

LIBERATING THE NHS: REGULATING HEALTHCARE PROVIDERS

A consultation on proposals Executive summary

Introduction

1. The White Paper, *Equity and excellence: Liberating the NHS*, set out the Government's strategy for the NHS. Our intention is to create an NHS which is much more responsive to patients, and achieves better outcomes, with increased autonomy and clear accountability at every level.
2. The consultation document, *Regulating Healthcare Providers*, invites views on our proposals to free foundation trusts from central Government control and to develop their current regulator, Monitor, into an independent economic regulator for health and adult social care.

Increasing freedoms for foundation trusts

3. The Government's intention is to free providers so that they can focus on improving outcomes, be more responsive to patients, and innovate. In doing this, we will build on the overall success of the foundation trust model. All NHS trusts will be supported to become, or be part of, a Foundation Trust within three years.
4. Foundation trusts will continue to have as their principal purpose the provision of goods and services to the health service in England. The broad statutory framework will ensure that any surplus are reinvested in the organisation, not distributed externally.
5. Ahead of bringing forward legislation, we are seeking views on the options for increasing Foundation Trusts' freedoms, in particular on proposals to:
 - repeal the arbitrary cap on the amount of income foundation trusts may earn from private patients to reinvest in their services; allowing trusts to expand the services they can offer for the benefit of patients, whilst maintaining their primary purpose of providing goods and services to the health service, and allowing the NHS to take proper advantage, for the benefit of this country, of the power of its brand abroad;
 - remove statutory controls over foundations trusts' borrowing limits. The Government is consulting over whether these controls will remain relevant, within a new system of economic regulation with strong incentives for financial discipline;
 - allow foundation trusts to change their own constitutions to meet their local needs, replacing the current requirement to obtain the consent of the regulator with more robust internal checks. In making changes foundation trusts would need to ensure that their constitution is consistent with the legal form prescribed in legislation;

- make it easier for foundation trusts, with their focus on providing services to the NHS, to choose how best to evolve and organise themselves and cooperate to make themselves more effective. We propose to remove unnecessary barrier to allow trusts to more easily merge with or acquire another foundation trust or NHS trust, or demerge; and
 - allow flexibility for some foundation trusts to adapt their governance arrangements to suit their particular circumstances. The Government has no intention of requiring or encouraging any existing foundation trust to change its governance model. However, we are interested in allowing some additional flexibility, for example to increase staff influence. For example, there may be a case for some foundation trusts to be led only by employees, for example smaller organisations such as those providing community services or those who have few capital assets that were paid for by the taxpayer, below a specified threshold.
6. The consultation document also considers the arrangements for the management of the taxpayers' investment in foundation. Currently, Monitor has a role in managing this investment and minimising the risk and cost of it being written off in the event of a foundation trust's financial failure. In the future it will be important for Monitor, acting as economic regulator, to avoid having a special interest in foundation trusts as a group of providers. We proposed that the role could be undertaken by the Department of Health or a third party working on behalf of the Department – this could include Monitor if the independence of the regulator role is maintained.

Economic Regulation

7. As we move away from a system of top-down performance management, Monitor will be developed into the economic regulator for all of health and adult social care in England. The Government's approach is that where specific control mechanisms are needed for providers, these should in general take effect through regulatory licensing and clinically-led contracting, rather than hierarchical management by regions or the centre.
8. Monitor will be responsible for regulating all providers to promote efficient, financially sustainable service provision. It will operate independently of Government so that providers have confidence in a stable, rules-based system – without the risk of political interference – to make long-term investments in services. All providers of NHS care should be able to compete on a level playing field with patients able to choose care from the provider they think the best.
9. Monitor will continue to have the status of a non-departmental public body and will be required to account to central government for the use of its resources.

Monitor's functions

10. Monitor's principal duty will be to protect the interests of patients and the public in relation to health and adult social care services. Monitor will have powers to license providers of NHS services and core functions to regulate prices for NHS services, where needed, promote competition, and support service continuity. Monitor will be required to exercise its functions in a manner consistent with the Secretary of State's duty to promote a comprehensive health service in England.

Licensing

11. In the new system Monitor and the Care Quality Commission will be jointly responsible for administering an integrated and streamlined registration and licensing regime. Our aim is for a streamlined process that helps to minimise bureaucracy and ensures that regulation is proportionate.
12. 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 - for example that it is a recognised legal body, with a properly constituted board, clear governance arrangements and a business plan. We envisage this replacing Monitor's current role in authorising foundation trusts.
13. Monitor will have a range of powers, including fines, to ensure that providers comply with their licence conditions. We propose that Monitor should fund its regulatory activities for licensed providers by charging fees and receiving grant-in-aid if needed to support other activities.

Price regulation and setting

14. Monitor will be responsible for setting efficient prices, or maximum prices, for NHS-funded services in order to promote fair competition and drive productivity. Monitor and the NHS Commissioning Board will work closely in deciding which service should be subject to national tariffs.
15. The tariff setting methodology should be made transparent and fully open to scrutiny. Providers will have right of appeal to the Competition Commission if they oppose Monitor's methodology.
16. On rare occasions we propose Monitor should have powers to modify tariffs for individual providers where it is in the interest of patients and the public.

Promoting Competition

17. We propose that in carrying out its functions Monitor would have a duty to promote competition, where appropriate including:
 - setting licence conditions to prevent anti-competitive behaviour
 - investigating anti-competitive conduct under the Competition Act 1998

- Carrying out studies and referring malfunctioning markets to the Competition Commission
- Investigating complaints about commissioning after referral to the NHS Commissioning Board
- Providing advice to Government and NHS Board on barriers to competition / level playing field

Supporting Continuity of services

18. Although commissioners will have the lead responsibility for ensuring continuity of services, Monitor may also need to intervene to ensure continued access to key services in some limited circumstances. Monitor will be able to classify services which require additional regulation as additionally regulated services and set conditions in providers' licences to protect the continuity of those services. Special licence conditions could include controls on the disposal of the assets needed to provide key services or requirements to give notice of planned changes to services.
19. We will also build protections to ensure the continued safe provision of additionally regulated services in the event that a provider becomes insolvent. A special administration regime will work as in other sectors, providing an alternative to ordinary insolvency procedures. Monitor will be responsible for establishing funding arrangements to finance the continued provision of services in the event of special administration. It is likely that it will initially do this by establishing a funding risk pool raised from levies on the providers of regulated services.

Conclusion and summary of consultation questions

20. The consultation invites comments on proposals for freeing foundation trusts and establishing independent economic regulation of providers by 11 October 2011. The Government proposes to make the changes through its forthcoming Health Bill, planned for introduction this autumn.

Responding to the Consultation

21. We are consulting on how best to implement the changes outlined in this summary and draw your attention to the full version of this consultation document and to the White Paper and other related consultation documents, available on the Department of Health website at www.dh.gov.uk/liberatingthenhs. Responses to the questions in the full consultation document should be sent to nhswhitepaper@dh.gsi.gov.uk or to the White Paper Team, Room 601, Department of Health, 79 Whitehall, London SW1A 2NS.