

Status of GP consortia and 'shadow' consortia

1. This note provides clarification on a number of questions that have been raised about:
 - the legal status of commissioning consortia, once they are established under the proposed legislative framework in the Health and Social Care Bill
 - the legal status of pathfinders or emerging consortia and the implications for issues such as employment of staff.

Commissioning consortia (post-establishment)

2. Subject to parliamentary approval, a prospective consortium will be able to apply to the NHS Commissioning Board to be established as a statutory body from April 2012 onwards. Once the Board has granted an application (i.e. it has authorised the consortium), the consortium will be established as a statutory body. It is proposed that the consortium will then take on its statutory commissioning functions from April 2013.
3. Subject to the Health and Social Care Bill, a commissioning consortium – 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.
4. A commissioning consortium 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 consortium will be determined in accordance with the provisions of the Bill, not the rules relating to companies or LLPs.
5. There appears to be some confusion about the clauses in the Bill that describe consortia 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 consortia will be exactly the same as a PCT or SHA now:
 - 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 consortia will not be either. If they were Crown agents, this would make them part of central government.
 - 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 established by specific legislation – this is the case for many public bodies. PCTs are corporate bodies established by the NHS Act 2006, and consortia 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 consortia in future.

6. As set out above, consortia will be classified as NHS bodies, just as PCTs and SHAs are now. Paragraph 129(3) in schedule 4 of the Bill inserts a defined list of NHS bodies into section 275 of the NHS Act 2006. This list includes consortia.
7. Commissioning consortia will be commissioning-only organisations. They will not be able to provide 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 commissioning consortium.

Status of 'shadow' consortia

8. During the period leading up to the establishment of consortia, 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 consortia'. 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.
9. 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. We are preparing a separate note describing good practice on these delegation arrangements.
10. 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 commissioning staff.
11. Commissioning budgets. Whilst we envisage increasing commissioning responsibilities being devolved to pathfinders and other emerging consortia, this must be done on the basis of budgets being physically held by PCTs (the note on delegation will explain this in more detail). 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.
12. Employment of NHS staff. Some staff may in due course transfer employment to an established commissioning consortium. In the meantime, NHS staff should remain employed by PCTs, rather than transferring employment to LLPs/CICs etc., in order to ensure that staff retain their NHS pensions, continuity of NHS service and so forth. There will be HR advice in

due course covering the employment position of NHS staff after the establishment of GP consortia (from April 2012 onwards) and after PCTs are abolished and consortia take on their statutory functions (from April 2013).

13. There is no point in other pathfinders or emerging consortia seeking LLP, CIC or other company status in support of their commissioning function, as this status is incompatible with becoming a statutory body (when established as a commissioning consortium).

Accountable Officers

14. A consortium 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.

Department of Health
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