CARE ENGLAND IN PURSUIT OF FAIRER FUNDING

Working with public sector commissioners - advice for providers on the legal frameworks

CARE ENGLAND
Representing independent care providers

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1. Introduction

Members of Care England are facing increasingly unrealistic and unsustainable fee rates being imposed by public sector commissioners. This may be encountered in context of tenders, fee rate freezes (or cuts) in existing contracts or simply as a result of increasing costs making the current rates unviable.

The Spending Review in Autumn 2015 offered the sector little comfort – whilst the LGA anticipates most local authorities will adopt the 2% Council tax precept there is no guarantee this will be used to meet increased costs of providers and in itself this is not enough to bridge the funding gap. Equally, the additional funding (an extra £1.5 billion) being made available through the Better Care Fund will not come into play until 2017/18 and is back loaded with the majority payable on 2019/20.

At the same time providers have become savvier about their rights and adopted more proactive approaches to securing their financial positions and the ongoing care and support of the people they serve. Care England has worked with members to support them in this more robust approach to Commissioners, for example by pulling together information on fee levels and preparing letters that can be sent to challenge local authorities when setting fee rates.

This paper was commissioned by Care England to provide members with a guide to the legal and commercial framework they are likely to encounter and the options available to them. Each section looks at the different legal tools at your disposal and where possible is supported by a decision tree.

Please note that unless indicated this guidance will apply to all four jurisdictions (England, Wales, Scotland and Northern Ireland). There may be differences in procedural requirements in some

situations which will be noted; equally in the case of the Care Act 2014 (in what follows referred to simply as the Act) it will only be relevant to England.

In addition unless indicated otherwise the principles set out relate to commissioning by both local authorities and health bodies (the term Commissioner will be used to refer to both). There are of course significant differences between commissioning by these bodies and these will be highlighted as appropriate.

If you have any questions on the content of this guide, please do not hesitate to contact Emma Young at emma.young@anthonycollins.com or on 0121 212 7402.

A. General considerations

2. Negotiating position

Whilst the majority of this guidance focuses on the legal rights and remedies available to you, we recognise that providers are understandably reluctant to initiate formal legal challenges. Wherever possible, your instinct will be to maintain the relationship with the Commissioner and seek to negotiate an acceptable resolution on fees.

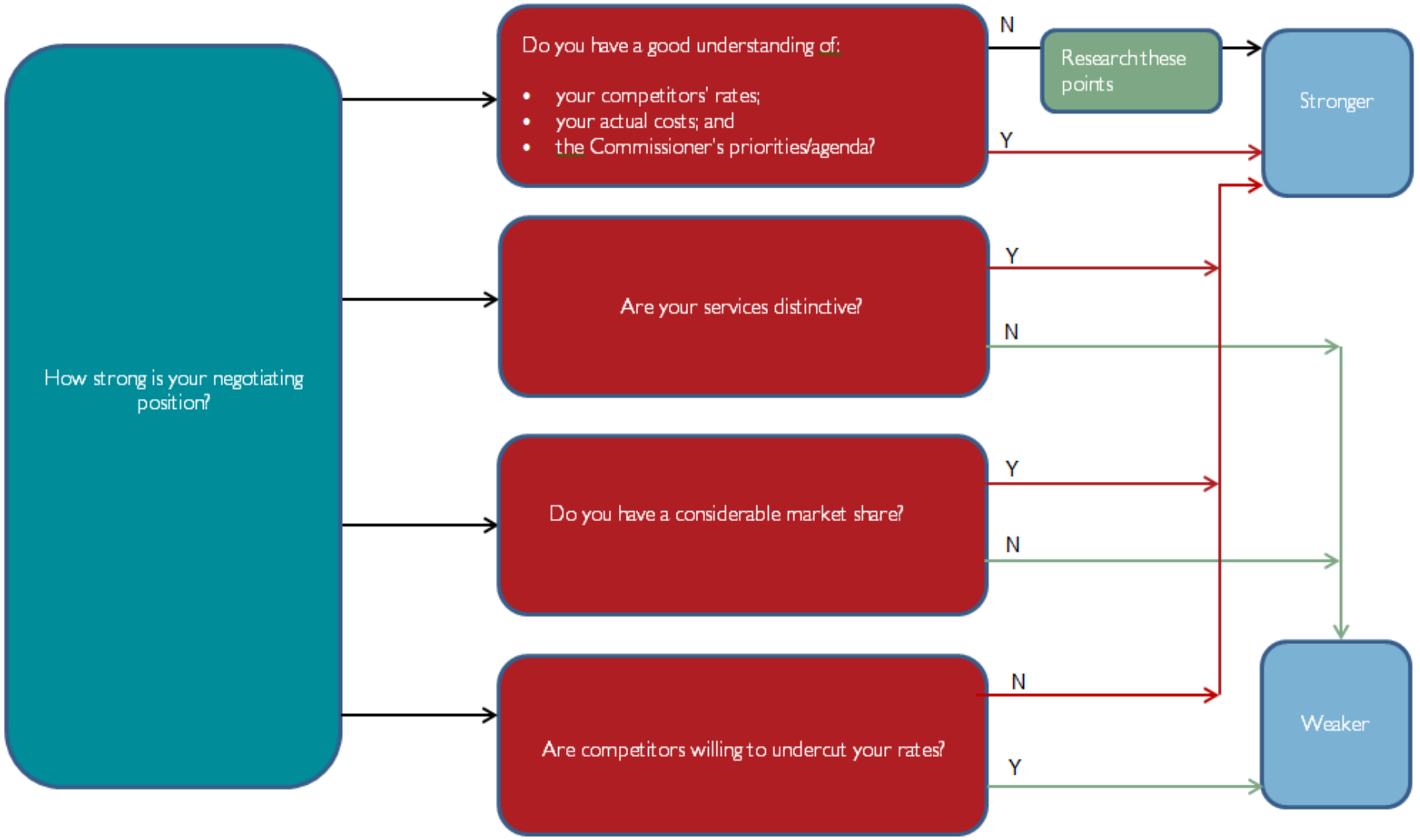
It is therefore important to understand your negotiating position; some of which will be within and some outside your control. The following may seem obvious points, but it is worth thinking through these issues as they may well determine the strength of your position and hence form the backdrop of any dialogue you have with the Commissioner.

- Historic relationship with the Commissioner – the past relationship a provider has with the Commissioner will be important; both at a strategic level and in terms of personal contacts within the commissioning team. Providers will undoubtedly want to maintain these relationships, but may also be able to call on past positive interactions to secure a proper hearing of its case on costs for particular contracts.
- Resources - the resources available to the Commissioner and the priority it places on the services in question will undoubtedly have a bearing on its appetite and ability to review pricing arrangements. Financial resources do NOT excuse a Commissioner of its statutory duties but will impact on its negotiating position and will vary considerably from one area to another.
- Leverage – the more distinctive the services you deliver, the more leverage you will have in terms of your discussions. More routine homogenous services will be easier for the Commissioner to source elsewhere and therefore traditionally providers hold a stronger position where offering specialist and/or individualised services.
- Competitors – another factor (albeit one which is outside your control) is the degree to which other providers in the area are willing and able to accept lower fee rates. If this is the

case the Commissioner is inevitably less inclined to agree higher rates than it could otherwise obtain, although some of the other factors detailed may mitigate the importance of comparative price alone. This is also a dangerous area because Commissioners may suggest that they have "providers" on framework agreements willing to take on work on very low rates, when in reality they have only one such supplier which could simply not cover demand. Local managers should develop a working knowledge of the rates the majority of your competitors are in fact accepting.

- Actual costs – before entering into any discussions with the Commissioner, we recommend providers have a comprehensive evidence base to demonstrate what their actual costs are. This makes it easier to justify a request to renegotiate fee levels and to show that you are acting reasonably. If a provider needs to use some of the legal remedies available to it, this information will also be a key part of your evidence. Consider using an independent source to audit costs to increase credibility.
- Dependencies - the size of provision can be an important factor in the strength of your negotiating position. The more dependent a Commissioner is on a particular provider, the more leverage that organisation will have if it feels it will have to exit publically funded services and therefore jeopardise the stability of the market for that area.
- Overarching considerations – finally, there are both your own strategic objectives and commercial thresholds and the Commissioner's agenda to consider. No doubt each organisation will have some "red lines" around what services you are able to underwrite and for how long, but there may also issues around undercutting competitors to achieve market share, maintaining or gaining geographical presence and diversification of services. Equally an understanding of the Commissioner's motivations and the objectives of Elected Members where dealing with local authorities can be extremely useful in terms of your positioning.

See Decision Tree 1 for an overview of these considerations.


How strong is your negotiating position?
Do you have a good understanding of:
• your competitors' rates;
• your actual costs; and
• the Commissioner's priorities/agenda?
N
Research these points
Y
Stronger
Are your services distinctive?
Y
N
Do you have a considerable market share?
Y
N
Are competitors willing to undercut your rates?
N
Y
Weaker

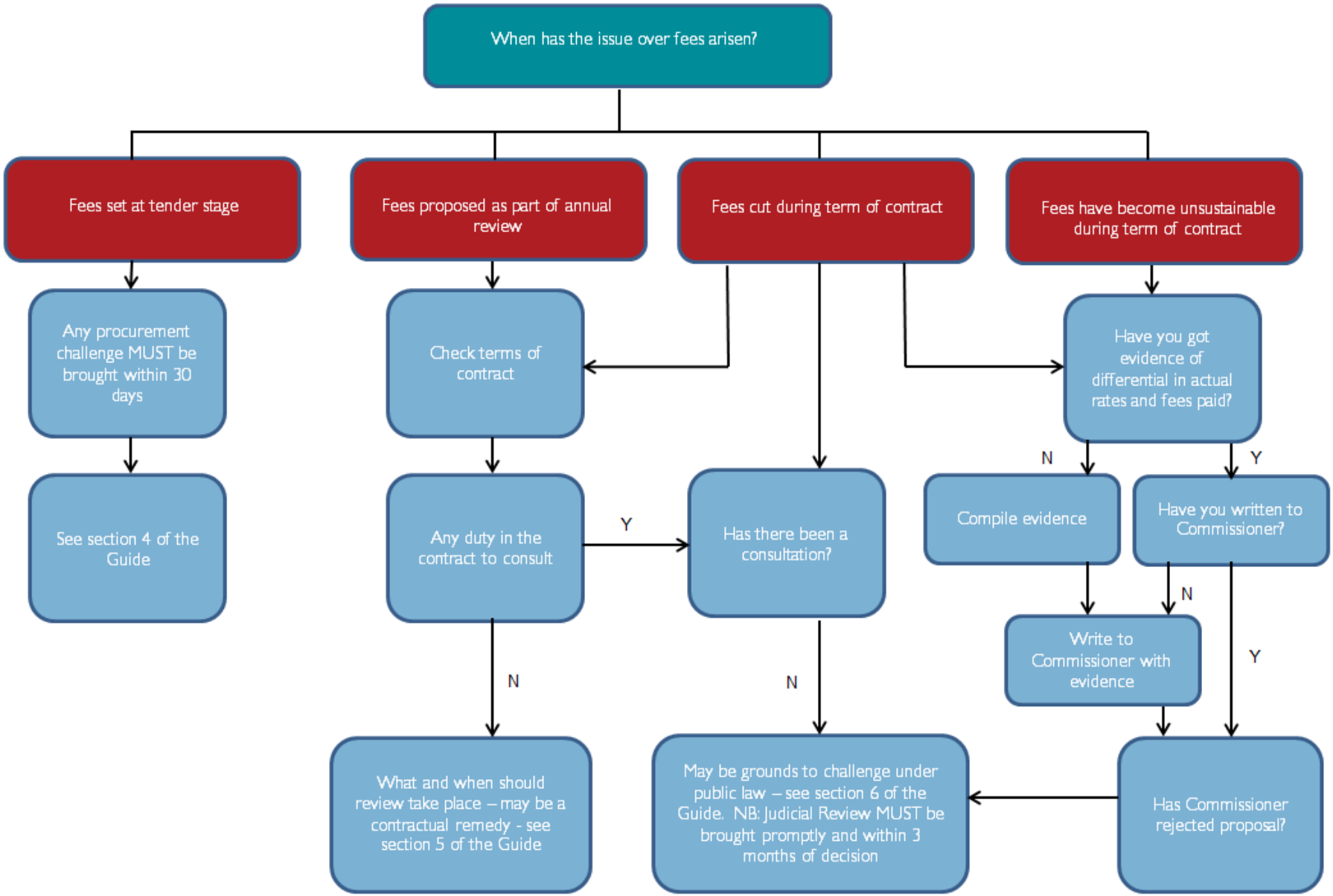
3. Timing

Where negotiations are unlikely to achieve your required outcomes, one point that cannot be underestimated is that certain legal remedies are only available for a limited time; notably procurement challenges and judicial review for which you have a maximum window of 30 days and 3 months to initiate respectively.

These are extremely short and strictly enforced time limits and a provider has to act very quickly to obtain any of the remedies available in these cases. We would strongly recommend that legal advice is sought as early as possible as a provider may lose remedies simply by being out of time. In addition, in the case of procurement law challenges, an early warning letter or request for evidence can produce very effective results without having to undertake costly proceedings in the Courts.

Decision Tree 2 sets out a timeline along which you may find yourself and directs you to the remedies which will apply at each stage.

Tree 2


When has the issue over fees arisen?
Fees set at tender stage
Fees proposed as part of annual review
Fees cut during term of contract
Fees have become unsustainable during term of contract
Any procurement challenge MUST be brought within 30 days
See section 4 of the Guide
Check terms of contract
Any duty in the contract to consult
Y
N
Has there been a consultation?
N
What and when should review take place – may be a contractual remedy - see section 5 of the Guide
May be grounds to challenge under public law – see section 6 of the Guide. NB: Judicial Review MUST be brought promptly and within 3 months of decision
Have you got evidence of differential in actual rates and fees paid?
N
Y
Compile evidence
Have you written to Commissioner?
N
Y
Write to Commissioner with evidence
Has Commissioner rejected proposal?

B. Legal Remedies

We turn now to the primary legal rights/remedies available to providers in the context of fee setting.

4. Procurement law challenges

European Law, which is reflected in UK regulations (most recently the Public Contracts Regulations 2015), requires Commissioners to procure social care services in a way that observes fundamental principles of transparency and equal treatment and complies with the detailed requirements of the relevant regulations. If they do not do so, and bidders can demonstrate that as a consequence, they have suffered a loss, then a challenge may be brought through the Courts, as set out in the regulations.

As noted above, there are very strict timescales for issuing challenges at Court (usually 30 days from when the problem first came to light) which does put a lot of providers off and often enables Commissioners to plough on regardless. Nevertheless, where there are fundamental principles at stake, providers would be wise to take advice throughout the process, challenge through the clarification process, bring the matter to the attention of the Monitoring Officer and in exceptional cases, be prepared to issue a challenge at Court.

If the sole concern is the viability of the level of fee set by the local authority (and not the procurement process itself), it may well be that Judicial Review will be the best legal route to pursue but a careful (and quick) analysis will need to be undertaken as to the correct route to take in the specific circumstances of each case. Providers either individually, or through a local trade body, will need to be well organised to respond quickly to the situations that they face.

If a procurement challenge is the correct route then a comprehensive letter setting out concerns, will need to be sent during the standstill period that usually applies for 10 days following notice of the contract award. Commissioners should be asked to extend the standstill period whilst they consider the concerns and this will ensure that no contracts will be granted during this period. In addition, a Claim Form will need to be issued at Court within 30 days of the contract award notice or the date of the breaches of regulations complained of, if earlier.

Sometimes it is possible to agree with Commissioners that after issue of the Claim Form, the next steps in the Court process can be put on hold while discussions take place. If no settlement is reached, a detailed claim will need to be drafted and filed at court within 7 days of issue of the Claim Form.

The Commissioner will then be required to serve a detailed defence within 14 days and the Court will then list the case for what is called a Case Management Conference (CMC). At the CMC the Court will wish to give directions to prepare the case for trial by a judge. Those directions will include disclosure of all relevant documents, serving of witness evidence and possibly also expert evidence.

Whilst the case is proceeding, Commissioners will be unable to let the contract unless the Court orders that the automatic suspension under the regulations can be lifted to allow the contracts to be let. Detailed consideration needs to be given to this area of a procurement challenge, which cannot be addressed in this general briefing note.

In practice, most procurement challenges are settled by the parties at an early stage, often through mediation. However, there are still a steady flow of cases passing through the Courts.

Note: The procurement regulations only currently apply to local authorities and not to health bodies. The regulations are due to be brought into play for health in April 2016.

5. Legal position within existing contracting arrangements

The starting point for any discussion of fees during the life of current service provision, as opposed to at the tender stage, should be the contract itself. This may be relevant in various ways as set out below. Before looking at the key terms, it is worth making an overriding point about the reluctance of the Courts to meddle with what it sees as commercial transactions. This can be understandably galling to providers as Commissioners typically produce contracts on a take it or leave it basis and so the provider often feels it has had no real opportunity to negotiate the terms.

The basic principle that the Court will not intervene where a party has struck a bad deal has particular implications for providers facing increases in employment costs (increases in NMW and the introduction of a National Living Wage). It means that where there is a change in the law or commercial environment, such as to increase costs, the supplier will be expected to bear this risk. By way of example, providers would be expected to take on the costs of heightened regulation resulting from the introduction of the Fundamental Standards and the higher fees which CQC has announced.

This underlying position can be altered by the terms of the contract and providers should look at their existing agreements to see whether there are any provisions which can be used to their advantage.

In what follows we look at those terms which we recommend providers should consider generally. We have provided separate advice on the rights and remedies available to providers under The NHS Standard Contract which are available to members through
The Care England website and, given that this agreement (which governs all social care and nursing services commissioned by health bodies such as Clinical Commissioning Groups) is soon to be significantly revised will not address its terms in this guidance.

Key terms to consider

- Pay review mechanisms – some contracts still have some sort of pay review mechanism which would typically apply annually and may include terms which apply in the context of

increases to national pay thresholds. Look also for:

- Timing of review - even if the mechanism if very loose, it may include important obligations such as when an increase should be introduced. As such, even if the contract does not give you much to use by way of challenging the review, it may enable you to point out that the increase should be backdated in accordance with the timeline in the agreement.
- Consultation - another area to explore is whether there is a duty to consult providers as part of the review; something which local authorities are often poor at doing.

- Change of law – a change of law provision specifically deals with how risk should be dealt with where there is change of law which affects the subject matter of the contract and these are not uncommon in agreements with public authorities. The terms are often quite complex, distinguishing between general and sector specific changes and those which could and could not be anticipated. Where there is such a clause it may:

  - Give the provider rights to an increase – by allocating the costs resulting from the change of law, such clauses may give providers contractual rights to increase its charges as a result and/or at least bring a degree of certainty over costs for example in the case of changes to national wage legislation;
  - Use against the provider - this is of course a double edged sword and contracts with local authorities increasingly include change of law clauses which put the burden of associated cost increases expressly at the door of the provider. One possible (but untested) argument in these circumstances would be to interpret such a provision as an exclusion clause. As the contracts which are produced are generally standard terms and conditions which are not subject to negotiation, such clauses are subject to a "reasonableness" test under the Unfair Contract Terms Act 1977 and so it may be possible to argue that excluding liability for these additional costs (such liability established under the Statutory Guidance supporting the Act) is unreasonable and the clause should be held to be void.

- Force majeure – force majeure clauses traditionally excuse parties from liability where an "act of God" or event outside either party's control makes it impossible for them to perform a contract. Very occasionally, the events listed cover changes in law. The underlying principle of these terms, however, is to exclude liability (act as a shield) rather than form the basis of an entitlement (act as a sword) and so may not form the basis of a claim for an increase in fees. Where such clauses may be of some practical benefit is where the provider does not have any rights of exit from the agreement as typically after a certain period of a continuing event of force majeure the parties will have the right to terminate the agreement.

- Variation/change mechanism – contracts will almost always have some form of clause dealing with variations; some will be short provisions requiring simply that the change is agreed by both parties and recorded in writing and others will require that quite complex procedures are followed. In some cases it may be arguable that the introduction of the NLW amounts to a variation which the provider can use to trigger the change mechanism. Certainly providers should be wary about any changes e.g. cuts to fee rates being unilaterally imposed as any change should be subject to consent and/or agreement between the parties.

- Termination rights – where there are termination rights without cause (i.e. on notice) these can be used as a lever in negotiations with the Commissioner. We have supported a number of providers in recent times in sending pre-emptive letters seeking an increase in fees commensurate with actual cost increases and threatening to end the contract in the absence of agreement.

- Other arguments to consider where there are no such rights include:

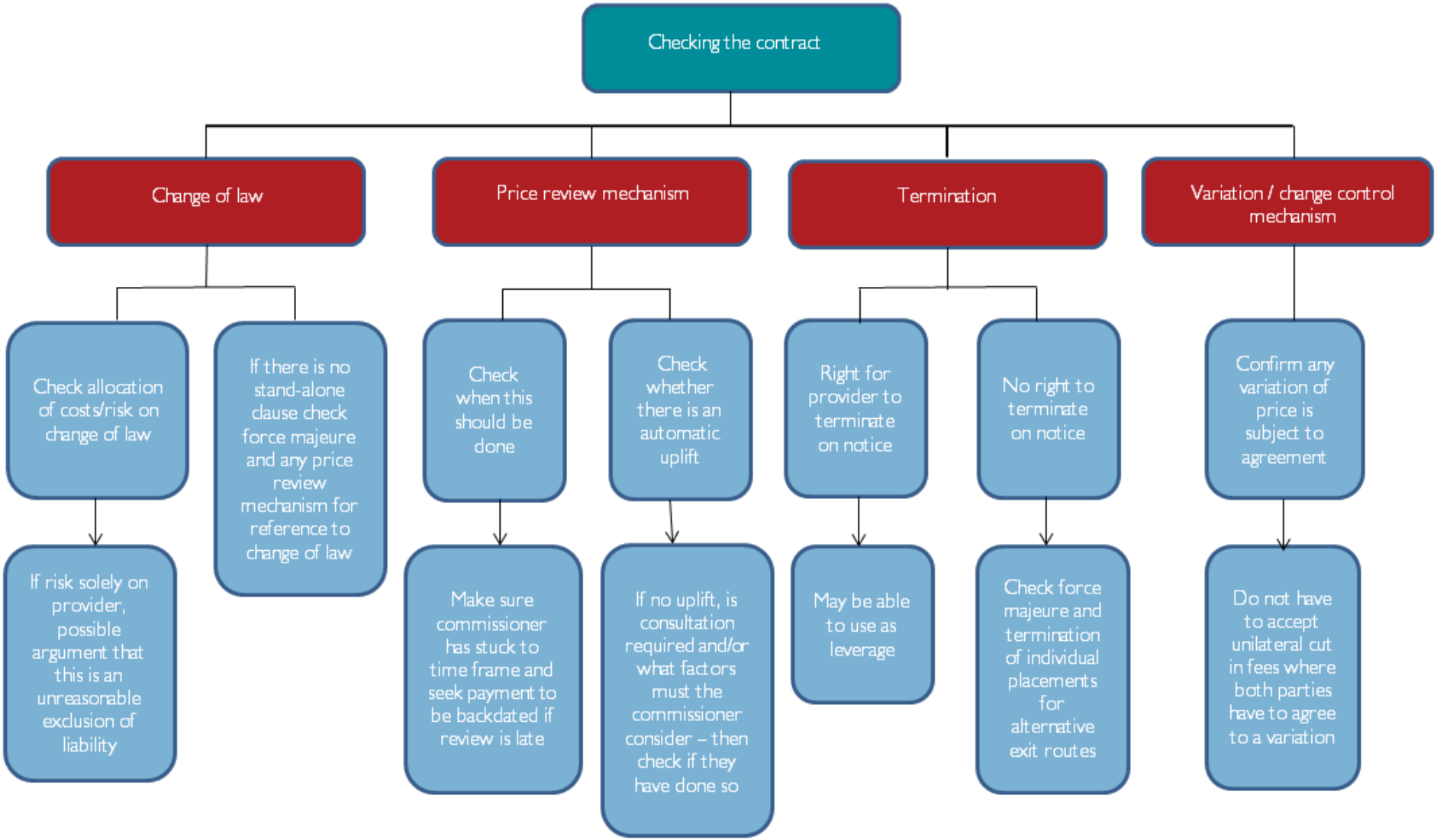
    - Implied termination rights – the right to terminate on reasonable notice can be implied into contracts provided the agreement is not for a fixed term. The right to terminate on reasonable notice is less likely to be implied if the contract already contains grounds for termination for either party. This means whereas is increasingly the case, the Commissioner alone has rights to exit the contract, this

does not favour a right being implied for the provider.

- Individual placements – whilst it may not be possible to terminate the overarching agreement there will often by rights to exit the individual placement arrangements with residents or other service users which can be used, en mass, to effectively withdraw (or threaten to withdraw) the services.
- Other grounds – there may be ways to exit an agreement elsewhere in the contract, for example, force majeure or where a dispute arises and the dispute resolution procedure fails.

- No contract in place – where there is no written contract in place, either because it was never signed or has expired, a provider may seek to be paid on a quantum meruit basis for the reasonable costs of delivering the service. It is likely that a claim for a fee based on such an analysis would include payments to staff at the NLW. It should, however, be noted that a contract does not have to be signed to form that basis of the arrangements between the parties. If an agreement was included as part of the original tender this is likely to be seen by the Courts as the framework under which the relationship should be governed.

See Decision Tree 3 for an overview.


Checking the contract
Change of law
Price review mechanism
Termination
Variation / change control mechanism
Check allocation of costs/risk on change of law
If there is no stand-alone clause check force majeure and any price review mechanism for reference to change of law
Check when this should be done
Check whether there is an automatic uplift
Right for provider to terminate on notice
No right to terminate on notice
Confirm any variation of price is subject to agreement
If risk solely on provider, possible argument that this is an unreasonable exclusion of liability
Make sure commissioner has stuck to time frame and seek payment to be backdated if review is late
If no uplift, is consultation required and/or what factors must the commissioner consider – then check if they have done so
May be able to use as leverage
Check force majeure and termination of individual placements for alternative exit routes
Do not have to accept unilateral cut in fees where both parties have to agree to a variation

6. Public Law Duties

Public authorities are subject to a range of public law and statutory duties. Ultimately the means of holding a public body to account over these obligations is through bringing a judicial review against them. Providers are understandably reluctant to challenge the commissioner by way of judicial review but as fee rates become increasingly unsustainable, such claims will be inevitable. The additional duties introduced by the Act also mean there are further grounds on which to challenge.

The window in which a judicial review can be brought is very short; a maximum of 3 months of the decision or policy in question and therefore any claim must be initiated quickly.

"Traditional" duties

It is worth starting out by noting that, quite apart from the new obligations which have been introduced by the Act, there is a long established line of case law which dictates how public bodies should exercise their functions. Breaches of these traditional public law duties can be summarised as follows:

- Acting outside the scope of their powers (ultra vires).
- Delegating a decision to another body or fettering of discretion.
- Taking into account irrelevant matters.
- Not taking into account relevant considerations.
- Not complying with relevant statutory or other guidance.
- Making an unreasonable or irrational decision.
- Not following the correct procedure, for example not consulting affected stakeholders.
- Breaching equality law duties or the human rights of those affected by the decision or policy,

In the context of fee setting these "traditional" obligations have been used effectively in the care sector where a local authority has failed to take into account relevant considerations when coming to a decision. Typically where a provider has put together a compelling body of evidence showing what their actual costs are, a failure by the Commissioner to properly include those costs when setting fee levels may be subject to challenge. Such failures can establish a claim that the public

body has acted irrationally or unreasonably.

Another example of fruitful grounds for challenge is around consultation. Commissioners will typically have duties to consult stakeholders where they are looking to introduce a change to the services they offer and failure to do so can halt the decision. In practical terms this may only delay the decision making process, but is certainly worth bearing in mind.

The Care Act Guidance and Monitor Guidance

The Act introduced a number of new statutory obligations on local authorities which if breached may found grounds for judicial review. Importantly the statutory guidance - which underpins the Act and therefore must be followed unless the local authority can demonstrate good reasons for not doing so – explicitly places a duty on Councils in England to pay sufficient fees to enable providers to meet national minimum wage legislation (which includes the National Living Wage). A list of useful excerpts from the Act and Guidance is included as Annex 1.

Note: The Care Act only applies to local authorities (not health bodies) and is limited in application to England.

Health funded care is not subject to national T=tariffs, but Monitor has provided guidance to health commissioners on setting local prices. The relevant guidance can be found at Annex 2. As above, a failure to follow this, may potentially found a claim for judicial review.

The Nuts and Bolts

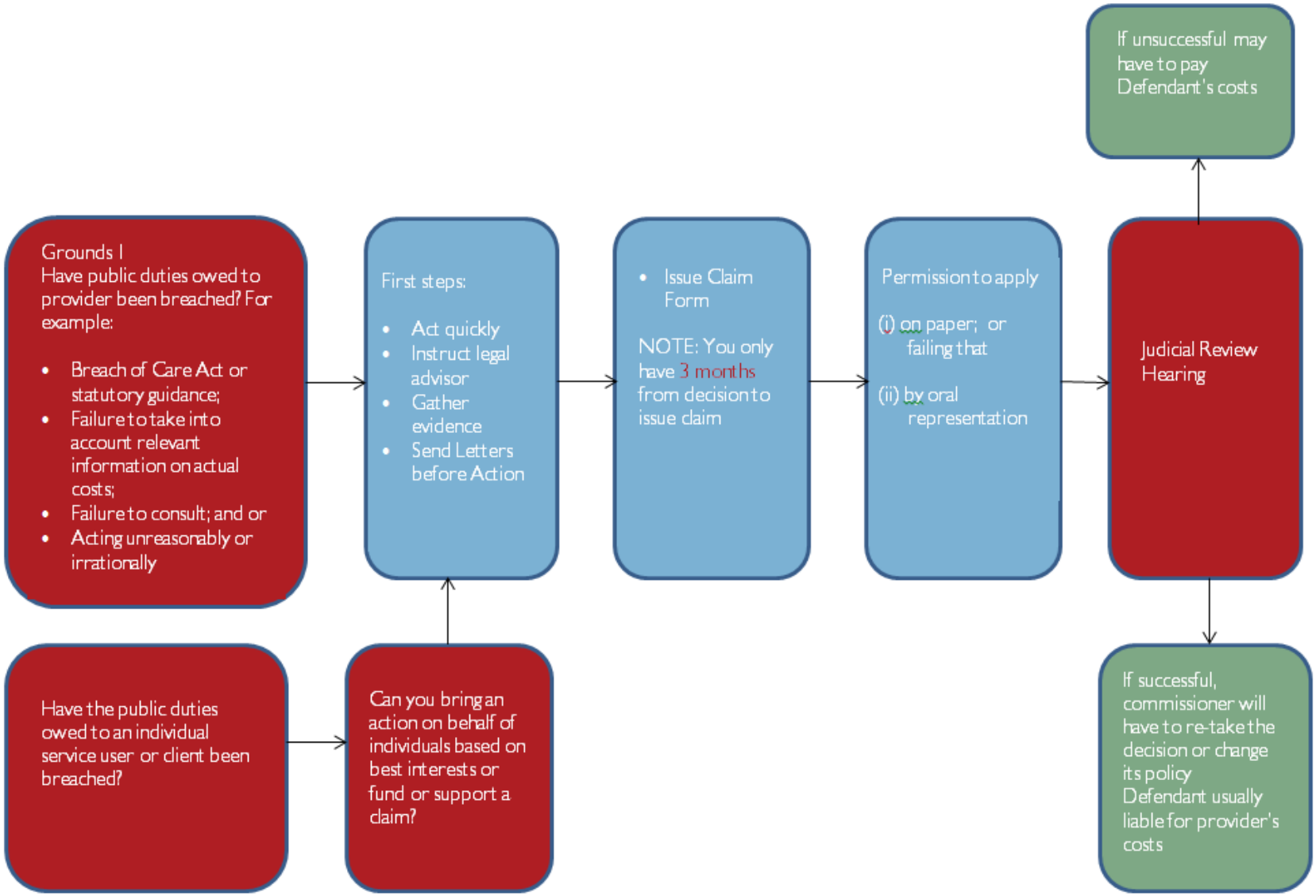
The following are some of the key procedural and practical points providers need to be aware of:

- Timing: Any application for judicial review has to be made as soon as possible and in any event within three months of the decision it relates to. In unusual cases there is the possibility that time can be extended for making such an application in respect of 'ongoing' issues;
- Human Rights Claims: Proceedings alleging breach of the HRA may also be brought via a free-standing claim which has to be brought within 12 months of the alleged breach.

- Permission: Before a claim can proceed, permission must be obtained from the Court for an application to be made. This means poorly constructed claims or those without merit will be dismissed at an early stage, with a Judge merely considering documents.
- How quickly will the claim be resolved: Claims will usually be heard relatively quickly. If the decision under challenge is imminent, it is possible to make an urgent application requesting an "interim" order which will usually be aimed at preventing anything being done and maintaining the status quo until a full hearing can take place.
- What to expect in Court: The hearing itself will be almost entirely in the hands of lawyers. There is no jury and it is extremely rare for those who have provided witness statements to be called to give oral evidence or to be cross examined on their statements. The proceedings will therefore be limited to argument by Counsel and the evidence presented on paper.
- Length of the hearing: Whilst the length of the hearing will depend on the complexity of the case, proceedings are usually relatively short.
- Remedies available: - If a claimant is successful the relief a Court can grant includes:
    - injunctive relief, usually prohibiting any particular action;
    - declaratory relief, which includes declaring an action unlawful; and
    - mandatory order, requiring the defendant to do something.
- Damages: *D*amages are not generally awarded in judicial review cases but these can be awarded in cases of breach of human rights.
- Costs: If the claim succeeds the party losing the case will typically be ordered to pay the other party's costs. However if a claimant has legal aid the defendant is often unable to recover his costs. There is, in practice therefore, a costs risk to a provider if proceedings are being brought against it by a service user even if the claim fails.
- Settlement: A judicial review or HRA claim can be settled out of Court just as any other matter can be and this may be particularly attractive to a commissioner wishing to avoid a precedent being set. The threat of JR can therefore be a powerful tactic.

See Decision Tree 4 for an overview.

Tree 4


Grounds I
Have public duties owed to provider been breached? For example:
• Breach of Care Act or statutory guidance;
• Failure to take into account relevant information on actual costs;
• Failure to consult; and or
• Acting unreasonably or irrationally
First steps:
• Act quickly
• Instruct legal advisor
• Gather evidence
• Send Letters before Action
• Issue Claim Form
NOTE: You only have 3 months from decision to issue claim
Permission to apply
(i) on paper; or failing that
(ii) by oral representation
Judicial Review Hearing
If unsuccessful may have to pay Defendant's costs
If successful, commissioner will have to re-take the decision or change its policy
Defendant usually liable for provider's costs
Have the public duties owed to an individual service user or client been breached?
Can you bring an action on behalf of individuals based on best interests or fund or support a claim?

7. The individual

Another way of approaching the adequacy of fee rates is from the perspective of the individual. Asserting the rights of your customer or client can be a powerful way in which to achieve positive results whilst maintaining the moral high ground.

The Act gives individuals clear rights around the assessment and care and support planning process and flaws in this may ultimately lead to the wrong amount of money being allocated to the personal budget of the individual. Making sure these are carried out properly and in accordance with the Act can provide a mechanism for increasing the fees to a level which properly secures the person's identified outcomes.

What does it mean to "meet needs"?

"*Meeting needs*' is an important concept under the Act and moves away from the previous terminology of 'providing services'. The concept of 'meeting needs' is intended to be broader than a duty to provide or arrange a particular service. Because a person's needs are specific to them, there are many ways in which their needs can be met. The intention behind the legislation is to encourage this diversity, rather than point to a service or solution that may be neither what is best nor what the person wants.

Mixing up money and needs

One of the most common issues that providers will face is that commissioners mix up the needs of the individual with how much it costs to provide care and support for them. There is obviously a link here – someone with complex needs and challenging behaviour is going to need more expensive support than a person who has low level needs but merging the two things is unlawful. The distinctions can be summarised as follows:

Under the Act the local authority's resources and the financial position of the individual are irrelevant to:

- the assessment of needs; and
- whether someone is eligible to have those needs met.

A local authority can take into account the individual's finances when it decides whether it can charge for services or not.

Councils can also take its own financial resources into account when it decides how an individual's needs should be met - if there are a range of options it can choose one of the cheaper alternatives. This may be relevant when a Council is looking to review a care and support plan, but cost must not be the only driver and when deciding how to meet needs the Council:

- must act reasonably;
- cannot set arbitrary upper limits on the costs it is willing to pay;
- must take into account the individual's preferences;
- must choose an option which can deliver the outcomes identified by or for the individual; and
- should not set arbitrary upper limits on the costs it is willing to pay to meet needs through certain routes – doing so would not deliver an approach that is person-centred or compatible with public law principles.

Other rights

Other rights to consider when championing an individual include those under the Equality Act 2010 and the Human Rights Act 1998. In relation to residential care the rights around choice of accommodation, tops ups and deferred payment arrangements may also be relevant.

8. Other agencies and alternative means of getting heard

Action by the Department of Health

The Department of Health (DH) and the Care Quality Commission (CQC) both have rights to intervene where local authorities set unreasonable fee rates including:

- Enforcement of the statutory position that s151 officers must set legal balanced budgets.
- If sector-led improvement approaches through ADASS and LGA are proving ineffective, DH can engage the Department for Communities and Local Government to instigate direct dialogue with the local authority.
- There are s.48 powers to bring in CQC, and options for further statutory intervention through the DH.

  The latter intervention needs two Secretaries of States to sign off on the action and in the current climate it seems unlikely that the government would wish to adopt such an approach given the potential implications for central funding.

The Competition and Markets Authority

Another area which seems ripe for exploration is competition law. The Chapter II prohibition of the Competition Act 1998 applies to the activities of *any one or more undertaking that amount to an abuse of a dominant position in a market which might affect trade within the UK or any part of it.* The questions here are (1) whether an authority is an "undertaking" (2) whether it holds a dominant position in the relevant market and (3) whether the pricing activities could ever amount to abuse of that position. The key case to date in this area remains *BetterCare v. North & West Belfast Health Board* (2002). This established that:

- a local authority is an "*undertaking*" for the purposes of the Competition Act;
- a local authority may well have a "dominant" position as the predominant purchases of care services in the region;
- the fact that the LA is a purchaser, rather than supplier of services, does not mean it cannot abuse this dominant position; and
- it is possible in some circumstances that imposing unreasonable pricing conditions on a supplier of services, including price cuts will constitute an abuse.

Despite these findings, the OFT (the predecessor to the Competition and Markets Authority) subsequently published guidance which made it clear they were unlikely to intervene in the activities of local authorities on these grounds. However, that was over 14 years ago and there may be some merit in exploring this challenge, where a group of providers are significantly prejudiced.

Local Government Ombudsman

The Local Government Ombudsman (LGO) looks at complaints about Councils and some other authorities, but not health bodies. It is a free, independent service and has carried out some comprehensive and helpful investigations in the care sector. It is however limited in two significant ways:

- complaints can only be raised once a provider has exhausted the local authorities own complaints procedures; and
- it is only able to make recommendations and has no powers to impose sanctions or enforce decisions.

Further information about the LGO can be found at:

http://www.lgo.org.uk/

Elected Members and MPs

An area which providers may find fruitful is to directly involve Elected Members and/or local MPs in underfunding issues. These individuals can have a powerful influence over local authorities and are particularly unhappy about being publically embarrassed. This route, however, does tend to aggravate officers, perhaps more so than even bringing a judicial review and therefore is likely to be something of a last resort.

Annex 1

The Care Act: market shaping

The Care Act has introduced many new duties on local authorities which may be relevant in the context of commissioning. These are particularly important in terms of increases in the introduction of the NLW.

The Act itself requires local authorities to exercise "market shaping" functions. This is a duty to "*promote the efficient and effective operation of a market in services for meeting care and support needs*" and to be done with a view to ensuring that any person in an authority's area who wishes to access services in the market has:

- *a choice of variety of providers who (taken together) provide variety of services;*
- *a variety of high quality services to choose from; and*
- *sufficient information to make informed decision*

In discharging this function, Councils must have regard to:

- *the need to make information about providers available;*
- *what current and future demand for services is and to consider how providers might meet this demand;*
- *enabling adults/carers to participate in work, education or training;*

- *ensuring sustainability of market;*
- *fostering continuous improvement in quality and efficiency / effectiveness of services, and encouraging innovation;*
- *fostering workforce able to deliver high quality services.*

The Statutory Guidance, which supports the Act and which a local authority must follow unless it can show good reason not to do so, is also particularly helpful in terms of meeting staff costs. For example it states:

Paragraph 4.31:

When commissioning services, local authorities should assure themselves and have evidence that contract terms, conditions and fee levels for care and support services are appropriate to provide the delivery of the agreed care packages with agreed quality of care. This should support and promote the wellbeing of people who receive care and support, and allow for the service provider ability to meet statutory obligations to pay at least the national minimum wage and provide effective training and development of staff. It should also allow retention of staff commensurate with delivering services to the agreed quality, and encourage innovation and improvement.

Local authorities should have regard to guidance on minimum fee levels necessary to provide this assurance, taking account of local economic environment. The tools referenced may be helpful as examples of possible approaches.

Referenced tools are:

- *UKHCA Minimum Price for Homecare*
- *Laing & Buisson toolkit for fair price for residential care*
- *ADASS paying for care calculator*

Paragraph 4.35

Local authorities must not undertake any actions which may threaten the sustainability of the market as a whole, that is, the pool of providers able to deliver services of an appropriate quality – for example, by setting fee levels below an amount which is not sustainable for providers in the long-term.

It is useful to have these duties in mind in positioning yourself in discussions with the authorities.

Annex 2

Monitor Guidance

Local pricing determined under NHS principles should comply with the Monitor Guidance which states as follows:

Principle 1

"Providers should be able to recover efficiently incurred costs (which will typically include provisions for the depreciation and financing of capital expenditure, as well as operating expenditure). Full recovery of efficient costs is particularly important for the long term, as it enables providers to invest in new equipment and innovation. To plan ahead effectively, providers need to be confident that efficiently incurred costs will be remunerated in full through national prices or local payment arrangements"

Principle 2

"We also recognise that setting national prices either above or below efficient costs *may not be in the interest of patients. The former may disadvantage patients by reducing the volume of services that commissioners can purchase, and may also reduce the incentive for providers to find cost savings. The latter may not adequately compensate providers for the cost of services, potentially leading to withdrawal of services, compromise on service quality, and/or under-investment in the future delivery of services. Prices that are too low may also result in commissioner over-purchasing those services at the expense of purchasing other services."*

As in the case of the statutory guidance, a breach of these principles by a health body may potentially establish grounds for judicial review and certainly provides another instance of a clear steer from the regulator about the importance of fair fee setting.

FOR MORE INFORMATION

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