

North East SHA Disputes Resolution Process
POLICY DOCUMENT

1. DEFINITIONS

The following terms shall have the following meanings:

Co-operation and Competition Panel	Means the Co-operation and Competition Panel set up to support the delivery to patients and taxpayers of the benefits of competition by investigating and advising the Department of Health and Monitor on potential breaches of the Principles and Rules of Co-operation and Competition.
DRP	Means this dispute resolution policy
Party or Parties	Means a party or parties to the dispute
Principles and Rules of Co-operation and Competition	Those principles set out at Annex A of this policy
Mediation and Mediator	Means to resolve differences through a process conducted by some impartial party A reference to a Mediator includes reference to the Mediator and any Co-Mediator and Assistant Mediator.
SHA	Means the North East Strategic Health Authority
Working Day	Means any day other than a Saturday or Sunday or Bank Holiday

2. INTRODUCTION

North East SHA is committed to fulfilling its system management role to ensure that local organisations work together effectively to deliver high quality and responsive services and value for money.

The NHS has moved from a system based on tight control of service provision to a more open system, characterised by a complete purchaser/provider split, more plurality of provision, and a greater degree of competition for service provision. The Principles and Rules for Co-operation and Competition set out the expectations on commissioners and providers working in this environment.

This document sets out the dispute resolution process (DRP) for dealing with perceived breaches of the Principles and Rules of Co-operation and Competition in the North East. It includes:

- **obligations regarding fair commissioning;**
- **requirements to cooperate;**
- **prohibitions of anti-competitive behaviour; and**
- **rules on approval of mergers.**

This policy is based upon the revised Principles and Rules of Co-operation and Competition (gateway reference 14611- Annex A). However, any perceived breaches which took place before 31st October 2010 will be considered using the previous Principles and Rules (gateway reference 13791).

This policy will be kept under constant review, recognising that NHS commissioning and provider relationships will change significantly as a result of the consultation feedback on the White Paper, *“Equality and Excellence: Liberating the NHS”*. Different processes and structures are likely to be required to resolve disputes in relation to commissioning of NHS-funded services. However, in the interim period the SHA will continue to implement this policy until a time when it considers the policy no longer achieves its objectives.

The design of the process is based on the principle that disputes should be resolved at the most local level possible:

- The first port of call for the provider is the commissioning PCT, which should have clear processes for resolving the dispute locally. The SHA expects PCTs to work closely with the individual complainant, making genuine attempts to resolve disputes and wherever possible utilising mediation before submitting a complaint to the SHA. Both parties are expected to participate in mediation on an equal basis.
- If the dispute is not successfully resolved at this level, the complaint should then be heard by the SHA Dispute Resolution Panel.

- If the complaint is still not successfully resolved, it can be referred to a national Independent Advisory Panel (the Co-operation and Competition Panel).

It is important to differentiate between the proposed new approach for dealing with disputes relating to the co-operation and competition principles and the arrangements for resolving NHS contractual disputes. Where a dispute arises with NHS partners regarding contractual arrangements it is not proposed to change the existing arrangements.

The full Dispute Resolution Process is illustrated in Annex B.

3. THE PRIMARY CARE TRUST PROCESS

The commissioning PCT will be the first port of call dealing with disputes. The SHA panel will not review cases unless there has been an attempt to resolve the case locally through the commissioning PCT level process.

Each commissioning PCT in the North East will publish its approach to dealing with disputes on its website. These include guidelines for making a complaint and the assessment criteria that the commissioning PCT will use.

There will be a named individual in each commissioning PCT who is the first point of contact for these disputes.

Complainants must submit a formal complaint to the PCT within 20 working days of the closure of the perceived breach(s) of the Principles and Rules of Co-operation and Competition.

Each PCT must either resolve the dispute or refer it to the SHA within 60 working days of receipt of the complaint. Timely updates will be provided by the PCT to the complainant throughout the process. Any extension to the timetable will be by agreement with the parties concerned and confirmed in writing.

4. OBJECTIVES, PRINCIPLES AND ACCEPTANCE CRITERIA OF THE SHA PROCESS

4.1 Objectives for the SHA dispute resolution process

The objectives for the SHA Dispute Resolution Process are as follows:

- To resolve disputes relating to the principles and rules for co-operation and competition transparently, fairly and consistently.
- To assure providers that the process is fair and transparent, enhancing willingness to participate in the market.
- To mitigate risks and protect the reputation of the NHS.
- To be compliant with potential acceptance criteria of the Co-operation and Competition panel
- To prevent where possible legal challenge and expensive external referral processes.

4.2 Underpinning Principles of Dispute Resolution Process (System Management Principles)

Transparency

- Communicate the process and decision making criteria widely and in advance.
- Engage all relevant stakeholders in the development of this process.
- Enforce declarations of interest.
- Publish findings within and across SHAs (the latter to enable consistency).

Objectivity

- Base analysis and the decision on objective information and criteria.
- Maintain an audit trail.

Proportionality

- Only begin the formal dispute process on matters of material importance.
- Resources used must be proportionate to the significance of the dispute.

Non discriminatory

- The SHA panel must not favour one part of the system over another.

Accountability

- The SHA will provide to the Board information relating to the number of disputes considered and outcome. Commissioning PCTs

will be expected to act on the decision of the SHA panel, and to be held to account by their own board.

Subsidiarity

- Wherever possible the dispute should be managed by the commissioning PCT drawing on the SHA support as required.
- If this fails then the SHA will manage the process and will manage issues of conflict of interest through membership of the national Independent Advisory Panel.

Consistency

- Ensure internal coherence and consistency.
- Consistency across SHAs; all have agreed to cooperate on process.

No double jeopardy.

- Providers should not be held to account differently by different institutions, and there should be parity between the processes at local, regional and national level. (For that reason, all SHAs have identified the areas of commonality required in the Disputes Resolution Processes. The North East's process is in line with the national requirements.)

4.3 Acceptance Criteria for SHA panel

The SHA panel will only accept disputes that meet the following criteria:

- The content of the dispute is covered by the principles and rules for co-operation and competition.
- There is a full and frank disclosure of all relevant and applicable information. This does not preclude the panel from asking for further information as it requires. Furthermore, any individuals connected to the complaint are on hand to provide further evidence/testimony as required.
- The dispute has, where appropriate, been through a demonstrated genuine attempt of local disputes resolution process with the commissioning PCT. Wherever possible, this should include mediation.
- The Panel is best placed to resolve the issues (i.e. over the other regulators including OFT, ASA)
- The dispute is not a reserved matter.
- No legal proceedings have commenced.
- The dispute is not trivial, vexatious or an abuse of the Panel's procedures.
- There is adequate time for the panel to review the complaint appropriately, for example, if there are time-critical issues.
- The issue relates to a decision made by a commissioning PCT; in joint commissioning arrangements, the Disputes Resolution

Process will only be used where the commissioning PCT is the lead commissioner.

- The issue relates to a decision made by a commissioning PCT within the SHAs area (see Section 4.5).

4.4 Mediation

If an informal resolution is deemed possible the SHA Dispute Resolution Panel Chair may invite the parties to participate in a mediation process if it has not already been conducted by the PCT as part of their Dispute Resolution Process.

Both parties will appoint the Mediator, and shall, in good faith, use its best endeavours to comply with requests made by the Mediator and to promote the efficient and expeditious resolution of the Dispute. The costs of mediation will be borne equally by both parties (see section 6) and should be proportionate to the level of the dispute. In order to reduce the potential costs of mediation, appropriately qualified and experienced members of staff from other NHS North East organisations can be called upon to conduct the mediation subject to both parties being appropriately assured of the neutrality and impartiality of the mediator.

The Mediator shall help the parties to isolate the issues, develop and explore options for resolution of these issues and, if possible, achieve expeditious resolution of the Disputes by agreement between them.

The Mediator shall not make decisions for a party, or impose a solution on the parties. If the parties request and the Mediator agrees, the Mediator may, if the parties reach impasse, provide the parties with a non-binding recommendation based on the Mediator's own knowledge of the subject matter and law.

In any event the complainant will be offered the option for a 4 week (20 working days) mediation period where there will be an opportunity for the complainant to meet with the PCT (and a mediator if appropriate) to try to resolve issues informally. Both parties are expected to participate in mediation on an equal basis.

If there is no mediation process, or if the mediation fails to resolve the dispute within the 4 week period, the complainant then is processed through the SHA Dispute Resolution Process to resolve. However, certain situations may require a fast-track straight to the national Co-operation and Competition Panel (such as for 'reserved matters').

4.5 Protocol for handling cross boundary issues,

In cases where a dispute affects more than one SHA in England, the SHAs in question will agree between them who will take the lead role.

The dispute will then be dealt with by the lead SHA in accordance with their published Disputes Resolution Process.

4.6 Reserved matters

Reserved matters are issues contained within the Principles and Rules for Co-operation and Competition that overlap with existing legislation and the role of competition authorities (OFT and Competition Commission). SHAs and commissioning PCTs are not expected to resolve these, but the Co-operation and Competition Panel will use SHAs to identify these issues and assist in the process.

Reserved matters include:

- Competition Act (CA98)- chapter 1 covering agreements that effect an ‘appreciable’ prevention, restriction or distortion of competition (overlaps principles 1 and 4 of the Principles and Rules for Co-operation and Competition (see Annex A)
- Competition Act (CA) - chapter 2 dominant providers; predatory pricing, restrictive agreements etc (overlaps Principles 1, 4 and 7 of the Principles and Rules for Co-operation and Competition).
- Enterprise Act 2002 (EA02) - covering mergers or acquisitions which apply to ‘enterprising ceasing to be distinct (overlaps principles of the Principles and Rules of Co-operation and Competition).
- Conduct issues – where there is a breach of the Principles and Rules of Co-operation and Competition, and the CCP is the most appropriate body to resolve the issue.

The operations of the Panel must not affect or restrict their legal responsibilities, to avoid risks of double jeopardy and being challenged by higher authorities (Competition Appeals Tribunal, European Commission).

5. THE DISPUTE RESOLUTION PROCESS

Stage 1: Making the Complaint

Should a complainant feel that either informal mediation is not an appropriate option or that it has not resolved the issues satisfactorily with the commissioning PCT, then the complainant can initiate the formal dispute resolution process with the SHA. Any complaint must be submitted to the SHA via an electronic form available from the SHA website (click [here](#)).

Complainants must submit a formal complaint to the PCT within 20 working days of the disclosure of the perceived breach(s) of the Principles and Rules of Co-operation and Competition.

PCT and complainants will then have a further 60 working days within which to resolve their dispute including holding a Dispute Resolution Panel. If after this period both parties have not yet reached an agreement, the dispute should be referred to the SHA. Either party can submit the dispute to the SHA; however they should also inform the other party in writing. Disputes should be referred to the SHA within 80 days of the closure of the perceived breach taking place. This complaint will be assessed by the relevant Lead SHA Executive Director against the acceptance criteria set out above.

Stage 2: Triage

Following the receipt of the complaint, the SHA will make an assessment of the following factors:

- *Whether the complaint is viable in the context of the acceptance criteria.* The SHA may get in contact with the complainant at this stage and request clarification or further information. If the complaint is not deemed to be covered by the acceptance criteria, the complainant will be notified that the complaint will not be progressed. The Complainant can appeal the SHA decision (see Section 7).
- *Whether the complaint should be fast tracked to another organisation, including the ASA, OFT or the national Independent Advisory Panel.* In which case, the complainant will be informed of the course of action and the process the complainant should follow.

Where the complaint is in scope, not subject to fast tracking and not appropriate for mediation, it will enter the SHA Dispute Resolution Process. This stage of the process will take no more than 20 working days.

Stage 3: The Panel

Following triage the complaint will be sent to the chair of the panel. The chair will write to the organisation against which the complaint has been made, and ask them to provide evidence of the process they followed.

In addition, the parties must also submit a joint paper. This must be no more than 4 sides of A4 (with no appendices), signed by both Chief Executives (or their nominated deputy).

It is expected that the Joint Report will contain the following key items:

- A statement as to what steps have been undertaken to resolve the dispute.
- What the parties agree and disagree on, the reasons they disagree and the key questions the SHA Dispute Resolution Panel should answer.

- Details of any formal mediation undertaken.
- Why the dispute could not be resolved at a local level.

All information related to the dispute will be submitted to the SHA at least 7 working days before the date set for the panel. The SHA will not accept or review any information submitted after such a date. Where either the PCT or the complainant fails to submit information within given timescales, the panel will be delayed, until receipt of all requested information.

After receipt of all relevant information, the chair will then decide whether:

- To invite any additional independent experts to sit on the panel, possibly including members of another SHA to improve objectivity.
- To agree informally with the panel whether any further information is required before the panel can make a decision.

The panel will then formally sit and review the case. This will be desk based rather than an open panel. This stage of the process should take no longer than 20 working days from receipt of all information.

Stage 4: The decision.

Final decisions will generally be conducted using the 'pendulum principle'. This means that the panel can only find wholly in favour of the commissioner or the provider. If two parties have multiple areas of dispute, they will all be resolved together in favour of one party.

If the panel is able to make a decision, it will write to all parties notifying them of the decision, explaining the rationale and setting out the requirements for both sides for dissolving the dispute. It will also notify the national panel of the dispute and the outcome.

If the panel is not able to make a decision based on the information available it can:

- Refer the case for further investigation from an independent organisation.
- Refer the case to the national co-operation and competition panel.

6. COSTS

Unless it is agreed otherwise, the costs arising out of any mediation process and subsequent dispute resolution will be borne equally by the parties in dispute. This may include the reasonable fees and/or expenses of the SHA Panel.

In addition, the parties to the dispute are expected to bear their own legal costs of preparation for, and any participation in this SHA dispute resolution process.

All costs incurred should, wherever possible, be proportionate to the scale and complexity of the dispute in question.

7. APPEALS

Appeals against the SHA decision or process should be escalated to the Co-operation and Competition Panel (<http://www.ccpanel.org.uk/>).

The SHA will confirm receipt of an appeal immediately and validate within 10 working days. The national Co-operation and Competition Panel timescales will subsequently apply.

8. MEMBERSHIP OF THE SHA PANEL

The North East SHA panel has the following three core members:

- Relevant Lead Executive Director (Chair)
- Executive Director of Finance
- Nominated SHA Lead Officer

In addition to this, depending on the nature of the complaint, the panel may include:

- Other members of the SHA with relevant knowledge and expertise
- Other external experts, potentially including legal advice, economic advice, equality legislation advice or other 'subject matter' experts as identified by the chair of the panel

The exact make up of the panel will be decided by the chair once the triage stage has been completed.

9.0 CONFIDENTIALITY

Subject to any legal and/or statutory duty of disclosure, each party to the dispute will keep confidential all information arising out of or in connection with this dispute resolution process, including the fact of any settlement and its terms, save for the fact that the mediation is to take place or has taken place.

Annex A: The Principles and Rules for Co-operation and Competition

Principle 1	Commissioners must commission services from the providers who are best placed to deliver the needs of their patients and populations.
Principle 2	Commissioning and procurement must be transparent and non-discriminatory and follow the Procurement Guide issued in July 2010.
Principle 3	Payment regimes and financial intervention in the system must be transparent and fair.
Principle 4	Commissioners and providers must cooperate to improve services and deliver seamless and sustainable care to patients.
Principle 5	Commissioners and providers should promote patient choice, including – where appropriate – choice of any willing provider, and ensure that patients have accurate and reliable information to exercise more choice and control over their healthcare.
Principle 6	Commissioners and providers should not reach agreements which restrict commissioner or patient choice against patients' and taxpayers' interests.
Principle 7	Providers must not refuse to accept services or to supply essential services to commissioners where this restricts commissioner or patient choice against patients' and taxpayers' interests.
Principle 8	Commissioners and providers must not discriminate unduly between patients and must promote equality.
Principle 9	Appropriate promotional activity is encouraged as long as it remains consistent with patients' best interests and the brand and reputation of the NHS.
Principle 10	Mergers, including vertical integration, between providers are permissible when there remains sufficient choice and competition or where they are otherwise in patients' and taxpayers' interests, for example because they will deliver significant improvements in the quality of care.

DH Reference: Gateway 14611

Annex B: The Dispute Resolution Process- Overview



