CAN WE EXPECT TO SEE A FAIR RATE FOR CHC?

By David Collins Solicitors

The financial tensions between commissioners and care home providers is far from new. We need only look to the Department of Health's guidance as far back as 2001 to see the concerns expressed then:

> *"Providers have become increasingly concerned that some commissioners have used their dominant position to drive down or hold down fees to a level that recognises neither the costs to providers nor the inevitable reduction in the quality of service provision that follows."* ('Building Capacity & Partnership in Care')

If anything, these concerns resonate more today than they did 13 years ago.

To date, there has been a great deal of publicity surrounding the various legal challenges brought against local authorities over the level of their fee rates. These challenges have seen a significant change in the way local authorities approach their fee setting obligations and have (in our experience) led to better fee rates being paid in many areas; or at the very least, the avoidance of fee reductions. Admittedly, there is still a long way to go and the insufficiency of local authority fee rates will certainly remain with us for many years to come.

However, save for the odd foray before the Co-Operation and Competition Panel (as it then was), the rates paid by PCTs/CCGs has attracted very little attention to date. Is this about to change?

Whilst CHC generally accounts for a lower proportion of the funding stream, the effects of its insufficiencies are likely to become more noticeable as the trend of residents entering care homes with more acute care needs continues to rise.

The Legal Framework

From 1 April 2014, the price payable by the NHS for health care services became subject to the '2014/15 National Tariff Payment System' published by Monitor.

Subject to some exceptions (which are not relevant for the purposes of this article), if a health care service is specified within the National Tariff, the Health & Social Care Act 2012 requires the NHS to pay the price specified within the National Tariff for that service. However, if the health care service is not specified within the National Tariff, the 2012 Act requires the NHS to pay:

> *"... such price as is determined in accordance with <u>the rules</u> provided for in the national tariff for that purpose"* [emphasis added].

The National Tariff recognises that there are a range of health care services in respect of which prices are determined locally. With regards to these services (which include CHC), where there is no national price, the National Tariff provides two rules. 'Rule 1' is the applicable rule for the purposes of this article. It requires that:

> *"Providers and commissioners must apply the principles in Subsection 7.1 when agreeing prices for services without a national price."*

One of these principles is that:

> *"local payment approaches must be in the best interest of patients."*

Subsection 7.1.1 of the National Tariff goes on to explain in more detail what is in the best interests of patients. It states that consideration should be given to matters of quality, cost effectiveness and the allocation of risk. In our view, these issues cannot be answered properly or at all, without at least consideration being given to what it costs to provide CHC care.

Indeed, in reference to the allocation of risk, the National Tariff specifically mentions 'unit costs'.

In addition to these rules, the National Tariff also sets out a number of key principles which underpin Monitor's methods for determining those national prices which are set out within the tariff. These key principles are: (i) prices should reflect efficient costs and (ii) prices should provide appropriate signals.

With regards to the first key principle that prices should reflect efficient costs, the National Tariff says as follows:

> *"In other parts of the economy, prices for a product or service generally reflect the resource costs of providing that product or service. There are circumstances where this does not apply – for example, in non-competitive markets (where a single buyer or seller may be able to extract an unfair premium). In many cases, this leads to regulatory intervention.*
>
> *Consistent with our duties, and in particular our duty to ensure that prices for providers are set at a fair level, we consider that prices, as in other parts of the economy, should reflect the efficient costs of provision.*
>
> *This means that prices should reflect the costs that a reasonably efficient provider ought to incur in supplying health care services at the level of quality expected by commissioners. In turn, providers can recover their efficiently incurred costs (which typically include provisions for the depreciation and financing of capital expenditure as well as for necessary operating expenditure). This can be particularly important in the long-term, as it can allow providers to expect to earn a reasonable return on their investments.*
>
> *A significant caveat to our principle that prices should reflect efficient costs is that they should do so only so far as is practicable ..."*

With regards to the second key principle, that prices should provide appropriate signals, the National Tariff cautions against the setting of prices which are 'too low'. It says:

> *"Setting prices* ***too low*** *can be just as detrimental to patient interests [as setting prices too high], particularly in the long term, as:*
>
> - *providers may not be adequately compensated for the services they provide, potentially leading to withdrawal of services, compromise on service quality, and/or underinvestment in the future delivery of services; and*
> - *commissioners may 'over-purchase' those services, because they will perceive the resource costs of those services to be lower than they actually are."*

These explanations by Monitor of the two key principles (in our view) underscore the need for CCGs to understand the actual costs of CHC care and to take them into account when they set standard CHC fee rates. Without any knowledge as to what the actual costs are, CCGs simply will not be able to inform themselves as to whether they are setting the prices too low, which as Monitor acknowledges, can be detrimental to patients' interests.

Monitor's Jurisdiction

Under the provisions of the Health & Social Care Act 2012, Monitor has the power to enforce compliance with the National Tariff.

Gateshead CCG

My practice is currently involved in pursuing a complaint against Gateshead CCG which has set its standard CHC rate on the basis of the local authority fee rate plus the FNC. The complaint is that this rate has been set without any enquiry or consideration of the actual costs

of providing CHC care. It has not, therefore, been set in accordance with the rules contained within the National Tariff. Without knowledge of the actual costs, how could the price have been set in the best interests of patients as required under the mechanism of 'Rule 1'?

The complaint further states that a CHC price set on the basis of the local authority rate plus FNC must be insufficient and, therefore, not in the best interests of patients. As we know, local authorities are only required to cover the costs of accommodation and personal care; not nursing care. FNC is only intended as a contribution towards the nursing costs of those residents who have some nursing requirements, but do not have nursing as their primary need. Arithmetically, therefore, a formula of 'local authority rate + FNC' will never equal what is required to be sufficient to meet the efficient costs that a reasonably efficient provider ought to incur. As the National Tariff recognises, this may be detrimental to patients' interests.

After some 'legal persuasion' over the last few months, Monitor has now accepted that:

1. The provision of CHC services for 2014/15 is subject to the rules set out within the National Tariff.

2. The relevant principles for determining CHC prices include:
   (i) local payment approaches must be in the best interests of patients;
   (ii) local payment approaches must promote transparency; and
   (iii) providers and commissioners must engage constructively when trying to agree local payment approaches.

3. CCGs should consider and take into account the efficient costs of providing CHC services, when agreeing local prices for those services. Pricing of services requires a consideration of the efficient costs, in order to be able to negotiate and agree prices effectively and in order to act in accordance with the principles specified within section 7.1 of the National Tariff.

4. Monitor accepts that the issue as to whether a CCG has set its CHC prices in accordance with the rules contained within the National Tariff falls within Monitor's regulatory jurisdiction.

5. Monitor has agreed to conduct an inquiry into whether Gateshead CCG followed the applicable rules within the National Tariff.

Other CCGs

To date, I am unaware of any CCGs that have set their current standard CHC rates in the knowledge of, or following any inquiry into the costs of providing CHC care. Typically, the rates are historic and/or may track local authority fees.

Not only is this unacceptable, but it is also likely to be in breach of the rules contained within the National Tariff and, therefore, also a breach of the statutory obligations contained within the Health & Social Care Act 2012.

Should you want to discuss any matter arising from this article, please do not hesitate to contact David Collins Solicitors.

About David Collins Solicitors:

We are a specialist law firm providing legal services solely to the care home sector. The areas of advice that we offer include:

- Local authority and CCG fee review negotiations and advice;
- Local authority and CCG framework advice and negotiation
- CQQ Registration, Regulation and Compliance Support;
- Safeguarding referrals, investigations and local authority contract suspensions;
- Disclosure and debarring referrals;
- Inquests;
- Contractual disputes and ADR;
- Debt Recovery;
- DOLs, Healthcare & Mental Health;
- Data Protection and disclosure of records.

For more information as to the services offered please visit: www.davidcollinssolicitors.co.uk or telephone 01937 834058. Alternatively, David Collins can be contacted directly by email at dc@davidcollinssolicitors.co.uk