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24 August 2011

To: SHA Director of Commissioning Development

Dear Colleagues

Re: Note of clarification
- Delegation of commissioning responsibilities to CCGs
- Legal status of pathfinders

I am writing to provide clarification in relation to two important aspects of Clinical Commissioning Group (CCG) development.

1) Delegation of commissioning to pathfinders and emerging clinical commissioning groups

Delegation of commissioning is a key indicator for Reform in the NHS Operating Framework 2011/12. We will use a single measure 'percentage of PCT commissioning spend delegated to GP practices' to monitor how emerging CCGs are progressing their development supported by PCT clusters. The clarification note attached sets out the technical detail about the specific indicator to track the progress of budget delegation for the remainder of 2011/12.

In addition to the definition provided on the indicator, the NHS, led by NHS London and NHS North East, has developed peer guidance on a nationally consistent approach to delegation. I understand, as SHA Directors of Commissioning Development, you will be making this available locally.

2) Legal status of Pathfinders and emerging Clinical Commissioning Groups

Questions have also been raised on the legal status of CCGs, once they are established under the proposed legislative framework in the Health and Social Care Bill, as well as the legal status of pathfinders or emerging CCGs. The clarification note attached sets out advice on issues relating to legal status for reference.

I hope you find this clarification helpful

Yours sincerely

Dame Barbara Hakin
National Managing Director
Commissioning Development

Cc SHA Directors of Finance
SHA Directors of Performance

Enc.

Towards Authorisation

Delegation of commissioning to pathfinders and emerging clinical commissioning groups (CCGs) – indicators

Legal Status of Pathfinders and emerging Clinical Commissioning Groups (CCGs)

Introduction

1. The Government's ambition for the best healthcare service in the world will be dependent on the development of highly effective clinical commissioning groups (CCGs) covering the whole of England and fully authorised. As we move from the current position of a vibrant network of pathfinders to a position where we have comprehensive coverage of fully authorised CCGs, the system is committed to supporting emerging CCGs in this journey.

2. During 2011 a number of documents will be released providing further clarity, for emerging CCGs as they develop.

3. This document provides the NHS with information on two key areas

    - The indicators that will be used to measure delegation of commissioning to pathfinders and emerging CCGs
    - The legal status of pathfinders and emerging CCGs

Delegation of commissioning to pathfinders and emerging clinical commissioning groups (CCGs) – indicators

Background

4. Delegation is an important step on the journey from clinical engagement to full authorisation of CCGs. The NHS Operating Framework 2011/12 identifies "GP consortia (now CCG) progress" as a key focus being measured by "% of PCT commissioning spend delegated".

5. This section sets out the technical detail about the specific indicator to track the progress of budget delegation for the remainder of 11/12. The indicator will track the progress of budget delegation to facilitate an understanding of how emerging CCGs are progressing their development supported by PCT clusters.

6. SHA and PCTs are reminded that in order to meet statutory requirements a pathfinder or emerging CCG can only exercise delegated PCT functions if the pathfinder or emerging CCG is set up as a committee or sub committee of a PCT Board. It is within this context advice is provided on delegated commissioning.

7. In addition to the definition provided here on the indicator, by which the NHS will measure success of delegation of commissioning to pathfinders and emerging CCGs, the NHS, led by Commissioning Development teams at NHS London and NHS North East, has developed peer guidance on a nationally consistent approach to delegation. It is available from SHA Directors of Commissioning Development.

Indicator proposed for the Integrated Dashboard

Metric	**Commissioning funds delegated to pathfinders/ emerging CCGs**		
	Total available commissioning funds*	**% Total applied for**	**% Total delegated**
Definition	Total commissioning budget not retained elsewhere i.e. excluding primary care contracting, specialist commissioning**, ambulance services, and public health commissioning *	Total value of proposals for delegation applied for by the pathfinder/CCG / Total available commissioning funds	Total value of funds delegated to the pathfinder/CCG / Total available commissioning funds
What it indicates	Allows understanding of pathfinder/CCG progress towards full delegation.		
Notes	*Cluster leads will provide this data from 11/12 FIMS Operating Plans (PCT 09) and other finance data sources. A proposal of what DH sub-codes are included and calculation of the metric is set out below. ** as defined in the National Specialised Services Definition Set versions 2 and 3		

8. It is proposed that the indicator will be updated quarterly with monthly reports reflecting the last known quarterly position. It is proposed that data will be collected via FIMs with detail on the mechanics of this to follow. A Q1 submission against the indicator will be made to test the data collection process.

Definition of commissioning budgets that can be delegated

9. The indicator is designed to monitor progress in delegating commissioning responsibilities. The denominator and numerator will be SHA-wide figures for the purposes of reporting. However, SHAs are likely to want to collect cluster and pathfinder/CCG level data. Where possible for pathfinder/CCG level reporting, known budgets will be calculated on a practice basis; where this is not possible the calculation for each pathfinder/CCG may use a population weighted capitation formula.

10. The proposed approach to calculate the 'total available commissioning funds' figure will be to start with planned spend for commissioning from readily available data in 11/12 FIMS Operating Plans (PCT 09) and then subtract budgets that will not be delegated, such as specialised commissioning, public health commissioning, and primary care contracting. Management costs should not be included in the total available commissioning funds figure and also not in budgets that are delegated and recorded against the indicator.

11. The DH sub codes that may be potential areas for delegation are 110, and 220-280. (**Appendix 1**).

12. Attention should be paid to the following:

Specialised Commissioning

13. Specialised commissioning will not be undertaken by CCGs when authorised. Specialised commissioning is included in the secondary care sub-codes, mainly in 'General and Acute'. Clusters will be required to define what specialist commissioning each sub-code includes in order that this can be excluded from the overall figures.

Armed Forces

14. The commissioning of some secondary care services for armed forces personnel is changing and will be commissioned by the Ministry of Defence and the NHS Commissioning Board. It is not anticipated that these amounts will make a material difference on a SHA-wide basis. Until further guidance is received, this should be included in the total budget that can be delegated.

Secondary Care Dental

15. This spend will not be delegated to CCGs and should be deducted from the total budget that can be delegated. The amounts are currently within acute expenditure where the provider is an acute trust, and may be difficult to separate out due to current contractual arrangements. Since the amounts will not be significant, if necessary they can be separated out a later date.

Ambulance Service

16. Ambulance service spend is expected to be included in CCG budgets. Currently, some pathfinders/CCGs are planning to take on delegated responsibility for commissioning ambulance services whereas in some areas, ambulance service spend is SHA-wide and will be retained by clusters during the transition. Whether ambulance service spend is included in the total budget available for delegation to pathfinders/CCGs will therefore be at the discretion of SHAs.

Public Health

17. Public health commissioning spend will not be included in the total budget available for delegation to pathfinders/CCGs. It is proposed that 10/11 figures, as stated in PCT's annual accounts, are used as an estimate. It is recognised that there will be some double counting within the public health expenditure, for example, specialist commissioning screening programmes and where public health spend is incurred in primary care. This means that the calculation will slightly understate the level of budget to be delegated. This is not expected to be a material difference at approximately 1-2%.

Joint Commissioning

18. The PCT will remain accountable for the part of a joint commissioning arrangement that sits in its budget, or where budgets have not been formally pooled but a joint approach to commissioning has been agreed. It is understood that these budgets will be retained at a local level and not transfer to the NHS Commissioning Board, and therefore it is expected that they should be delegated to CCGs. The value of the PCT budget devolved to local authority control or aligned to joint commissioning should be included in the overall available commissioning budget where this is for commissioning that will not transfer to the NHS Commissioning Board.

19. It is proposed that pathfinders/emerging CCGs take on responsibility for overseeing the joint commissioning arrangements in a similar way to how PCTs (now as clusters) have that overseeing function now, and this should include practical management of the S75 arrangemetns and oversight of other joint arrangements. When responsibility for these services is transferred to the pathfinder/CCG, the relevant budget will be added to the delegated budget figure.

Delegated responsibilities part-year effect

20. In many cases it is expected that pathfinders/CCGs will take on delegated responsibilities on an incremental basis during the year, and therefore the overall budget controlled from that point will increase. This indicator will not calculate delegated commissioning budgets on pro-rata basis; rather the indicator will capture the overall ‘whole-year’ available budget controlled at that point in time to demonstrate the split in responsibility.

Legal Status of Pathfinders and emerging Clinical Commissioning Groups

Background

1. In the development of pathfinders and emerging clinical commissioning groups (CCGs) a number of questions that have been raised about:
    a. the legal status of CCGs, once they are established under the proposed legislative framework in the Health and Social Care Bill
    b. the legal status of pathfinders or emerging CCGs and the implications for issues such as employment of staff.
2. This section provides clarification on these issues.

Clinical Commissioning Groups (post-establishment)

3. Subject to parliamentary approval, a prospective CCG will be able to apply to the NHS Commissioning Board to be established as a statutory body, once the NHS Commissioning Board is formally established as a non-departmental body (likely to be between July and October 2012). Once the Board has granted an application the CCG will be established as a statutory body. It is proposed that the CCG will then take on its statutory commissioning functions from April 2013.

4. Subject to the Health and Social Care Bill, a CCG – once it is established – will be a statutory corporate body, classified as an NHS body. In both these respects, it will have the same statutory status as a PCT or SHA now.

5. A CCG cannot be a private company or private corporate entity of any kind (be it a Community Interest Company or Limited Liability Partnership or any other model). The constitution of a CCG will be determined in accordance with the provisions of the Bill, not the rules relating to companies or LLPs.

6. There appears to be some confusion in the NHS about the clauses in the Bill that describe CCGs as 'corporate bodies' and explain that they will not be regarded as 'servants or agents of the Crown'. In both these respects, the status of CCGs will be exactly the same as a PCT or SHA now:
    a. Crown servants or agents. Examples of Crown agents are Ministers and their central government departments. PCTs and other existing NHS bodies are not part of the Crown or Crown servants or agents, and CCGs will not be either. If they were Crown agents, this would make them part of central government.
    b. Corporate bodies. A corporate body is a group of people acting together that has a separate legal identity from the identities of its individual members. There are various types of corporate bodies – for example companies established under the Companies Act. But companies are not the only example and other corporate bodies may be established by specific legislation – this is the case for many public bodies. PCTs are corporate bodies established by the NHS Act 2006,

and CCGs will similarly be corporate bodies. Where a corporate body is established by statute, it is referred to as a statutory body, i.e. a body established by statute to carry out a specific purpose and whose duties and powers are conferred and limited by that statute. This is the case with PCTs now and it will be the case for CCGs in future.

7. As set out above, CCGs will be classified as NHS bodies, just as PCTs and SHAs are now. Paragraph 134(2)(c) of Schedule 4 to the Bill inserts a defined list of NHS bodies into section 275 of the NHS Act 2006. This list includes CCGs.

8. CCGs will be commissioning-only organisations. They will not be able to provide health services. This would not preclude individual GP practices that are members of the consortium grouping together (e.g. as a CIC or LLP) to provide certain services, provided those arrangements were entirely separate from those of the CCG.

Status of 'shadow' CCGs

9. During the period leading up to the establishment of CCGs, we envisage that pathfinders or other groups of GP practices will increasingly commission services under powers delegated to them by PCTs. However, it is important to recognise that this does not give them the status of 'commissioning CCGs'. Nor would it be possible for a body to have that status pending passage of the Bill through Parliament, the relevant provisions coming into force and a successful application for establishment being made to the NHS Commissioning Board.

10. If a pathfinder or group of GP practices is to exercise delegated PCT functions (as opposed to simply providing advice or other services) they must become committees or sub-committees of a PCT. The legal basis for delegation to a committee is regulation 10 of the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) Regulations 2001 (SI 20002/2375). The proceedings of the committee would be subject to any applicable standing orders adopted by the PCT and PCT Boards may need to consider amending existing standing orders. Members of the committee would need to comply with the rules on financial interests in regulation 11 of the PCT (Mermbership, Procedure and Administration Arrangements) Regulations 2000.

11. Some pathfinder groups are private corporate entities (e.g. LLPs or CICs), because they have grown out of PBC groups that used these organisational forms. Although the pathfinders may want to use these organisational forms for some purposes, these organisational forms cannot be used to hold commissioning budgets, nor should they be used to employ NHS commissioning staff.

12. This does not preclude individuals from an LLP or CIC becoming members of a committee or sub-committee of a PCT to exercise delegated PCT functions – the functions resting with the committee and its members, rather than the LLP or CIC itself. An LLP or CIC could undertake some commissioning

activity as a contractor providing support services but the decision-making and actual budgets would need to rest with the PCT or its committees.

Commissioning budgets.

13. Whilst we envisage increasing commissioning responsibilities being devolved to pathfinders and other emerging CCGs, this must be done on the basis of budgets being physically held by PCTs. LLPs/CICs etc cannot physically hold budgets, because they cannot commission NHS services in their own right, they do not have the same tax status as PCTs, and they cannot hold their own Government Banking Service accounts.

Employment of NHS staff.

14. Some NHS employees may in due course transfer employment to an established CCGs. In the meantime, those staff should remain in the employment of their current PCT employer on their current contractual terms, retaining their current pension arrangements. The only exception to this would be if they chose to leave that employment of their own volition to secure another post with a separate employer, In this case their current contract of employment would cease and they would enter into new contractual arrangements with their new employer. There is no intention to consider transferring functions or employees to any organisation before commissioning CCGs are established. There will be HR advice in due course covering the employment position of NHS staff after the establishment of CCGs (no earlier than 1st July 2012) and after PCTs are abolished and CCGs take on their statutory functions (from April 2013).

Accountable Officers

15. A CCG cannot have an Accountable Officer until it is formally established. Some areas are helpfully looking at establishing ‘shadow Accountable Officers’ as a means of supporting leadership development, but this does not confer a formal status.

Appendix 1
Sub-Codes - FIMS, Purchase of Health Care by PCT ascribed to activity

Shaded sub-codes are included in the 'total available commissioning funds.'
Un-shaded sub-codes not included and retained by Clusters.

Analysis of Purchase of Health Care by PCT	Sub Code
Purchase of Primary Healthcare	
GMS,PMS, APMS and PCTMS	**100**
Prescribing Costs	**110**
Contractor Led GDS & PDS	**120**
Salaried Trust Led GDS & PDS	**130**
General Ophthalmic Services	**140**
Department of Health Initiative Funding	**150**
Pharmaceutical Services	**160**
Local Pharmaceutical Services Pilots	**170**
New Pharmacy Contract	**180**
Non-GMS Services from GPs	**190**
Other - *requires a decision on a case-by-case basis*	**200**
Total Primary Healthcare Purchased	**210**
Purchase of Secondary Healthcare	
Learning Difficulties	**220**
Mental Illness	**230**
Maternity	**240**
General and Acute	**250**
Accident and Emergency	**260**
Community Health Services	**270**
Other Contractual	**280**

Total Secondary Healthcare Purchased	**290**
Grants (revenue) to fund Capital Projects - GMS	**300**
Grants (Revenue) to LAs to Fund Capital Projects	**310**
Grants (Revenue) to Private Sector to Fund Capital Projects	**320**
Grants (Revenue) to Fund Capital Projects - Dental	**330**
Grants (Revenue) to Fund Capital Projects - Other	**340**
TOTAL HEALTHCARE PURCHASED BY PCT	**350**
Amount of secondary healthcare Included above that PCT commission from itself	**360**
Social Care from Independent Providers	**370**
Healthcare from NHS FTs included above	**380**

*Expenditure excludes payments mace to other PCTs, includes Provider Arm employee benefits