National Audit Office

Report
by the Comptroller
and Auditor General

Department of Health, NHS England and Monitor

Managing conflicts of interest in NHS clinical commissioning groups

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What this investigation is about

1 A conflict of interest is circumstances that risk an individual's ability to apply judgement or act in one role being impaired or influenced by a secondary interest. The potential for conflicts of interest is commonplace in both the public and private sectors. Conflicts of interest can occur naturally as a product of the way a system is designed, or as a result of policy decisions. While it may not be reasonable or efficient to remove the risk of conflicts of interest entirely, it is essential to recognise the risks and put measures in place to identify and manage conflicts when they arise.

2 Reforms under the Health and Social Care Act 2012 (the Act) created a new clinically led local NHS commissioning system in England. This system gives local health professionals a key role in commissioning health services to deliver quality health outcomes for the populations they serve, but also increases the potential for conflicts of interest. This investigation was in response to Parliamentary and public concerns over the risk of conflicts of interest influencing local NHS commissioners' decisions in ways that favour secondary interests, such as personal gain, over patients' interests.

Background

3 The Act established 211 NHS clinical commissioning groups (CCGs) as clinically led commissioners of local NHS services in England from April 2013. These CCGs make decisions about local health services and funding levels. From April 2015 the number of CCGs reduced to 209 when 3 CCGs merged.

4 All GP practices are members of their local CCG. Within each CCG, some GPs, along with other clinical experts, CCG officials and lay members, are members of their CCG's board – its governing body. Under these arrangements there is potential for some GPs and their colleagues to make commissioning decisions about services they provide, or in which they have an interest. Where this is the case there is a risk that commissioners may put, or be perceived to put, personal interests ahead of patients' interests. Because they are also providers of local clinical services, GP commissioners are particularly likely to have potential conflicts of interest.

5 CCGs control around two-thirds of the NHS commissioning budget, with £64.3 billion allocated to CCGs in 2014-15. CCGs commission a wide range of local services including planned hospital care; urgent and emergency care; community health services; out-of-hours GP services; mental health services; learning disability services; and extra local primary medical services beyond the scope of the standard GP contract. In 2013-14 and 2014-15 NHS England was responsible for commissioning most primary medical services. From 1 April 2015, NHS England's new primary care co-commissioning arrangements give CCGs the option to have much greater involvement in GP service commissioning.

6 The Department of Health (the Department) recognised the new local commissioning arrangements increased the potential for significant conflicts of interest. However, it felt the benefits it expected from clinically led commissioning would outweigh the risks, and that CCGs could manage the risks.

Scope of our investigation

7 The objective of our investigation was to establish the facts about:

- the risk of conflicts of interest in the local NHS commissioning system (Part One);
- the accountability, control and assurance arrangements for managing conflicts of interest which were established by the Act and associated regulations (Part Two); and
- how these arrangements were working in the 211 CCGs active in 2014-15, based on analysis of information on CCGs' websites, undertaken prior to April 2015 (Part Three).

8 We have previously set out good practice principles for managing conflicts of interest in our investigation *Cross-government: Conflicts of interest*.[1] We used these principles for this review. Our methods are in Appendix One.

1 Comptroller and Auditor General, *Cross-government: Conflicts of interest*, Session 2014-15, HC 907, National Audit Office, January 2015.

Summary

Key findings

The risk of conflicts of interest

9 **Some 1,300 (41%) of clinical commissioning group (CCG) governing body members in position at the time of our analysis in 2014-15 were also GPs, who may, potentially, have made decisions about local health services and have been paid by their CCG for providing them.** Non-GP commissioners may also have potential conflicts of interest, for example where have they have financial or other interests in organisations providing locally commissioned health services (paragraph 1.8).

10 **Stakeholders raised concerns about the potential for conflicts of interest in the new system, particularly, but not exclusively, when CCGs commission services where GPs are likely to be involved as providers.** In practice, in 2013-14 and 2014-15 CCGs had a relatively limited role in commissioning and managing primary medical services. Most contracts and spend were for commissioning care from NHS trusts under well-established arrangements, reducing the likelihood of conflicts. The Department of Health (the Department) told us that relatively few new contracts were awarded by CCGs during 2013-14 and 2014-15; and Monitor found this was the case for community services in its 2014 survey. The limited new commissioning activity lessened a common scenario in which a risk of conflict can arise. Conflicts of interest can occur in other situations too, for example when CCGs decide to extend or roll-over existing contracts, or when they make performance management decisions about existing contracts (paragraphs 1.6 and 1.9 to 1.12).

11 **The new arrangements from April 2015 for co-commissioning primary care services from GPs increase the risk of significant conflicts of interest in CCGs.** From April 2015, CCGs could choose to take an enhanced role in GP service commissioning. This included an option to take on fully delegated responsibility from NHS England for commissioning primary medical services. NHS England believes that those CCGs who opted to do so will be able to commission care for their patients and populations in more coherent and joined-up ways — but they also expose themselves to a greater risk of conflicts of interest, both real and perceived. CCGs will need to think through carefully how they handle the likely increases in the range and frequency of potential conflicts, particularly where they use fully delegated primary care commissioning. Under the new arrangements, it is increasingly likely that sometimes all GPs on a decision-making body could have a material interest in a decision. NHS England recognised the increased risk and is developing plans to manage it, including issuing statutory guidance for CCGs for the first time in December 2014 (paragraphs 1.14 to 1.16 and 2.12 to 2.14).

Accountability, control and assurance

12 The Department considered the nature and scale of the risk of conflicts of interest when designing the accountability, control and assurance arrangements for them. It formed these arrangements from statute and regulation, assigning explicit statutory roles, responsibilities and requirements to help prevent and detect conflicts of interests and respond to them. These roles and responsibilities are assigned, locally, to CCGs and, nationally, to the Department, NHS England and Monitor (paragraphs 2.2 and 2.3).

Locally

13 The Health and Social Care Act 2012 (the Act) places a legal duty on CCGs to manage conflicts of interest. CCGs must do this in a way that protects the integrity of their decision-making. They also have to keep and publish specified registers of interests. Regulations, and statutory guidance from NHS England and Monitor, support the statutory provisions (paragraphs 2.4 to 2.6 and 3.4).

14 Beyond statutory requirements, local management, monitoring, assurance and reporting for conflicts of interest, and other risks, are matters for a CCG's governing body. Practice will, necessarily, vary from one CCG to another. NHS England issued guidance for CCGs on managing conflicts of interest in March 2013, to which all CCGs had to have regard. In December 2014, NHS England strengthened its approach by issuing statutory guidance for CCGs from April 2015. This statutory guidance prescribed stronger assurance measures in line with the increased risks of primary care co-commissioning. NHS England expects these measures to improve the consistency of local reporting, enhance transparency and strengthen the overall assurance available about how CCGs are managing potential and actual conflicts. The strengthened assurance measures in the statutory guidance include requiring CCGs, from 2015-16, to publish on their websites details of procurement decisions, including how any conflicts have been managed to promote transparency. Also, where CCGs undertake joint or delegated commissioning responsibilities for primary care services, their audit committee chair and accountable officer must provide direct formal attestation to NHS England that the CCG has complied with this guidance. Such measures are important for maintaining confidence in the local accountability system (paragraphs 2.13 and 2.15).

Nationally

15 The Department does not get regular information on how CCGs manage conflicts of interest from NHS England or Monitor. The Department focuses on ensuring the assurance system (NHS England) and regulatory system (Monitor) hold CCGs to account, rather than specific areas of governance, such as conflicts of interest. However, the Department, NHS England and Monitor said that conflicts of interest would be raised at their regular accountability meetings if they were a cause for concern (paragraph 2.5).

16 NHS England has a limited understanding of how effectively CCGs are managing conflicts of interest or whether they are complying with requirements, which will hamper its ability to respond promptly to the likely increase in conflicts. NHS England's role with regard to CCGs is one of both assurance and support in a system where CCGs have a large degree of autonomy, and NHS England's direct intervention is by exception. By design, NHS England does not routinely collect detailed assurance or information on CCGs' conflict of interest risks and how they manage them. It considers CCGs' management of conflicts of interest as part of its wider assurance on an 'exception' basis, for example when CCGs or third parties raise issues about conflicts with it. NHS England believes its 'by exception' approach is proportionate and consistent with its assurance role over devolved independent bodies which have a statutory responsibility to manage conflicts locally. NHS England has acted to obtain information from CCGs about their management of conflicts when specific concerns are present, and reported that it has not found conflicts of interest to give rise to significant cause for concern. However, in our report *Out-of-hours GP services in England*[2] we concluded that, in this case, its assurance about how CCGs had managed any potential conflicts was limited (paragraphs 2.7 to 2.11).

17 Our analysis, to June 2015, found Monitor had only undertaken one formal investigation that included a concern about conflicts of interest in a CCG. It is Monitor's role to enforce NHS regulations on procurement, patient choice and competition. These regulations include not awarding contracts for services where there is an actual or perceived conflict of interest. Monitor's role includes investigating such claims and it can issue directions to commissioners that alter contractual arrangements for NHS services. Since January 2014, Monitor has launched four formal investigations under these regulations; only one of these investigations featured concerns about conflicts of interest in a CCG. The investigation was in response to a complaint from a healthcare trust that the process used by Northern, Eastern and Western Devon Clinical Commissioning Group to award a contract for community services for adults with complex care needs was not consistent with the CCG's regulatory obligations. It also alleged that conflicts of interest affected the integrity of the proposed contract award decision. In August 2015 Monitor concluded that the integrity of the CCG's decision had not been affected by conflicts of interest (paragraphs 2.16 to 2.18).

2 Comptroller and Auditor General, *Out-of-hours GP services in England*, Session 2014-15, HC 439, National Audit Office, September 2014.

Managing conflicts of interest in 2014-15

18 In 2014-15 almost all CCGs had put in place most key elements of the legislative requirements which help them to prevent and manage conflicts. Our analysis of CCG websites in February 2015 showed that all 211 CCGs had at least the required minimum number of lay members on their governing bodies. All CCGs published their governing body papers and minutes of meetings. Some 209 CCGs had published registers of interests online for governing body members, although only 40 published details of the interests of the wider CCG membership, and 45 published employees' interests. And 210 CCGs had published information online on how they will manage any conflicts that arise (paragraphs 3.3 to 3.6).

19 During 2014-15, a minority of CCGs had reported they had to manage actual or perceived conflicts of interest. We reviewed CCGs' governing body minutes for April to December 2014. Potential conflicts were declared for agenda items in 22% of CCGs during this period. This related to 75 recorded instances of potential or actual conflicts, including on a range of services commissioned by CCGs to be provided by GP; schemes to improve access to general practice; the proactive care programme; and the primary care co-commissioning arrangements (paragraphs 3.7 and 3.8).

20 We could not always assess from publicly available information how CCGs had managed specific conflicts of interest, which limits local transparency. In the 75 instances of potential or actual conflicts we found from our sample of governing body minutes, the level of detail given about the conflict and how it had been managed varied. In 14 cases the information provided was insufficient for us to assess how the CCG managed the conflict. Transparent information is an enabler of local accountability, and as such is important for promoting confidence in the local health commissioning system. NHS England expects its updated guidance for CCGs, issued in December 2014, to lead to more consistent disclosures across the sector (paragraphs 2.13 to 2.15, 3.7 and 3.8).

21 Where CCGs reported information about their controls for managing risks of conflicts of interest, it showed the adequacy of those controls had varied. Some 117 CCGs included information on conflicts of interest in their governance statement in their 2013-14 annual report and accounts. Of these, 15 CCGs reported that internal auditors had found weaknesses and areas for improvement in their systems and processes to manage conflict of interest risks. Other disclosures included positive assurance statements that required processes were in place, details about actions taken to improve controls, and information on how CCGs had managed specific conflicts of interest (paragraphs 3.9 to 3.12).

Overall observation

22 The Department recognises the potential for conflicts of interest in the new system for NHS commissioning, and the need for public confidence that conflicts are dealt with appropriately. Its adoption of a statutory framework and assignment of explicit responsibilities for managing conflicts of interest indicates it took a proportionate response to the high potential risk. Our limited evidence suggests that in 2014-15 CCGs generally had arrangements for managing conflicts of interest to reduce the risk of commissioners' decisions being improperly influenced. These arrangements rely on both personal integrity and local transparency. NHS England has so far, however, collected little data centrally on how effectively CCGs are managing conflicts. It has relied instead on an exception-based assurance process, and on Monitor as the system regulator. Developments in the health service, in particular new arrangements for co-commissioning primary care services, are likely to significantly increase the number and scale of conflicts of interest. Public confidence that conflicts are well managed will be vital: Parliament and the public will want to know that CCGs are safeguarding patients' interests and taxpayers' money by managing these risks. To promote this confidence:

- the Department will need to be clear that it has assurance that conflicts of interest are being managed in a way that is sufficient to meet its needs as steward of the health system;
- NHS England will need to be satisfied that it has sufficient and timely information to assure itself that CCGs are managing conflicts promptly and effectively. This will include needing to be satisfied that CCGs have implemented the strengthened assurance measures in its new statutory guidance, and that these measures are operating as intended and that they are effective;
- Monitor will need to be confident that it could respond to an increased number of complaints about conflicts at appropriate scale and pace; and
- CCGs will need to ensure transparency at the local level when making commissioning decisions and when handling of conflicts of interest, to promote accountability.