

Response from Barts and The London NHS Trust

09 July 2009

Dear Sir/Madam

Thank you for inviting comments on the Non-Contracted Hours Study by the CCP. We have provided our comments on each section in turn for ease of reference.

1. General Points

We accept that the consultant contract does allow for consultants to work non-contracted hours for non-NHS providers therefore employers should not be preventing consultants from doing so, unless it would result in detriment to NHS patients and/or services. However, we believe that the contract between an employer and an employee should be paramount and that decisions relating to non-contracted hours should remain with the employer in discussion with the employee around potential conflicts of interest and not be determined by any other external body.

Many foundation trusts for example welcome the opportunity for their consultants to be offered additional work and see this as a positive recruitment and retention tool, providing it does not work to the detriment of services to NHS patients.

It is generally the practice however that Trusts differentiate between consultant requests to use non-contracted hours (beyond the first four) to work for another employer where they are providing specific patient services and where they would be involved in the direction of the service or have a financial interest that would give rise to conflicts of interest. We believe that this is a sensible and pragmatic approach to this element of the consultant contract.

In relation to ISTC's a protocol already exists (Annex B of the ISTC HR Framework) to enable the deployment of non-contracted hours and we believe that this should not be duplicated by further guidance.

2. Considerations of Safety and Quality of Care

The Panel will need to balance any potential reduction in patient choice from a decision not to allow the consultant to accept non-contracted hours employment elsewhere in a public interest test against the potential impact on the quality of care to NHS patients by a consultant working significantly longer hours than the 48 hours allowed in order to work non-contracted hours.

3. Training and Development: Protecting Public Investment

All NHS Trusts invest considerable sums in consultant training as their responsibility under the terms of the contract and in the interests of NHS patients. These sums do not just cover direct costs of training, but also involve opportunity/activity costs in side the foundation trusts as well as secretarial and infrastructure support for training. If restrictions were either removed or were defined too broadly, this would affect a Trust's willingness to invest in consultant training and this should be protected. In essence another employer will be receiving a free good paid for out of the public purse, unless reasonable adjustments could be made to the investment from employers that currently do not carry responsibilities for training and development

4. Duty of Fidelity

At present there is an implied duty of fidelity to an employer within the consultant Contract. We believe this should be made an express duty, particularly as future NHS strategy following the next stage review

will mean that clinical leadership becomes even more central to NHS activity. This will increasingly mean that consultants will play critical roles in decision making in their employing organisations and have access to strategic and commercially sensitive information. A clear commitment to fidelity to the employing organisations should be a reasonable exchange for this enhancement of organisational role and responsibility.

5. Implications for Contractual Relationships of Clinical Leadership in the NHS

We believe that as important as a consequence of the growth of clinical leadership is that current restrictions on non-clinical activity should not be removed as it is particularly in these areas that consultants will have access to information that is commercially sensitive. As a result most NHS trusts differentiate between consultants simply taking on additional service provision and being involved in its direction and/or having a financial interest or shareholding in the private provider. In any case consultants must make a declaration of interests and where this interest goes beyond simply performing clinical work are likely to judge that a conflict of interest is likely to arise.

6. Duty of Confidentiality

The duty of confidentiality – both to patients and the employer should be preserved and not undermined by any further guidance.

7. Comparison with other sectors

It is not uncommon to have these types of restrictions built into contracts of employment in other sectors, which have open markets. This does not in those sectors, restrict competition - it merely creates a greater incentive on employers to attract high quality staff. Consultants have the freedom to choose who they work for and to agree the terms of their employment at the outset, including to negotiate non-contracted hours. If we as trusts want to attract high quality consultants and consultants want to work in high quality organisations such as Barts and The London NHS Trust, they will have mature discussions around the issue of non-contracted hours. Equally if employers from other sectors such as within the ISTCs want to attract consultants to work for them, they should also conduct mature conversations with the relevant NHS trust employer.

8. Level Playing field Considerations

If employers from other sectors are seeking a greater levelling of the playing field, we would agree with colleagues in Foundation Trusts that the panel should take into account that FTs do not operate on a level playing field as they have legislative restrictions upon them, such as the Private Patients Cap, which prevents them from operating competitively with other sectors in healthcare provision. Any measures that attempt to level the playing field in one area alone will merely serve to exacerbate existing disadvantages elsewhere.

We hope that these comments are helpful.

Peter Morris

Chief Executive
Barts and The London NHS Trust