Liberating the NHS: Regulating Healthcare Providers

Community Services – Strategy and Policy

Appendix E

1. Introduction

1.1 This briefing note summarises the key messages from Liberating the NHS: Regulating Healthcare Providers and outlines the consultation questions on which the Government is seeking feedback.

1.2 Liberating the NHS: Regulating Healthcare Providers is one of a series of consultation papers which provide detail on the proposals of the recent NHS White Paper, Equity and Excellence: Liberating the NHS. The other consultation papers include: Local democratic legitimacy in health; Commissioning for patients; and Transparency in outcomes. These consultation documents can be downloaded here.

1.3 Responses should be made to Communities and Local Government and Department of Health by 11th October 2010. The Government will publish a response prior to the introduction of a Health Bill later this year.

2. Summary and Policy context

2.1 Equity and Excellence: Liberating the NHS was published on 12 July 2010. This White Paper sets out the Government’s vision for the future organisation of the NHS in England and Wales and is based upon a commitment to put patients at the heart of the NHS, through an ‘information revolution’ and by providing them with greater choice and control.

2.2 Liberating the NHS: Regulating Healthcare Providers provides further information on the White Paper’s proposals for potential additional freedoms
for foundation trusts and the establishment of an independent regulator for health and adult social care. It considers the core purpose of Monitor in its changed role as an economic regulator responsible for regulating prices, promoting competition and supporting service continuity.

3. **Freeing Providers**

3.1 The Government’s intention is to free providers so that they can focus on improving outcomes, be more responsive to patients and innovate. As part of this, the Government intends to build on the overall success of the foundation trust model. Within three years, the Government will support all NHS trusts to become Foundation trusts. It will not be an option for organisations to decide to remain as an NHS trust.

3.2 The Government’s approach is that where specific control mechanisms are needed for providers, these should take effect through regulatory licensing and clinically-led contracting, rather than hierarchical management by regions or the centre. All providers of NHS care should be able to compete on a level playing field, so that they succeed or fail according to the quality of care they give patients and the value they offer to the taxpayer.

3.3 The proposal is that in the future, Foundation Trusts will be regulated in the same way as any other provider, whether from private or voluntary sector. Patients will be able to choose care from the provider they think to be the best.

**Continuity and additional potential freedoms for foundation trusts**

3.4 The legislative framework for foundation trusts will be retained and they will therefore continue to have a unique legal form. This will ensure that any surplus and proceeds from the sale of assets will continue to reinvested in the organisation or used to repay debt rather than distributed externally.

**Private income**

3.5 The Government will bring forward provisions to repeal the cap on foundation trusts’ private income, currently fixed at the percentage of their income that derived from private sources before the organisation became a foundation trust. The Government feels that repealing this this cap will allow foundation trusts to broaden the scope of their activity and take advantage of the reputation of the NHS brand internationally, whilst maintaining their primary purpose of providing NHS services.
1. Do you agree that the Government should remove the cap on private income of foundation trusts? If not, why; and on what practical basis would such control operate?

Statutory borrowing limits

3.6 Foundation trusts are already free to borrow from banks and other private sector lenders for improvements to facilities and equipment. Unlike voluntary or private providers, they are subject to statutory controls whereby Monitor can set limits on the amount that they can borrow. The Government is considering whether maintaining these statutory controls will remain necessary in the light of the proposed new system of economic regulation which will include price setting and failure as well as strong incentives for financial discipline.

2. Should statutory controls on borrowing by foundation trusts be retained or removed in the future?

Changing the constitution and configuration of a foundation trust

3.7 The Government proposes allowing foundation trusts to change their constitutions, with the consent of their boards of governors and directors but no longer requiring the specific consent of Monitor. Foundation trusts would still need to ensure that their constitution is consistent with the legal form prescribed in legislation. They would, therefore, still be required to notify Monitor of changes to their constitutions, although this would not be subject to regulatory approval.

3. Do you agree that foundation trusts should be able to change their constitution without the consent of Monitor?

3.8 The Government proposes to ensure that the law makes it easier for a foundation trust to merge, demerge or acquire another foundation trust or NHS trust, and that legal requirements about a foundation trust's legal status, elections and appointments do not hinder this process. Like other organisations, NHS Trusts and Foundation Trusts will be subject to merger controls to protect competition.

4. What changes should be made to legislation to make it easier for foundation
trusts to merge with or acquire another foundation trust or NHS trust? Should they also be able to de-merge?

Governance

3.9 The Government has no intention of requiring any existing foundation trust to change its governance model. However, it is interested in exploring whether there would be benefit in allowing some additional flexibility for foundation trusts, for example to increase staff influence.

3.10 The Government proposes that foundation trusts could be given the flexibility to adapt their governance arrangements to suit particular circumstances, with the consent of their governors. This flexibility could be available for all foundation trusts or alternatively could be restricted to more mature foundation trusts.

3.11 The White Paper proposes that some foundation trusts could be led only by employees. The Government considers that it might be possible to define a sub-group of providers that could be allowed to adopt a staff-only membership model from the start of their existence as foundation trusts e.g. organisations that only provide community services.

5. What if any changes should be made to the NHS Act 2006 in relation to foundation trust governance?

Taxpayer investment in foundation trusts

3.12 The taxpayer has an interest in foundation trusts through public dividend capital and loans owed to the Department of Health. Should foundation trusts fall into financial failure, this could necessitate writing off some element of this investment. Under the current regime, Monitor has a role in managing these risks. With Monitor to act as an economic regulator it will have to avoid having a special interest in or giving preferential treatment to foundation trusts as a group of providers, compared with any other group of providers. In the future, the role could be undertaken by the Department of Health (DH) or a third party working on behalf of the DH.

6. Is there a continuing role for regulation to determine the form of the taxpayer’s investment in foundation trusts and to protect this investment? If so, who should perform this role in future?

7. Do you have any additional comments or proposals in relation to increasing
4. Economic regulation

4.1 Liberating the NHS set out proposals to introduce a system of independent economic regulation to sit alongside independent quality regulation. The rationale for economic regulation is to protect the public interest in the provision of services, particularly where communities are highly dependent on one, or very few, providers.

4.2 Monitor will be developed into the economic regulator for all health and adult social care in England. Monitor’s principal duty will be to protect the interests of patients and the public in relation to health and adult social care services, by promoting competition where appropriate and applying regulation where necessary.

4.3 Monitor will license providers of NHS services in England and exercise functions in three areas: regulating prices, promoting competition and supporting service continuity. Monitor’s statutory remit will be limited to the provision of health and adult social care services. It will continue to have the status of a non-departmental public body (NDPB), like the Care Quality Commission (CQC) and the future NHS Commissioning Board.

4.4 Monitor will need to balance multiple objectives, which may at times come into conflict. Where it appears to Monitor that any of its duties conflict with each other in a particular case, it will need to take a balanced judgement and set out a clear rationale for its decision.

4.5 Monitor’s regulatory decisions will be subject to a range of further checks and balances including obligations to consult with interested parties and to carry out impact assessments of the costs and benefits of new regulation.

5. Licensing

5.1 In the proposed new system, the Care Quality Commission (CQC) and Monitor will be jointly responsible for administering an integrated and streamlined registration and licensing regime.

5.2 Monitor will be required to license some providers of NHS services as part of delivering its regulatory functions. This will supersede and replace some
aspects of Monitor’s existing authorisation and compliance regime. It will be a requirement of Monitor’s licence that organisations are registered with CQC.

5.3 The CQC and Monitor will retain separate responsibilities for their parts of the regime. CQC will continue to register providers of health and adult social care while Monitor will license providers of NHS healthcare services.

5.4 Monitor’s powers to regulate prices and license providers will only cover NHS services. Providers of other care services, including adult social care, would still be required to register with the CQC but would not be required to hold Monitor’s licence.

5.5 Monitor will be responsible for developing a general licence setting out conditions for all relevant providers of NHS services. The general licence conditions are likely to include:

- a requirement that an organisation is a fit and proper body to provide NHS services;
- requirements to provide Monitor with details on provision of NHS services, to notify them of proposed changes to services and to report information; and
- other rules to protect patients’ and taxpayers’ interests.

5.6 Monitor will also be able to set special licence conditions for individual providers in certain cases, either because a provider enjoys a position of market power in a local area or where there is a need for additional regulation to protect service continuity. Special licence conditions could include additional requirements on providers to promote choice, for example, requirements to provide certain services to competitors and requirements to protect continuity of services, for example, requirements to pre-notify the regulator of plans to stop providing the service.

8. Should there be exemptions to the requirement for providers of NHS services to be subject to the new licensing regime operated by Monitor, as economic regulator? If so, what circumstances or criteria would justify such exemptions?

9. Do you agree with the proposals set out in this document for Monitor’s licensing role?

Enforcement powers

5.7 Monitor will have a range of powers to ensure that providers comply with their licence conditions, including the power to fine providers who fail to comply
with licence conditions. They may also include the power to suspend, alter or revoke a licence for failure to comply with its conditions.

Appeals against licence modifications

5.8 Monitor will have an obligation to review the need for and functioning of the general and special licence conditions on a periodic basis. In addition, groups of providers will have the right to appeal to the Competition Commission if there is significant opposition to Monitor’s proposed changes to the general licence conditions. Individual providers will also have the right to appeal regarding any proposed changes to their special licence conditions.

10. Under what circumstances should providers have the right to appeal against proposed licence modifications?

Fees

5.9 Monitor will need appropriate resources in order to carry out its functions – the Government proposes that Monitor should fund its regulatory activities for licensed providers by charging fees and receive grant-in-aid from government if needed to support other activities. The Government notes that this will ensure that the regulator is independent from Government, that providers subject to regulation pay directly and that Monitor is incentivised to ensure that regulation is proportionate.

11. Do you agree that Monitor should fund its regulatory activities through fees? What if any constraints should be imposed on Monitor’s ability to charge fees?

6. Price regulation and setting

6.1 Monitor will have responsibility for setting efficient, or maximum prices, for NHS funded services in order to promote fair competition and drive productivity. Monitor and the NHS Commissioning Board will need to work closely together to decide which services should be subject to national tariffs and to develop appropriate currencies for pricing and payment purposes.

6.2 Monitor’s role will also include setting prices or price caps for services, subject to national tariffs. Monitor will be responsible for devising a pricing
methodology. It will be required to run a public consultation process, engaging with both the NHS Commissioning Board and providers.

6.3 Monitor will have a duty to have regard to the need to make best use of limited NHS and social care resources, although primary responsibility for managing within the limits of these resources will be for the Board and for local commissioners.

12. How should Monitor have regard to overall affordability constraints in regulating prices for NHS services?

6.4 Both purchasers and providers will be able to challenge aspects of Monitor’s pricing decisions. The NHS Commissioning Board will be able to appeal to the Competition Commission if it opposes Monitor’s methodology for setting tariff prices. Providers will also have the right to appeal to the Competition Commission.

13. Under what circumstances, and on what grounds, should the NHS Commissioning Board or providers be able to appeal regarding Monitor’s pricing methodology?

6.5 The Government proposes that Monitor will have powers to modify tariffs for individual providers on rare occasions to sustain the provision of services. In carrying out this function, Monitor would need to have regard to its duties to protect the interests of patients and the public, to promote efficiency and to ensure that modifications do not give an unfair competitive advantage or constitute unlawful state-aid.

6.6 Commissioners and providers will be able to apply to Monitor to set a differentiated price or to arbitrate in the case of pricing disputes in the competitive market. Monitor will need to consult the Commissioning Board on proposed variations to tariff prices in individual cases, and work closely together when developing tariffs and prices. They will be under an obligation to consult with each other on the services subject to national tariffs, contract currencies, funding models and to agree variations to the tariff in individual cases in relation to some pricing disputes.

6.7 The Department of Health will be responsible for promoting effective working between the Board and Monitor.

14. How should Monitor and the Commissioning Board work together in
7. Promoting competition

7.1 The Government will create a presumption that all patients will have choice and control over their treatment and choice of any willing provider. The NHS Commissioning Board will have a duty to promote patient choice. Monitor would have a duty to promote competition.

Preventing anti-competitive behaviour

7.2 Monitor will have concurrent powers with the Office of Fair Trading (OFT) to apply the Competition Act in addressing restrictions on competition in the health and adult social care sectors. The government proposes that Monitor should:

- carry out ‘market studies’ to investigate markets where competition is not functioning properly;
- advise Government and the NHS Commissioning Board on changes to allow competition to function effectively;
- have powers to refer dysfunctional markets or barriers to competition to the Competition Commission for investigation;
- have powers to enforce competition law and impose sanctions and remedies in relation to providers of health or adult social care services irrespective of whether they are required to hold a licence;
- have powers to set general license conditions for all licensed providers
- have powers to set special licence conditions for some individual providers to protect competition. These might include requirements to accept services, such as diagnostic tests, from other providers where clinically appropriate, requirements for providers to publish their terms and conditions for providing services to other providers or requirements covering a provider’s capital expenditure in certain circumstances.

15. Under what circumstances should Monitor be able to impose special licence conditions on individual providers to protect choice and competition?

16. What more should be done to support a level playing field for providers?

Anti-competitive behaviour by commissioners

7.3 Legislation will be introduced setting out the duties of the NHS Commissioning Board and commissioners to promote choice, act transparently and without discrimination in all commissioning activities and prohibit agreements or other actions which restrict competition against patients’ and taxpayers’ interests.
Monitor will have powers to investigate and remedy complaints regarding commissioners’ procurement decisions or other anticompetitive conduct, acting as arbiter.

17. How should we implement these proposals to prevent anti-competitive behaviour by commissioners? Do you agree that additional legislation is needed as a basis for addressing anticompetitive conduct by commissioners and what would such legislation need to cover? What problems could arise? What alternative solutions would you prefer and why?

Regulation of mergers
7.4 The OFT and Competition Commission will be the sole organisations with responsibility for investigating mergers in health and social care services. Legislations may be required to modify the Enterprise Act 2000 to take account of the specific characteristics of mergers in healthcare.

8. Supporting continuity of services
8.1 There will be a range of safeguards in the new system to ensure the continuity of care, even when the providers of services may change. The objective of these measures is to ensure that there is a smooth transfer if commissioners wish to replace existing services with better alternatives.

8.2 In future GP commissioning consortia will commission the vast majority of NHS services for patients and will therefore retain primary responsibility for ensuring the continuity of service provision.

8.3 Monitor may also need to intervene to ensure continued access to key services in some circumstances. Monitor already has the power to define ‘mandatory services’ which foundation trusts are not allowed to withdraw. Under the proposed new approach, Monitor will be able to classify services which require additional regulation and set conditions in providers’ licences to protect the continuity of these services. These special licence conditions could include the protection of assets needed to provide services or a requirement on providers to give notice of planned changes to the services. Criteria for defining additional regulated services are likely to focus on identifying where a provider is the only provider or one of very few providers in a local area.

8.4 In addition, Monitor would be able to trigger application of a special administration regime to ensure the continuity of additionally regulated
services, and ensure the assets used to deliver them are protected in the event of insolvency.

18. Do you agree that Monitor needs powers to impose additional regulation to help commissioners maintain access to essential public services? If so, in what circumstances, and under what criteria, should it be able to exercise such powers?

Special administration, insolvency and risk pooling

8.5 Monitor will be responsible for establishing funding arrangements to finance the continued provision of services in the event of special administration. It will have 14 days to trigger special administration to protect additionally regulated services and will be responsible for establishing the funding arrangements to finance the continued provision of services in the event of special administration.

19. What may be the optimal approach for funding continued provision of services in the event of special administration?

20. Do you have any further comments or proposals on freeing foundation trusts and introducing a system of economic regulation?

21. What action needs to be taken to ensure that no-one is disadvantaged by the proposals, and how do you think they can promote equality of opportunity and outcome for all patients, the public, and where appropriate, staff?

If you require any further information on this consultation, please contact a member of Community Services Strategy and Policy on 0208 314 8289 or e-mail edward.knowles@lewisham.gov.uk