NHS PROVIDERS RESPONSE TO NHS IMPROVEMENT CONSULTATION ON OVERSIGHT OF NHS-CONTROLLED PROVIDERS

ABOUT NHS PROVIDERS

NHS Providers is the membership organisation and trade association for the NHS acute, ambulance, community and mental health services that treat patients and service users in the NHS. We help those NHS providers to deliver high quality, patient focused care by enabling them to learn from each other, acting as their public voice and helping shape the system in which they operate. NHS Providers has 98 per cent of all trusts in membership, collectively accounting for £65 billion of annual expenditure and employing more than 928,000 staff.

KEY MESSAGES

- We recognise that the proposals put forward are intended to ensure that emerging new care models are appropriately captured by the regulatory system, with the aim of mitigating the risk of provider organisations falling through the gaps of regulation and the potential risk to the system and the provision of high quality care that this could create. We also recognise that there may be consideration for this additional level of scrutiny if control is shared across two or more foundation trusts.
- However, it is important to recognise that the proposals amount to a significant shift in the current system architecture, in effect amounting to the recognition by NHS Improvement of another type of entity in the NHS system beyond NHS trusts and foundation trusts.
- We also believe that in a number of instances there are likely to be strong ties between subsidiaries and joint ventures and their parent organisations which call into question the extent to which it is feasible or practical to treat the latter as free agents in the system for oversight and accountability purposes.
- Consideration must be given to the level of additional regulatory burden that these proposals would bring and the impact on frontline care and resources available for investment into services.
- The proposals potentially affect the equal standing of NHS foundation trusts that have set up such joint ventures or subsidiaries and private providers, as the latter would benefit from the greater flexibility in terms of the oversight they are subject to. We do not believe that the need to maintain a level playing field between ventures entered into by foundation trusts, such as the establishment of joint ventures or subsidiaries, and private providers has been satisfactorily taken into account in considerations of the proposals.
- Should NHS-controlled providers be recognised and overseen in the same way as foundation trusts (FTs) and trusts through the Single Oversight Framework (SOF), there is a need for NHS Improvement to provide further clarity as to which parts of the SOF will apply to these providers.
- Finally we would be concerned if the proposed extension of oversight to NHS-controlled providers would create an unfair competitive advantage to private providers to deliver these services.

INTRODUCTION

We welcome the opportunity to respond to this consultation which covers proposed changes for how NHS Improvement oversight would operate in the future. We agree that the existing regulatory and oversight arrangements may not always align with new and more joined-up ways of providing care. As such, we appreciate

that the proposed changes are rooted in the view that some providers may pursue setting up joint ventures to support the development of new care models and the need for the regulatory framework to evolve in light of that.

We have a number of comments about the proposals which are detailed further below. As a general point, we would highlight that the repeated references to 'organisations controlled by NHS providers' throughout the consultation has the potential to cause confusion about the scope of the proposals by implying that NHS trusts are captured by the new proposals. It could therefore be clarified that in effect only foundation trusts (FTs) would fall under the definition of 'NHS-controlled providers', as it currently stands.

IMPLICATIONS FOR THE SYSTEM ARCHITECTURE

The consultation and proposals involve the recognition of a third type of entity in the NHS system in a more formal way – NHS trusts, foundation trusts and now the joint ventures and subsidiaries that they own – and treating the latter in the same way as NHS trusts and foundation trusts for purposes of oversight. We recognise that the proposals put forward are intended to ensure that emerging new care models are appropriately captured by the regulatory system, with the aim of mitigating the risk of provider organisations falling through the gaps of regulation and the potential risk to the system and the provision of high quality care that this could create. We are supportive of the development of new care models and a more collaborative approach to healthcare delivery, and are also cognisant of the current legislative restrictions which means that NHSI will need find 'workarounds' to manage risk in the system. However, we are concerned that the proposals represent a shift in the architecture of the current system which has not been fully appreciated and as such, we would welcome a national level discussion on this changing architecture to ensure that changes are thought through and transparent.

In addition to the above, the proposals have the potential to impact on the freedoms of FTs which are set out in law. The ability to set up subsidiaries and joint ventures goes to the heart of the freedoms conferred to those holding FT status. Under the status quo, if an FT sets up a subsidiary or joint venture this is overseen by NHS Improvement through the independent providers' risk assessment framework, rather than the provider licence. These subsidiaries and joint ventures are therefore currently not subject to section 6 of the licence, which includes the FT governance requirements, or regulated through the SOF. It is increasingly difficult to describe a clear distinction between foundation trusts and NHS trusts and such a change in policy would require a clear national level debate and a full consultation.

TYPES OF VENTURES THAT PROPOSALS APPLY TO

NHS foundation trusts have the power to create such ventures or subsidiaries 'for the purposes of, or in connection with, their functions'. The consultation states that the proposals to extend oversight would apply to ventures or subsidiaries set up for the provision of healthcare services or to hold and deliver an ACO contract directly. However, it is worth noting that FTs will have such arrangements in place for different purposes and it will be essential that there is no ambiguity as to when a separate licence will be required. For example, many FTs will have joint ventures in place, for example, to support their estates transformation or linked to the supply of medical equipment. While our understanding is that such joint ventures will not be caught by these proposals, it is important that there is clarity about the scope of the proposals.

Trusts have concerns that these proposals would be counterproductive to the collaborative way of working through STPs and the proposals set out in the Carter review around the consolidation of pathology services, rather than

support these approaches. There is also a particular risk that the proposals result in regulatory duplication and/or risk breaching competition legislation due to the sharing of commercially sensitive information.

LINKS BETWEEN CONTROLLED AND PARENT ORGANISATIONS

The consultation proposes that guidance and oversight which applies to NHS FTs will be extended to 'NHS controlled providers', with some exceptions. In some circumstances where the legal entity holding an ACO contract is a foundation trust, they would already be subject to NHS Improvement regulation due to the provider licence conditions and where this is the case the proposals risk adding a layer of oversight, which may or may not add value over and above oversight of the parent organisation. There are also some instances where the application of the SOF would not be appropriate for the new 'NHS controlled provider'. For example, it is proposed, that control totals will not apply to this new type of entity. While we understand the reasoning behind this, we believe that this is indicative of the challenges that these proposals pose in that NHS Improvement is seeking to hold to account organisations that do not have the autonomy to be held to account in the same way. By way of another example, it would be difficult to envisage a scenario where NHS Improvement may be able to pursue the removal from office of the board of, for example, a company limited by guarantee whose directors are appointed by an NHS trust and an FT without their consent.

The consultation acknowledges that NHS-controlled providers, as defined under these proposals, are likely to have strong ties to their parent organisations but rules out the option of holding them to account through their 'parent' companies on grounds that this is not achievable within the current legislative framework and that it would be difficult when the joint venture is controlled by more than one provider. Given that such entities are beholden to their parent organisations, we would welcome more information on these legislative barriers associated with regulating them through their parent organisations.

POTENTIAL REGULATORY BURDEN

Further detail would be welcome about how the SOF would apply to the ventures affected by these proposals. For example, it is unclear how the agency rules and price caps would be applied as part of the oversight but this could pose difficulties as not all subsidiaries will operate using agenda for change pay terms and conditions.

It seems sensible, as suggested in the consultation, that NHS Improvement will aim to consider the performance of an NHS-controlled provider in light of the performance of their parent organisation(s). We agree that if concerns are identified in an NHS-controlled provider, consideration should be given to whether the causes can be attributed to the parent provider. However, this again highlights the challenges of the proposals. Some information is reported through the licence of the parent organisation and other information reported to Companies House, and also it is not yet clear how the oversight arrangements would align with those already required under Company House regulations. We have a concern that the proposals would introduce additional reporting, with the associated increase in administrative burden. We therefore welcome further assurance that the extra oversight will in effect not lead to duplication in reporting or double jeopardy for the owner organisation and/or the subsidiary or joint venture entity. What is more, there is a possibility that some of the requirements placed on NHS-controlled providers may oblige them to publish or disclose commercially sensitive information, therefore putting them in a vulnerable position compared to private providers.

Finally, we expect that NHS Improvement may also want to consider how publishing judgements and segments in the public domain could impact on the commerciality and ability of ventures entered into by foundation trusts to

operate competitively in the market place. We also urge NHSI to align closely with CQC when taking forward these proposals and ensure there is consistency in the regulatory frameworks.

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