Consultation on Monitor’s enforcement guidance on the Procurement, Patient Choice and Competition Regulations

1. I write with regard to Monitor’s consultation on its enforcement guidance on the Procurement, Patient Choice and Competition Regulations. Please note that our comments on this document should be viewed alongside our response to Monitor’s consultation on its draft substantive guidance.

2. The Royal College of General Practitioners (RCGP) is the largest membership organisation in the United Kingdom solely for GPs. Founded in 1952, it has over 46,000 members who are committed to improving patient care, developing their own skills and promoting general practice as a discipline. We are an independent professional body with enormous expertise in patient-centred generalist clinical care. Through our General Practice Foundation, established by the RCGP in 2009, we maintain close links with other professionals working in General Practice, such as practice managers, nurses and physician assistants.

3. We gratefully acknowledge the contributions of the RCGP Centre for Commissioning in formulating this response.
Summary

4. The RCGP welcomes the opportunity to comment on this draft guidance. We are pleased to see indications in the document that appear to point in the direction of a graduated and proportionate approach to enforcement, and we believe that this will help to establish Monitor’s authority and credibility with NHS stakeholders. We also welcome an approach that sees enforcement focused on supporting patients and public, rather than providers.

5. In the future we anticipate that much work on integrated care will be undertaken together with local authorities. We therefore have some concerns, which we also articulated in our response to the consultation on the substantive guidance, as to how the guidance will be applied in cases of joint commissioning with local authorities, who may operate under different rules. There is a need, therefore, for further work to align the rules and enforcement procedures under which health and social care operate.

6. As Monitor develops its role there will be new learning; we would welcome regular “lessons learnt” publications and opportunities for the NHS to engage with Monitor.

Detailed response

Chapter 3. Prioritisation

Chapter 3, Q1. Do you support Monitor’s proposal to adopt the same prioritisation framework when considering enforcement action under the Procurement, Patient Choice and Competition Regulations as that applied by Monitor when considering enforcement action using its other powers?

If not, can you suggest alternative considerations that should inform Monitor’s priorities when taking enforcement action under the Procurement, Patient Choice and Competition Regulations?

7. Yes, we support this proposal. We particularly welcome the explicit mention of supporting local resolution through direct engagement with the commissioner before Monitor is approached.

Chapter 3, Q2. Do you agree with Monitor’s proposed approach to deciding whether to take formal or informal action?
Chapter 3, Q3. Do you think some considerations are more important than others? If so, please explain why. Do you have suggestions for other types of informal action we could take?

8. The approach being taken appears to be reasonable, in that it reflects an escalation process (from working with commissioners through to issuing a warning letter) and is based on what is in the interests of health care service users. We believe that Monitor’s default position wherever possible should be to work with commissioners as part of an informal action, and only escalate its response if absolutely necessary.

Chapter 4. Making declarations of ineffectiveness, issuing directions and accepting undertakings

Chapter 4, Q1. Do you agree with the factors that Monitor intends to take into account in determining whether a breach is sufficiently serious?

Chapter 4, Q2. Do you think some considerations are more important than others? If so, please explain why.

Chapter 4, Q3. Do you think there are other considerations that we should take into account in assessing seriousness?

9. These factors appear reasonable, however only as case law emerges will it be possible to understand fully how they will be applied in practice. We welcome the fact that Monitor will approach assessment of the seriousness of a breach from the perspective of health care users and not providers.

10. Health care is complex and should also be viewed in system terms. We would add, therefore, the direct or indirect impact on the relevant wider health and social care system as a consideration.

Chapter 4, Q4. Do you agree with the factors that Monitor intends to take into account in deciding whether to impose enforcement measures, and if so, which ones to impose?

11. This approach appears reasonable. However, we believe that a further factor that should be taken into account is whether any breach or potential breach of the regulations was intentional, and where it appears that a breach has been made by error but in good faith that should be taken into consideration. This may include consideration of whether or not
reasonable processes have been followed by commissioners to obtain appropriate advice.

12. We would like to see any enforcement measures focused on value to the patient and the population, and not on providers.

Chapter 4, Q5. Do you support Monitor’s proposal that, where appropriate, we will accept undertakings rather than pursuing more burdensome investigations? Are there other factors that you think we should take into account in assessing whether to accept an undertaking?

13. We support this proposal as it appears to be based on the premise that commissioners will want to act in good faith for the benefits of patients and their local population.

14. One additional factor that we suggest should be taken into account is the likelihood that the commissioner will be able to comply with the agreed undertaking.

Chapter 5, Enforcement – case procedures

Chapter 5, Q1. Monitor has the discretion to establish its own procedures for ‘case initiation’, ‘investigation’ and ‘case updates’. Do you support Monitor’s proposals?

15. We support these proposals, but on the basis that informal resolution should usually be encouraged before a formal investigation is opened.

16. Overall we feel that this chapter is reasonable in the way that it establishes a graduated approach before moving to a Final Notice. However, it would be useful if Monitor could clarify that, even in cases of breaches of the regulations, Monitor would not have the power to direct commissioners as to when and how to put services out to tender.

Chapter 5, Q2. Monitor is required to publish procedures for accepting undertakings. Do you support Monitor’s proposed procedures? Do you consider that Monitor’s proposal to consider seeking views on proposed undertakings on a case-by-case basis is appropriate?

17. We support this approach in that it allows commissioners, who will usually act in good faith, to remedy cases that are under investigation. Inevitably process and case law will evolve and therefore we think that Monitor’s proposal to seek views on a proposed undertaking on a case-by-case basis is reasonable. We would note that such a process should only be entered into where these is a clear added benefit from doing so.
18. While only formal procedures will be made public we feel, on the basis that most commissioners will be acting in good faith on behalf of the local population, that frequent publication of “lessons learnt” from informal resolution would be helpful.

Chapter 5, Q3. Although not required to do so under the Act or the Procurement, Patient Choice and Competition Regulations, Monitor intends to send commissioners a Notice of Intent before it takes a final decision to make a direction or declaration of ineffectiveness. Do you support this proposal? Do you support Monitor’s proposal to consider seeking views on the Notice of intent on a case-by-case basis?

19. We support these proposals, particularly given that case law has not yet developed and both commissioners and Monitor are still in a learning phase.

Chapter 5, Q4. Neither the Act nor the Procurement, Patient Choice and Competition Regulations requires Monitor to provide commissioners with a specified period of time in which to comment on provisional findings in the Notice of Intent. Do you agree with Monitor’s proposals regarding the opportunities to make representations?

20. We agree that these are reasonable.

Chapter 5, Q5. Although not required to do so under the Act or Procurement, Patient Choice and Competition Regulations, Monitor intends to publish final notices unless the circumstances of the case make this inappropriate. Do you support Monitor’s proposal to do so?

21. We support this proposal.

Chapter 6. Decision-making

Chapter 6, Q1. Do you support Monitor’s decision-making procedures for enforcement action under the Procurement, Patient Choice and Competition Regulations? Do you have any suggestions regarding these proposals?

22. We support these procedures. However, we would suggest that Monitor should consider inviting clinical experts to advise the decision-making committee, so that decisions to take enforcement action include the clinical perspective. This would ensure that Monitor’s decisions have greater clinical credibility both within the NHS and with the public.
We look forward to ongoing dialogue with Monitor as it develops this and other guidance relating to its role as sector regulator and we would welcome further opportunities to engage with this process.

Please do not hesitate to contact me if you have any questions about our response.

Yours faithfully,

Professor Amanda Howe MA Med MD FRCGP

Honorary Secretary of Council