

YPLA National Commissioning Framework: Update on Progress, Key Issues, and Next Steps

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Introduction and Recommendation

The National Commissioning Framework (NCF) is formal guidance from the YPLA to local authorities, and to other stakeholders, on the operation of the system to plan and allocate funding for education and training provision for 16 – 19 year olds and 19 – 25 year olds who are subject to a learning difficulty assessment. As well as describing the roles and responsibilities of all partners, the NCF sets out the detailed processes and timescales for all aspects of provision. The NCF has been published in the form of a core document that sets out the main issues, alongside more detailed technical annexes. A short, summary version will also be made available.

This paper sets out the process that has been followed to date in preparing the NCF for publication and identifies some key issues that will require further attention and additional work by the YPLA.

The NCF has been the subject of various formal Ministerial submissions, and the NCF was reviewed and then finally agreed for publication by the Minister in March 2010.

As agreed with the YPLA Committee the NCF (core document and annexes) was published on April 1st in advance of formal approval by the YPLA Board. This enabled the statutory guidance to be available on the YPLA's first day of operation, and meant that the document could be published in advance of any restrictions that now operate in the pre election period.

The recommendations to the YPLA Board are:

- to review and comment on progress with the NCF;

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- to review and comment on the key issues that are identified; and
- to formally endorse the publication of the NCF.

The final versions of the core document and the annexes are available via the YPLA website at this address <http://www.ypla.gov.uk/publications/ncf/>.

Process to Develop the NCF and the Formal Consultation

Section 72 of the Apprenticeships, Skills, Children and Learning Act (ASCLA 2010) commits the YPLA to issue guidance to local authorities about the performance of their new duties to secure education and training provision for all 16-19 year olds and 19 – 25 year olds who are subject to a learning difficulty assessment. This guidance will take effect through the NCF.

The NCF was developed by shadow YPLA officials in LSC and DCSF in consultation with a very large number of stakeholder organisations including local authorities and providers. Following its endorsement by the Young People's Learning Agency Committee and DCSF Ministers, the document was issued for public consultation in November 2009. The consultation closed on 5 February, and the shadow YPLA revised the draft document to take account of the responses.

Throughout the consultation period the shadow YPLA was in discussion with the DCSF, the React team at the LGA, and a range of other bodies at national, regional and local level in order to ensure the effectiveness and deliverability of the commissioning process articulated in the NCF.

During the formal consultation a total of 135 responses from a range of bodies including local authorities, Sub-Regional Groups and Regional Planning Groups, colleges and all the main relevant national representative bodies were received. A summary of the results of the consultation and the YPLA response will be available from the YPLA website but can also be provided via Sue Randall at sue.randall@ypla.gov.uk

Around half of the responses provided general comments, or comments on specific points only, rather than responding in detail to each of the questions included in the draft NCF.

The main issues raised included: the perceived complexity of the system; the timetable for allocations; views from some local authorities that the scope for local flexibility and decision making is limited; and some specific issues about apprenticeships and LLDD. Further detail on some of the key issues is set out below.

Single Equality Impact Assessment

The consultation draft of the NCF was subject to a full and independent Single Equality Impact Assessment (SEIA). The assessment found that there were positive effects for both equalities in general and for particular learner groups. While it found few major potential adverse impacts on learners, the learner group for which most potential adverse impacts were found was those with learning difficulties and/or disabilities (LLDD), particularly around the placement process.

The main findings were:

- the impact assessment found few major potential adverse impacts on learners;
- positive impacts were found for both equalities in general and for particular learner groups;
- the learner group for which most potential adverse impacts were found was learners with learning difficulties and/or disabilities (LLDD);
- learner groups that may experience benefits include travellers and socio-economically deprived and multiply disadvantaged learners;
- most stakeholder required more explicit references to E&D in the NCF;
- local flexibility has the potential for great equality benefits but also inequalities of access and treatment across the country;
- the inclusion of young offenders within the commissioning framework provides a step towards alignment with mainstream provision.

The major potential negative impacts identified were in differing approaches taken by local authorities to different learner groups, and around the placement process for young people with LLDD. Other potential negative impacts included:

- minimum standards across the board may provide a perverse incentive to providers to “cherry pick” learners, which might disadvantage those most in need;
- affordability of LLDD provision may result in discrimination if funding envelopes are exceeded;
- differing capacity of local authorities may result in difficulties; a particular concern being whether every local authority had inherited staff from the LSC with expertise in LLDD;
- performance management not including explicit mention of equality outcomes and equality of commissioning;
- potential impact of differing local political priorities
- potential capacity issues for specialist LLDD and mental health trusts to engage meaningfully with multiple local authorities
- process of change and the break-up of LSC expertise in E&D and LLDD could adversely impact on the most vulnerable students.

The potential risks around the placement process for young people with LLDD are acknowledged. In order to mitigate these risks, it has been agreed that in 2010/11 and, if necessary 2011/12, the YPLA will contract with the Independent Specialist Providers (ISPs) on behalf of local authorities. As well as a specialist team at the centre, each region of the YPLA will have a senior inclusion adviser together with a team including specialists in LLDD. Additional guidance for local authorities on

placements for learners with LLDD at ISPs has been developed. In addition, the LSC has worked closely with LAs and React to build capacity in this area of work.

The SEIA was published at the same time as the NCF. As well addressing the general findings as above, a number of specific changes have been made to the draft NCF in light of the assessment, including new text to stress the importance of and rationale for working with the third sector in relation to the hardest to reach learners, and a re-working of the LLDD annex to make the language and presentation more acceptable to LLDD stakeholders.

The full impact assessment is available from the YPLA website and from Sue Randall at sue.randall@ypla.gov.uk

Key Issues and Ministerial Feedback

A number of key issues emerged during the development and consultation processes. In addition, feedback from the Minister indicated that he was largely content but, in relation to the complexity of the system, he would like to see what more can be done to make it simpler. With regards to in-year adjustment, he emphasised the importance of language to avoid causing undue concern in the sector and the need to acknowledge the need for stability and certainty in funding.

Complexity of the system. Moving to a local authority - led commissioning system and, at the same time, safeguarding young people's learning opportunities and over £7bn of public funding, necessarily brings with it a level of complexity for the first full year of operation at least. Therefore, work continues with stakeholders to review the processes to make them as simple as they can be. We are also starting to consider how the allocations system will evolve as we move towards achieving full participation. The final version of the NCF was revised to stress further the central role of LAs in strategic decision-making and commissioning. In addition, the process relating to Apprenticeships has been further clarified.

Some of the concerns raised in the consultation implied that the level of detail included in the draft was causing the perception that the process is more complex than it may be. Feedback from React and provider representatives on the YPLA Committee was that the revised NCF draft is a significant improvement, and does enable them to have a clearer understanding of the process and stages. All of the feedback on the revised structure and presentation has been positive.

Timetable for allocations. Respondents to the consultation process expressed concerns about whether the allocations process can be delivered within the defined timescales. Although there are risks here, we are confident that they can be mitigated. The fact that we have a 2011-12 settlement for participation provides some stability. We will also develop a series of specific mitigating actions which will include: preparing contingency plans and processes to address any delays in publishing budgets or in other aspects of the operation of the business cycle at local, regional or national level; undertaking health check monitoring of each local

area at regular intervals during the year, identifying and managing any risks or delays to decision making, and helping and guiding LAs to open the planning dialogue with providers in advance of budget being agreed and to take a longer term view of strategic needs in their area and so reduce their dependency on national decisions and products.

In year adjustment of allocations. Responses to the consultation were mixed but, in the main, against in year adjustments. However, we continue to receive requests from schools for in-year adjustments and the LSC's technical group (principally representing the FE sector) are in favour of in-year adjustments in instances of significant under- or over- performance against plans. In addition, the Audit Commission has said that they consider in-year adjustment to be desirable where large sums of funding are involved. We propose therefore to continue with the intention to operate in-year adjustment, but only where there are significant levels of under or over spend. We will use 2010/11 as a trial year and expect YPLA to learn from and build on the 2010/11 experience and work with the sector to develop the approach for 2011/12 and subsequent years. Detailed proposals on the operation of in year adjustment will be submitted to a future meeting of the YPLA Board.

Learners with Learning Difficulties and/or Disabilities (LLDD). A range of issues were raised in relation to provision for learners with LLDD, including the operation of planning and funding for Independent Specialist Providers (ISPs) and the relationship between 16 – 19 and 19+ Additional Learner Support (ALS). We are preparing improvements to the linkages between provision for learners with LLDD and high cost ALS and will implement these for 2010/11. More detailed guidance for LA LLDD commissioning in 2011/12 will be issued shortly.

Public Procurement Guidelines / Open and Competitive Tendering

Through the development and consultation processes issues have emerged in relation to public procurement guidelines and local authority use of open and competitive tendering (OCT) for 16-19 provision. The circumstances in which they should apply OCT to meet their legal obligations were queried by some LAs during the course of the NCF consultation. Subsequently, at least two LAs have obtained legal advice on this issue, and their question relates to whether negotiated allocations contravene the Public Contracts Regulations 2006 and the EU's Interpretive Communication 2006. The position reflected in the revised draft NCF, supported by DCSF and YPLA lawyers, is that negotiated allocations are allowable, due to the fact that education is a residual service under the 2006 regulations and that parts of the regulations do not apply in the procurement of education and training.

For the purposes of the NCF, the final text we have agreed with YPLA and DCSF legal advisers is as follows:

“Within the scope and lifespan of the NCF, to ensure sector stability and protect the interests of learners, we expect that local authority procurement of learning, including from schools and colleges, will in most cases be through negotiated allocations with the providers commissioned by the former LSC for 2010/11. These providers were selected according to the LSC’s procurement rules and have undergone a level of public investment. As part of their new duties, local authorities may wish to work with the YPLA and Chief Executive of Skills Funding to review the range of post-16 provision in their area. Where there are gaps in provision, or where there are issues of quality or demand which lead to a need to commission a new provider, local authorities will need to consider whether open and competitive tendering is required. In doing this they will need to consider their obligations to comply with the EU principles and regulations in relation to public procurement and will want to consider whether they should seek legal advice on these issues.

In considering the case for – or against – open and competitive tendering, local authorities will want to take into account the impact of their ability to meet NCF timetables; on resources (both their own and those of providers); on effective partnership arrangements; and on the stability of the provider base. “

Procurement legislation is a complex area, and some aspects are open to different interpretations. On the basis of the legal advice they have received so far some local authorities are considering whether they need to operate a system of competitive tendering that would, for example, bring F.E. college provision and funding into scope. YPLA and DCSF officials will meet with the relevant local authorities in the near future to explore the issues. We will also continue to work with our legal advisers and with DCSF, REACT and others to develop the arguments and communications to help reinforce the messages that OCT is unlikely to be appropriate in the majority of situations.

Operation and Review of the NCF

YPLA staff and key stakeholders have been briefed on the NCF as part of the development and consultation processes. We have plans for both internal and external communication that will ensure that the documents and other materials are available to access via the website and the intranet. Should there be any significant changes to the guidance in 2010-11 we have a system of e mail alerts that will notify stakeholders.

We are now starting work on the project that will lead to publication of the revised NCF and associated guidance in 2011. This will involve work with key stakeholders and YPLA staff to review and improve the approach. We have also committed to work with the Bureaucracy Reduction Group to make sure there are no unnecessary burdens placed on providers.

Through the coming year the YPLA will ensure close monitoring and early identification of any timetabling risks that may arise.

Further reports on emerging issues will be brought to the Board as required.

Risk Assessment

As noted above there are possible issues related to the application of public procurement law, including the potential for elements of provision to be subject to open and competitive tendering under the Public Contracts Regulations. In the most extreme scenario this could lead to very large elements of provision being subject to open tender, with the potential for significant disruption in the delivery of services.

The provision of 16 – 19 education and training is a residual service under the Public Contracts Regulations 2006 and therefore parts of the Regulations do not apply to the procurement of education and training. However the law still says that a public body procuring a residual service such as education and training must:

1. Publish a notice of award of a contract (part B of Schedule 3 to the Public Contracts Regulations) – if the value of the contract or series of contracts is above the threshold.
2. Carry out a transparent and fair procedure which involves advertising the availability of the contracts, and having a clear method of choosing the provider(s).

However it may be that education commissioned by local authorities in some cases will fall outside the Public Procurement rules. The understanding of the YPLA in relation to various types of provision is as follows.

Schools and other Institutions Maintained by the Local Authority

Local authorities funding of schools or other institutions where the local authority is considered to maintain them is outside the public procurement rules, because such institutions are considered to be part of the authority and are carrying out public functions.

Academies

Academies are funded by the YPLA under Grant in Aid and this funding is outside of the public procurement rules.

Further Education Institutions

The LSC received advice that where it was providing grant funding to assist further education corporations to carry out their statutory education functions under the Further and Higher Education Act this would not fall within the procurement regulations. Similarly this could apply to local authorities funding Further Education and sixth form colleges by means of grant to provide education.

Apprenticeships

This provision is procured via the Skills Funding Agency.

Other provision, including Foundation Learning

Provision such as Foundation Learning procured by local authorities from private and third sector providers will be subject to Public Contracts Regulations.

The NCF advises that local authorities will want to consider whether to take their own legal advice on these issues.

Following the planned meeting between YPLA, LGA REACT and local authorities we will provide an update to the YPLA Board.

Contingency Option

As a possible contingency, LSC Annual Year 2009/10 funding agreements are in most cases in fact the second year of three year agreements to 31 July 2011. It could be argued that the LSC was transferring to local authorities a commitment to fund to then. This would mean that the statement that for the time span (and this term was deliberately included in the statement) of the NCF we expect most procurement to be via negotiated commissioning would be correct.

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