NHS Standard Contract and Shortened contract for 2016/17

Please find a number of comments collated from members of Care England referring to the consultation on the 2016/17 contracts.

Many CCG's don't understand the document in relation to care homes. We hope NHSE will encourage CCGs to ask questions of it if they are unsure and Care England will also be happy to support getting key messages around the contract out to care homes so that the discussions locally are as well informed as possible.

Specific general comments

- The document is only as good as the user and headings not completed or not removed cause confusion. Clearer headings relevant to services along with guidance on what CCGs should complete would help commissioners in completing the document.
- Section 75's – many local authorities are looking to work with CCGs under section 75 arrangements for joint commissioning. It is not clear which T&C's will prevail in circumstances where conflict is evident and the local authority insists on using their terms. We suggest some national guidance for use in these situations as the move toward joint commissioning by 2020 between CCGs and Councils, might be stymied without clearer national direction in this area.
- Penalties – Penalties are not enforceable in law, and yet the contract includes many penalty clauses (eg SC28.18, SC36.37, SC36.38). The section for Duty of Candour and Never Events needs review and all penalties need to be removed due to the unlawful nature. It is greatly concerning that legally unenforceable provisions are included in a contract.
- The contract is not drafted in the spirit of partnership due to the inability to negotiate much of the contract.
- Risk – The contract is very one sided against the provider with no limitations of liability.
- Termination – Heavily in favour of the commissioners, often not available to the provider without negotiation in particulars (which has to be added in). Many CCGs fail to allow this.
- Commissioners can trigger for termination for non material breaches. There is no evidence of this being used therefore it is suggested it is removed as it causes problems and is not in the spirit of partnership.
- Variations – The document is very 'fixed in stone', very difficult to vary, is a complex process, difficult to manage and ascertain commercial risk.
- Renewals – due to the annual renewal process, some providers can have hundreds of CCG contracts all requiring renewal at the same time. It would be easier if a simple extension could be signed rather than having to review all pages again every time for each document with no tracked changes over the previous version. Block contracts can be for more than 1 year but the agreement needs annual review and signature. Would be helpful if duration could be for more than 12 months and any national changes provided in tracked changes.
- CCGs often fail to engage on pricing and CQUIN negotiations. NHS E need to constantly reiterate the message that care homes need to be offered the opportunity to earn a CQIUN payment.

- General and Service conditions cannot be amended. Particulars can be amended to an extent. Quality schedule is set according to service so, although technically negotiable, CCGs won't change as they are designed for the services hence why selecting the right services is so important i.e. community services is not 'discharge to assess' or 'intermediate care' and causes lengthy protracted negotiations. There is a need to ensure the right conditions are linked to the right services. If the wrong service is selected, then the wrong conditions then apply.
- Information Governance – Standard provision states that NHS is Data Controller. In IG law, the provider is the Data Controller. This leads to never ending disputes and the contract is factually and lawfully incorrect.
- Sub-Contractors – the contract states provider cannot do so unless listed. This is not practical and we suggest changing to those sub-contractors that have a material impact on the provision of the services. Again a list of material provided services for care homes would be useful.
- The Friends and Family Survey requirement is inflexible in terms of format. Care homes already conduct surveys, and it is more appropriate to use a provider format than an NHS format.
- Equipment – the basic requirement is to provide all equipment necessary to provide the service. Again, this is not appropriate in the care home arena, and leads to confusion if individual CCGs don't understand that more detailed equipment provisions should be included. Cost of equipment will have to be covered within the Contract Price meaning that the cost of such equipment will be ultimately be met by the Commissioners.
- There is a provision at SC35.3.3 allowing the CCG to insist that the Provider publish a failure to meet the Duty of Candour "prominently on its website". This is the CCG attempting to act as a regulator. The CQC regulates compliance with the Duty of Candour, and the CCG already has the power to report to the CQC or ensure the Provider remedies the situation.
- Any variations to the terms and conditions should be possible only by mutual agreement regardless of whether the Contract was awarded under a competitive tendering process.
- The clauses concerning audit of the Services should be reviewed and revised as necessary in order to eliminate the risk of duplication of work already undertaken by the Statutory Regulators.
- Only the Statutory Regulator has a statutory right to enter the Provider's Premises without notice. It is not correct to suggest that any Commissioner, any authorised representative of Local Healthwatch or any body or person concerned with the treatment or care of a Service User may simply turn up unannounced at the provider premises
- In circumstances where the Provider disagrees with the Commissioner's opinion on Suspension, the referral to the Contract's Dispute Resolution procedure is not an effective method to resolve such a dispute; a Suspension may destabilise a Service and could damage the Provider's business and it is therefore essential for a dispute / challenge to be dealt with quickly and efficiently.
- Safeguards must be put in place to ensure that there is no unreasonable delay by the Commissioners in lifting the Suspension once all matters have been rectified.
- The provisions of the information requirements paragraph should be redrafted in order to avoid recommendations within non-mandatory Guidance becoming contractual requirements.

<u>Payment Terms</u>

Most CCGs fail to engage to negotiate certain provisions such as pricing annually and the comments below have been made previously and we remain concerned about how the payment terms are determined.

Locally-Determined Prices are by definition subject to local negotiation between commissioner and provider. Bearing in mind that the Contract must not serve to micro-manage Commissioners and Providers, these clauses should be redrafted accordingly.

SC36.4 states that *the Co-ordinating Commissioner and the Provider may agree a Local Price for one or more Contract Years or for the duration of the Contract. In respect of a Local Price agreed for more than one Contract Year the Co-ordinating Commissioner and the Provider may agree and document in Schedule 3A (Local Prices) the mechanism by which that Local Price is to be adjusted with effect from the start of each Contract Year. Any adjustment mechanism must require the Co-ordinating Commissioner and the Provider to have regard to the efficiency and uplift factors set out in the National Tariff where applicable.*

The terminology "must require" is misleading in suggesting that this could be mandatory. We suggest that the final sentence is reworded to read "Where appropriate, the Parties may have regard to the efficiency and uplift factors set out in the National Tariff".

SC36.5 states that *Local Prices must be determined in accordance with the rules set out in the National Tariff*.

This is also misleading in suggesting that the National Tariff is mandatory for Local Prices. Although the National Tariff Rules attempt to set out the distinction between mandatory "Rules" and non-mandatory "Guidance", there is inconsistent use of this terminology whereby what Monitor intended to be non-mandatory "Guidance" on Local Prices was actually described as "Rules". In 2015/16, many NHS commissioners (including NHS England Area Teams) continue to misinterpret Monitor's guidance as meaning that the national efficiency factor must be mandatorily applied to all Local Prices, even though Monitor has confirmed that this guidance is not mandatory.

SC36.6 states *that the Co-ordinating Commissioner and the Provider must apply annually any adjustment mechanism agreed and documented in Schedule 3A (Local Prices). Where no adjustment mechanism has been agreed, the Co-ordinating Commissioner and the Provider must review and agree before the start of each Contract Year the Local Price to apply to the following Contract Year, having regard to the efficiency and uplift factors set out in the National Tariff where applicable. In either case the Local Price as adjusted or agreed will apply to the following Contract Year*.

Given the Contract's acknowledgement that agreement may not necessarily be reached before the start of a Contract Year, this clause cannot reasonably require agreement to be reached before the start of a Contract Year. Also, reference to having regard to the efficiency and uplift factors is superfluous and should be removed.

SC36.8 specifies a notice period of six months to be served by either Party if agreement on Local Prices cannot be reached. In view of the new provisions for greater flexibility on notice periods under GC17, this clause should be revised.

SC36.9 states that if any Local Price has not been agreed or determined in accordance with SC36.6 and SC36.7 before the start of a Contract Year then the Local Price will be that which applied for the previous Contract Year increased or decreased in accordance with the efficiency and uplift factor set out in the National Tariff. It is wholly inappropriate for this clause to suggest that in the absence of

agreement by the Parties, the default position shall be to apply the National Tariff efficiency and uplift factor to Local Prices.

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