Department of Health consultation on proposals for revising the objection mechanism

ABOUT NHS PROVIDERS

NHS Providers is the membership organisation and trade association for the NHS acute, ambulance, community and mental health services that treat patients and service users in the NHS. We have over 220 members – more than 90% of all NHS foundation trusts and aspirant trusts – who collectively account for £65 billion of annual expenditure and employ more than 928,000 staff.

INTRODUCTION

NHS Providers is responding to proposals put forward by the Department of Health (DH) to amend the objection mechanism as part of the statutory consultation on the national tariff. The DH is consulting on proposals to:

- Remove the possibility for the objection mechanism to be triggered by 51% of providers by 'share of supply'
- Increase the threshold for the objection mechanism from 51% of providers and commissioners (by number) to between 66% and 75%.

We have consulted widely with our members on the proposals and strongly oppose the changes put forward. This will have a material impact on frontline NHS providers and will serve to remove the only formal opportunity available to NHS provider leaders to raise concerns about their ability to deliver the right quality of care. NHS Providers and our members will continue to work collaboratively with the Department of Health, NHS England and Monitor to improve the way the national tariff is set and the way the sector is consulted on the proposals. However, the proposed changes to the objection mechanism will weaken this crucial engagement and dialogue at a time when it must be stronger than ever to meet the financial challenges the NHS is facing. After the difficult 2015/16 tariff round, we need to work together transparently and collaboratively in order to avoid placing significant further risk on provider finances.

We call on the Department of Health to:

- **Maintain the possibility for the objection mechanism to be triggered by 51% of providers by 'share of supply'**: it is only fair and proportionate to give a genuine voice to providers who are most affected by the proposals, and who provide the most amount of NHS services to NHS patients.
- **Maintain the volume threshold for the objection mechanism at 51%**: if over half of all providers formally object to the proposals, this is a clear indication that the proposals are not appropriate and should be significant enough to necessitate a formal review of the proposals.
- **Review the definition of relevant providers before any further changes are proposed to the objection mechanism:** only 62% of 'relevant providers' able to object to the national tariff proposals are NHS trusts or foundation trusts. First and foremost this mechanism needs to give a voice to those organisations at the forefront of delivering NHS care.
- **Provide further assurances about how the sector is consulted on national tariff proposals in future:** the changes to the mechanism follow a challenging 2015/16 national tariff setting process. The proposals on from the Department of Health propose to undermine the ability of providers to object to the proposals without any proposed improvements to the way the national bodies set the national tariff and engage with

the sector in advance of the statutory consultation. The sector needs as early an opportunity as possible to scrutinise proposals in the tariff which would have a material impact on their financial position, such as the efficiency factor, cost uplifts and any proposed marginal rates.

COMMENTS ON THE PROPOSED CHANGES

1. Do you agree that the objection mechanism for the NHS national tariff should be revised to provide greater certainty on prices in advance of a new financial year?
We do not agree that the objection mechanism should be revised for the following reasons: • The 2015/16 national tariff proposals put forward in the statutory consultation notice placed an unacceptable level of financial pressure on providers and would have led to an even more untenable financial situation for the provider sector unless proposals were revised. As such, this represented exactly the 'exceptional circumstances' the objection mechanism was set up to address. The fact that it was triggered should not be considered as a failure of the process but rather that the objection mechanism worked in the way intended. • We are concerned by the suggestion in the consultation document that the mechanism was simply triggered by a small group of providers and principally as a result of the new rules around specialised services. This was clearly an important consideration – and one which meant that the cost pressure facing some providers increased 10% in 2015/16 compared to 2014/15 – but this should only be seen as one of the reasons. Objecting to the national tariff was not a decision that NHS boards took lightly; it should be seen as recognition across the acute, ambulance, community and mental health sectors that they were not able to meet patient need and demand within the proposals put forward in the statutory consultation notice. • Triggering the objection mechanism led to substantial delays in business planning which provided challenges for the 2015/16 financial year, but this could have been avoided if the process for engaging on the national tariff was appropriate in the first place. The majority of the sector was formally consulted on several fundamental aspects of the national tariff, including the full detail of the marginal rate for specialised services, for the first time at the statutory consultation stage which meant that providers had limited opportunity to have their concerns addressed unless they formally objected to the proposals. • The delay the objection mechanism introduced in to the planning process needs to be considered alongside the length of time Monitor and NHS England took in deciding how to respond to the statutory consultation. If proposals had proceeded according to the steps outlined in the Health and Social Care Act 2012 (either a further statutory consultation or referral to the CMA), it is possible this would have produced a more timely and transparent solution for the sector. • If the Department of Health is concerned about the destabilising affect of the objection mechanism on annual planning, it would be better to provide greater stability and certainty on prices through moving to a longer term pricing model through a multi-annual tariff. • We need to fundamentally change the way the sector is engaged and consulted on the national tariff in the first place – getting this right, rather than rewriting the conditions for triggering the objection mechanism, would be the most appropriate and transparent way to resolve any concerns that the mechanism can be inappropriately triggered or that it causes too much disruption in the system. Providers would not feel the need to formally object if they had an appropriate opportunity to have their concerns addressed earlier in the process.

We are also concerned that a number of more fundamental issues have not been addressed in the review of the objection mechanism, and consider these need to be resolved before any changes are implemented:

- *Reviewing the definition of relevant providers*: there are currently 361 'relevant providers' but only 223 (62%) are NHS trusts and foundation trusts. This means that there are 138 non-NHS organisations, ranging from charities, hospices, and private providers, all with an equal voting weight to NHS organisations (if the share of supply is removed) despite the fact that the majority of them will carry out a comparatively small amount of NHS work. There are also a number of NHS trusts providing mental health, community and ambulance services which are not considered relevant providers and as such do not have an opportunity to formally object to the proposals even though some provisions in the national tariff have significant implications for their services. We consider that there needs to be a fundamental review of the organisations which are eligible to object to the proposals, before any changes are made to the conditions for triggering the mechanism.
- *Making the objection process an evidence-based dialogue rather than a binary and adversarial process:* we consider that a more nuanced approach needs to be taken as to whether the threshold for objection has been met. NHS providers are committed to delivering safe and efficient services for their patients and Monitor and NHS England are committed to setting prices to support the delivery of safe and efficient care. The objection process should act as an early warning sign that the proposed tariffs will not achieve this joint aim, and this should inform a period of engagement and dialogue. In this spirit, we need a system that is less binary, where providers feel they will not be heard without lodging an objection that comes with considerable uncertainty. For example, if 45% of providers object to the national tariff (either by number of providers or by share of supply) this is a clear signal that the sector thinks there are issues that must be addressed, even if the threshold has not formally been reached. The consultation document does not provide any further assurances about how NHS England and Monitor will be engaging with the sector as a result of these changes.
- *Expanding the areas of the tariff which can be objected to:* the grounds for objecting to the national tariff should be expanded to cover national business rules, such as the marginal rate for emergency admissions, specialised marginal rates and level of the efficiency factor. At the moment, it forces providers to specifically object to the method in the national tariff if they have a concern about the tariff, even if this is not their specific concern. This might also enable a more sophisticated way of objecting to the tariff, in which relevant providers could object to the areas of the tariff which affect them directly.

2. Do you agree that the objection threshold based on providers' share of supply should be removed? If not, why should this threshold remain? If it should remain at what level should it be set?

- We do not support the proposal to remove the share of supply and believe that it should remain at 51% for the following reasons:
  - It would give a disproportionate weight and influence to organisations with small amounts of NHS work, rather than giving a genuine voice to providers who see the largest amount of NHS patients and who are most affected by the proposals in the national tariff
  - Removing the share of supply would mean that two relevant providers would have the same influence over the outcome, despite being fundamentally different organisations – for example, the vote of a large teaching hospital, with a turnover of over £1bn, seeing over two million patients a year, would have the same weight as a private minor injuries unit with a turnover of around £150,000. This does not seem fair or meaningful, and will

serve to disenfranchise NHS public providers.

- This would make it significantly less likely for the objection mechanism to be triggered in the future as the very organisations most affected by the proposals included in the national tariff would struggle to have their voice heard. This could destabilise NHS finances as national tariff proposals might not be fit for purpose but there will be limited opportunity to challenge the proposals. Without this early warning system, the first signs of the tariff proposals being undeliverable will be the financial distress and failure of NHS providers.
- We do not agree with the assessment that the share of supply set at 51% provides an opportunity for a small number of large trusts to trigger the objection mechanism as indicated in the consultation document. Instead, it should be viewed as an opportunity for the providers who see the most amount of NHS patients, provide the most NHS services, and who are most affected by the proposals and in a position to determine whether the proposals would create instability and uncertainty, to have a legitimate voice in the process. We would also challenge the notion that the tariff proposals were unacceptable to only a small number of disproportionately large providers, when the financial distress of smaller acute providers and non-acute providers demonstrates the impact of the tariff is sector-wide.

3. Do you agree that the objection threshold for providers and commissioners should be raised and, if so, to what level?

We do not support the proposal to increase the objection thresholds to between 66% and 75% for the following reasons:

- We believe that the current threshold of 51% is fair and equitable – if half of all relevant providers raise concerns about the proposals through objecting to the tariff, this is significant enough to necessitate a formal review of the proposals. Even if the threshold is not met, we consider that a sufficient number of objections should trigger a formal discussion and process on what amendments are needed to the national tariff based on responses to the statutory consultation notice.
- Given that only 62% of all relevant providers are NHS trusts or foundation trusts, this means that even if every relevant NHS provider were to object to the proposals, this would not be enough to trigger the mechanism. This will disenfranchise frontline NHS organisations, and will remove one of the very few ways in which NHS provider leaders can formally raise concerns about their ability to deliver the right quality of care.
- This will give disproportionate weight to non-NHS organisations, and providers of small amounts of NHS services who are less affected by the national tariff proposals (please see above for more information).

5. Do you consider there to be any significant impact on health services as a result of the proposed changes to the objection process?

Yes, for all the reasons outlined in this consultation response we consider that making these changes will have the following impact on the NHS:

- Disenfranchising frontline NHS organisations from objecting to proposals affecting the vast majority of the NHS's budget – the national tariff covers £72 billion of healthcare spend, representing the single largest policy governing the distribution of NHS funding. The objection mechanism represents a vital back-stop in case proposals put forward are not fit for purpose, and the mechanism should be retained in its current form.
- These proposals give too much weight to organisations providing limited NHS services, such as charities, hospices and small private providers. It is only fair and proportionate that organisations

most affected by proposals, and who see the largest number of NHS patients, are given a representative say when it comes to objecting to the proposals.

- These proposals have been put forward without sufficient assurances that there will be changes in the way NHS England and Monitor consult on the national tariff with the sector. The objection to the proposals put forward last year was not a symptom of the mechanism being wrong but a symptom of the proposals and process not being right.
- The objection mechanism, and the changes proposed to them, should not be seen as a technicality having little material impact on frontline care. If the national tariff fails to set appropriate and fair prices, if the rules penalise providers unfairly or if the impact of the changes are so severe to destabilise some organisations, this will have a fundamental impact on the services providers are able to provide to patients. This has an impact at both the organisational and individual service line level as it might mean providers will have to discontinue certain services because they cannot afford to run them safely and it could fundamentally affect the future sustainability of their organisation.
- The objection mechanism provides an essential early warning signal of how deliverable the proposals will be. By undermining this, and by failing to put in place an alternative set of arrangements to formally challenge the national tariff, the 2016/17 process will put the sector in a very difficult position. If the set of proposals for 2016/17 is not deliverable, and if the voice of NHS providers is not heard through the statutory consultation process alone, then the net result will be increasing numbers of providers in both financial distress and financial failure.

Contact: Phillippa Hentsch, Policy Advisor Phillippa.Hentsch@nhsproviders.org