GOVERNMENT CONSULTATION

LIBERATING THE NHS: REGULATING HEALTH CARE PROVIDERS

Overview

Together the Optical Confederation represents the 12,000 optometrists, the 6,000 dispensing opticians and 7,000 optical businesses in the UK who provide high quality and accessible eye care services to the whole population. The Confederation is a coalition of the five optical bodies: the Association of British Dispensing Opticians (ABDO); The Association of Contact Lens Manufacturers (ACLM); the Association of Optometrists (AOP); the Federation of Manufacturing Opticians (FMO) and the Federation of Ophthalmic and Dispensing Opticians (FODO).

The UK optical market is small, £2.7bn in total, of which over £280m (just above 10%) derives from the NHS sight testing service. The sector is already tightly regulated by the General Optical Council in respect of optical services plus by the Office of Fair Trading, the Advertising Standards Authority etc in the same way as any other retail businesses.

We are pleased to respond to this consultation.

The highly competitive, open market in which community optical practices operate delivers high levels of quality, access and choice to all patients (including housebound patients) in all localities. Almost uniquely in the NHS, in optics money directly follows the patient and practices compete for each and every patient. If not, they go out of business and others move in to take their place.

We applaud the Coalition Government in their wise decision to retain this highly efficient service as a national service commissioned by the National NHS Commissioning Board.

We also applaud the Government’s aim to cut the unnecessary bureaucracy with which the NHS has been saddled, built up under the previous administration

As noted above our sector is not large and is already highly regulated. As a point of principle, and in line with the Government’s aims of keeping bureaucracy to a minimum, we do not think Monitor should have powers in relation to our sector which simply duplicate existing regulation. This would simply drive up costs for the NHS and patients without any benefit. We agree with Secretary of State Vince Cable comments:

“One of the great risks with government when it can’t spend is that it tries to look as if it is doing something by regulating instead. But the regulatory burden is a check on
business growth and everything we can do to lighten it will help” (Speech 10 June 2010)\(^1\).

**For this reason we believe the new system of licensing by Monitor and the Care Quality Commission should not apply to community optical practices.**

We therefore very much welcome the indications we have recently been given by Departmental officials that it will not be necessary for the national sight testing service – which is already delivered though an open, highly competitive, well regulated and genuine market - to be brought within the proposed Monitor and Care Quality Commission regimes.

We also feel that the consultation has been developed primarily with Foundation Trusts, the acute sector and similar providers in mind rather than independent contractors such as ourselves who sell one standard, albeit important, service to the NHS. One size does not fit all and to maintain proportionality and keep the costs to a minimum, the regulatory burden should be appropriate to the sector in question.

To ensure the fair operation of markets and to prevent abuse (as we have seen in the past in the NHS) we would also advocate that tendering processes should be open and transparent, that Foundation Trusts should not be able to abuse their positions to pursue vertical integration where this was not in the public interest, and that there should be some transparent mechanism for challenge in the system where it is felt that Monitor and or the Care Quality Commission are exceeding their brief or falling down in their duties.

Our responses to the specific consultation questions in which we have an interest or which affect our sector are below.

As a Confederation, we would be very keen to work with the Government and to be actively involved in the transition to ensure the best possible outcomes for the public and patients from the Government’s NHS reform programme.

**Question 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?

**Answer:** Yes, but please see our concern in our response to Question 7 below.

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

**Answer:** Like the Government, we would eventually like to see the statutory controls on Foundation Trusts’ borrowing removed to bring the benefits of competition to secondary care services. However we do not believe that there is currently sufficient management capacity or calibre (especially commercial or other experience) in the

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NHS or public sector to be trusted with full responsibility for public sector borrowing at the present time. We have only to think of the difficulties some public authorities got themselves into with, say, the Icelandic banks and speculative investment to be concerned.

In the interests of protecting the public purse, therefore, we would suggest that:

- Foundation Trusts should have to consult Monitor before agreeing any externally-financed loan (or cumulative loans) above a specified level

- as part of that consultation, Monitor should have a right to impose a cap on such borrowing in the public interest (with the Trust’s having a right of appeal to the NHS Commissioning Board in cases of dispute). In this way, all well-thought through and supported proposals should be able to seek the external funding they need but without losing necessary reassurances for the public, tax payer and HM Treasury.

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

**Answer:** Yes – this is largely an internal matter – but they should be required to have the demonstrable support of their major stakeholders to do so.

**Question 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?**

**Answer:** We have no experience or views on the legislation but do believe that Foundation Trusts should be able to merge, acquire another foundation trust, or demerge as appropriate.

What we would warn about, however, is the risk of ‘gung ho’ and ‘macho’ NHS managers competing to outdo one another to achieve greater status without benefiting patients or the public. There is a long a history of this in the NHS – particularly around Trust mergers and PFI deals.

We feel therefore that the conditions that NHS trusts have to go through in order to achieve a merger, hostile take-over or de-merger should be made very clear in regulations. We would particularly recommend close independent scrutiny of management buy-outs having seen previous problems with e.g. Dr Foster.

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

**Answer:** The regime should follow as closely as possible that for public corporations but with added protections in that the funds being risked belong to the public rather than private shareholders. As part of this, it is vital that governors have the right to approve, vote on and, if necessary, challenge the remuneration packages for senior
staff in the light of the massive senior pay inflation that NHS Trusts have driven over the past 20 years.

It is also vital that governors keep a sensible overview of expenditure e.g. on the use of management consultants and how such contracts are let. In recent years, the NHS has seen a number of suspicious and curiously restricted tendering exercise and these should be stopped.

Just as in the private sector, NHS boards can be prone to the charismatic leadership of particular chairs, chief executives or corporate directors, with consequent isolation from information and the ability to challenge any decision-making for the remainder of the non-executives. The governors need fully to understand their role of challenging the executives on strategy, policy and direction and particularly on probity, governance and public interest.

**Question 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?**

**Answer:** Ultimately this responsibility must lie with the Secretary of State and so, notwithstanding our wish to see central government bureaucracy cut back to the minimum, we believe this should be a function for a Department of State.

**Question 7: Do you have any additional comments or proposals in relation to increasing foundation trust freedoms?**

**Answer:** The community optometric sector consists of independent contractor businesses providing services under contract for NHS patients, or to private patients. As many in our sector are small businesses, and it is this diversity of providers and rigorous competition between them which provides such a good deal for the patient and the NHS, we would be fearful of Foundation Trusts abusing their monopoly positions to pursue vertical integration with the community sector at the expense of genuine local competition and a vigorous private sector market.

We would welcome much greater clarity on government proposals for ensuring that NHS Trusts do not exploit their market position to become all-consuming behemoths covering the entirety of local patient care and effectively stifling genuine, albeit small, competition on which the public benefit depends.

**Question 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?**

**Answer:** As noted above, we believe this system should not apply to providers of NHS sight testing services.

We feel that there is a very important matter of principle here: i.e. that there should be no duplication in regulation. For example, if the private sector is already covered
by the Office of Fair Trading or Advertising Standards Authority etc and healthcare regulators, there is no reason for Monitor to have duplicatory powers. This is particularly true of the already highly competitive and highly regulated optical market.

Community optical practices - as registered optical businesses, optometrists and dispensing opticians - are already regulated by the General Optical Council. As regulated providers they operate in a free market with open entry (subject to meeting national quality criteria) with money genuinely following the patient.

They consequently depend entirely for their income and survival on delivering high-quality, cost-effective and accessible care to patients. Those that do not, simply go out of business as patients go elsewhere. As independent providers they are already subject to Office of Fair Trading and Advertising Standards Authority regulation which Foundation Trusts are not.

Given that:

- optics is a genuine free market for patients
- there are existing regulatory requirements to safeguard the public
- and the fact that these have been shown to be effective,

we feel that adding the additional burden Monitor/Care Quality Commission to the single sight-testing service would simply duplicate existing controls and add significantly to costs without bringing any benefit to the public or patients.

It should be noted that is also for these reasons that, in the past, the Department of Health has resisted bringing community optical services within the ambit of the Care Quality Commission and that this has not resulted in any detriment to patients or patient care. On the contrary there has been a clear public benefit in keeping-down costs to patients and the NHS.

For all these reasons, we would be strongly opposed to community optometric services being brought within the Monitor/Care Quality Commission regime.

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

**Answer:** Yes, but only in so far as these do not apply to community optometric practice which, as explained above, is already governed by other regulations including rules about advertising and miss-selling. To duplicate regulation of the sector in this way would substantially increase the costs to business without any demonstrable benefit for patients or the public.

The optical market includes a range of providers which do not have boards etc including single-handed providers, partnerships, family businesses and small regional businesses. It is clear from the consultation document that the proposals in this section have been developed more with Foundation Trusts, acute hospitals and similar providers in mind, rather than the requirements for independent contractors providing community-based ophthalmic (and possibly pharmacy and hearing care) services. These proposals cannot sensibly apply in the commercial retail market in
which we operate where their application would add a significant additional cost burden without commensurate or demonstrable benefit.

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

**Answer:** Wherever providers believe that Monitor’s activities are inhibiting the proper and effective functioning of a market.

**Question 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?

**Answer:** We agree in principle that Monitor should fund its regulatory activities through fees. However all bureaucracies and regulators have a tendency to inflate, to believe in the ‘rightness’ of their monopoly positions and the absolute necessity of raising any funds they would like to raise. What is less clear from the consultation document, and on which we would welcome more detail, is what challenge there will be in the system and how the Government will ensure these fees will be kept to the minimum necessary levels.

Should, for instance, increases in Monitor fees require the support of the major stakeholders e.g. the NHS Commissioning Board, the NHS Confederation, NHS Alliance and National Association of Primary Care without which they would have to be referred to the Department of Health?

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

**Answer:** In the sight testing sector, we fully support and applaud the Government’s position to preserve the national sight testing service commissioned only by the National Commissioning Board. In these circumstances a common fee should be set for NHS sight tests, the requirements of which are set out in legislation, regardless of location. This drives competition which, in the optical sector, works for the benefit of patients and the NHS.

We would therefore be strongly opposed to Monitor’s having the power to vary national fees in our sector which would distort the market and undermine the benefits to patients of fair and open competition.

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

**Answer:** The NHS Commissioning Board and other providers should be able to appeal regarding Monitor’s pricing methodologies in any area where they believe this adversely affects the beneficial operation of a free and open market for the benefit of patients and the public.
**Question 14:** How should Monitor and the Commissioning Board work together in developing the tariff? How can constructive behaviours be promoted?

**Answer:** By being held to account by the Department of Health and by being required to account both to the Department of Health and publicly for the actions they have taken together and to report separately (e.g. minority reports) where agreement cannot be reached.

**Questions 15 & 16:** Under what circumstances should Monitor be able to impose special licence conditions on individual providers to protect choice and competition? What more should be done to support a level playing field for providers?

**Answer:** We have no views on these issues provided they are not applied to community optical practice where the open market already delivers these benefits without regulatory intervention.

**Question 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?

**Answer:** We agree that additional legislation is needed to address the potential for anti-competitive conduct by commissioners. GP commissioners will be relatively new to this process and in many parts of the country informal and hidden networks will operate which might inhibit “willing providers” from entering the market. GP Commissioners should be under a personal legal duty not to behave in an anti-competitive manner and required by regulation to ensure all tendering and bidding processes are:

- open to all
- open to scrutiny, and
- allow reasonable timescales for responses to enable providers to compete (without unnecessarily delaying the development of appropriate services).

**Question 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?

**Answer:** Yes, but only in the case of publicly-owned providers. Moreover “essential services” should be clearly defined so that this power cannot be used inappropriately to prop up inefficient providers.

**Question 20:** Do you have any further comments or proposals on freeing foundation trusts and introducing a system of economic regulation?
We support these changes in respect of Foundation Trusts as being in the public interest. However we are less convinced about their application to private sector providers where good contracting should address most issues.

In particular we would be strongly opposed to their application to the national patient focussed and extremely cost-effective sight testing service which is already highly regulated by the General Optical Council, where a genuine market operates to provide very tight controls on providers, where quality, access and choice are already the drivers of patient choice and competition and where additional regulation would be costly and unnecessary.

We would also oppose moves to legislate to allow Monitor to assist the OFT and Competition Commission on mergers between providers of NHS services (under paragraph 6.13 and 6.14). The OFT and Competition Commission already possess sufficient powers to oversee mergers among private NHS providers, and expanding these to include Monitor would add another layer of complexity and uncertainty, with little or no benefit, and which might discourage necessary mergers.

We also see no need to give any intervening powers (over independent healthcare mergers) to the Secretary of State for Business Innovation and Skills, for the same reason ie that other regulatory authorities eg the OFT and Competition Commission already possess sufficient powers in this regard.

Optical Confederation
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