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The Centre for Public Scrutiny
'Equity and Excellence' – Summary of Consultation Response

Introduction

The Government published its response to the public consultation on the Healthcare White Paper 'Equity and Excellence' on 15 December 2010. A link to the response document is here:

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_122661

This summary is not a critique of every aspect of the response – it is intended to relate to key themes that CfPS initially identified in its original summary of the Healthcare White Paper.

The response document focuses mostly on commissioning, local democratic legitimacy and regulating providers. There will be separate responses to the consultation papers on the NHS Outcomes Framework, the 'Information Revolution' and 'Extending Patient Choice'.

The Health and Social Care Bill is expected to be introduced in Parliament in January.

Changing the structure of the NHS

GP practices will have flexibility to decide how they come together to form consortia and how these consortia evolve over time, subject to being able to demonstrate to the NHS Commissioning Board, when applying to be established, that they have workable arrangements to enable them to carry out their statutory duties. However, there is to be a phased approach by setting up a programme of GP consortia pathfinders. Pathfinder consortia have already been announced, testing the different elements involved in GP-led commissioning and enable emerging consortia to get more rapidly involved in current commissioning decisions. The pathfinders will operate under existing legislation, but they will provide valuable early learning and momentum.

As part of their application to the NHS Commissioning Board for establishment, consortia will have to submit a proposed constitution, and this will be publicly available. The Bill will provide that each consortium's constitution must include, as a minimum: the name and members of the proposed consortium; the geographic area for which the consortium will be responsible (for the purposes of certain prescribed responsibilities such as securing emergency care); arrangements for discharging their statutory functions (which will include public and patient engagement, and multi-disciplinary working);

procedures for decision-making and managing conflicts of interest; and arrangements for securing the effective participation of the consortium's members. To reinforce the requirement that governance arrangements must be robust, the NHS Commissioning Board will also have the power to issue guidance to consortia on the form and content of their proposed constitution, drawing for example on the principles of good governance in public life.

Consortia will have a duty, before the start of each year, to prepare commissioning plans, including proposals for how they intend to use their commissioning budget and how they intend to improve outcomes for patients. Consortia will need to discuss these proposals with local health and wellbeing boards to ensure that they reflect joint strategic assessments of need and joint health and wellbeing commissioning strategies.

The Government considers that requiring there to be a statutory management board for each consortium would be over-prescriptive; and that placing legislative requirements for there to be lay or patient participation in the governance of consortia is unlikely to work. The Government does not wish to discourage consortia from developing arrangements for lay or patient involvement but believes that consortia should make their own decisions on this.

To support public accountability, consortia will also be required to make public their remuneration arrangements, to hold an annual general meeting that is open to anyone, make their commissioning plans available to the public, and publish an annual report which includes consideration of how well they have discharged their new joint arrangements with local authorities. The annual report will also be the place where GP consortia reflect the patient and public consultations that have taken place. This is an aspect that CfPS will continue to lobby on and we will be working with GP Consortia to develop robust non-professional input and to become transparent, inclusive and accountable organisations.

The NHS Commissioning Board will have a vital role in providing national leadership for driving up the quality of care, including safety, effectiveness and patients' experience, promoting patient and public involvement, and the promotion of innovation and integration across the NHS, by supporting consortia in a number of ways. It will be for the shadow NHS Commissioning Board to take forward work on developing the Commissioning Outcomes Framework with the support of NICE. To help maintain momentum, the Department will publish a discussion document early in 2011, seeking more detailed views on possible features of the framework, and we will ask NICE to engage with professional and patient groups on proposals for the design and testing of specific outcome indicators. In response to consultation, commissioning maternity services will sit with GP consortia rather than being commissioned nationally.

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The Government accepts that reform of the provider side of the NHS is likely to take time and needs careful staging. Therefore there will be a longer and more phased transition period. The Government will ensure rapid progress is made on the NHS trust pipeline to foundation trust status and in opening up choice and competition, for example in community services.

There was widespread support for retaining the strengths of the current FT governance model, most responses emphasised the benefits of the existing model and identified risks in allowing greater flexibility. Strong, transparent and accountable governance arrangements are vital to the safe and effective operation of an FT. Taking account of responses, the Government has decided to make a number of changes to clarify responsibilities and make the directors and governors of an FT more directly accountable for their decisions and for the performance of the trust. The Bill will make explicit the duty of governors to hold the board of directors to account, through the chair and non-executive directors; give governors power to require some or all of the trust's directors to attend a meeting; extend to FT directors the duties imposed on directors under company law; require FTs to hold an annual general meeting for its membership, at which members would be able to discuss the trust's annual report and accounts. CfPS will be working with stakeholders to help FT governors and non-executives develop their skills in scrutiny and accountability.

Many respondents agreed that foundation trusts should be able to change their constitution without the consent of Monitor. The Bill will remove the need for Monitor's consent, but retain the essential elements governing the requirements for a constitution. The Bill will strengthen the power of the governors by requiring their agreement to any changes to an FT's constitution. As an additional safeguard, the FT's members could overturn any constitutional change concerning the governors' own role within the organisation, if a significant majority of the members voting at an annual meeting opposed it. FTs will be under a new statutory obligation to inform the regulator about amendments to their constitution, but it will be the responsibility of trusts rather than Monitor to assure themselves that changes are compatible with legislation. However, in case the details need to be refined in the light of experience, the Bill will give power to use regulations to amend the precise voting mechanisms and the amount of support required from members, governors and directors for making changes relating to the constitution and governance of an FT.

The Government is pressing ahead with the proposal to give foundation trusts the flexibility to merge, acquire another FT or NHS trust, or de-merge without the approval of Monitor, to allow them to respond quickly to the needs and choices of patients. However, given the potential impacts on patients, commissioners and staff the Bill will require an FT's governors to agree any merger, acquisition, separation, or any other change that the FT's constitution defines as "significant". CfPS will be working with stakeholders to ensure that processes for changing FT constitutions and operational changes are transparent, inclusive and accountable.

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Changing the culture of the NHS

There was a consensus for a move away from centrally-dictated process targets. The Government is clear that professionals and the public should be involved in every stage of developing outcomes frameworks. The Government will publish three separate frameworks for the NHS, public health and social care which are designed to incentivise collaboration and, in some cases, hold organisations to account for providing integrated services. This recognises that the NHS, social care and public health sectors deliver services through unique delivery systems, each with their own structures and governance, and provides for robust accountability mechanisms, which hold organisations to account for the things they are responsible for delivering. For the NHS, the NHS Commissioning Board will be held to account through the NHS Outcomes Framework. An outcomes framework for social care, published for consultation in November 2010, will allow local areas to hold their councils to account for adult social care. In public health, the Public Health Outcomes Framework, which will be published shortly for consultation, will allow the public to hold their councils and the Secretary of State to account for progress.

The Government also recognises that accountability mechanisms can only do so much to foster integration. It will be the day-to-day behaviours at every level of the system which determine how successfully services collaborate with each other and whether this leads to improved outcomes. The new role for local authorities will help to ensure that the right behaviours are being adopted at a local level, as they promote joined-up working and look across outcomes in health and social care.

The Commissioning Outcomes Framework will be used by the NHS Commissioning Board to hold GP consortia to account for their contribution to improving outcomes and to support ongoing improvements in the quality of commissioning. Failure to achieve the minimum level of performance for a significant portion of the Framework (or key aspects of it) could trigger an intervention by the Board. The measures available to the Board range from directing a consortium to fulfil its functions in a different way to, in extreme cases, dissolving the consortium. The Commissioning Outcomes Framework will be developed by the NHS Commissioning Board, with support from NICE. It will have a strong focus on patient reported outcome measures (PROMs) and patient experience, as well as progress in reducing inequalities. CfPS will be working with stakeholders to ensure that outcomes frameworks are transparent, inclusive and accountable.

Patients and public at the heart

The Bill will place the NHS Commissioning Board under a duty, in exercising its functions, to have regard to the need to promote the involvement of patients and their carers in decisions about the provision of health services to them. The NHS Commissioning Board will also be under a duty to issue guidance on commissioning to GP consortia, which could include guidance about how to fulfil their duties in relation to public and patient involvement.

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The Bill will place duties on the NHS Commissioning Board and GP consortia to, in the exercise of their respective functions, have regard to the need to enable patients to make choices with respect to aspects of health services provided to them.

The Bill will create a more distinct identity for HealthWatch England, led by a statutory committee within the Care Quality Commission (CQC). The HealthWatch England Committee will carry out the work of CQC related to HealthWatch England and have powers to provide advice to the NHS Commissioning Board, Secretary of State for Health, CQC and Monitor. The Bill will include a power for the Government to set out in regulations how the HealthWatch Committee should be appointed. HealthWatch England will agree standards against which local HealthWatch organisations and local authorities could benchmark performance and spread good practice. The Government will set out proposals for governance and stakeholder engagement at the time of the publication of the Bill. An early priority will be to set out how relationships and accountabilities will work, especially the relationship between local authorities, local HealthWatch and HealthWatch England. CfPS will be contributing to these discussions and helping to make relationships work well.

Local HealthWatch will continue LINks' role in promoting and supporting public involvement in the commissioning, provision and scrutiny of local care services. HealthWatch could decide to take into account patients' views, including whether they feel their rights have been met under the NHS Constitution.

The Bill will therefore provide for local authorities to commission HealthWatch to provide advice and information to enable people to make choices about health and social care. This could include helping people to access and understand information about provider performance and safety, and the NHS Constitution.

The Government has decided to phase local authorities' responsibility for commissioning NHS complaints advocacy services, and allow flexibility to commission from other organisations as well as from local HealthWatch - this could be either local HealthWatch, or other organisations with HealthWatch signposting these services to people.

Funding for LINks will therefore continue through the transition into local HealthWatch, and will be enhanced to reflect HealthWatch's responsibilities. Local authorities will have funding for HealthWatch built into their existing allocations, including additional funding for NHS complaints advocacy and providing advice and information for people making choices.

From 2011, the Government will be working with local authorities as they prepare for their new role in commissioning support for choice and complaints advocacy for patients. The Department of Health will publish a transition plan early in 2011, which will provide for LINks to continue to influence local services while local HealthWatch prepares to start exercising functions. From April 2012, local authorities will fund local HealthWatch to deliver most of their new functions. Responsibility for commissioning NHS complaints advocacy will transfer to local authorities in April 2013.

This phased introduction will give local authorities the opportunity to focus on putting in place robust and effective arrangements for the new local HealthWatch roles. It will better ensure that the quality of NHS complaints advocacy services continues throughout the transition to local authority commissioning.

The Government will invite local authorities to develop pathfinder organisations to help with preparations for local HealthWatch. Pathfinders will be able to explore more fully a number of issues that the consultation has raised and look at how these can best be resolved to make sure that HealthWatch gives patients and the public the strong voice that the consultation responses called for. For example, pathfinders will be able to test which models most effectively deliver locally commissioned services to support patient choice and complaints advocacy. They can highlight any potential conflicts that arise between HealthWatch's different roles and test ways of addressing these. Pathfinders for HealthWatch will also be able to test different structures for governance and accountability of local HealthWatch, including the role of hosts. CfPS will be using its experience of supporting the implementation of LINks to inform this process and to help Healthwatch develop as an inclusive, community facing body.

Patients and the public will be empowered through transparency of information about service quality and outcomes, shared decision-making with clinicians about their treatment and care and choice about who will provide their treatment and care. Local Healthwatch will have a strong voice and will have a strong relationship with councils. Patient and public involvement will be a duty for commissioners. CfPS will be continue to lobby about this aspect of the Bill and will work with stakeholders to ensure that patient and public involvement in the new structures is robust and influential.

New roles for councils

The Bill will require the establishment of a health and wellbeing board in every upper tier local authority. The Bill will allow for health and well being boards to include representatives from lower tier authorities. The Bill prescribes that there must be at least one local elected representative. The Bill provides that the other core members of the health and wellbeing board will be GP consortia, the director of adult social services, the director of children's services, the director of public health, and local HealthWatch. Beyond this core, the local authority can decide who to invite and it will have flexibility to include other members. There will be flexibility for the local authority to delegate functions to the health and wellbeing board where it feels appropriate.

To engage effectively with local people and neighbourhoods, boards may also choose to invite participation from local representatives of the voluntary sector and other relevant public service officials. They will also want to ensure input from professionals and community organisations that can advise on and give voice to the needs of vulnerable and less-heard groups. Boards may also want to invite providers into discussions, taking care to adhere to the principles of treating all providers, existing or prospective, on a level playing field. CfPS will be working with Boards to ensure they develop transparent, inclusive and accountable practices.

At present JSNA obligations extend only to its production, not its application. The Government is therefore introducing in the Bill a new legal obligation on NHS and local authority commissioners to have regard to the JSNA in exercising their relevant commissioning functions. Health and wellbeing boards should have to develop a high-level "joint health and wellbeing strategy" (JHWS) that spans the NHS, social care and public health, and could potentially consider wider health determinants such as housing, or education.

Councils and consortia will be required to have regard to the joint strategic needs assessment, they will also be under a new statutory duty to have regard to the JHWS; health and wellbeing boards will be able to consider whether the commissioning arrangements for social care, public health and the NHS, developed by the local authority and GP consortia respectively, are in line with the JHWS; the health and wellbeing board will be able to write formally to the NHS Commissioning Board and the GP consortia if, in its opinion, the local NHS commissioning plans have not had adequate regard to the JHWS. Equally, it will be able to write to the local authority leadership if the same is true of public health or social care commissioning plans; and when GP consortia send their commissioning plans to the NHS Commissioning Board, they will be under an obligation to state whether the health and wellbeing board agrees that their plans have held due regard to the JHWS and send a copy of their plans to the health and wellbeing board at the same time.

Local authorities may well wish to use health and wellbeing boards to consider wider health determinants such as housing and leisure, or co-ordinating commissioning of children's services. Health and wellbeing boards could become a vehicle for driving wider place-based initiatives, such as the community budget areas announced in the recent Spending Review, focussed on helping turn around the lives of families with multiple problems, improving outcomes and reducing costs to welfare and public services by enabling a more flexible and integrated approach to delivering the help these families need.

The Government aims to accelerate the introduction of health and wellbeing boards through a new programme of early implementers. CfPS will be working with stakeholders to ensure that there is robust scrutiny and accountability of these emerging arrangements.

The Government proposed that the functions exercised by the health overview and scrutiny committee (OSC) would be subsumed within the health and wellbeing board. Respondents were of one voice in saying that the Department had got this wrong. The Department is persuaded that its original proposal was flawed. The Bill will not therefore confer the health scrutiny function on health and wellbeing boards. The Government has acknowledged that there are many examples of very effective health OSCs, undertaking excellent work. CfPS is delighted with this recognition and is grateful to all those who provided comments on this aspect of the White paper proposals.

This doesn't mean that health scrutiny will remain exactly as now. Wider government policy is to give local authorities greater freedom to discharge its functions in different ways. Local authorities will have a new freedom and flexibility to discharge their health scrutiny powers in the way they deem to be most suitable – whether through continuing to have a specific health OSC, or through a suitable alternative arrangement. To enable this flexibility, the Bill will confer the health overview and scrutiny functions directly on the local authority itself. CfPS will be working with stakeholders to support the development of health scrutiny, based on our four principles of good scrutiny.

Given the changes proposed to the delivery of scrutiny functions, CfPS will be working with stakeholders to consider how local HealthWatch organisations relate to the delivery of local authority scrutiny functions, particularly through the pathfinders and early implementers.

In addition to being consulted on the designation of what services are subject to additional regulation (that is, services that need protecting from failure in provision), the local authority will be able to refer decisions about significant changes to any designated services to the Secretary of State. CfPS will be working with stakeholders to provide support for consultations and referrals relating to service changes.

To ensure that the health scrutiny model is consistent with other forms of scrutiny in local authorities, and as democratic as possible, any decision to refer a substantial service change proposal should be triggered by a meeting of the full council. This is a significant change to the autonomy of overview and scrutiny committees that have previously been able to refer changes without reference to Executive Cabinets or full council. This is an aspect that CfPS will continue to lobby on.

The exception to this will be if a number of councils choose to establish a joint scrutiny arrangement, in which case the joint OSC will hold the referral power. When local authorities establish joint OSCs, they will do so on the basis that at an early stage they agree for the decisions of the joint OSCs to be binding on all participating councils. The Department is also considering revisions to the regulations governing referrals, so when deciding to make a referral, local authorities are obliged to publish a timescale for the decision-making process and take account of a wider range of considerations including the duties on NHS commissioners to improve the safety, effectiveness and patient experience of services, and the need for services to be financially sustainable. There will be consultation on these proposed changes to the scrutiny regulations and CfPS will continue to lobby about these aspects.

In future, the local authority's right of referral will apply in relation to any type of provider of NHS-funded services, whatever their governance arrangements and ownership structure. The Bill will include a regulation making power that can enable the Secretary of State to direct NHS commissioners (either directly in the case of the NHS Commissioning Board, directly or via the NHS Commissioning Board in the case of GP consortia) to stop reconfigurations of those services subject to additional regulation, when they are referred to him.

This is one of the few occasions, other than in an emergency, or possibly in complying with EU law, when the Secretary of State will have any ability to interfere with an individual commissioner or provider. In making decisions, the Secretary of State will, as now, be guided by the Independent Reconfiguration Panel, and additionally be required to take account of the safety, effectiveness and patient experience of services and the need for services to be financially sustainable.

The Government intends to take the important step of significantly extending the powers relating to the scrutiny function of local authorities. At present, health is unique amongst all local authority scrutiny arrangements in having powers for the local authority to require autonomous providers to attend scrutiny meetings. This power currently extends to NHS trusts, foundation trusts and primary care trusts. CfPS suggested that the scrutiny powers should be strengthened so that "*any provider of health and social care paid for by public funds should be under an obligation to be transparent, inclusive and accountable for how they plan and deliver services.*" The Bill will enable the Government to extend the powers of local authorities to enable effective scrutiny of any provider of any NHS-funded service, including, for example, primary medical dental or pharmacy services and independent sector treatment centres, as well as any NHS commissioner. The powers will also include scrutiny of local public health services.

They will include the ability to require any NHS funded providers or commissioners to attend scrutiny meetings, or to provide information. In this way local democratic scrutiny will be increased very substantially. The proposed powers for the local authority to scrutinise matters relating to GP consortia's commissioning functions is a very important way of ensuring local public accountability. CfPS is delighted that scrutiny powers are being extended and will be working with stakeholders to ensure the new arrangements work constructively.

Conclusion

Subject to Parliamentary approval, the health and wellbeing board will become a statutory committee of the local authority at the same time that GP consortia take on responsibility for the NHS budget. Although boards will only formally assume their powers and duties in April 2013, they will come into existence in advance of this date. Many areas are already well advanced in their approach to integrated working, and are thinking about and beginning to model how these future arrangements might work. It is important that the system learns from these areas. The Department will shortly write to local authorities inviting interest in becoming an early implementer and to clarify the key transition milestones as they impact upon local government. Subject to the scale of interest, the Department will then work with the early implementers to establish a shared development agenda and explore key issues. CfPS will be working with stakeholders to ensure that the new arrangements build on foundations of transparency, inclusiveness and accountability.

Tim Gilling
Deputy Executive Director, CfPS
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