University Hospitals Coventry and Warwickshire NHS Trust

# Co-operation and Competition Panel

# Consultation on consultant's non-contracted hours

## Background

The concept of patient choice for acute elective care relies upon there being a plurality of providers that patients and commissioners can access. Our consultants using their non-contracted hours to work for alternative providers of NHS-funded services is one means by which patient choice can be facilitated.

Consultants employed substantively by an NHS Trust who then work in their non-contracted time for another NHS provider competing for the same work may be seen to be a conflict of interest with their contracted position with the substantive employer. However, restriction on this activity may place a competitor for NHS provision at a disadvantage as they are likely to access the same pool of medical expertise.

The Dept of Health and Monitor have asked the Cooperation and Competition Panel (CCP) to carry out a study of restrictions placed on consultants in relation to the non-contracted hours they work for other healthcare providers.

The CCP have issued two discussion papers for consultation so as to enable it to provide advice and recommendations to DH on this issue.

## Evidence

The consultation paper 1 sets out:

1. The principles and rules relevant to restrictions of which Principle 4 is key:

   Principle 4: Commissioners and providers should foster patient choice…….and choice must not be restricted through collusive behaviour or any other action.

   However Principle 2 also comes into play and states:

   "Providers and commissioners must co-operate to ensure that the patient experience is of a seamless service, regardless of organisational boundaries and to ensure service continuity and sustainability".

2. Restrictions in the NHS Contract. The new NHS Consultant Contract specifically provides for private professional practice undertaken outside NHS contracted hours and the relevant part states:
    a. The doctor discloses his or her private commitments
    b. Where there is actual or potential conflict of interest, NHS commitments take precedence over private work
    c. The provision of Private Professional Services or Fee Paying Services for other organisations does not:
        i. Result in detriment to NHS patients or services or
        ii. Diminish the public resources that are available for the NHS
3. Other legal restrictions
    a. EWTD – this will not impact on the those consultants who have chosen to opt out (the majority)
    b. Duty of fidelity (to the main NHS employer)
    c. De facto restrictions
        i. Consultants generally require an substantive NHS practice to maintain their professional standing (e.g. GP's)
        ii. The main NHS employer bears the costs of training, CPD, pensions and facilitates the consultant attendance and engagement with a range of other NHS activity (college, education, research, committee's quality reviews at speciality and sub-speciality levels)

It asks for comment on the duty of fidelity as applied to the consultant contract and whether the provision of services by consultants to other providers of NHS funded services in their non-contracted hours constitute Private Practice of Fee Paying services (and thus come under the terms of the new consultant contract which at the time of its drafting had not envisaged the patient choice agenda)?

The second consultation paper provides examples and evidence received of:

1. Types of restrictions placed on the use of consultant's non-contracted hours
2. Rationale for the imposition of a restriction for example
    a. To prevent the Trust volume and revenue to a competing NHS provider
    b. To protect patient and safety
    c. To prevent distortions to competition and anti-competitive behaviour
    d. To provide a level playing field
    e. To be in line with other professions and industries
3. Effectiveness of any restrictions

The CCP has used a methodology of cost- benefit analysis of the application of restrictions to assess whether restrictions infringe the Principles referred to above.

Evidence for costs included for example the use of oversees doctors resulting from restrictions, ISTC's (policy of additionality), the ability to set up new NHS provider services and the availability of experienced clinicians acting in a management / advisor capacity. The question posed is whether restriction has limited entry (of new additional services into NHS provision) and that this has not effected competition. This would require evidence that the market is saturated.

Evidence for benefits (of restriction) such as those referred to above is presented for example a consultant working non-contracted hours for an independent NHS provider which the consultant has a financial interest in and bidding for work in competition with the main employer. The main employer bears all the costs of training, CPD, sick pay, pensions and so on which if restriction were reduced would result in an unfair burden of costs not taken on by the alternate NHS provider. In addition the consultant will potentially be in possession of commercially sensitive information as a result of their position with the main employer which could be of benefit to a competitor that the consultant works for in non contracted hours.

**Consultation process**

The Trust's response draws upon an email enquiry for views of all clinical consultants, the views of the executive management team and the position of the BMA. In addition our consultation response has been sent to the Coventry and Warwickshire Primary Care for their views.

**The Trust response**

1. It is clearly in NHS patients' best interests to have healthcare provision and concomitant clinical governance applied by the best available staff members, who are NHS consultants in a workforce where the NHS as a system exercises an effective monopoly. Furthermore, an individual NHS consultant has a responsibility to patients that must extend beyond the duty to the individual employer so long as professional principles of clinical confidentiality, patient autonomy and so on are followed.

2. This Trust does not as a general rule seek to impose restrictions on what consultant employees do during their non-contracted hours. We would not normally envisage seeking to restrict work undertaken by clinical consultants in their non-contracted hours, for another mainstream NHS provider. As a University Hospital Trust we recognise that these employees have been trained at public expense whilst working across a range of other NHS institutions in the course of their training. It therefore follows that the public should benefit from that investment and not have their choice unduly restricted because some NHS organisations wish to create a local monopoly.

3. In exceptional cases an individual consultants, where external activities may affect their ability to discharge their contractual obligations to the Trust, either because they were working excessive hours or because they had a personal financial interest in an external provider to which NHS patients were being referred who might otherwise be treated by the Trust may be challenged through our established procedures. If a restriction were to be imposed it would apply solely to the contract of the individual concerned.

4. However, by the same token we feel it is unreasonable for alternative NHS-funded providers to complain about restrictive practices when they have not borne any of the medical training or study leave costs required to develop and maintain consultants at their present high levels of competence. We agree this benefit of restriction also extends to other employment benefits and pension.

5. Where the provision of services to an alternative NHS-funded provider are concerned it would certainly be helpful to secure greater clarity within the present consultant contract, since this is an area where friction might be expected to arise and where the question of a duty of fidelity is particularly pertinent. In this respect we support the view expressed in the BMA consultation.

6. Should a consultant employee carrying lead or senior responsibility for a particular service of the Trust, and who has either helped create or is privy to our detailed service development plans, we contend it is not unreasonable to seek to restrict their work for such a provider should the need arise. Once again however the nature of that restriction would depend on the individual circumstances. It would in our view be difficult to impose an indefinite blanket ban on undertaking such work without being accused of restraint of trade or professional practice.

7. Whilst this consultation is concerned with the consultant contract, it is a fact that consultants do not work alone and we would suggest that this question cannot be fully considered without also taking into account non-consultant NHS employment contracts. The rapid growth in the numbers of nurse consultants and specialist nurses in recent years accompanied by steadily rising demand for therapy services means that similar considerations also apply to these employees and indeed all other NHS employees.

**Disclosure**

The Trust's views may be made known and we look forward to receiving the views of the Panel in due course.