

Annex to Sir David Nicholson's letter on 'Equity and Excellence: Liberating the NHS' – Managing The Transition And The 2011/12 Operating Framework

Update on the HR Strategy

Gateway reference: 15272

1. Introduction

1.1 The Government's planned reforms set out in 'Equity and Excellence: Liberating the NHS' and the response to the recent consultation exercise 'Liberating the NHS: Legislative framework and next steps' have wide-ranging implications for staff within the NHS (Strategic Health Authorities (SHAs) and Primary Care Trusts (PCTs) in particular), staff within the Department of Health (DH) and staff within the Arms Length Bodies (ALBs). The estimated number of staff whose current employment is affected by these reforms is around 90,000. Because the reforms signal potential new organisations which will take over the responsibilities of SHAs and PCTs, change the functions of the DH with a more strategic role and a renewed focus on public health, and create new and change existing ALBs, developing an HR response is more complex than for any other past reorganisation. Staff who are affected by these changes also have different sets of terms and conditions including Agenda for Change and Very Senior Managers for NHS staff, Civil Service terms and conditions for DH staff, and a mixture of NHS, Civil Service and organisation specific terms for ALB staff.

1.2 In August 2010, Sir Neil McKay published an initial letter stating that we would start to issue national HR guidance, covering NHS, DH and ALB staff to support the implementation of the reforms, in a series of letters and documents; this Annex is the next in that series. We will publish further guidance in support of this 'building blocks' approach as the detail of the changes are published and as the form and functions of new organisations are established following the publication of the Health Command Paper: 'Liberating the NHS: Legislative framework and next steps'. The purpose of this approach is to ensure that staff have the best opportunities in the new system, and that we collectively minimise the number and cost of redundancies. The proposals in the Health Command Paper remain subject to parliamentary approval and the Health and Social Care Bill will be introduced in the New Year. Steps taken towards implementation in the meantime will be within the existing statutory framework.

1.3 We are planning to produce the next HR guidance early in 2011 for:

- NHS Staff
- Staff in DH
- Staff in ALBs

1.4 This guidance is being produced in partnership with trade unions nationally and they will be designed to ensure that the NHS, DH and ALBs are equipped with a workforce that has the right skills, knowledge and behaviours as well as the right leadership to deliver the change.

1.5 The guidance will cover the following issues:

- Clarity about responsibilities for implementation
- Preparing for the changes
- Definitions including 'at risk' and when the term should be applied
- Ensuring equality and diversity
- Detailed descriptions of the application of TUPE
- Relevant competition pools
- Pay arrangements including severance payments
- Suitable alternative employment
- Consultation arrangements including in the event of redundancy
- Support for staff

1.6 Consultation based on the Public Health White Paper 'Healthy Lives: Healthy People' has started and will begin soon on the reform of NHS workforce education and training. These consultations are likely to signal further important information which we will need to reflect in further publications related to the HR strategy. However, it is appropriate to put plans in place to support the transition roadmap set out and to provide as much clarity for staff as possible.

1.7 We are designing the HR strategy to take into account the different responses of staff to the Government's reforms. Sir David Nicholson has said that there will be broadly three categories of staff in organisations directly affected by the changes: those who wish to leave immediately, those who wish to stay in post to support the management of the transition, and those who wish to be part of the future system. For staff in the first category, a Mutually Agreed Resignation Scheme (MARS) has already been made available. For those in the second category, this HR Annex sets

out plans to support retention of business critical staff through a separate pre-
authorised MARS and by using existing contractual flexibilities.

1.8 For those in the third category, who wish to be part of the future system, the
HR strategy will provide:

- Opportunities for PCT staff in three broad areas: roles in the new PCT clusters, roles with emerging consortia, and opportunities to develop new commissioning support organisations.
- Opportunities for SHA and relevant PCT staff may include being part of the NHS Commissioning Board, the Provider Development Authority, the economic regulator and the new structures for education and training. Staff in PCTs and SHAs may also of course wish to seek opportunities in the provider sector.
- Opportunities for some ALB staff in the NHS Commissioning Board
- Opportunities for DH staff in DH, the NHS Commissioning Board, the Provider Development Authority, the economic regulator and the new structures for education and training
- Public health staff in PCTs and SHAs may also transfer to local authorities subject to the passage of the Bill.

1.9 The policies included in this annex and future publications will show how staff, including those three broad groups in paragraph 1.7, will be supported. We will strive to deliver on the pledges to NHS staff set out in the NHS Constitution.

2. Purpose

2.1 We have established five principal objectives to guide our thinking as we consider the implications of the reforms on existing organisations and their staff.

They can be summarised as follows:

- Support business continuity during the very complex transition up to 2015
- Establish mechanisms to retain the knowledge and skills of people currently working in the affected organisations
- Encourage the development of new roles and skills for staff who will work in the new system
- Provide a bridge for tomorrow's leaders by providing the tools to help equip them to lead the transition and future organisations.

- Seek to avoid compulsory redundancies, maximise redeployment and avoid unnecessary redundancy costs

3. Context and Roadmap

3.1 Sir David Nicholson and Una O'Brien's letters describe the broad functions of new organisations and the roadmap sets out the milestones for transition. The letters highlight key actions and changes for organisations. They also refer to the continued approach to management cost reductions that have previously been set out, and are not related to the Health Command Paper: 'Liberating the NHS: Legislative framework and next steps'. They also emphasise the evolutionary nature of the changes and therefore the onus on staff to prepare and develop themselves for the future. Nationally, at regional level, and locally, organisations will give staff the tools and support to help them do this.

3.2 The HR milestones are set out in Section 10 of this annex.

4. Implications for Staff

4.1 It is important to emphasise that many functions performed by current organisations will continue to be performed by new organisations. Because of this, the Transfer of Undertakings (Employment Protection) Regulations 2006 – commonly known as TUPE - and/or the Cabinet Office Statement of Practice (COSOP) may apply to a number of the functions carried out by new organisations. More content on TUPE/COSOP is contained in Section 8 of this annex.

4.2 As described above, the changes heralded by 'Liberating the NHS' and 'Healthy Lives and Healthy People' will require a complex series of moves across the NHS, DH and ALBs at a time when significant management cost savings will need to be delivered. As the functions of each organisation in the new system are fully defined and the respective cost envelope set, it will be possible to identify the broad numbers of posts in new organisations and how this may impact on existing staff. For the DH, further information will be published in January with the DH planning guidance.

4.3 Sir David Nicholson's and Una O'Brien's letters also explain that decisions are still to be made about the geographical locations of all new organisations. However, it is proposed that the NHS Commissioning Board would have its main office in Leeds with a small London base, and representation at sub-national level to

an extent and in locations to be decided. The location of the new economic regulator is still to be finalised. It will have a London base, but as it expands to take on additional functions it is likely to require a further location outside London.

4.4 To support this process, we are developing a high level people and functions migration map. It is primarily a planning tool and will provide a comprehensive picture over time of the final destinations of DH, ALB, PCT and SHA functions and the number of staff currently working in those functions.

4.5 For the NHS, this mapping is being road-tested by some PCTs and SHAs with the intention of identifying the number of NHS staff currently performing particular functions.

4.6 For the DH and appropriate ALBs, the mapping will be developed through the planning process which will take place between January and March 2011.

4.7 The results from this mapping, with information about the likely sizes and locations of the new organisations, will provide the basis for developing the detailed HR strategy including arrangements for TUPE/COSOP or as appropriate, the relevant competition pools.

4.8 The first iteration of the people and functions migration map for all functions will be completed in January 2011. Subsequent iterations will be developed in line with the outcomes of the consultation on 'Healthy Lives: Healthy People' and the reform of workforce education and training.

5. What we have done so far

5.1 We have already made significant progress in a number of areas:-

- 1:1 discussions should have been held with all potentially affected NHS staff by the end of September 2010. There is an expectation that Boards and Chief Executives will ensure the continuation of 1:1 discussions with staff for as long as is necessary. These discussions should continue to focus on the impact of the changes on individuals, including reviewing workload pressures and priorities, as well as focusing on personal futures.
- All DH staff should have had their mid-year reviews where they could discuss any individual concerns about their work and the implications of the transition programme for them. This should include a discussion about

their personal development needs as well as career planning aspirations. These discussions should continue to focus on the impact of the changes on individuals, including reviewing workload pressures and priorities, as well as focusing on personal futures.

- ALB Chief Executives have been engaging with their staff, who are affected in many different ways, to ensure they have an opportunity to discuss the implications of the changes for them and how they can best be supported.
- We have worked closely with trade unions nationally through the Social Partnership Forum (SPF) and with the DH trade unions on the development of this annex and the HR strategy, including agreement on a set of overarching principles which have guided our work so far and will inform the preparation of the further guidance when it is published next year.
- We introduced a national voluntary severance scheme (MARS) for the NHS and relevant ALB staff which was developed in partnership with NHS Employers and trade unions to support SHAs and PCTs with their management costs reduction targets. The scheme was entirely voluntary and supported staff who wanted to leave the NHS straightaway. The national scheme closed at the end of October/early November and around 2,200 staff have been approved to leave under the scheme across England.
- A number of PCTs, ALBs and Trusts who were unable to participate in the national MARS for timing reasons have indicated that they wish to run their own MARS based on the nationally agreed scheme. Any Trusts or PCTs who wish to do this should agree this with their SHA, who will seek the approval of the DH. ALBs should seek agreement with the ALB Unit at the DH before offering MARS to their staff. Any agreed scheme will need to be completed by the end of January 2011. The national MARS which ran in the autumn of 2010 is now being evaluated and consideration will be given as to whether a further nationwide scheme should be launched.
- The DH is planning to run its own voluntary redundancy scheme for staff in DH and ALBs on Civil Service terms and conditions in January 2011 subject to the successful passage of the Superannuation Bill 2010/11. In some SHAs and PCTs voluntary redundancy schemes are also being

implemented or consulted on in line with existing NHS terms and conditions of service to help achieve management cost reductions.

- New regulations are in place that allow Chairs and Non Executive Directors to hold multiple appointments on Boards which will help support business continuity and governance arrangements for PCTs moving to clusters.
- Guidance has been previously issued on the NHS Employers website to the NHS, DH and ALBs about the type of support employers should be providing staff who may be affected by organisational changes during the transition period. This emphasises, for example, the need to keep staff engaged in changes as they happen, ensure NHS staff have priority access to vacancies on NHS Jobs and provide help with career planning and preparation for job applications. It is important for employers to look more widely for alternative employment possibilities for displaced staff for example, through Job Centre Plus, recognising the role of the private sector in creating job opportunities. NHS Employers will publicise best practice guidance and case studies on its website in the near future
- In the NHS, all SHAs now have regional HR or Employment Frameworks in place to support staff during major changes and to help ensure that skills are developed and retention is maximised. All SHAs have been working with the national SPF and will continue to do so to ensure consistency of application of the regional Frameworks in a number of key areas:
 - Partnership arrangements to ensure that all regional Frameworks are implemented and reviewed jointly by employers and recognised trade unions.
 - Categorisation of NHS staff as 'affected by change' in advance of formal 'at risk' status.
 - Effective consultation arrangements with staff and trade unions including consultation periods which may go beyond the statutory minimum.
 - Pooling arrangements to ensure that each SHA has agreed complementary arrangements in place for giving NHS staff access to employment pools that reflect existing and emerging structures.
 - Arrangements for handling of NHS voluntary severance arrangements and local organisational change.

- The inclusion of DH, NHS and ALB staff and jobs within local regional framework arrangements and employment pools.
- The engagement of all NHS employers, including Foundation Trusts, in each SHA Area.
- Regular discussion on the roll out of new structures.
- The DH and ALB frameworks are also near completion and will be published in January 2011.

6. The Immediate Next Steps

Sustaining staff capacity and capability during transition

6.1 One of the main sources of concern identified during the consultation period on the proposals set out in 'Equity and Excellence: Liberating the NHS' centred on the scale and pace of the change and how the risks to financial and operational performance will be managed during transition. Another key concern is the loss of staff whose expertise is needed to support the development of the new organisations.

6.2 It is a priority to identify and retain those staff who will be critical to sustain capacity and capability throughout the transition period by offering some certainty around pay and terms during transition. For the NHS, guidance is being prepared in partnership with NHS Employers and the trade unions with the aim of supporting organisations to retain key staff through the application of two approaches to retention:

- The offer of a national pre-authorized MARS. This would provide a guarantee for eligible applicants of a severance payment calculated in line with Agenda for Change Section 16 for key staff who we would wish to retain until an agreed future date.
- The use of existing contractual flexibilities such as a short-term retention premium and/or the use of a special payment where staff take on additional responsibilities or a wider portfolio. The use of these flexibilities should consider the implications for equal pay.

6.3 The DH and ALBs are also considering how they retain key members of staff during the period of transition in ways consistent with this framework.

The Development of Clusters

6.4 The Health Command Paper, 'Liberating the NHS: Legislative framework and next steps' and the 'Operating Framework for the NHS in England 2011/12' require SHAs to have clusters in place by June 2011. Clusters will consolidate the functions of existing PCTs. There will however be no statutory mergers of PCTs, and they will retain their existing allocations. Where clusters are already in place, existing geographical coverage will be broadly maintained. Each cluster will operate under a single executive team. The detailed design of executive teams will be a matter for the cluster Chief Executive and the respective PCT Boards to determine.

6.5 Appointments to cluster executive teams must follow a fair and transparent process.

6.6 National guidance on the HR processes associated with the formation of clusters will be published in January 2011 to support discussions through the national and regional SPFs. These regional discussions should include consideration of the implications for staff's right to transfer to new structures under TUPE.

Assignment

6.7 We described earlier why the nature of this change means it is not possible to publish one detailed overarching HR Framework. The roadmap sets out the sequence for the establishment of the proposed new statutory bodies. It also describes the transitional arrangements to support this change.

6.8 In addition the Health Command Paper, 'Liberating the NHS: Legislative framework and next steps' makes reference to the need for organisations such as GP Commissioning Consortia to have:

...the opportunity to plan how they intend to carry out their future functions, in particular by deciding what activities they will undertake for themselves by employing or engaging their own staff, what activities they will carry out on a collaborative basis (e.g. through a lead consortium arrangement or through collaboration with local authorities), and what activities they wish to buy from external support organisations.

6.9 'The Operating Framework for the NHS in England 2011/12' also sets out the importance of clusters supporting the development of emerging GP Commissioning

Consortia. One of the key ways in which this can be achieved is by assigning staff from PCTs in agreement with the Consortium.

6.10 In this example, **assignment** is the process of aligning relevant staff in PCTs who currently work the majority of their time in functions which are scheduled to transfer to GP Commissioning Consortia. Any transfer of functions is subject to the passage of the Health and Social Care Bill. The process of assignment must take account of the views of the GP Commissioning Consortia running cost budget and be developed in consultation with trade unions and staff.

6.11 It gives NHS staff concerned the opportunity to support GP Commissioning Consortia and it gives the Consortia resources to support the development of their new functions. GP Commissioning Consortia would have the choice of provider once they become a legal entity following authorisation. However, the process may result in the transfer of staff under TUPE.

6.12 We recognise that many PCTs and emerging GP Commissioning Consortia have begun this kind of approach already. Where this has happened, PCTs will wish to ensure that an approach is taken that is consistent with this annex.

6.13 We will ask SHAs and PCTs to work with emerging GP Commissioning Consortia to assign staff wherever possible by the end of June 2011 at the latest. Any assignment of staff is provisional pending the passage of the Health and Social Care Bill. Some Consortia will want to consider this collectively so some staff may be assigned to one Consortium leading a commissioning function on behalf of others. Assignment could also be used to progress the commitment set out in the Operating Framework for clusters to provide the following support to GP Commissioning Consortium including:

- An organisational development expert / facilitator;
- A qualified or accredited senior finance manager (this may be shared across consortia);
- An individual with expertise of appropriate governance arrangements / corporate affairs; and
- A commissioning expert to support the consortium in their assessment of how they will deliver their future commissioning responsibilities.

6.14 The 'Operating Framework for the NHS in England 2011/12' and the Health Command Paper, 'Liberating the NHS: Legislative framework and next steps' also set out the direction for the development of **commissioning support units** within clusters. Once established, each cluster will identify staff within it whose future role will be to support commissioning. Clusters will reshape and redefine the roles of commissioning support staff (not directly assigned to consortia) to create a comprehensive support function for all constituent consortia. These units will become pathfinder commissioning support, offering to consortia all the additional commissioning support they need during the transition.

6.15 In order to ensure further economies of scale and develop niche commissioning support, pathfinder commissioning support units will work together and be supported to develop expertise and capability in a specific aspect of commissioning which could then be offered across a much wider geography.

6.16 Staff assigned to work in commissioning support would be supported and given expert advice in the creation of social enterprises and a full range of joint ventures with the private or civil society organisations as well as commercial advice. Our aim would be to support them to be able to become a social enterprise, or a joint venture by April 2013.

6.17 SHAs and PCTs should use their existing HR Frameworks to ensure that assignment is undertaken in a fair and transparent way in consultation with trade unions. Emerging GP Commissioning Consortia leaders **must** be involved in these processes.

6.18 We will consider adopting assignment for all other relevant staff affected by the reforms and will produce further advice about this in partnership with trade unions as the people and function migration mapping work develops. We believe there is significant scope to pursue this policy for staff involved in the following functions:

- Provider Development Authority
- National and regional specialist commissioning
- Public health
- Workforce education and training
- ALB functions that are either moving to other existing ALBs or to new organisations

6.19 We will also test how assignment can be applied to relevant staff involved in support functions.

7. Providing a Bridge for Leadership

7.1 In order to support tomorrow's leaders the DH and the National Leadership Council (NLC) have reviewed their priorities and realigned resources to enable transition. For the NHS, this includes supporting boards to ensure they are providing and commissioning safe and high quality services. The NLC's advice, 'Governing for Quality', is very timely and is being adapted further for use by GP Commissioning Consortia. The National Equality and Diversity Council will also be providing guidance on what provider and commissioning boards can do to ensure a focus on fairness and equality is retained during the changes.

7.2 There is also a commitment to maintaining talent and leadership capability and to making people available to support new structures. The NLC's Top Leaders and Emerging Leaders programmes are being adapted so they can support people to make these moves and inform employers efforts to retain key leaders.

7.3 The DH and ALBs continue to invest in the development of leaders to ensure capability is strengthened to effectively lead and manage change through transition and into the future. In reviewing resources and priorities, the DH will extend its provision of leadership development including programmes via the National School of Government and internally led development solutions.

7.4 The NHS, DH and ALBs will work together to maximise leadership development opportunities for ALB staff.

7.5 Staff should be given an equal opportunity to participate in these programmes.

7.6 Considerable work is needed to enable new organisations to develop their own capability to ensure they are fully fit for purpose. Resources are being made available through the NLC to GP and provider leaders to identify where national action can accelerate progress through the use of commonly developed frameworks and resources.

7.7 Within the NHS, specific resources are also being identified nationally, regionally and locally to support the leadership and talent development for all staff to better equip them for the change. The DH is also developing plans to build its leadership and capability for all its staff to better equip them for the future.

8. Transfers and the law – TUPE and COSOP

8.1 The law relating to transfers is complex and changes regularly. Each transfer is different and decisions are taken depending on the particular circumstances of the transfer. The proposed Health and Social Care Bill includes provisions allowing the Secretary of State or the NHS Commissioning Board to establish staff transfer schemes in relation to bodies established or abolished by the act. Subject to parliamentary approval, the department will be publishing more details of their intentions as their proposals develop. If employers intend to make transfers prior to schemes established by the Secretary of State coming into force, they will need to establish the legal position for their own specific transfer situations. In both cases, transfers of public sector staff may be covered by TUPE. In some circumstances, regardless of whether TUPE applies, staff may be covered by the Cabinet Office Statement of Practice (COSOP), 'Staff Transfers in the Public Sector' (revised November 2007). The broad legal principle underpinning transfers is that TUPE applies when there is a 'relevant transfer'. This may include:

- a transfer of an undertaking, business or part of an undertaking or business; or
- a service provision change, where a contractor takes on a contract to provide a service for a client from another contractor.

8.2 When such a transfer or service provision change takes place, staff who are employed in the undertaking or business or delivering the service immediately before the transfer would normally transfer to the new organisation, with their contractual terms, including continuity of service, protected (other than occupational pensions).

8.3 The application of TUPE however, will always be a matter of law based on the individual circumstances of the particular transfer. In circumstances where TUPE does not strictly apply, public sector transfers may be covered by the Cabinet Office 'Staff Transfers in the Public Sector Statement of Practice' (COSOP), where the transfer is effected on terms that are overall no less favourable than if TUPE had applied. Equally, staff transfer schemes established by the Secretary of State may

transfer staff on similar or the same terms as if TUPE had applied. These are sometimes, referred to as 'TUPE-like' terms.

8.4 Whether staff transfer under either TUPE or COSOP they currently benefit from the added protection of the Cabinet Office – 'A Fair Deal for Staff Staff Pensions' (HM Treasury, 1999). Fair Deal requires that the new pension must be broadly comparable to the old one. Fair Deal is currently under review and how pensions are managed will depend on the outcome of that review next Spring. Where staff are transferred to a Local Authority they should be able to remain within a public sector pension scheme such as the NHS Pension Scheme or the Local Government Pension Scheme.

8.5 Where the new organisation has NHS employing authority status, the transferring NHS Staff will retain access to the NHS Pension scheme. GP Commissioning Consortia will have NHS employing authority status.

8.6 In situations where the new organisation chooses to outsource delivery of the transferred functions by contracting with another public, voluntary or private sector organisation, TUPE and/or COSOP and Fair Deal may still apply and the staff may be transferred to the outsourced provider of the function.

9 Partnership Working

9.1 Work on the HR strategy and related products is being developed with trades unions and, for the NHS, representatives of employers, and this process will continue nationally.

9.2 For the NHS, national engagement with NHS Employers and trade unions has taken place through a sub-group of the SPF. For the NHS at a regional level, a similar process of engagement is taking place through regional SPFs. As changes are taken forward at a local level, SHAs and PCTs or clusters are expected to engage fully with their local trade union representatives.

9.3 It is important that we work with local authorities and the private sector to support the smooth transfer of staff if services are transferred to them. This should include ensuring that those organisations are aware of staff rights on transfer and their responsibilities under TUPE. It should also include SHA leadership to ensure close liaison locally and regionally, with major employers that might benefit from the

skills and experience of displaced staff to promote opportunities for displaced staff who cannot be retrained, redeployed and retained within the NHS.

10. Timescales going Forward

10.1 The following timescales relate to the content of this HR annex and are complementary to the roadmap. A frequently asked questions and 'Influencing Your Own Future' document to support this annex will be published next week.

End of January 2011

- Produce guidance for the introduction of the national pre-authorised MARS for the NHS
- Publish the next stage of function and people migration mapping
- Publish guidance on HR process for senior cluster appointments
- DH voluntary severance scheme launched
- Commence discussions with PCTs and GP Commissioning Consortia about assignment
- Deadline for existing MARS applications
- Review of existing national MARS scheme completed
- Publish internal DH and ALBs HR Framework
- Publish DH planning guidance

By end of March 2011

- Complete the testing of the concept of assignment in all other areas
- Overarching HR strategy for NHS, DH and ALB staff published
- Publish DH plan 2011/12

No later than June 2011

- Complete the process of senior appointments to ensure clusters are in place by June 2011
- Complete the assignment of staff to GP Commissioning Consortia and where appropriate to Commissioning Support Units within clusters