Consultation response

The King's Fund response to the Department of Health's consultation on an NHS Constitution

17 October 2008

The King's Fund welcomes the opportunity to contribute to the consultation process. Our Chief Executive, Niall Dickson, and Director of Policy, Anna Dixon, are members of the Constitutional Advisory Forum. In addition, we have published two discussion papers relevant to this consultation: *Governing the NHS: Alternatives to an independent board* (Dixon and Alvarez-Rosete 2008), which recommended the establishment of an NHS Constitution, and *Should Primary Care Trusts be Made More Locally Accountable?* (Thorlby *et al* 2008), which discussed options for making PCTs more accountable to their local communities.

The King's Fund seeks to understand how the health system in England can be improved. Using that insight, we help to shape policy, transform services and bring about behaviour change. Our work includes research, analysis, leadership and service improvement. We also offer a wide range of resources to help everyone working in health to share knowledge, learning and ideas.

The King's Fund position on an NHS Constitution

We feel that an NHS Constitution is potentially a valuable way of providing clarity on the purpose of the NHS. However, we have two main comments on the proposals contained in the draft Constitution.

First, in order to be worthy of the name, the Constitution must be a document that will endure. As it is currently proposed, the content of the Constitution will not be established in legislation; instead it will be a 'declaratory document'. However, our recommendation stands. Without such safeguards the Constitution will be vulnerable to change with every incoming government.

Second, the draft constitution is highly ambitious in its scope. It defines the guiding principles of the NHS; it codifies existing legal rights of patients and staff and adds some pledges; it proposes a list of NHS values and it is to be accompanied by a statement of accountability that will outline the roles of the various NHS and non-NHS bodies that deliver health care in England. In our view the Constitution will succeed if it is easy to disseminate its core message to patients, staff and the general public. As it is currently conceived there is a danger that it will lose some clarity of purpose.

Below we set out our response to the specific questions raised in the consultation document.

The source and status of the Constitution

1. Should all NHS bodies and NHS-funded organisations be obliged by law to take account of the NHS Constitution?

The Constitution needs to acknowledge that the NHS is no longer one organisation centrally managed by the Department of Health, but that increasingly it is a commissioner rather than a provider of care. The creation of an NHS Constitution provides an opportunity to clarify what is expected of all organisations that deliver NHS-funded care. The draft Constitution explicitly recognises that 'other private, public and third sector organisations' provide health

care and specifies that all providers of NHS services will be obliged by law to take the NHS Constitution into account.

It is right that the NHS Constitution should apply to all providers of NHS-funded care. This will ensure that patients are clear that they will receive the same standard of care wherever they are treated and that providers are clear about the standards expected of them. However, while the rights of a patient are protected regardless of who is providing their care, the rights of staff may vary considerably according to whom they are employed by. This applies not only in the case of private and voluntary sector providers. Foundation trusts also have freedoms that other NHS employers do not have and the Secretary of State has limited scope to tell them what to do in relation to their staff. However, if the NHS Constitution is to be of value then all NHS bodies and NHS-funded organisations should be legally obliged to take account of it.

2. Should legislation require the Secretary of State for Health to renew the Constitution every ten years?
3. Should the Handbook to the NHS Constitution be renewed every three years?

Questions 2 and 3 are answered together.

As we state in the introduction, if the Constitution is to secure the foundations of the NHS (as stated in *A consultation on The NHS Constitution* (Department of Health 2008a) then it needs to be a document that will endure. However, it is not clear that a set timeframe for renewal would be appropriate for other aspects of the Constitution, for example the rights and pledges, and the statement of accountability. Therefore our recommendation is that while a ten-year renewal period may be appropriate for the principles of the NHS Constitution, these other components of the Constitution, and the Constitution Handbook, should be reviewed and updated when necessary (ie, when other legislation creates new rights or alters the governance arrangements of NHS bodies) and not only at set intervals.

The purpose and principles of the NHS

4. Are the statement of purpose and the set of principles right? Are there any principles that should be added?

We welcome the reiteration of the key principles of the NHS. As we noted in *Governing the NHS* (Dixon and Alvarez-Rosete 2008), there is currently little disagreement about what those principles should be. The Conservative party has accepted the NHS principles set out in legislation in the NHS Plan of 2000 and they in turn hardly differ from those set out in the 1946 NHS Act.

However, the word 'comprehensive' may cause a problem in the wording of the first principle. The NHS does not provide fully comprehensive care; many patients pay for elements of their care, most notably for prescribed medicine, and care offered varies in different geographic areas. This principle contradicts both principle two, which specifies that there are limited circumstances in which individuals may pay for NHS services, and principle six, which acknowledges that NHS resources are finite and thus implies that there are limits to what it is able to pay for. It may be better to say it is largely comprehensive.

Patients and the public

5. Is the list of public and patients rights clearly explained and accessible to all sections of the population?
6. Is it useful to bring together all of the key public and patients' rights and pledges?

The document does appear to be well drafted and clear but it would need to be tested direct with members of the public and with patients. We do not have any further comments to make on these points.

7. Do you agree with a new legal right to choice about your NHS care?

The rights of a patient to choose their GP practice and their GP already exist, and since April 2008 patients have been offered a free choice of provider when being referred for treatment by their GP. The new legal right is welcome - it should increase take-up of this policy.

The wording of this pledge appears to suggest that patients will be entitled to make choices not just about the provider of their care, but about the treatment itself. However, the legislation underpinning these rights (as outlined in the Handbook to the NHS Constitution) does not provide for this, therefore both the intention and the wording of this pledge need to be clarified.

Further, it should be noted that the Constitution refers earlier to an interpretation by the European Courts of Justice of EU legislation that gives patients the right to go abroad for treatment if they face an 'undue delay' in receiving that treatment at home. The right to seek treatment abroad may expand with subsequent interpretations of this legislation or implementation of the proposed EU Directive on the application of patients' rights in cross-border health care. The possible ramifications of this on health policy in England are hard to ascertain at present.

Finally, it should be noted that there is no evidence to date that patient choice has had an overall impact on clinical quality, and evidence suggests that patients choose their hospital according to ease of access rather than standards of care (Department of Health 2008b). It is critical that the pledge that 'the NHS will strive to offer easily accessible information' is executed well if the policy is to have its intended effect on quality improvement.

8. Is this list of pledges right? Which are most helpful?

The rationales behind the pledges are varied. Some are aspirational – for example, 'the NHS will strive to inform you about what healthcare services are available to you, locally and nationally' and 'the NHS will strive to make the transition as smooth as possible when you are referred between services and to include you in relevant discussions'. Such pledges may be better expressed as NHS policy rather than in the Constitution. There is a danger highlighted in *Governing the NHS* (Dixon and Alvarez-Rosete 2008) that including these aspirations that are not legally enforceable may raise expectations that cannot be met, as arguably happened with the Patients Charter in the 1990s.

Other pledges could be strengthened even if they do not qualify in legal terms as a right for patients. For example, 'the NHS will strive to ensure services are provided in a clean and safe environment that is fit for purpose, based on national best practice'. As the Handbook indicates, providers are obliged to meet standards on cleanliness and safety. The new Care Quality Commission will introduce minimum standards on cleanliness within health care settings, so patients will be able to challenge if they do not receive a certain standard of care. Given these circumstances this pledge and others could be strengthened to indicate that NHS services 'should' meet standards of cleanliness and safety.

Indeed the word 'strive' while perhaps attractive to lawyers appears very weak; if there is nothing more than a loose promise to try to do something it probably should not be included in the constitution.

There is no definition given of 'fit for purpose' or any information given on who will develop best practice. This is a difficult area to define and any definition needs to be established in consultation with patients, who may have a very different perspective to staff about what is important.

9. Are the responsibilities and expectations of patients and the public appropriate? Which are most helpful?

The Constitution has published the responsibilities and expectations of patients and the public for the first time. It is right that the public are reminded that although they are

entitled to high-quality health care, they also have a responsibility to make the best use of that care. However, it would be wrong to expect such a declaration to have much impact on the longstanding problem of patients failing to attend appointments and not finishing prescribed courses of medication.

In conclusion, we welcome the uncontroversial statement, 'you should recognise that you can make a significant contribution to your own and your family's good health and take some personal responsibility for it'. However, as with the Constitution as a whole, whether this has any impact will depend on how the Constitution is disseminated and used within the NHS.

10. Are the mechanisms for complaint and redress clear and sufficient?

The Constitution will be a frustrating document for patients unless they can are directed towards someone who can deal with their concerns. The Constitution needs to make clear to whom they should go in the first instance (usually the provider of the service) and then if they are not satisfied should suggest a second place to go - this could be their local PCT. In the longer term there is a need to review the workings of NHS complaints systems

Staff

11. Is the list of staff pledges right? Which are most helpful?
12. Is it useful for the Constitution to set out staff responsibilities? Is the description right?

As stated in our response to question one, NHS care is increasingly provided by a diverse range of organisations. If the NHS Constitution is to apply to all staff delivering NHS-funded health care it is important to ensure that all NHS bodies and NHS-funded organisations are legally obliged to take account of these responsibilities and pledges.

Accountability

13. Do you support the proposal to publish a separate statement of accountability? How can we make this most helpful?

In *Governing the NHS* (Dixon and Alvarez-Rosete 2008) The King's Fund recommended that any NHS Constitution clarify the lines of accountability within the health care system. The NHS is no longer a centrally managed provider of care with lines of accountability leading to Whitehall. The NHS is primarily a commissioner of health care that can be provided by a range of public, private or voluntary organisations, including NHS trusts and foundation trusts. Direct managerial control of public providers is being replaced by other forms of accountability such as contractual accountability to PCTs, local accountability to overview and scrutiny committees and Members Councils and regulatory accountability to the Care Quality Commission and to Monitor.

Some of the roles that were previously carried out by the Department of Health are now carried out by external agencies such as NICE, Monitor and the Care Quality Commission. Their roles should also be outlined in the statement of accountability.

A statement of accountability also provides an opportunity to strengthen local accountability, as recommended by the Local Government Association health commission (Local Government Association 2008). That report proposed that health service managers be obliged to explain their decisions publicly and that that there be a formal process whereby the local population (or their representatives) can pass judgement on those it decides have underperformed.

NHS values

14. Should values be included in the Constitution?

Yes - any provider of NHS care could be reasonably expected to already abide by them and they will be useful for patients wishing to assess whether the care they receive matches these values.

The Handbook to the NHS Constitution

15. Is the level of detail in the Handbook to the NHS Constitution right?

The level of detail appears to be about right but will need to be tested direct with staff, patients and members of the public. We do not have any comments to add on this point.

Further questions

16. How can we best ensure that there is widespread awareness of the Constitution among the public, patients and staff?
17. How do you think implementation of the Constitution should be monitored?

Questions 16 and 17 are answered together:

The Constitution is not a conventional policy document that is designed to bring about measurable change across the NHS. Its implementation can be monitored only by how patients, public and staff respond to it.

While it will become clear if the legal rights summarised within it are being increasingly taken up, the implementation of the 'softer' pledges will be best measured by monitoring the extent to which commissioner and providers comply with the standards behind those pledges.

References

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