

Independent Patient Choice and Procurement Panel

Review of a proposed contract award

**All Age Continuing Care (AACC) Service for Staffordshire and
Stoke-on-Trent**

Case Reference: CR0004-24

9 September 2024

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1. Executive Summary

1. On 2 August 2024, Xyla, part of Acacium Group, asked the Independent Patient Choice and Procurement Panel (“the Panel”) to advise on the selection of a provider by Staffordshire and Stoke on Trent Integrated Care Board (“SSOT”) for its All Age Continuing Care Service (“the AACC service”). The Panel, in accordance with its case acceptance criteria, accepted Xyla’s request on 2 August 2024.
2. This is the first review by the Panel where a provider has been selected under the Most Suitable Provider (MSP) process, a new procedure under the Health Care Services (Provider Selection Regime) Regulations 2023 (“the PSR regulations”). Many commissioners are still gaining experience in using the MSP process, and the Panel hopes that this report will assist by providing additional clarity in areas where there may be uncertainty.
3. SSOT is one of 42 Integrated Care Boards (ICBs) in the NHS in England. One of SSOT’s responsibilities is to commission continuing care services for patients of all ages in the SSOT population.¹
4. In June 2023, at a financial recovery workshop to address SSOT’s financial challenges, continuing care was highlighted as a system-wide issue where action was needed. Under the arrangements then in place, continuing care ‘gateway’ services for SSOT were, in large part, delivered by Midlands and Lancashire Commissioning Support Unit (MLCSU). Gateway services involve determining patient and service user eligibility for continuing care and arranging its delivery by care providers. Service elements include referral management, clinical assessments, case reviews, personal health budgets, care brokerage, market management and financial administration.
5. In April 2024, SSOT adopted a proposal for the future of continuing care gateway services. This proposal had two main components:
 - first, SSOT to bring gateway services in-house for four continuing care patient pathways; and
 - second, SSOT to procure a provider of gateway services for another three continuing care patient pathways. This latter arrangement would be known as the AACC service.
6. On 3 May 2024, SSOT published a Prior Information Notice (PIN) and invited potential providers to express interest. SSOT received nine submissions with potential providers answering 31 questions on the basic criteria and 29 questions on the key criteria. Under the PSR regulations:
 - Basic criteria relate to a provider’s suitability to pursue a particular activity, its economic and financial standing, and its technical and professional ability.
 - Key criteria must relate to: (i) quality and innovation; (ii) value; (iii) integration, collaboration and service sustainability; (iv) improving access, reducing health inequalities and facilitating choice; and (v) social value.
7. On 28 May, the Assessment Panel met, and agreed that MPFT was the only provider to pass all of the basic criteria, and that all of MPFT’s responses to the key criteria

¹ In this report the term ‘continuing care’ refers to continuing care services for both adults and children.

were of a sufficient standard to be assessed as “meets requirements”. All other interested providers were eliminated from the provider selection process for not passing the basic criteria. Xyla’s response to the basic criteria was failed due to a “technical error” in answering a question about its CQC registration.

8. Following the 28 May meeting, the Assessment Panel discussed plans to request further information from MPFT with its legal advisers. At this meeting, it was advised that as Xyla had only failed the basic criteria as a result of a technical error, Xyla’s participation in the provider selection process should be reinstated and its response to the key criteria should be evaluated.
9. On 7 June, the Assessment Panel proceeded with requesting further information from MPFT. On 11 June the Assessment Panel met and considered Xyla’s response to the key criteria. The Assessment Panel found that Xyla “did not meet requirements” in relation to several key criteria, and as a result Xyla was again eliminated from the provider selection process. On 18 June, the Assessment Panel reviewed the further information from MPFT and on 20 June, on the Assessment Panel’s recommendation, SSOT approved the award of the AACC contract to MPFT.
10. The Panel has considered three main issues in its review:
 - first, the applicability of the PSR regulations to the AACC service;
 - second, whether SSOT’s decision to use the MSP process complied with the PSR regulations; and
 - finally, whether SSOT’s conduct of the MSP process complied with its obligations under the PSR regulations to act transparently, fairly and proportionately.
11. On the first issue, the Panel has doubts as to whether the PSR regulations are applicable to the AACC service given the nature of the services being provided and the absence of any analysis by SSOT that shows their application. The Panel, however, considers that a finding on this issue is not necessary given the other findings by the Panel in this review.
12. On the second issue, the Panel finds that SSOT did not breach its obligation to act with a view to improving the efficiency in the provision of services by using the MSP process to select a provider for the AACC service. However, the Panel finds that SSOT did not “take into account likely providers and all relevant information” in its initial decision to use the MSP process nor did it do so at any point thereafter while conducting the MSP process. As a result, SSOT’s decision to use the MSP process was in breach of the PSR regulations.
13. On the third issue, that is, whether SSOT’s conduct of the MSP process complied its obligations under the PSR regulations to act transparently, fairly and proportionately, the Panel considered:
 - first, SSOT’s stated preference for MPFT as the provider of the AACC service;
 - second, SSOT’s requirement that potential providers be registered with the CQC;
 - third, SSOT’s questions on the key criteria;
 - fourth, SSOT’s methodology for evaluating submissions;
 - fifth, SSOT’s evaluation of the MPFT and Xyla submissions; and
 - finally, SSOT’s feedback to Xyla on its submission.

14. On the first point, the Panel's view, based on the pre-MSP documentation, SSOT's stated understanding of the MSP process, and the manner in which SSOT conducted the provider selection process, is that SSOT used the MSP process as a means of confirming its strong pre-existing preference for MPFT rather than as a genuinely open decision-making process. The Panel therefore finds that SSOT did not act fairly and as a result breached the PSR regulations.
15. On the second point, SSOT's requirement that potential providers be CQC registered meant that a significant number were unable to participate in the selection process. The Panel finds that SSOT by requiring potential providers of the AACC service to be CQC registered, when no such registration was needed, did not act fairly with respect to potential providers that were excluded from the provider selection process. As a result, SSOT breached its obligations under the PSR regulations to act fairly.
16. On the third point, the Panel finds that SSOT, as a result of running a competitive exercise under the auspices of the MSP process, did not act fairly, transparently or proportionately and as a result breached its obligations under the PSR regulations.
17. On the fourth point, Panel finds that SSOT did not act fairly in relation to its methodology for evaluating responses to the key criteria nor transparently in its communication of that methodology to potential providers and, as a result, breached its obligations under the PSR regulations.
18. On the fifth point, the Panel finds that SSOT did not act fairly when evaluating MPFT's and Xyla's submissions against the key criteria, and as a result, SSOT breached its obligations under the PSR regulations.
19. On the final point, the Panel finds that SSOT did not act transparently when refusing to provide feedback on Xyla's submission and as a result breached its obligations under the PSR regulations.
20. Given these conclusions, three options are open to the Panel. The Panel may advise that:
 - the breaches had no material effect on SSOT's selection of a provider and it should proceed with awarding the contract as originally intended;
 - SSOT should return to an earlier step in the provider selection process to rectify the issues identified by the Panel; or
 - SSOT should abandon the current provider selection process.
21. The breaches of the PSR regulations identified by the Panel clearly had a material effect, and there is no possibility of SSOT complying with the PSR regulations by returning to an earlier step in the provider selection process.
22. As a result, the Panel's advice is that SSOT should abandon the current provider selection process.
23. The Panel also recommends that in any future procurement for the AACC service, SSOT robustly assures itself that it falls within the scope of the PSR regulations. Failure to do so may mean that SSOT does not select the most appropriate procurement process and may leave SSOT open to further challenge.

2. Introduction

24. On 2 August 2024, Xyla asked the Panel to advise on SSOT's selection of a provider for its AACC service. The Panel accepted Xyla's request on 2 August 2024 in accordance with its case acceptance criteria. These criteria set out both eligibility requirements and the prioritisation criteria the Panel will apply when it is approaching full caseload capacity.² Xyla's request met the eligibility requirements, and as the Panel was not approaching full capacity, there was no need to apply the prioritisation criteria.
25. The Panel's Chair appointed three members to a Case Panel for this review (in line with the Panel's procedures). The Case Panel consisted of:
 - Andrew Taylor, Panel Chair;
 - Carole Begent, Case Panel Member; and
 - Sally Collier, Case Panel Member.³
26. The Case Panel's review has been carried out in accordance with the Panel's Standard Operating Procedures ("procedures").⁴ This report provides the Panel's assessment and advice to SSOT⁵ and is set out as follows:
 - Section 3 briefly describes the role of the Panel;
 - Section 4 sets out the background to the Panel's review, including the events leading up to, and including, the selection of a provider for the AACC service;
 - Section 5 summarises the provisions of the PSR regulations relevant to this review;
 - Section 6 sets out the concerns raised by Xyla;
 - Section 7 sets out the Panel's assessment of the issues; and
 - Section 8 sets out the Panel's advice to SSOT.
27. This is the first review by the Panel where a provider has been selected under the MSP process, a new procedure under the PSR regulations. The Panel estimates that only twenty or so contracts have been awarded under the MSP process since the PSR regulations came into effect.⁶ Many commissioners are still gaining experience in using the MSP process, and the Panel hopes that this report will assist by providing additional clarity in areas where there may be uncertainty.
28. The Panel would like to record its thanks to both SSOT and Xyla for their assistance and cooperation during this review.

² The Panel's case acceptance criteria are available at <https://www.england.nhs.uk/commissioning/how-commissioning-is-changing/nhs-provider-selection-regime/independent-patient-choice-and-procurement-panel/>.

³ Biographies of Panel members are available at <https://www.england.nhs.uk/commissioning/how-commissioning-is-changing/nhs-provider-selection-regime/independent-patient-choice-and-procurement-panel/panel-members/>.

⁴ The Panel's Standard Operating Procedures are available at <https://www.england.nhs.uk/commissioning/how-commissioning-is-changing/nhs-provider-selection-regime/independent-patient-choice-and-procurement-panel/>.

⁵ The Panel's advice is provided under para 23 of the PSR Regulations and takes account of the representations made to the Panel prior to forming its opinion.

⁶ This is out of an estimated total of around 800 contracts.

3. Role of the Panel

29. The PSR regulations, issued under the Health and Care Act 2022, have put into effect the Provider Selection Regime for commissioning health care services by the NHS and local authorities. The PSR regulations came into force on 1 January 2024.⁷
30. Previously, health care services were purchased under the Public Contracts Regulations 2015 and the National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013. The Provider Selection Regime, however, provides relevant authorities (i.e. commissioners) with greater flexibility in selecting providers of health care services.
31. The Panel's role is to act as an independent review body where a provider has concerns about a commissioner's provider selection decision. Panel reviews only take place following a commissioner's review of its original decision.
32. For each review, the Panel's assessment and advice is supplied to the commissioner and the potential provider that has requested the Panel review. It is also published on the Panel's webpages. The commissioner is then responsible for reviewing its decision in light of the Panel's advice.

4. Background to this review

33. SSOT is one of 42 ICBs in the NHS in England. The geographic area served by SSOT is aligned with Staffordshire County Council and Stoke-on-Trent Council. It has a population of 1.1 million people with diverse and complex health and care needs, comprising rural and urban areas, extremes of affluence and deprivation, and significant health inequalities.⁸
34. One of SSOT's responsibilities is to commission continuing care services for its population. Continuing care pathways include continuing healthcare (CHC), fast track home care, acquired brain injury care (ABI), s.117 care services, non-CHC mental health care, joint funded care, and children and young persons' continuing care. SSOT's commissioning responsibilities for continuing care are shared, for several pathways, with local authorities.⁹
35. Determining patient eligibility for continuing care, and arranging its delivery, involves a number of what are described in this report as 'gateway' functions. These include referral management, clinical assessments, case reviews, case management, quality assurance of service provision, personal health budgets, care brokerage, market management, financial administration, the management of appeals and retrospective applications, and the management of Court of Protection processes. These gateway functions are critical to delivering high quality care.

⁷ The PSR Regulations are available at <https://www.legislation.gov.uk/uksi/2023/1348/contents/made> and the accompanying statutory guidance is available at NHS England, *The Provider Selection Regime: statutory guidance*, <https://www.england.nhs.uk/long-read/the-provider-selection-regime-statutory-guidance/>.

⁸ Further information on SSOT is available on its website at <https://staffsstoke.icb.nhs.uk/your-nhs-integrated-care-board/>.

⁹ Local authorities have, for example, certain legal responsibilities in relation to the after care of certain individuals who have left hospital after being detained under the provisions of the Mental Health Act. (These services are known as s.117 services.)

36. SSOT has faced significant clinical and financial challenges with continuing care since the ICB was established. For example, SSOT spends approximately £250 million per annum on continuing care, which is the second highest per capita expenditure amongst all ICBs in England.¹⁰ SSOT told us that addressing its challenges in continuing care requires fundamental changes to its management, not just adjustments at the margin. One element is to ensure stronger clinical leadership¹¹ and, organisationally, SSOT is adopting new arrangements for managing continuing care gateway functions, including the new AACC service.

37. The AACC service will deliver gateway functions for CHC, fast track home care and ABI. The AACC contract is due to commence on 1 April 2025, and has a 3 year duration with the option of a 2 year extension. It has an indicative lifetime value of approximately £14.7 million across the full 5 year term.¹²

38. This section sets out:

- first, the events leading up to the start of the AACC provider selection process (Section 4.1); and
- second, the key steps in the conduct of the AACC provider selection process (Section 4.2).

4.1 Events leading up to the provider selection process for the AACC service

39. In June 2023, at a financial recovery workshop to address SSOT's financial challenges, continuing care was highlighted as a system-wide issue where action was needed. Under the arrangements then in place, continuing care gateway services were, for the most part, delivered by MLCSU. Other providers of gateway services included MPFT, North Staffordshire Combined Healthcare NHS Trust (NSCHT) and the two local authorities in the SSOT area (see Table 1).

40. SSOT said that the MLCSU-led service had “led to the service being out of sync with the local integrated system approach”, which had led to higher costs, “SSOT being an outlier for eligibility/conversion to CHC funding”, “a high usage of over-restrictive care”, and a large number of overdue care reviews.¹³

41. In July 2023, SSOT established a System CHC collaborative, led by MPFT, to improve continuing care outcomes.¹⁴ In September 2023, an update on the overall financial recovery plan was presented to SSOT. This included seven key areas for action, one of which was continuing care. The update recapped on key areas of focus and set out progress so far. This included that:

- “focusing collectively on CHC is the right thing to do and that it is the largest opportunity we have to improve care and save money”;
- “the ICB is the wrong organisation to manage delivery of CHC and these supporting workstreams, and that providers are better placed to undertake this role”; and

¹⁰ Panel meeting with SSOT, Transcript, 30 August 2024.

¹¹ Panel meeting with SSOT, Transcript, 30 August 2024.

¹² The new contract was initially due to commence on 1 December 2024. However, the start date has been postponed to 1 April 2025, in part due to delays to the contract award process caused by the recent UK general election.

¹³ SSOT, *Meeting with the Case Panel, Response to issues for discussion raised by the Panel*, 30 August 2024, p.3.

¹⁴ SSOT, *Presentation to the Case Panel*, 30 August 2024, p.3 and p.7.

- “a provider collaboration will own and drive the [system recovery] programme ...”¹⁵

Table 1: Existing arrangements for continuing care gateway services

Specification elements	CHC	Fast track (home care)	ABI	s.117	Non CHC (mental health)	Joint funded	CYP Continuing Care
Referral management	MLCSU	MPFT	MLCSU	LA	MLCSU	LA	MLCSU
Clinical assessment	MLCSU	MPFT	MLCSU	MPFT/ NSCHT	MPFT/ NSCHT	MLCSU	MLCSU
Reviews	MLCSU	MPFT	MLCSU	MLCSU	MLCSU	MLCSU	MLCSU
Case management	MLCSU	MPFT	MLCSU	MLCSU	MLCSU	MLCSU	MLCSU
Quality assurance	MLCSU	MPFT	MLCSU	LA	MLCSU	LA	MLCSU
Personal Health Budget	MLCSU	N/A	N/A	N/A	N/A	N/A	MLCSU
Care brokerage	MLCSU	MPFT	MLCSU	LA	MLCSU	LA	MLCSU
Market management	MLCSU	MPFT	MLCSU	LA	MLCSU	LA	MLCSU
Admin – Financial	MLCSU	MLCSU	MLCSU	LA	MLCSU	LA	MLCSU
Appeals	MLCSU	MLCSU	MLCSU	N/A	MLCSU	N/A	MLCSU
Court of Protection	MLCSU	MLCSU	MLCSU	MLCSU	MLCSU	MLCSU	MLCSU

Note: (i) Some of the MLCSU and MPFT delivered services are delivered jointly with other organisations; (ii) LA – Local Authority.

Source: SSOT, *AACC Options paper and recommendations*, p.2.

42. Actions to be taken with respect to the management of continuing care included “transfer management of CHC to Midlands Partnership University Foundation Trust (MPFT)”, and “MPFT to manage Midlands and Lancashire CSU staff [responsible for CHC]”.¹⁶ Specific interventions included “reduction of inappropriate 1:1 care packages”, “implementation of a new CHC policy”, “changes to the market pricing structure”, and “streamlined CHC end of life / fast track pathway”.¹⁷
43. In November 2023, consistent with the plan to move away from MLCSU, SSOT gave 12 months notice of its intention to terminate MLCSU’s contract for continuing care gateway services (known as the Personalised Healthcare contract).
44. In April 2024, SSOT adopted a proposal for continuing care gateway services to replace the MLCSU-led service (“the April 2024 paper”). This had two main components:
 - first, SSOT to bring gateway services in-house for four continuing care pathways (i.e. s.117, non-CHC (mental health), joint funded and CYP continuing care); and
 - second, SSOT to procure a provider of gateway services for the other three continuing care pathways (i.e. CHC, fast-track home care and ABI) – see Table 2. This latter arrangement would be known as the AACC service.

¹⁵ SSOT, *System Recovery Programme Update*, September 2023, p.32.

¹⁶ SSOT, *System Recovery Programme Update*, September 2023, p.33.

¹⁷ SSOT, *System Recovery Programme Update*, September 2023, p.37.

Table 2: Planned arrangements for continuing care gateway services

Specification elements	CHC	Fast track (home care)	ABI	s.117	Non CHC (mental health)	Joint funded	CYP Continuing Care
Referral management	MSP	MSP	MSP	In-house	In-house	In-house	In-house
Clinical assessment	MSP	MSP	MSP	In-house	In-house	In-house	In-house
Reviews	MSP	MSP	MSP	In-house	In-house	In-house	In-house
Case management	MSP	MSP	MSP	In-house	In-house	In-house	In-house
Quality assurance	MSP	MSP	MSP	In-house	In-house	In-house	In-house
Personal Health Budget	MSP	MSP	MSP	In-house	N/A	N/A	In-house
Care brokerage	MSP	MSP	MSP	LA already	N/A	N/A	In-house
Market management	MSP	MSP	MSP	LA already	N/A	N/A	In-house
Admin – Financial	MSP	MSP	MSP	In-house	In-house	In-house	In-house
Appeals	In-house	In-house	In-house	N/A	N/A	N/A	N/A
Court of Protection	In-house	In-house	In-house	In-house	In-house	In-house	N/A

Source: SSOT, *AACC Options paper and recommendations*, p.7.

45. The April 2024 paper included a review of the options for selecting a provider for the AACC service. Direct Award Options A, B and C were ruled out as not applicable, leaving a choice between the MSP process and the Competitive process.¹⁸ In relation to the MSP process, the paper said “The ICB can only use MSP where it believes it can identify the most suitable provider(s) considering ‘likely providers’ and all information available at the time. To enable this to happen, pre-market engagement activity is strongly advised” and “This option is like an open procurement under PCR however does reduce the timetable considerably”.¹⁹
46. The April 2024 paper went on to say that “Due to the termination notice, the ICB would not be able to conduct a robust PCR full procurement [i.e. a competitive exercise] and undertake the service transfer in the period left on the contract”.²⁰ That is, a key driver for SSOT’s decision to use the MSP process was that it was the only provider selection process it could complete within its desired timeframe for selecting a provider.

4.2 Conduct of the provider selection process for the AACC service

47. On 3 May 2024, shortly after deciding to use the MSP process, SSOT published a PIN announcing this intention, and invited potential providers to express interest by 24 May.
48. SSOT received nine submissions with potential providers answering 31 questions on the basic criteria and 29 questions on the key criteria. Under the PSR regulations:
 - *Basic criteria* relate to a provider’s suitability to pursue a particular activity, its economic and financial standing, and its technical and professional ability.²¹

¹⁸ The competitive process described in the April 2024 paper suggests it would take place under the Public Contracts regulations (PCR), which governs the UK Government’s procurement of goods, works and services other than health care services. If the AACC service is a health care service (which is discussed further in Section 7.1), then SSOT would be unable to select a provider for this service under the PCR, which only applies to non health care services. The PSR regulations do, however, include a competitive process for selecting providers.

¹⁹ SSOT, *AACC Options paper and recommendations*, p.4. (The Panel notes that there are important differences between the MSP process and a competitive exercise, regardless of whether it is conducted under the PSR regulations or PCR.)

²⁰ SSOT, *AACC Options paper and recommendations*, p.5. (As set out in footnote 19, if the AACC service is a health care service, then the PCR is not available to SSOT as a process for selecting a provider.)

²¹ These requirements are set out in Schedule 16 of the PSR Regulations.

- *Key criteria* must relate to: (i) quality and innovation; (ii) value; (iii) integration, collaboration and service sustainability; (iv) improving access, reducing health inequalities and facilitating choice; and (v) social value.²²

49. Responses to the basic criteria were assessed as “pass / fail”, and responses to the key criteria were assessed as “meets requirements / does not meet requirements”. To progress to the “Key Criteria stage evaluation”, potential providers had to “pass all the mandatory and discretionary requirements and the pass/fail requirements of the Basic Selection Criteria Questionnaire stage”.²³

50. An Assessment Panel was formed by SSOT to evaluate providers’ submissions. On 27 May, Assessment Panel members individually reviewed all nine submissions, including providers’ responses to both the basic and key criteria. As a result, Assessment Panel members had to review 540 answers that day (i.e. 60 answers from each of the nine providers).²⁴

51. On 28 May, the Assessment Panel met, and agreed that MPFT was the only provider to pass all of the basic criteria, and that all of MPFT’s responses to the key criteria were of a sufficient standard to be assessed as “meets requirements”. All other interested providers were eliminated from the provider selection process for not passing the basic criteria. Xyla’s response to the basic criteria was failed due to a “technical error” in answering a question about its CQC registration.

52. Following the 28 May meeting, the Assessment Panel discussed plans to request further information from MPFT with its legal advisers. At this meeting, it was advised that as Xyla had only failed the basic criteria due to a technical error, Xyla’s participation in the provider selection process should be reinstated and its response to the key criteria should be evaluated.

53. On 7 June, the Assessment Panel proceeded with requesting further information from MPFT and met with MPFT to discuss this request. On 11 June, the Assessment Panel met and considered Xyla’s response to the key criteria. The Assessment Panel found that Xyla “did not meet requirements” in relation to several key criteria, and as a result, Xyla was again eliminated from the provider selection process. On 18 June, the Assessment Panel reviewed the further information from MPFT and on 20 June, on the Assessment Panel’s recommendation, SSOT approved the award of the AACC contract to MPFT. A corresponding notice of its intention was published on 5 July.

54. On 16 July, prior to the standstill period expiring for the award of the AACC contract, Xyla made representations to SSOT about its provider selection decision. In response, SSOT carried out an internal review and wrote to Xyla on 26 July confirming its intention to award the contract to MPFT.²⁵ Xyla made a further representation to SSOT on 31 July, to which SSOT responded on 1 August again confirming its intention to award the contract to MPFT.

²² The key selection criteria are defined in Regulation 5 of the PSR Regulations.

²³ SSOT, *Most Suitable Provider process (Provider Selection Regime) Guidance, Provision of All Age Continuing Care (AACC) Service*, para 5.4.

²⁴ Assuming that each Assessment Panel member worked a standard 7.5 hour day, this would have allowed around 50 seconds to evaluate each answer.

²⁵ The SSOT review panel found there was “no merit in the representations as made” and that they were “wholly satisfied that the ICB has followed the PSR Regulations fully and has not identified any fundamental areas where that process of regulatory requirements weren’t followed in good faith”.

55. Following receipt of SSOT's 1 August response, Xyla requested that the Panel review SSOT's provider selection decision. The Panel accepted this request on 2 August, and SSOT, on being made aware of the Panel's acceptance of Xyla's request, confirmed that it would hold the standstill period open for the duration of the Panel's review.

5. PSR regulations relevant to the MSP process

56. This section provides a summary of the key provisions of the PSR regulations relevant to the MSP process, and provides readers with a ready reference to many of the regulations discussed in this report.

57. The five parts of the PSR regulations most relevant to this review are as follows:

- First, the PSR regulations set out the services to which the PSR regime applies (Regulation 3). This states that the regulations "apply where a relevant authority procures relevant health care services for the purposes of the health service in England, whether alone or as part of a mixed procurement". The regulation goes on to set out the circumstances in which the PSR regulations apply to procurements that include a mix of health care and other services (so-called mixed procurements).
- Second, the PSR regulations set out the general obligations that apply to relevant authorities (i.e. commissioners) when selecting a provider of health care services (Regulation 4). This states that relevant authorities must "act: (a) with a view to - (i) securing the needs of people who use the services; (ii) improving the quality of the services; and (iii) improving efficiency in the provision of the services; and (b) transparently, fairly and proportionately".
- Third, the PSR regulations set out the key criteria that potential providers must be assessed against, including when using the MSP process (Regulation 5). These are, in summary, (a) quality and innovation, (b) value, (c) integration, collaboration and service sustainability; (d) improving access, reducing health inequalities and facilitating choice; and (e) social value.
- Fourth, the PSR regulations set out the circumstances in which a relevant authority may use the MSP process (Regulation 6(6)). This states that "Where (a) the relevant authority is not required to follow Direct Award Process A or Direct Award Process B; (b) ...; (c) the relevant authority is of the view, taking into account likely providers and all relevant information available to the relevant authority at the time, that it is likely to be able to identify the most suitable provider; and (d) ...; the relevant authority must follow either the Most Suitable Provider process or the Competitive process, such choice being at the discretion of the relevant authority".
- Finally, the PSR regulations set out the process that relevant authorities must follow when using the MSP process (Regulation 10). This states that "Where the relevant authority follows the Most Suitable Provider process, the process is that the relevant authority (a) follows the steps set out in this regulation; and (b) awards any contract without a competition. (2) Step 1 is ... (3) ...; (4) Step 2 is that the relevant authority identifies potential providers who may be the most suitable

provider, with reference to the key criteria and the basic selection criteria; (5) ...; (6) Step 3 is that the relevant authority assesses the potential providers identified in step 2 and chooses, taking into account the key criteria and applying the basic selection criteria, the most suitable provider to whom to make an award ...”.

58. The Provider Selection Regime Statutory Guidance “sits alongside the Regulations to support organisations to understand and interpret the PSR regulations”.²⁶ Reference is made to relevant provisions of the Statutory Guidance in the Panel’s assessment of the issues in Section 7.

6. Representations by Xyla

59. Xyla, part of Acacium Group (also known as Independent Clinical Services), is an independent sector provider of services to NHS customers, including clinical services, community services, mental health services and care assessments. More information about Xyla is available on its website (see <https://xylaservices.com/>).

60. Xyla initially raised three concerns with the Panel regarding SSOT’s selection of MPFT. These were as follows:

“CQC position: Xyla have not received any feedback at all apart from that we did not have a valid CQC. This is manifestly incorrect as we provided a valid CQC for our business. When we challenged this the ICB has stated we did not say this within the basic selection criteria. This is not correct as we selected the appropriate drop down box stating we had a CQC and the instructions did not ask you to write this within the free text as well. At no point have the ICB sought to check our CQC status. To dismiss a potential provider on such spurious grounds is unreasonable and unfair.

“No feedback on proposal: We have received no other feedback on why our bid was not successful. Given there are 60 questions which took over 2 FTE months to complete it is reasonable to expect the ICB to be transparent with providers to document why one provider has been selected over others. There were 9 potential bidders for this opportunity. It is essential that the commissioner acts in a transparent and fair manner to all providers to ensure that there is value for money for the public purse.

“Use of the MSP process: The PSR regulations afford relevant authorities the privilege and flexibility to use the MSP process in certain circumstances instead of a competitive process. This privilege comes with an obligation to do so appropriately and where the authority has, and can evidence that they have, sufficiently detailed knowledge of the provider market to ensure the authority is acting from a fully informed position.

“Given that MLCSU received 9 submissions for the AACC tender we are unsure why MLCSU has decided to award a tender via the MSP process. We understand the AACC service is currently being provided by MLCSU and there were 9 potential providers therefore it should not be re-procured via the MSP process. Given the budget is approximately £15m for the AACC service the use of the PSR competitive process would likely result in an award decision that provides significantly better value

²⁶ NHS England, *The Provider Selection Regime: statutory guidance*, 21 February 2024, p.2.

for money for MLCSU and ensure that a transparent and fair process is undertaken for all potential providers.

“We also note that as per Schedule 5 of the PSR regulations the authority must publish the details of the award decision-makers. This does not seem to have occurred within the original notice ...”

“The ICB has not acted in accordance with Regulation 4B in that they have not been transparent, fair and proportionate [in] their decision making process. A failure to follow the competitive process has also meant they have not [met] Key criteria 5B on value. We have a cheaper price than the winning provider for example.”

61. Xyla suggested that its concerns amounted to a breach of the PSR regulations in relation to the general obligations on commissioners (as set out in Regulation 4), the use of the key criteria for selecting providers (as set out in Regulation 5), the decision to use the MSP process (as set out in Regulation 6), and the conduct of the MSP process (as set out in Regulation 10).
62. Further information was made available to Xyla during the Panel’s review relating to SSOT’s evaluation of Xyla’s submission. As a result, Xyla made further representations to the Panel, which were as follows:

“On 26th July we were informed by the ICB that our submission did not meet the basic selection criteria because we had not satisfied the necessary CQC assurance needed in the submission ... This implied that we were not considered, solely, because we were non-compliant with the CQC requirement. In the subsequent feedback from the ICB, it is now clear that they are satisfied that we are fully compliant with the CQC requirements, evidenced by the comments in Key Criteria 1 ‘CQC and additional policies and evidence submitted’.²⁷

“In the PSR statutory guidance, it is expected that, for MSP, the Commissioner must be able to demonstrate they have understood alternative providers and have reached a reasonable decision when selecting a MSP. Nothing in the feedback we have seen suggests that the ICB has taken the time to understand Xyla as a suitable alternative provider. This can be evidenced by the ICB not asking any follow-up questions from Xyla (as it did with others). In addition, from the letter provided on 26th July ... the ICB said that ‘Additional advisory steps relating to pre-engagement with the market that was not carried out, would not have changed the overall outcome, in the opinion of the Panel from the evidence provided to it.’ This is a clear disregard for the MSP process, and if Xyla had been engaged, the Panel would have understood that Xyla is a viable alternative provider for this service.

“The feedback we have now received has been high level, subjective and inconsistent which would have been avoided in a Competitive Process. For example, there is discrepancy between the feedback provided under Key Criteria 2 and Key Criteria 3. Key Criteria 2 acknowledged that we have an established staffing model capable of effectively responding to surges in demand, yet Key Criteria 3 stated that our response lacked detail in managing conflicting priorities during surges. These points are contradictory, as our model clearly addresses such challenges.

“Under a Competitive Process, there would have been: 1) a rigorous and detailed level of quantitative feedback against each of the 29 questions and 2) relative feedback

²⁷ As a result, this issue is not considered further in this report.

against the winning provider. Neither of which has been provided as part of this opaque process.”

63. Xyla concluded these additional representations by saying “Considering our compliant bid and the expectation for authorities to uphold a transparent selection process, we believe a Competitive Process is necessary for this procurement. This will guarantee a fair, open evaluation and ensure the ICB receives the most economically viable offer for this crucial service”.

7. Panel Assessment

64. The issues that have arisen during the Panel’s review are in three main areas:

- first, the applicability of the PSR regulations to the AACC service (Section 7.1);
- second, whether SSOT’s decision to use the MSP process complied with the PSR regulations (Section 7.2); and
- finally, whether the conduct of the MSP process complied with the PSR regulations (Section 7.3).

65. This section sets out the Panel’s assessment of these issues, and its findings on whether SSOT complied with the PSR regulations in relation to each issue.

7.1 Applicability of the PSR regulations to the AACC service

66. This section sets out the Panel’s assessment of whether SSOT’s provider selection process for the AACC service fell within the scope of the PSR regulations. If the AACC service does not fall within the scope of the PSR regulations, then SSOT would be obliged to procure a provider for this service under the PCR.

67. The PSR regulations apply to the procurement of relevant health care services. Where such health care services are purchased together with other services as part of a “mixed procurement”, then relevant health care services must form a majority of the contract, by value, for the PSR regulations to apply. (The relevant authority must also be of the view that the non health care goods or services could not reasonably be supplied under a separate contract.)

68. The Statutory Guidance further explains that health care services are “those services that provide health care (whether treatment, diagnosis or prevention of physical or mental health conditions) to individuals (i.e. patients or service users) or groups of individuals (e.g. where treatment is delivered to a group such as in the form of group therapy)”.²⁸

69. The Statutory Guidance goes on to say that:

“In scope health care services included services provided by NHS providers, other public bodies, local authorities, and providers within the voluntary, community and social enterprise (VCSE) and independent sectors. In broad terms, these are services arranged by the NHS such as hospital, community, mental health, primary healthcare, palliative care, ambulance and patient transport services for which the provider requires Care Quality Commission (CQC) registration.

²⁸ See p.6 of the Statutory Guidance.

“This definition purposefully excludes non-health care or health-adjacent services from being arranged under the regime. This means, for example, that business consultancy, catering, administrative services, patient transport services that do not require CQC registration or other services that may support health care infrastructure, but do not provide health care directly to people, must not be arranged under the regime (other than when legitimately part of a mixed procurement)”.²⁹

70. A question arises as to whether the PSR regulations apply to the procurement of the AACC service. This is because the AACC service has several elements that do not appear to be relevant health care services, such as “Care brokerage”, “Market management”, and “Administration – financial systems”.³⁰ Health care is defined as the provision of health care (i.e. treatment, diagnosis or prevention of physical or mental health conditions) directly to people, and it seems unlikely that these three elements, and perhaps others in the AACC service, meet this definition.
71. Given the likely presence of non health care elements in the AACC service, SSOT would need to have considered the definition of a mixed procurement under the PSR regulations (see paragraph 67) to assure itself that the PSR regulations applied to its selection of a provider for the AACC service. Under a mixed procurement, the health care elements of the AACC service must form a majority of the contract’s value for the PSR regulations to apply and SSOT also has to be of the view that the non health care elements could not reasonably be supplied under a separate contract.
72. The Panel asked SSOT for any analysis or assessment that it had carried out to assure itself that the AACC service fell within the scope of the PSR regulations. SSOT was unable to provide this. However, SSOT told the Panel that “The AACC service is a nurse led service, as described in the service specifications, from the clinical assessment to the care brokerage, contracting of clinical care, and ongoing clinical reviews of the patients”.³¹ In response to a follow up question, SSOT further said that it “believes the assessment of individuals for Continuing Health Care services is akin to diagnosis” and thus falls within the definition of health care set out in the Statutory Guidance.³²
73. SSOT told the Panel that the provider of the AACC service does not require a CQC registration.³³ This is consistent with SSOT’s existing arrangements for continuing care gateway services where MLCSU is not CQC registered. SSOT also said that, in relation to whether health care services form a majority of the AACC contract’s lifetime value, it had “looked at the total workforce that would transfer as part of the service and 53% of the workforce are required to be registered nurses, to undertake full assessments of an individual’s health and care needs [and] this includes a clinical assessment, akin to diagnosis”.³⁴
74. The Panel also asked Xyla whether it considered that the AACC service involved the provision of health care services. Xyla said that AACC services do not involve direct

²⁹ See p.7 of the Statutory Guidance.

³⁰ The AACC service consists of nine elements (as set out in the April 2024 paper and as shown in Table 2). These are: Referral management, Clinical assessment, Reviews, Case management, Quality assurance – provision, Personal health budgets, Care brokerage, Market management, and Administration – financial systems.

³¹ SSOT, *Meeting with the Case Panel, Response to issues for discussion raised by the Panel*, 30 August 2024, p.2.

³² SSOT, *Response to Panel question*, 2 September 2024.

³³ SSOT, *Meeting with the Case Panel, Response to issues for discussion raised by the Panel*, 30 August 2024, p.3.

³⁴ SSOT, *Response to Panel question*, 2 September 2024.

treatment and care delivery for patients or service users, and this means CQC registration was not specifically required for the AACC service.

75. Xyla went on to say that the clinical assessment element of an AACC service involves clinical assessment of a person to determine if they have a primary health need. Professionals are required to gather information relating to the person and interpret clinical information from a wide range of sources care such as hospital records, care home records GP records etc, and also engage with patients (service users) and their families, to carry out a comprehensive assessment to determine whether their needs are greater for health than for social care. While direct care and treatment is not being provided, the clinicians involved have a duty of care to ensure that the person's needs are being met safely in the appropriate care setting and, as part of that, there may be requirements to engage with other professionals or raise safeguarding issues. There is a responsibility to ensure that appropriate care is being commissioned.
76. The Panel would generally expect that any service falling within the scope of the PSR regulations (other than prevention services arranged by local authorities) would be supplied by a CQC registered provider. The Statutory Guidance, as set out above, notes that health care services "are services arranged by the NHS ... for which the provider requires Care Quality Commission (CQC) registration" (see paragraph 69).
77. However, in those cases where a commissioner believes that it is procuring a health care service where the provider does not need a CQC registration, then the Panel expects to see a robust analysis by the commissioner that provides assurance that the service meets the definition of a health care service. In the case of mixed procurements, the Panel expects to see a robust analysis that provides assurance that health care services form a majority, by value, of the service that is being commissioned. The Panel also expects to see a robust analysis of whether the non health care elements of such a procurement could not reasonably be supplied under a separate contract.
78. In relation to the AACC service, the Panel has doubts as to whether the PSR regulations are applicable given the nature of the services being provided and the absence of any analysis by SSOT that shows their application. The Panel, however, considers that a finding on this issue is not necessary given its other findings in this review.
79. The Panel recommends that SSOT, in any future procurement for the AACC service, robustly assures itself that the PSR regulations are applicable. Failure to do so may mean that SSOT does not select the most appropriate procurement process and may leave SSOT open to further challenge.

7.2 SSOT's decision to use the MSP process

80. This section sets out the Panel's assessment of whether SSOT's decision to use the MSP process to select a provider for the AACC service was consistent with its obligations under the PSR regulations.³⁵ It considers two issues:

³⁵ As set out in Section 7.1, the Panel has doubts as to whether the PSR regulations apply to the provider selection process for the AACC service. However, given that the Panel's assessment on this issue is not definitive, the Panel has also assessed

- first, whether SSOT breached the requirement to act with a view to “improving efficiency in the provision of the services” (as per Regulation 4); and
- second, whether SSOT could have held “the view, taking into account likely providers and all relevant information available to the relevant authority at the time, that it is likely to be able to identify the most suitable provider” (as per Regulation 6).

7.2.1 Obligation on SSOT to improve efficiency in the provision of services

81. Xyla told the Panel that “Given the budget is approximately £15m for the AACC service the use of the PSR competitive process would likely result in an award decision that provides significantly better value for money”. Xyla’s concern is that SSOT’s decision to use the MSP process conflicts with its obligation to improve efficiency in the provision of services (as per Regulation 4).
82. Regulation 4 places several obligations on SSOT in commissioning the AACC service. These are to act with a view to: (i) securing the needs of the people who use the service; (ii) improving the quality of the services; and (iii) improving efficiency in the provision of the services. Regulation 4 goes on to say that “when acting with a view to the matters [set out above], the relevant authority may consider the value of providing services in an integrated way, including with other health care services, health-related services or social care services”.
83. Commissioners using the MSP process must take value (and efficiency) considerations into account when identifying the most suitable provider. Value is one of the key criteria against which potential providers must be assessed in the MSP process (see Regulation 5).
84. The Panel’s view is that a commissioner is unlikely to breach its obligation to act with a view to improving efficiency in the provision of services simply by virtue of using the MSP process. The Panel would expect to see evidence that goes beyond the value of a contract for it to have concerns about a commissioner’s compliance with its obligation to improve efficiency. The Panel did not see any such evidence in this review. As a result, the Panel finds that SSOT by using the MSP process to select a provider for the AACC service did not breach its obligation to act with a view to improving efficiency in the provision of services.

7.2.2 SSOT’s ability to identify the most suitable provider

85. The MSP process is open to a relevant authority that is of “the view, taking into account likely providers and all relevant information available to the relevant authority at the time, that it is likely to be able to identify the most suitable provider”. In these circumstances, the relevant authority may choose between “either the Most Suitable Provider Process or the Competitive Process, such choice being at the discretion of the relevant authority” (Regulation 6).
86. The Statutory Guidance says that “Relevant authorities are advised to follow this provider selection approach [i.e. the MSP process] only when they are confident that

SSOT’s decision to use the MSP process (in Section 7.2), and its conduct of the MSP process (in Section 7.3) under an assumption that the PSR regulations do apply.

they can, acting reasonably, clearly identify all likely providers capable of providing the health care services" (p.16).

87. The Statutory Guidance also sets out expectations for relevant authorities' monitoring of the provider landscape so that they can make a suitable judgement as to whether they are "likely to be able to identify the most suitable provider", and hence whether they should use the MSP process. The Guidance says that:

"Relevant authorities are expected to develop and maintain sufficiently detailed knowledge of relevant providers, including an understanding of their ability to deliver services to the relevant (local/regional/national) population, varying actual/potential approaches to delivering services, and capabilities, limitations, and connections with other parts of the system. Relevant authorities may wish to consider undertaking pre-market engagement to update or maintain their provider landscape knowledge.

"We expect this knowledge to go beyond knowledge of existing providers and to be a general feature of planning and engagement work, developed as part of the commissioning or subcontracting process rather than only at the point of contracting" (p.9).

88. The risk for a relevant authority, if it has limited knowledge of the provider landscape, is that a decision to use the MSP process will be taken without "taking into account likely providers and all relevant information" as required under Regulation 6. Regular monitoring of the provider landscape and updating this knowledge as needed ahead of any provider selection exercise allows this risk to be mitigated.

89. In relation to SSOT's decision to use the MSP process, the Panel was unable to identify any evidence in SSOT's documentary record that demonstrated its knowledge of likely providers or how this knowledge was taken into account when deciding to use the MSP process. Rather, SSOT's decision to use the MSP process appears to have been driven by a view that it could be carried out more quickly than a competitive process (see paragraph 46). SSOT's desire to move quickly also led to it deciding against any pre-market engagement to update or maintain its provider landscape knowledge before the provider selection process. A SSOT Board paper in June 2024 said "Due to timescales aligned to this MSP process a pre-market engagement exercise was not undertaken ..." ³⁶

90. During this review, SSOT was asked to provide an overview of its knowledge of potential providers of the AACC service before seeking expressions of interest under the MSP process. SSOT was unable to give the Panel any such overview.³⁷ Nevertheless, when meeting with the Panel, SSOT said that it was aware of several potential providers of the AACC service, including MLCSU, MPFT, NSCHT, other NHS CSUs in England and Xyla.³⁸ Xyla told the Panel that there were only a few other independent sector providers of AACC services, including Liaison Group³⁹ and UB Healthcare.⁴⁰

³⁶ SSOT, *AACC Procurement Outcome*, June 2024, para 2.6.

³⁷ SSOT, *Response to Case Panel's additional information request*, 16 August 2024.

³⁸ SSOT also referred to 'CMS' as another independent sector provider of AACC services. We understand this to be a reference to CHS Healthcare, a business acquired by Xyla.

³⁹ Further information on Liaison Group's AACC services is available at <https://liaisongroup.com/chc-framework/>.

⁴⁰ Further information on UB Healthcare's AACC services is available at <https://ubhealthcare.co.uk/nhs-funded-care-delivery-support-service>.

91. SSOT's knowledge of likely providers of AACC services and their capabilities before deciding to use the MSP process was limited. SSOT chose not to use a pre-market engagement exercise to address gaps in its knowledge. To the extent that SSOT was aware of likely providers of the AACC service and their capabilities, there is no evidence that this information was taken into account in its decision to use the MSP process, or that it informed SSOT's view about its ability to identify the most suitable provider.
92. Under the PSR regulations, SSOT when deciding to use the PSR process is required to be of the view that "*taking into account likely providers and all relevant information available* to the relevant authority at the time, that it is likely to be able to identify the most suitable provider" (emphasis added).
93. The Panel finds that SSOT's lack of knowledge about "likely providers" means that it was unable to "take into account likely providers" when initially deciding that it was "likely to be able to identify the most suitable provider" using the MSP process. Further, as set out in paragraph 89, SSOT did not address gaps in its knowledge about "likely providers" through a pre-market engagement exercise. Furthermore, as discussed in Section 7.3.2, SSOT's requirement that potential providers of the AACC service be CQC registered meant that most potential providers of AACC services could not participate in its provider selection process. As a result, gaps in SSOT's knowledge about likely providers could not have been addressed through the responses SSOT received to its call for expressions of interest.
94. The Panel finds that SSOT did not "take into account likely providers and all relevant information" in its initial decision to use the MSP process nor did it do so at any point thereafter in its conduct of the MSP process. As a result, SSOT's decision to use the MSP process was in breach of the PSR regulations.

7.3 Fairness and transparency in SSOT's selection of a provider

95. This section sets out the Panel's assessment of whether SSOT complied with its obligations under the PSR regulations to act fairly and transparently in carrying out the MSP process for the AACC service. In doing so, the Panel considered:
 - first, SSOT's preference for MPFT as the provider of the AACC service (Section 7.3.1);
 - second, SSOT's requirement that potential suppliers be registered with the CQC (Section 7.3.2);
 - third, SSOT's questions on the key criteria (Section 7.3.3);
 - fourth, SSOT's methodology for evaluating submissions (Section 7.3.4);
 - fifth, SSOT's evaluation of the MPFT and Xyla submissions (Section 7.3.5); and
 - finally, SSOT's feedback to Xyla on its submission (Section 7.3.6).

7.3.1 SSOT's preference for MPFT as the provider of the AACC service

96. This section considers whether SSOT's stated preference for MPFT as the provider of continuing care gateway services, as expressed prior to the provider selection process, biased decision-making during the selection process and caused SSOT to breach its obligation to act fairly.

97. In August 2023, the System Recovery Programme Update presented to SSOT set out three actions that were being implemented in relation to the management of CHC. This included transferring management of the MLCSU contract from the ICB to MPFT. During this review, SSOT told the Panel that MPFT did, however, take on some additional responsibilities in relation to end of life fast track care.⁴¹

98. During the Panel's review, SSOT said that "The ICB had a working assumption that the recently formed System CHC collaborative would be the most suitable provider for the All Age Continuing Care Service, as the formation of the System CHC collaborative was to promote and foster greater integration between acute, community, mental health and social care. The lead organisation for the System CHC collaborative was Midlands Partnership NHS Foundation Trust, and the executive view was that they were the most suitable provider."⁴²

99. The Panel further asked SSOT "Given the apparent strength of [SSOT's] position ... how was it possible to run a fair and transparent process [to select a provider of the AACC service]?" SSOT's response was that the MSP process "requires organisations to be able to identify the most suitable provider(s) prior to starting the process. If you already have an idea who the likely provider(s) are, then would this not always raise a challenge about a fair and transparent process?".⁴³

100. SSOT's response shows a misunderstanding of the requirements of the MSP process. Relevant authorities should know about likely providers, based on their provider landscape monitoring, and be able to form the view – based on this knowledge – that they are likely to be able to identify the most suitable provider if they use the MSP process. Knowing about likely providers, however, is different to identifying the most suitable provider before the MSP process starts, and then using the MSP process to confirm a decision that has already been made.

101. The Panel's view, based on the pre-MSP documentation, SSOT's stated understanding of the MSP process, and the manner in which SSOT conducted the provider selection process (see Sections 7.3.3 to 7.3.5), is that SSOT used the MSP process as a means of confirming its strong pre-existing preference for MPFT rather than as a genuinely open decision-making process. The Panel therefore finds that SSOT did not act fairly and as a result breached the PSR regulations.

7.3.2 SSOT's requirement that potential providers be registered with the CQC

102. This section considers whether SSOT's requirement for potential providers to be registered with the CQC breached its obligation to act fairly during the provider selection process for the AACC service.

103. One of the criteria set by SSOT for potential providers of the AACC service was possession of a relevant CQC registration.⁴⁴ This contrasted with SSOT's existing

⁴¹ SSOT, *Meeting with the Case Panel, Transcript*, 30 August 2024.

⁴² SSOT, *Response to Case Panel's additional information request*, 15 August 2024, Q6.

⁴³ SSOT, *Meeting with the Case Panel, Responses to issues for discussion raised by the Panel*, 30 August 2024, p.5.

⁴⁴ SSOT asked for evidence of CQC registration in both the basic criteria and key criteria. In the basic criteria, potential providers were told "it is a mandatory requirement that all Suppliers who are responsible for delivering regulated activity services under the contract are CQC registered". This requirement was repeated in the key criteria (MLCSU, *Annex 1: Most Suitable Provider process (Provider Selection Regime) Guidance, Provision of All Age Continuing Care (AACC) service, NHS Staffordshire and Stoke-on-Trent Integrated Care Board (SSOT ICB)*, p.11).

arrangements where MLCSU, the incumbent provider of continuing care gateway services, is not CQC registered.

104. In response to a Panel question, SSOT said that the requirement for a CQC registration “was an error made by SSOT, it had been a question posed by the procurement team ‘does the service need to be CQC registered?’ and SSOT had responded yes, without due consideration to the impact. However, this had no bearing on the evaluation or the decision to award”.⁴⁵
105. While the requirement for CQC registration may not have had a bearing on the evaluation of potential providers that responded to the PIN, it also meant that other potential providers who were not CQC registered would have been deterred from responding.
106. During this review, SSOT told the Panel that the pool of likely suppliers of the AACC service included MLCSU and the three other CSUs in England (namely, North of England (NECS), South, Central and West (SCW) and Arden & GEM). A brief review indicates that AACC services are offered by NECS, SCW and MLCSU, but less obviously by Arden & GEM.⁴⁶ There is no indication that any of the four CSUs are CQC registered. Further, neither Liaison Group nor UB Healthcare, the two independent sector providers of AACC services identified by Xyla, are CQC registered.
107. SSOT’s requirement that potential providers have a CQC registration meant that a significant number were unable to participate in the selection process. The Panel finds that SSOT by requiring that potential providers of AACC service be CQC registered, when no such registration was required, did not act fairly with respect to those potential providers that were excluded from the process. As a result, SSOT breached its obligations under the PSR regulations.

7.3.3 SSOT’s questions on the key criteria

108. This section considers whether the nature of SSOT’s key criteria questions were consistent with its obligation to act fairly during the provider selection process for the AACC service.
109. Potential providers were asked to answer 29 questions on the key criteria. Many of these questions probed potential providers’ approach to delivering the service specification. By way of example, the first three questions for potential providers were the following:
 - “Please describe how you would deliver continuous quality and service improvement against the All Age Continuing Care (AACC) service specification to ensure enhanced performance and value for money are delivered each year, including proposed areas where efficiency savings could be realised.
 - “Please provide details of how the AACC service will be led and how it will manage to train staff to make sure it is delivering high quality care, encourages

⁴⁵ SSOT, *Meeting with the Case Panel, Responses to issues for discussion raised by the Panel*, 30 August 2024, p.3.

⁴⁶ A description of the AACC services offered by NECS is available at <https://www.necsu.nhs.uk/what-we-offer/managed-services/clinical-support/all-age-continuing-care-aacc/>, a similar description for SCW is available at <https://www.scwcsu.nhs.uk/services/all-age-continuing-care-aacc/>, and for MLCSU is available at <https://www.midlandsandlancashirecsu.nhs.uk/personalised-healthcare-commissioning-services/>.

learning and innovation and promotes an open and fair culture, how it will support staff resilience given the contentious nature of decisions as part of delivering this service.

- “Please provide an overview of your proposed approach to deliver the services in alignment with the Service Specification focusing on your innovation offered to improve outcomes and delivering good value for money ...”⁴⁷

110. During this review, SSOT characterised its questions on the key criteria as helping “the ICB to understand the ... market landscape”. SSOT also said that “the provider responses would give [it] a greater level of understanding of the potential providers of the service”,⁴⁸ and that the rationale for the questions “was to establish an overall sense [of] the organisations and [how] well they would integrate seamlessly into the ICS health and social care landscape”.⁴⁹

111. The Statutory Guidance says that the MSP process “is designed to allow relevant authorities to make an assessment on which provider (or group of providers) is most suitable to deliver the proposed contracting arrangements based on consideration of the key criteria and the basic selection criteria, and to award a contract *without running a competitive process*” (p.16, emphasis added).

112. The distinction between an assessment of providers’ capabilities in an MSP process and an assessment of providers’ offers in a competitive process can be seen in the PSR regulations.

- For the MSP process, the commissioner “assesses the potential providers and chooses, taking into account the key criteria and applying the basic selection criteria, the most suitable provider to whom to make an award” (Regulation 10).
- By contrast, in the competitive process, the commissioner “assesses any offers received in accordance with the contract or framework award criteria” (Regulation 11).

113. Under the PSR regulations, commissioners can choose between the MSP process and Competitive process. SSOT, however, having chosen the MSP process, then went on to ask key criteria questions where the vast majority were about “the offer” potential providers were making, rather than about assessing potential providers or the market landscape more generally.⁵⁰ As a result, SSOT was effectively conducting a competitive exercise not through the Competitive process but via the MSP process.⁵¹

114. SSOT told the Panel that if it had used the Competitive process “we would have taken a much more detailed and forensic look at the providers with full interviews, site visits and quality inspections”.⁵² The implication is that the competitive exercise conducted

⁴⁷ MLCSU, Annex 1: Most Suitable Provider process (Provider Selection Regime) Guidance, Provision of All Age Continuing Care (AACC) service, NHS Staffordshire and Stoke-on-Trent Integrated Care Board (SSOT ICB), pp.9-10.

⁴⁸ SSOT, Response to Case Panel’s additional information request, 15 August 2024.

⁴⁹ SSOT, Response to Case Panel’s additional information request, 16 August 2024.

⁵⁰ The Panel considers that at least 21 of the 29 questions asked by SSOT in relation to the key criteria focused on suppliers’ offer (i.e. their specific approach to the contract), rather than building SSOT’s understanding of suppliers’ capabilities. These were questions 1-3, 5, 7, 8, 11-16, 18-23 and 26-29.

⁵¹ The Panel appreciates that a commissioner will need to reach agreement with a provider identified through the MSP process to the terms that it will supply the relevant health care service. However, the MSP process does not allow for providers’ bids on their offer to be assessed via the conduct of the MSP process.

⁵² SSOT, Response to Case Panel’s additional information request, 16 August 2024.

by SSOT, through the MSP process, was much less rigorous than if SSOT had conducted a competitive exercise through the Competitive Process. SSOT's approach was to the detriment of providers that participated in the MSP process, and did not have their offers evaluated to the extent that would have been the case had SSOT used the Competitive process.

115. The Panel finds that SSOT, as a result of running a competitive exercise under the auspices of the MSP process, did not act fairly, transparently or proportionately and as a result breached its obligations under the PSR regulations.

7.3.4 SSOT's methodology for evaluating responses to the key criteria

116. This section considers whether SSOT's methodology for evaluating providers' responses to the key criteria was consistent with its obligation to act fairly and transparently.
117. Potential providers that satisfied the basic criteria, namely MPFT and Xyla, had their responses to the key criteria considered at a meeting of the Assessment Panel. Responses to the key criteria questions were graded as 'meets requirements' or 'does not meet requirements'. Guidance on how the Assessment Panel would grade responses was set out in the documentation supplied to interested providers.⁵³
118. The Statutory Guidance says that "when following the most suitable provider process, the relevant authority ... must *decide the relative importance of each of the key criteria* for the service in question ... It is advised that for provider selection processes with higher contract values, greater focus is given to value for money and the quality and efficiency of the services to be provided, unless this means the service does not best meet the needs of the population it is serving" (emphasis added).⁵⁴
119. SSOT told the Panel that it had decided the relative importance of each of the key criteria by asking more questions on some key criteria than on others. In particular, SSOT asked ten questions on quality and innovation, seven questions on integration, collaboration and service sustainability, five questions on value, four questions on improving access, reducing health inequalities and facilitating choice, and three questions on social value.
120. SSOT did not, however, supply potential providers with information setting out this approach, and in the absence of such information SSOT's approach was by no means obvious. It is, for example, possible to assign the same weight to each of the key criteria while at the same time asking more questions on some of the key criteria than on others. There was no reason why it would have been clear to potential providers that SSOT's approach was the one it told the Panel it had adopted.
121. Further, potential providers not only had no information on SSOT's view of the relative importance of each of the criteria, they also had no information on SSOT's view of the relative importance of individual questions within each of the key criteria or on how SSOT would make an overall assessment of each provider.

⁵³ MLCSU, Annex 1: *Most Suitable Provider process (Provider Selection Regime) Guidance, Provision of All Age Continuing Care (AACC) service, NHS Staffordshire and Stoke-on-Trent Integrated Care Board (SSOT ICB)*, pp.9-18.

⁵⁴ See p.16 of the Statutory Guidance.

122. The Panel finds that SSOT did not act fairly in relation to its methodology for evaluating responses to the key criteria nor transparently in its communication of that methodology to potential providers and, as a result, breached its obligations under the PSR regulations.

7.3.5 SSOT's evaluation of the MPFT and Xyla submissions

123. This section considers whether SSOT's treatment of MPFT's submission gave it an unfair advantage in the provider selection process.

124. As set out in paragraphs 50 to 53, an Assessment Panel was formed by SSOT to evaluate providers' submissions. On 27 May, Assessment Panel members individually reviewed all nine submissions, including providers' responses to both the basic and key criteria.

125. On 28 May, the Assessment Panel met, and agreed that MPFT was the only provider to pass all of the basic criteria, and that all of MPFT's responses to the key criteria were of a sufficient standard to be assessed as "meets requirements". However, the Assessment Panel also concluded that further information was required from MPFT regarding its response to several questions. Xyla's response to the basic criteria was failed due to a "technical error" in answering a question about its CQC registration.

126. Following the 28 May meeting, the Assessment Panel discussed plans to request further information from MPFT with its legal advisers. At this meeting, it was advised that as Xyla had only failed the basic criteria due to a technical error, Xyla's participation in the provider selection process should be reinstated and its response to the key criteria should be evaluated.

127. On 7 June, the Assessment Panel proceeded with requesting further information from MPFT. On 11 June, the Assessment Panel met and considered Xyla's response to the key criteria. The Assessment Panel found that Xyla "did not meet requirements" in relation to several key criteria. It concluded that no further information was needed from Xyla, and Xyla was again eliminated from the provider selection process.

128. The further information requested of MPFT consisted of nine questions, at least seven of which duplicated questions that MPFT had already answered in its submission, and an 'executive level' meeting was held with MPFT to discuss these questions. Of the seven duplicate questions, three questions were on integration, collaboration and service sustainability, two questions were on quality and innovation, and two questions were on value.

129. On 17 June, MPFT provided its response to the Assessment Panel's request for further information. MPFT's response comprised of approximately 30 pages of text, spreadsheets and graphics. This material was considered by the Assessment Panel at a meeting on 18 June.

130. On 20 June, the Assessment Panel recommended that SSOT award the AACC contract to MPFT, and SSOT accepted this recommendation. The paper containing this recommendation said that "X".⁵⁵

⁵⁵ SSOT, AACC Procurement Outcome, June 2024.

131. During this review, the Panel asked SSOT about the opportunity given to MPFT to resubmit its answers to a significant number of the original questions while no further information was requested from Xyla. SSOT said “we already knew what they [MPFT] could do. They just hadn’t necessarily articulated it in terms of some of their responses ... the follow up responses that we had [from MPFT] ... provided that level of confidence and that level of assurance ... So again we knew what we were after, we knew what they were able to provide, and what they were actually delivering for us already through the pilots and through the work they were already doing with us. And it was just that they actually hadn’t articulated it.”⁵⁶

132. The Panel’s view is that MPFT’s response could not have met the threshold for a ‘meets requirements’ grading for each of the key criteria if the Assessment Panel considered that MPFT needed to resubmit its answers to at least seven questions before it could recommend that SSOT award it the AACC contract.

133. In these circumstances, SSOT would have had two options: (a) to reassess its view that it could identify the most suitable provider through the MSP process; or (b) to request further information from Xyla as well as MPFT. Instead, SSOT relied on information about MPFT that it had from outside the provider selection process when deciding that MPFT should have its initial answers graded as ‘meets requirements’ and then have the opportunity to resubmit its answers.

134. As a result, the Panel finds that SSOT did not act fairly when evaluating MPFT’s and Xyla’s submissions against the key criteria, and as a result, SSOT breached its obligations under the PSR regulations.

7.3.6 Feedback to Xyla on its submission

135. This section considers whether SSOT’s refusal to provide feedback to Xyla on its submission was in breach of its obligation under the PSR regulations to act transparently.

136. On 5 July, SSOT published an Intention to Award a Contract notice consistent with the requirements of Schedule 6 of the PSR regulations. This notice must provide “A statement explaining the award decision-makers’ reasons for selecting the chosen provider, with reference to the key criteria”. To meet this requirement, SSOT published the following:

“There were twenty-nine questions divided across the five areas of key criteria which included: Key criteria 1. Quality and Innovation, Key criteria 2. Value, Key criteria 3. Integration, collaboration and service sustainability, Key criteria 4. Improving Access, reducing health inequalities and facilitating choice and Key criteria 5. Social Value.

“Following the receipt of the responses the ICB project panel assessed the responses to determine whether a provider met the requirements. The assessment was completed on a pass/fail basis of the basic selection criteria; and in terms of the key criteria, SSOT ICB reviewed how providers either met or did not meet the ICB’s requirements for each question in the Key Criteria questionnaire.

⁵⁶ Transcript of Panel meeting with SSOT, 30 August 2024.

“The requirements for each question in the Key Criteria questionnaire were set out in the information supplied with the PIN notice (2024/S 000-014425) and each question contained a descriptor of what SSOT ICB's requirements were for that question.

“The rationale for choosing the Most Suitable Provider was based on the panel assurance regarding their responses in all areas of the key criteria, although the panel felt that the responses in relation to both the quality and innovation, and integration, collaboration and service sustainability was strong and these two areas were key components of the both service delivery and future innovation.”

137. The information that must be published in a Schedule 6 notice after an MSP process contrasts with the information that must be made available following a Competitive process. This requires publication of a Schedule 10 notice which similarly contains a statement explaining the decision makers' reasons for selecting the chosen provider, with reference to the key criteria. In addition, unsuccessful providers must receive a communication, as per Schedule 9, setting out reasons why the successful provider was successful and why the unsuccessful provider was unsuccessful.
138. On 16 July, Xyla wrote to SSOT raising concerns about the lack of feedback on its submission. Xyla suggested that it was reasonable for SSOT to provide this feedback and that a failure to provide it would result in SSOT not acting fairly or transparently. SSOT, in its response on 26 July, noted that there is no requirement to provide feedback under the MSP process to “those organisations involved in providing information to assist the ICB in its market assessment”. Further, SSOT said that it had met its obligations through the Intention to Award a Contract notice, and it had acted in a manner that was consistent with the PSR regulations.
139. During the Panel's review, SSOT was asked to comment on the relevance of the overarching requirements for fairness and transparency in relation to Xyla's request for feedback. SSOT told the Panel that:

“The ICB felt that it was difficult when reading the guidance and the regulation as a most suitable provider award was quite challenging for any provider that took the time to help the ICB to understand the kind of market landscape, as in this case through the ICB asking for additional information to help the ICB make its assessment, as PSR does not make any provision for the ICB or the authority to actually provide any feedback” and that “the ICB carefully followed the guidance as set out in Schedule 6 ... and it does not state that the ICB needed to go back to the rest of the market and provide extra feedback on what the ICB had done and how.”
140. SSOT also told the Panel that “it's a fairly unfair thing ... when there's an MSP ... they can send a lot of information in, spend a lot of time and energy and potentially [the] process at the moment as we read it doesn't mean they get any feedback, and I think that's probably unfair and I would equally feel that that was unjustified ... We just were really mindful that we treated [everyone] equally in that process. So there were seven others we also didn't go back to [with] any information and that was because we thought that was required”.⁵⁷
141. Xyla's concern about the lack of feedback from SSOT appears to stem from it participating in a process that felt, from Xyla's perspective, much like a competitive

⁵⁷ Transcript of Panel meeting with SSOT, 30 August 2024.

process. As set out in Section 7.3.3, the Panel has found that SSOT effectively ran a competitive exercise under the auspices of the MSP process, and as a result, it is not surprising that Xyla sought feedback consistent with it being a competitive exercise.

142. The Panel's view is that the PSR regulations do not prohibit the provision of feedback to participants in an MSP process, and that the obligation on relevant authorities to act transparently means that it will generally be appropriate for feedback to be provided where this is requested. The Panel finds that SSOT did not act transparently when refusing to provide feedback on Xyla's submission and as a result breached its obligations under the PSR regulations.

8. Panel Advice

143. In summary, the Panel's findings on the provider selection process carried out by SSOT for the AACC service are as follows:

- First, the Panel has doubts as to whether the PSR regulations are applicable to the AACC service given the nature of the services being provided and the absence of any analysis by SSOT that shows their application. The Panel, however, considers that a finding on this issue is not necessary given its other findings in this review.
- Second, the Panel finds that SSOT did not breach its obligation to act with a view to improving the efficiency in the provision of services by using the MSP process to select a provider for the AACC service. However, the Panel finds that SSOT did not "take into account likely providers and all relevant information" in its initial decision to use the MSP process nor did it do so at any point thereafter while conducting the MSP process. As a result, SSOT's decision to use the MSP process was in breach of the PSR regulations.
- Finally, the Panel finds that SSOT did not act transparently, fairly or proportionately in carrying out the MSP process to select a provider for the AACC service.

144. Given these findings, three options are open to the Panel. The Panel may advise that:

- the breaches of the PSR regulations had no material effect on the SSOT's selection of a provider and SSOT should proceed with awarding the contract as originally intended;
- SSOT should return to an earlier step in the provider selection process to rectify the issues identified by the Panel; or
- SSOT should abandon the current provider selection process.

145. The breaches identified by the Panel have clearly had a material effect on SSOT's selection of a provider, and there is no possibility of SSOT complying with the PSR regulations if it were to return to an earlier step in the provider selection process.

146. As a result, the Panel's advice is that SSOT should abandon the current provider selection process.

147. The Panel also recommends that in any future procurement for the AACC service, SSOT robustly assures itself that it falls within the scope of the PSR regulations.

Failure to do so may mean that SSOT does not select the most appropriate procurement process and may leave SSOT open to further challenge.