration, access, inequalities and choice, service sustainability, and social value), demonstrating the aim of achieving broader *“value”* over cost in the procurement of healthcare services.

What does the Bill say?

The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 will be repealed and in its place the Secretary of State will be given the power to create regulations to implement a new provider selection regime. This will also allow the Secretary of State to remove the commissioning of healthcare services from the scope of the Public Contracts Regulations 2015, which are considered a barrier to collaboration and integration due in part to the high risk of legal challenge.

The Bill states that the regulations may make provision for the following transparency and scrutiny requirements:

- Ensuring transparency or fairness in relation to procurement;
- Ensuring that compliance can be verified; and
- Managing conflicts of interest.

The regulations will also detail the general objectives of procurement and the procurement processes.

What will the provider selection regime cover?

The regulations will cover health care services for the purposes of the health service in England, and other goods and services that are procured together with those health care services. What this includes is yet to be seen, and will be defined in the regulations. It will be interesting to see the extent to which mixed procurements (i.e. procurements that include some health care services) will be covered by the provider selection regime.

What next?

The detail of the proposals will be in the draft regulations implementing the provider selection regime, as well as guidance that will subsequently be published by NHS England. We expect that these will substantiate the proposals and address a number of outstanding issues that were not clear from the White Paper. 70% of respondents to NHS England's consultation on the provider selection regime either agreed or strongly agreed with the proposals, and in the main we do not anticipate the regulations being materially different to the proposals that we have already seen.

We look forward to considering the draft regulations once they have been published.

Authors

Katherine Calder

Charlotte Burnett

Newcastle
+44 (0)191 404 4060
kcalder@dacbeachcroft.com



Leeds
+44 (0)113 251 4785
ckburnett@dacbeachcroft.com



Emily Broad
London - Walbrook
+44 (0) 20 7894 6029
ebroad@dacbeachcroft.com

DCD
DAC BEACHCROFT