

LIBERATING THE NHS: REGULATING HEALTHCARE PROVIDERS BMA SUMMARY (ENGLAND)

Background

On 12 July 2010 the Secretary of State for Health Andrew Lansley released a White Paper on health reform entitled [Equity and Excellence: Liberating the NHS](#) setting out an ambitious agenda for the NHS for the next five years.

As part of the White Paper consultative process [Regulating healthcare providers](#) was released on 26 July 2010. This consultation provides further information on proposals to give foundation trusts greater autonomy, and plans to establish an independent economic regulator for health and adult social care. Responses to the consultation document are due by **11 October 2010**.

Introduction

It is the Government's vision that:

- Providers will be free from control by hierarchical management and instead subject to effective quality and economic regulation;
 - Clinically led commissioning, payment by results and choice will drive improvements in quality beyond essential regulatory standards; and
 - Monitor will be an economic regulator responsible for regulating prices, promoting competition and supporting service continuity.
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CHAPTER 2 – Freeing providers

This chapter sets out how foundation trusts will be freed from constraints, in order to focus on improving outcomes, being more responsive to patients and innovating.

- **Within three years all NHS trusts will become foundation trusts.** It will not be an option for organisations to decide to remain as NHS trusts.
- If NHS trusts and Strategic Health Authorities (SHAs) fail to agree credible plans, and **if the NHS trust is unsustainable, the Secretary of State may apply the trust administration regime** introduced by the *Health Act 2009*.
- **From April 2013 Monitor will take on the responsibility of regulating all providers of NHS care.**
- The principal purpose of foundation trusts will continue to be the provision of goods and services to the health service in England. **Their statutory framework will continue to ensure that any surplus and proceeds are reinvested in the organisation rather than distributed externally.**
- Foundation trusts are already effectively social enterprises – organisations with a social purpose that use any surpluses in pursuit of their goals.
- **The cap on private income of foundation trusts will be repealed**, to allow foundation trusts to broaden the scope of their activities whilst maintaining their primary purpose of providing NHS services.
- **The Government is considering whether to maintain statutory controls over foundation trusts' borrowing limits**, introduced to prevent them from borrowing irresponsibly, given that no foundation trust has taken a loan from the private sector for a significant capital investment since 2004.
- **In the future foundation trusts may be allowed to change their constitutions with the consent of their boards of governors and directors**, replacing the current requirement to obtain consent from Monitor.

- **Legislation will be changed to make it easier for a foundation trust to merge with or acquire another foundation trust or NHS trust, or de-merge.** NHS Trusts and foundation trusts will be subject to merger controls to protect competition.
 - **The flexibility to adapt governance structures to suit an organisation's particular circumstances could be made available for some foundation trusts.** This could be for all or only some organisations, such as foundation trusts that have existed for over three years, to emphasise the need to build effective relationships with governors and make a convincing case for change.
 - It may 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.
 - **The accountability of foundation trusts to their governors could be increased,** to mitigate against the risks involved in changing governance arrangements and the removal of regulatory controls.
 - The role of managing taxpayer involvement in foundation trusts could be undertaken by the Department of Health (DH) or a third party working on its behalf, or by Monitor if the independence of the regulator role is maintained.
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CHAPTER 3 – Economic regulation

This chapter sets out the proposed changes to the role of Monitor, to enable it to become the independent economic regulator for health and adult social care in England.

- **The Government proposes to introduce a system of independent economic regulation to sit alongside independent quality regulation.**
- **Given the introduction of the 'any willing provider' policy, the Government hopes to be able to address potentially anti-competitive behaviour through regulation, rather than through legal proceedings.**
- **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 through regulation where necessary.**
- Monitor will be required to have regard to a set of objectives:
 - Maintaining the safety of patients and individuals accessing services;
 - Securing ongoing improvements in quality of care;
 - Providing equitable access to essential health and adult social care services;
 - Supporting commissioners in maintaining continuity of essential services;
 - Securing ongoing improvements in the efficiency of services;
 - Promoting appropriate investment and innovation; and
 - Making best use of limited NHS and adult social care resources.
- Monitor will license providers of NHS services in England and exercise functions in three areas:
 - Regulating prices;
 - Promoting competition; and
 - Supporting service continuity.
- Monitor will need to balance conflicting objectives e.g. considering the public interest in maintaining access to services in remote areas against objectives to improve efficiency or promote competition. As such, **Monitor will need to act transparently in determining its approach to regulation and decisions in individual cases.**
- **Monitor will continue to have the status of a non-departmental public body.** The Secretary of State will not have powers to direct it in carrying out its functions, but will retain the power to appoint the Chair.
- **It is proposed that the Secretary of State should also have the power to approve the appointment of a Chief Executive, nominated by the Chair.** The Secretary of State would have powers to remove either during their terms for reasons of incapacity or misbehaviour.

CHAPTER 4 – Licensing

This chapter sets out the role of Monitor in licensing providers of NHS services, including its relationship with the Care Quality Commission (CQC).

- **Monitor and the CQC will be jointly responsible for administering an integrated and streamlined registration and licensing regime.**
- Monitor will need to license some providers of NHS services as a mechanism for delivering its regulatory functions, e.g. to promote competition. It will be a requirement of Monitor's licence that an organisation is registered with the CQC.
- **The CQC and Monitor will retain separate responsibilities for their parts of the regime.** This means the CQC will continue to register providers of health and adult social care while Monitor will license providers of NHS healthcare services. Both regulators will need to work together to develop streamlined procedures.
- **Monitor's power to regulate prices and license providers will only cover NHS services.** Providers of other care services will be required to register with the CQC but not to hold Monitor's licence.
- **Monitor will be responsible for developing a general licence setting out conditions for all relevant providers of NHS services.** This is likely to include:
 - That an organisation is a fit and proper body to provide NHS services;
 - Requirements to provide Monitor with details on provision of NHS services;
 - Requirements to notify proposed changes to services;
 - Requirements to report information e.g. on data costs; and
 - Rules to protect patients' and taxpayers' interests.
- **Monitor will also be able to set special licence conditions for providers in certain cases,** either because a provider enjoys a position of market power or because there is a need for additional regulation to protect service continuity. This could include additional requirements to promote choice.
- **Monitor will have a range of powers to ensure compliance with licence conditions,** including issuing fines or suspending or revoking a licence.
- **Groups of providers will have the right to appeal** to the Competition Commission if a significant proportion opposes Monitor's proposed changes to the general licence conditions. Individual providers will have the right to appeal regarding proposed changes to their special licence conditions.
- **It is proposed that Monitor should fund its regulatory activities for licensed providers by charging fees** and through grant-in-aid from government if needed to support other activities.

CHAPTER 5 – Price regulation and setting

- **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 need to work closely together in deciding which services should be subject to national tariffs,** and in developing appropriate currencies for pricing and payment purposes.
- Currencies will identify units of services for payment purposes and may have a different impact upon incentives, e.g. where currencies and payments are based on throughput of diagnostic or surgical procedures this may create financial incentives for providers to increase volumes of those procedures.
- **The Board will have primary responsibility for determining appropriate currencies.** There may also be a role for Monitor, in setting tariff structures, to ensure that currencies do not restrict or distort competition against the public interest.

- **Monitor’s role will be to set prices or price caps for services subject to national tariffs.** Monitor will be responsible for devising a pricing methodology.
- Monitor will be required to run a public consultation process, engaging with both the NHS Commissioning Board and providers. The tariff-setting methodology should be made transparent and fully open to scrutiny.
- **The Government believes that it is important that both purchasers and providers are 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.
- **The Government proposes that Monitor should have powers to modify tariffs for individual providers on rare occasions,** e.g. where a provider might unavoidably have higher costs than other organisations because it operates in a rural location and provides a key service to a small isolated population.
- In carrying out this function, Monitor would need to have regard to its duties to protect the interests of patients and the public, through competition where appropriate and through regulation where necessary. It would also need to have regard to its duty to promote efficiency.
- **In particular, it would need to ensure that any modifications to the tariff did not give recipient providers an unfair competitive advantage or constitute unlawful state aid under European Union rules.**
- **Commissioners and providers will be able to apply to Monitor to set a differentiated price or arbitrate in some pricing disputes.** Monitor will need to consult the Board on proposed variations to tariff prices in individual cases.
- Monitor and the NHS Commissioning Board will be under an obligation to consult with each other on the services subject to national tariffs, contract currencies and funding models.
- Monitor will also need to consult with the Board on proposals to agree variations to the tariff in individual cases and in relation to some pricing disputes.
- The DH will have a responsibility for promoting effective working between the Board and the regulator.

CHAPTER 6 – Promoting competition

- In the new system, the NHS Commissioning Board will have a duty to promote patient choice, including developing the NHS choice offer in accordance with its mandate from the Secretary of State.
- **Monitor would have a duty to promote competition, where appropriate.**

Roles of Monitor, the NHS Commissioning Board and others in promoting competition		
Role of NHS Commissioning Board	Role of Monitor	Role of other organisations
Promoting patient choice	Setting licence conditions to prevent anti-competitive behaviour/facilitate development of competition	Secretary of State sets mandate for NHS Board
Deciding how to introduce choice of any willing provider	Investigating anti-competitive conduct under <i>Competition Act 1998</i>	Office of Fair Trading (OFT) has concurrent powers to investigate anti-competitive conduct under <i>Competition Act 1998</i> in health and social care
Developing standard NHS contracts	Carrying out studies and referring malfunctioning markets to the Competition Commission	Competition Commission investigates barriers to competition in markets following reference
Establishing guidance on commissioning and procurement		
Assessing complaints on commissioning/procurement		

Role of NHS Commissioning Board	Role of Monitor	Role of other organisations
	<p>Investigating complaints about commissioning after referral to NHS Board</p> <p>Providing advice to Government and NHS Board on barriers to competition/level playing field</p>	<p>OFT and Competition Commission investigate and prevent anti-competitive mergers</p>

Preventing anti-competitive behaviour

- **Monitor is to have concurrent powers with the OFT to apply the *Competition Act* in addressing restrictions on competition in the health and adult social care sectors.**
- **It is proposed that Monitor should be able to carry out ‘market studies’** to investigate markets where competition is not functioning properly. Monitor will be able to advise Government and the NHS Commissioning Board on changes to allow competition to function effectively. It will also have powers to refer dysfunctional markets or barriers to competition to the Competition Commission for investigation.
- Monitor’s role is part of the Government’s attempt to ensure a level playing field where there is competition.
- **Application of Monitor’s powers to enforce competition law within the health and social care sectors will not be limited to providers required to hold a licence. Providers may deliver a mix of NHS and private healthcare, as well as other care services and the regulator would not be able to police the system effectively if there were distinctions preventing it from investigating issues spanning these different activities.**
- The Government proposes that Monitor should have powers to set special licence conditions for some individual providers to protect competition.
- These special licence conditions 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.
- Monitor is also to have powers to investigate and remedy complaints regarding commissioners’ procurement decisions, or other anticompetitive conduct, acting as arbiter.

Regulation of mergers

- The Government believes that as well as preventing anti-competitive behaviour, it will be important to regulate mergers, to maintain sufficient competition in the public interest.
- The OFT and Competition Commission are responsible for regulating mergers in all sectors under the *Enterprise Act 2002*.
- **The Government proposes that the OFT and Competition Commission be the sole organisations with responsibility for investigating mergers in health and social care services.** The Government expects Monitor to offer the OFT and Competition Commission any assistance and advice in investigations, as they may reasonably require.
- **Legislation may be needed to ensure that the full range of providers of NHS services are subject to appropriate merger controls.** The need for modifications to the *Enterprise Act 2002* is being considered, to take into account the specific characteristics of mergers in healthcare, including whether there is a case for:

- Any modifications to ensure that the full range of providers of NHS services, including NHS trusts and foundation trusts are subject to merger controls; and
- Powers for the Secretary of State for Business Innovation and Skills to intervene in mergers on public interest grounds.
- The Cooperation and Competition Panel will continue to provide expert advice on mergers during the transition to the new system.

CHAPTER 7 – Supporting continuity of services

This chapter sets out how the Government will ensure the continuity of essential public services and the continuity of care, even when the providers of services may change.

The role of commissioners

- Commissioners will retain primary responsibility for ensuring the continuity of service provision.

Additionally regulated services

- **Monitor may need to intervene to ensure continued access to key services in some limited circumstances.**
- **At present, foundation trusts are not allowed to withdraw ‘mandatory services’ without permission from Monitor.**
- The Government proposes to build on this approach, providing further protection, over and above that given by commissioners, to services that are vital to local populations.
- **Monitor will be able to classify services which require additional regulation** and set conditions in providers’ licences to protect the continuity of those services.
- **It will be for Monitor to set out the criteria for defining additional regulated services.**
- These criteria are likely to focus on identifying where a provider is the only provider or one of very few providers of services in a local area.
- **The Government envisages that Monitor would have powers to impose special licence conditions for providers delivering additionally regulated services**, as an evolution of its current approach to regulating foundation trusts and taking a consistent approach irrespective to the type of provider.
- **Monitor could have powers to impose special licence conditions to protect the assets needed to provide those services (such as control on disposal of assets).**
- Special licence conditions could also include requirements on providers to give notice of planned changes to additionally regulated services. Providers would be obliged to continue to provide additionally regulated services during the notice period.
- In addition, Monitor would be able to trigger application of a special administration regime to ensure the continuity of additionally regulated services and protect the assets used to deliver them in the event of insolvency.

Special administration, insolvency and risk pooling

- **In certain areas of the economy (e.g. the water and energy sectors), special administration arrangements have been put in place to ensure the continued supply of key services where a provider becomes insolvent. The Government proposes to establish a similar special administration regime for additionally regulated health services in England.**
- This special administration regime will provide an alternative to ordinary insolvency procedures.
- It will build upon aspects of the unsustainable provider regime in the *Health Act 2009*, without some of the bureaucracy and ability for political interference.
- **In the event of insolvency**, Monitor will have 14 days to trigger special administration to protect additionally regulated services, before the start of any other insolvency process.
- In these cases, a special administrator will be appointed with responsibility for securing the continued provision of additionally regulated services.

- **The administrator will be required to develop plans to ensure the continuity of those services. Possible outcomes include transfer or rescue.**
- **Monitor will be responsible for establishing funding arrangements to finance the continued provision of services in the event of special administration.**
- Monitor will have the freedom to decide on the best approach, which may change over time.
- **It is likely that Monitor will initially do this by establishing a 'funding risk pool', raised from levies on the providers of regulated services.**
- These levies will be based on both the size of such providers and the level of risk they may need to access the risk pool.
- Monitor will be responsible for determining an appropriate approach to risk assessment.

Consultation Questions

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 should such control operate?
2. Should statutory controls on borrowing by foundation trusts be retained or removed in the future?
3. Do you agree that foundation trusts should be able to change their constitution without the consent of Monitor?
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?
5. What if any changes should be made to the *NHS Act 2006* in relation to foundation trust governance?
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 foundation trust freedoms?
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?
10. Under what circumstances should providers have the right to appeal against proposed licence modifications?
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?
12. How should Monitor have regard to overall affordability constraints in regulating prices for NHS services?
13. Under what circumstances and on what grounds should the NHS Commissioning Board or providers be able to appeal regarding Monitor's pricing methodology?
14. How should Monitor and the Commissioning Board work together in developing the tariff? How can constructive behaviours be promoted?
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?
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 anti-competitive conduct by commissioners and what would such legislation need to cover? What problems could arise? What alternative solutions would you prefer and why?
18. Would 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?
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?