
NHS West Norfolk Clinical Commissioning Group
Advice in relation to the implications of a Delegation Agreement
between NHS England and the CCG
01 March 2017

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1 The issue

- 1.1 We understand that the CCG has made an application for the delegation of primary care commissioning (with effect from 01 April 2017).
- 1.2 As part of its due diligence in connection with this, the CCG requires a legal review of financial and other legal risks inherent in the proposed agreement for the delegation of primary medical care commissioning from NHS England to the CCG (the “delegation agreement”).

2 A general overview

- 2.1 The delegation agreement sets out the basis upon which NHS England will agree to delegate its primary medical care commissioning functions to the CCG. Technically, the actual delegation will be made by another document (referred to in the delegation agreement as “the Delegation”) which is issued unilaterally by NHS England. The purpose of the delegation agreement is therefore to set a contractual context for the delegation and to give each party assurances about how the other will behave.

3 The delegation in operation

- 3.1 The delegation agreement says that the CCG must establish a committee to exercise its delegated commissioning functions. The only stated requirements for that committee are that it accords with the revised NHS England conflicts of interest guidance, which is here: <https://www.england.nhs.uk/commissioning/wp-content/uploads/sites/12/2016/06/revsd-coi-guidance-june16.pdf>. The CCG should also consider whether any amendments need to be made to its primary care commissioning committee (not necessarily before the agreement is signed, but

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certainly before it takes its first commissioning decisions, pursuant to the delegation) either to reflect this guidance or to reflect the terms of delegation. Our view is that CCGs' committees should by definition comply with the terms of delegation because CCGs can only commission within their delegated authority, including the delegated limits and requirements to obtain consent from NHS England set out in the delegation agreement. However, the primary care commissioning committee arrangements should still be checked against the December 2016 guidance.

- 3.2 In exercising its delegated functions, the CCG is obliged to follow law (which includes directions), statutory guidance and good practice (see clause 6.4) and must do so in such a way as to comply with NHS England's statutory duties and to "enable NHS England to fulfil" its reserved functions (clause 6.5). In addition CCGs are required to "have regard to" non-statutory guidance and contract notices issued by NHS England. The phrase "have regard to" has a specific legal meaning, which is that you should consider the guidance and contract notices and if you decide not to follow them (a) you should have reasons and (b) those reasons should be articulated and recorded.
- 3.3 "Guidance" for this purpose includes any policy, guidance or manual about how CCGs should exercise the delegated functions. In downgrading the CCG's obligation to the level of having regard to Guidance (as opposed to being obliged to follow it) NHS England also agreed to insert statement in clause 24.4 that "NHS England acknowledges that in considering the need and/or content of new Guidance it will engage appropriately with CCGs."
- 3.4 The delegation agreement also provides for monitoring by NHS England. The approach is light touch, but note that the CCG Improvement and Assessment Framework applies as much to this activity as to any other activity of the CCG. NHS England requires CCGs to produce an annual business plan, commissioning plan and annual report (see clause 13), and under clause 13.26 the first plan is to be delivered "Within two (2) months of the date of the Delegation" and thereafter "three (3) months before the start of each financial year."
- 3.5 The delegation of primary medical care commissioning to CCGs is not complete or unlimited. Some primary medical services responsibilities (see clause 8.2 and Schedule 3) are excluded from the delegation, although that does not mean that the CCG will not be asked to assist with them (see "Other things the CCG... may be

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asked to do” below). However, it will be up to the CCG whether to agree to take on those tasks (see clause 8.9).

- 3.6 In addition, Schedule 5 sets out decisions that must be referred up the line to NHS England – these are (a) settling a claim over £100,000; (b) any novel, contentious or repercussive decision; and (c) any primary medical services contract which has, or could have, a life of more than 5 years. Although it is often quite hard to identify whether something is novel, contentious or repercussive, CCGs will already be familiar with these concepts from their own delegated limits. All NHS bodies, except possibly foundation trusts, are subject to the requirement to obtain (ultimately) Treasury approval for items in this category, as is the Department of Health.
- 3.7 In handling claims, the CCG must comply with clause 14, and note particularly that clause 14.4 requires the CCG to comply with NHS England’s policy and instructions, send copies of any documents received about a claim to NHS England and seek their approval before taking legal advice about the claim. NHS England may also step in (taking the conduct of claims over from the CCG) and out (handing the conduct of claims back to the CCG), after discussion with the CCG. Note also that, as mentioned in the preceding paragraph of this advice, the CCG is not allowed to settle claims over £100,000 without NHS England’s approval. Further the CCG is not allowed to make any admission of liability or settle any claims that may give rise to a claim (of any value) by or against any NHS England assigned staff without NHS England’s consent (paragraph 6 of Schedule 8).
- 3.8 Post-agreement, the CCG and NHS England are also to agree an agreement for sharing personal data using the template set out in the delegation agreement (see clause 10).

4 Financial risks to the CCG

- 4.1 Under clause 13.3, NHS England is entitled at any time to increase or reduce the funds made available to the CCG for the delegated commissioning. A decrease could in theory mean that the CCG has less money than it needs to meet the primary medical services arrangements it has entered into (see particularly clauses 13.3.5-13.3.6). This understandably caused some concern amongst CCGs when NHS England’s initial proposals were published in 2015 and the position has been improved, but the risk is not entirely eliminated. Clause 13.3A was added to give

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CCGs comfort that the provisions would only be used to correct a mistake or in “significant or exceptional circumstances that would require such corrections or adjustments (including but not limited to a change in the mandate published by the Department of Health or other external factors).” Our view is that “significant or exceptional circumstances” would include the need for NHS England to deal with a funding crisis of its own.

- 4.2 CCGs are to be responsible for all claims under the primary medical services contracts. NHS England has explained that this is because the funds paid to CCGs under the delegation agreements include NHS England’s budget for claims (see clause 14.11). At the request of CCGs, clause 13 has also been amended to say that NHS England will take responsibility where the claim arises from its own fault and that claims which pre-date the delegation (and any claims for which NHS England has a reserve) are outside the CCGs’ responsibility. Clause 14.10 says that if the CCG’s delegated funds will be insufficient to meet both the claim and discharge its delegated functions, then the CCG and NHS England shall meet to discuss and agree any adjustment that may be needed to the CCG’s allocation. Whilst this falls short of an absolute commitment to make up any shortfall, it is a great improvement on the words it replaced.
- 4.3 The CCG is also responsible for any overspends. This is not expressly stated in the delegation agreement, but was mentioned explicitly at a previous NHS England legal webinar and flows from passing the budget and commissioning responsibility to the CCG.
- 4.4 Although, or perhaps because, NHS England retains responsibility for the commissioning functions delegated to the CCG, it makes the CCG responsible for any action which does not comply with the delegated authority, including breach of any of NHS England’s commissioning duties. The CCG should also note that NHS England is entitled to dock the CCG’s monthly payments for any loss it suffers as a result of “the CCG’s negligence, fraud, recklessness or deliberate breach of the Delegation (including any actions that are taken that exceed the authority conferred by the Delegation) or this Agreement” (clause 13.35 and 13.3.3). The CCG has a similar right against NHS England (and there is to be a financial adjustment) for any negligence, fraud, recklessness or deliberate breach of the Delegated Functions by NHS England.

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5 NHS England assigned staff

5.1 Schedule 8 sets out the starting position for the NHS England staff provided to support the commissioning, which is that they will be employed by and report to NHS England, who will pay them. The CCG and NHS England then have six months in which to agree whether this assignment arrangement (Model 1) should continue or whether to switch to Model 2 (secondment to the CCG) or Model 3 (employment by the CCG).

6 Very long notice period for the CCG

6.1 If the CCG wishes to terminate the delegation agreement, it must give notice to NHS England no later than the 30th September before the 31st March on which the delegation is to terminate. This means that a notice served by a CCG on 1 October 2017 would not be effective until 31 March 2019. To meet this concern, NHS England have added a further clause to make it explicit that the delegation agreement may be terminated at any time by mutual agreement. By contrast, NHS England can terminate the agreement at any time.

7 Other things the CCG is or may be asked to do

7.1 Although the section 7A (public health) functions are retained by NHS England, the delegation agreement says that NHS England will transfer funds to the CCG to enable the CCG to manage the making of these payments on its behalf. The agreement also goes on to say that NHS England can decide to require the CCG to provide similar administrative and management support for other retained functions if it wishes to do so (see clauses 13.21-13.23), but only if the CCG agrees.

8 Consequences of breach

8.1 The delegation agreement allows NHS England to recover financial loss from the CCG where the CCG is in breach of the agreement. It also provides step-in rights for NHS England. This is in addition to the powers NHS England has under the National Health Service Act 2006 (as amended) to intervene in a CCG that is failing to perform.

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9 Locally Agreed Terms

- 9.1 Before the CCG returns the delegation agreement it must be agreed with the local NHS England team and signed on behalf of the CCG and the Local Team. The Local Team's agreement is required because the Local Team needs to agree who their responsible officer will be (the name goes in the Particulars section) and whether there will be any local terms.
- 9.2 This means that Schedule 7 (which sets out the local terms if any) also needs to be completed, even if there are no "Local Terms", before the agreement is signed because it either states what the local terms are or says that there are none ("If there are no Local Terms, state "There are no Local Terms" in this Schedule 7").
- 9.3 The guidance says, "Local Terms may only be agreed between the CCG and NHS England on an exceptional basis and must not derogate from the terms and conditions of the Delegation Agreement. Local Terms may include:
- 9.3.1 details of any pooled funds of NHS England and the CCG;
 - 9.3.2 resourcing arrangements between NHS England and the CCG; and
 - 9.3.3 details of any particular services that the Assigned Staff will provide to the CCG under Schedule 8."
- 9.4 The CCG has forwarded to us a copy of a draft Memorandum of Understanding related to the management of finance functions as between the CCG and NHS England. It is our view that the contents of this document should be included in Schedule 7 to the delegation agreement as they constitute "Local Terms" which should be incorporated contractually. We have considered the draft MOU under separate cover.

10 Opinion

- 10.1 In our view, NHS England made significant concessions in addressing the concerns previously raised by CCGs in 2015 about the delegation agreement. If the CCG proceeds with delegation, this is not without risks, but from what NHS England says these risks are to be met from the transferring budgets. The residual risk for CCGs is that NHS England is required to trim its primary care commissioning budget in-year

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to meet its own statutory obligations. In those circumstances, we think a political solution would have to be found.

11 Status of this advice

11.1 As the CCG will appreciate, this advice note is not a comprehensive summary of the 80-page delegation agreement and for a fuller understanding needs to be read together with the 19-page summary (“Guide to the Delegation Agreement”) which should have been sent to the CCG with the delegation agreement. The “Guide” is only a summary and if there is any inconsistency, the agreement takes precedence over the guidance. Accordingly, our advice above is based on the delegation agreement.

To discuss any of the issues raised in this document please contact either:

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