

## Consultation on changes to regulations required to facilitate the operation of an NHS Standard Contract (Accountable Care Models)

### Consultation response

The Secretary of State's proposal to introduce these regulatory changes is of fundamental concern because, although presented as minor, necessary and technical alterations to secondary legislation, they in fact assume but do not give information about very far reaching changes in the organisation of health and social care in England. They are directed towards imposing, through NHS England, a standard contract which would produce major and radical re-organisation of the National Health Service in England, covering who makes decisions about the provision of healthcare, who has the power to change the scope of health care services, what is the basis of payment and provision and "dissolving the boundary between health and social care."<sup>1</sup>

Furthermore it is not clear that the proposed regulations are consistent with the general scheme of the primary legislation, particularly the division between commissioners and providers, nor with the proper interpretation of the Secretary of State's powers under the legislation.<sup>2</sup>

Our level of concern is such that unless the Secretary of State withdraws his support for the NHS Standard Contract (Accountable Care Models), until NHS England has carried out a lawful consultation on the ACO contract, and/or conducts a full public consultation on the introduction of accountable care organisations, we intend to challenge the Secretary of State's support for the ACO Contract through the regulations by way of judicial review, and our solicitors have written to the Secretary of State for Health to give him notice of that intention.

### The proposed regulations

There are 10 proposed regulations which would change 12 existing regulations:

- **National Health Service (General Medical Services Contracts) (Amendment) Regulations 2018** Will allow holders of GMS contracts to suspend those contracts to participate in a fully integrated ACO, and provision to re-activate.
- **National Health Service (Personal Medical Services Agreements) (Amendment) Regulations 2018** Will allow holders of PMS agreements to suspend those contracts to participate in a fully integrated ACO, and provision to re-activate.
- **Primary Medical Services (Sale of Goodwill and Restrictions on Sub-contracting) Regulations 2004** Will ensure that existing restrictions on the sale of the goodwill in a medical practice also apply to providers of primary medical services under an ACO Contract and to sub-contractors providing primary medical services under an ACO contract.
- **Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 SI 2009/309** Will ensure complaints made to an ACO contractor or subcontractor will be handled.

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1 There is no statutory power under which the Secretary of State for Health may "dissolve" the boundary between health and social care.

2 For example, although the Secretary of State has the power to make regulations to vary or terminate GMS contracts he does not have the power to make regulations to suspend contracts.

- **NHS (Charges for Drugs and Appliances) Regulations 2015 S.I. 2015/570** Will apply the Regulations on the provision of drugs and appliances to ACO contractors and subcontractors in the same way as they currently do under existing arrangements.
- **National Health Service (Performers Lists) (England) Regulations 2013 S.I.2013/335** Will extend the existing Performers' List provisions to providers operating under an ACO Contract.
- **Medical Profession (Responsible Officers) Regulations 2010 S.I. 2010/2841** Will ensure ACO contract holders are able to become a designated body, in order to appoint a RO.
- **The National Health Service (Travel Expenses and Remission of Charges) Regulations 2003 S.I. 2003/2382** Will ensure that all possible ACO contractors and subcontractors would be covered.
- **National Health Service (Licence Exemptions, etc) Regulations 2013 S.I. 2013/2677** Ensure that joint ventures holding ACO contracts are subject to equivalent regulatory oversight for services of equivalent risk in more conventional provider models.
- **National Health Service (Clinical Commissioning Groups – Responsibilities and Standing Rules) Regulations 2012 S.I. 2012/2966** Will expand the scope of the definition of 'commissioning contract' to include contracts used for integrated commissioning of primary care.

They would enable GPs to “suspend” their current contracts and transfer their patient lists to ACOs.

They would recognise ACOs as organisations designated as ACOs under an NHS Contract which “dissolves” the boundaries between health and social care.

There is very little real information in the consultation document about the meaning, purpose and effect of ACOs. The consultation on the regulations does not give enough information about ACOs, or their effect, to enable us to provide an informed response. But if made, the regulations would undermine the duty of NHS England to consult on the variation to the NHS Standard Contract required to enable ACOs to operate.

Once the regulations are in force, which they would be as soon as they are laid before Parliament and without any debate, the regulations say ACOs could be designated if brought into being through a contract which matches the definition in the regulations. And if the regulations have effectively already defined the ACO contract, there will be no opportunity for a meaningful consultation to be carried out by NHS England.

### **The NHS Standard Contract**

NHS England does not have the power to issue or impose an NHS Standard contract without first consulting.

In August 2017 NHS England said that it had produced a draft ACO contract that was ready for use. (This is the draft standard contract referred to in the Secretary of State's Executive Summary.)

However, following correspondence with our solicitors (copies of which have been sent to the Secretary of State), NHS England has said that the draft contract is not in fact ready to be used. The key points from the correspondence are:

- **NHS England has not formally issued a draft contract. It has not produced a contract which is ready for use.**

- **It has not yet consulted and does not propose to do so until 2018.**
- **It is aware of its duty to consult and intends to consult in 2018.**

The 2018 consultation must be carried out lawfully. It must be “undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give an intelligent response...and the product of the consultation must be conscientiously taken into account when the ultimate decision is taken.”<sup>3</sup>

The Secretary of State’s technical consultation on the proposed regulations which it is said have been requested by NHS England<sup>4</sup> assumes that decisions about the NHS standard contract have been made, even though they cannot lawfully be made until after consultation.

The technical consultation on amendments to regulations is no substitute for a lawful consultation on the proposed NHS Standard Contract for ACOs.

A lawful consultation on the creation of regulations or contracts for ACOs, whether carried out by the Secretary of State or by NHS England, would, at a minimum:

- explain what is an ACO,
- explain why it is thought necessary to create ACOs,
- explain what powers an ACO would have,
- explain what it would do,
- explain what kind of body it would be, how would it be constituted and by whom
- explain the governance, transparency and accountability rules it would be subject to, including public rights of involvement in its decision making,
- explain public money would it receive,
- set out alternatives to achieving policy objectives,
- provide any impact assessment made of the introduction of ACOs,
- provide evidence obtained or considered which demonstrates the likely effects that ACOs would have (1) on improving health and social services and reducing inequalities, (2) on the scope, range and entitlement to those services, and (3) on access to services, in light of the different funding and population bases for health and social services,
- explain the basis of the powers to promote ACOs and to “dissolve boundaries” between (as opposed to integrate) health and social services and explain why the powers given by Parliament to integrate services are not sufficient to achieve the policy objectives.

By contrast, this consultation tells us nothing about ACOs beyond the following different definitions:

““ACO” means a body known as an accountable care organisation, having been so designated by the Board<sup>5</sup> because it is providing or arranging the provision of services under the 2006 Act under contractual arrangements which— (a) have the objective of integrating care and having a single, systematic approach to using the resources for a local population to improve quality and health outcomes; and (b) allow a single provider

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<sup>3</sup> *R v Brent London Borough Council ex p Gunning* (1985) 84 LGR 168

<sup>4</sup> NHS England have told us that this consultation is an exercise separate from their publication of a draft ACO contract. However, it is difficult to see how this assertion can be accurate.

<sup>5</sup> i.e. NHS England

organisation to make most decisions about how to allocate resources and design care for its local population”<sup>6</sup>

““ACO” means a body known as an accountable care organisation having been so designated by the Board, because it is providing or arranging the provision of health services under the National Health Service Act 2006 which are referred to in a contract based on a standard contract, developed by the Board, for accountable care models”<sup>7</sup>

These definitions, although different, appear, in conjunction with other amendments, to suggest that an ACO, if introduced, would be a private corporate non-NHS body which NHS England decides is an ACO, and to which will be transferred decisions about allocation of resources and care, even though NHS England has no statutory power to designate ACOs and even though the ACO might not, itself, actually provide any services.

Depending on exactly what ACOs are and what it is proposed they will do, which is not known or explained in this consultation, the proposed changes may in any event not be consistent with the primary legislation which empowers the Secretary of State to make regulations.

Completing implementation of the commissioner/provider split was a central purpose behind the Health and Social Care Act 2012, conferring certain functions on clinical commissioning groups (CCGs) and only on them - not to service providers and not to “ACOs”. If the regulations frustrate this purpose then it is unlawful to propose or make them.<sup>8</sup>

There appears to be no regulatory impact assessment.

This limited consultation is therefore no substitute for the full consultation that must be carried out before any major change to the organisation of NHS services is implemented.

It pre-empts the consultation NHS England proposes to carry out in 2018 which must be carried when any NHS England proposals for a standard contract are at a formative stage.

We therefore request that the proposed regulations are withdrawn and not laid before Parliament until after a lawful consultation on the principle of ACOs and the dissolution of boundaries between health and social care has been conducted.

Colin Hutchinson, Allyson Pollock, Sue Richards and Graham Winyard

2<sup>nd</sup> November 2017

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<sup>6</sup> See proposed changes to the NHS (Travel Expenses and Remission of Charges) Regulations 2003, the NHS (Charges for Drugs and Appliances) Regulations 2015 and to the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009

<sup>7</sup> Proposed changes to The Medical Profession (Responsible Officers) (Amendment) Regulations 2010

<sup>8</sup> *Padfield v Minister of Agriculture, Fisheries and Food [1986] AC 997*.