Response to Notice of Possible Remedies

Central Manchester University Hospitals NHS Foundation Trust and University Hospital of South Manchester NHS Foundation Trust

1. This submission responds to the Notice of Possible Remedies by Central Manchester University Hospitals NHS Foundation Trust (CMFT) and University Hospital of South Manchester (UHSM). It address each of the following issues (consistent with the CMA's invitation in the remedies notice):
    a. prohibiting the merger and the existence of any other effective remedies, whether structural or behavioural, to address the provisional SLC and any resulting adverse effects;
    b. whether the benefits proposed by the parties are RCBs as defined by the Act;
    c. the timing and relative certainty that the benefits will arise;
    d. the scale of the benefits;
    e. the extent to which the benefits will be passed on to patients (either directly or via commissioners);
    f. whether there are any other benefits not so far identified by the parties, which we should take into account, such as any further clinical benefits or financial savings likely to be generated by the merger;
    g. whether the benefits proposed by the parties outweigh the provisional SLC and any resulting adverse effects identified in the provisional findings; and
    h. any other matters raised in this Notice.

2. The Trusts look forward to discussing the matters covered in this submission with the Panel at the response hearing on 4 July. To the extent that the Panel needs additional information going beyond what is contained in this submission in order to reach a decision on patient benefits, or any related issue, the Trusts will happily respond.

Effective remedies to address the provisional SLC

3. The Notice of Possible Remedies sets out a view that prohibition is the only effective remedy to the loss of competition arising from the planned CMFT/UHSM merger. Partial divestitures and behavioural remedies are described as either unlikely to be practicable or effective.

4. The Trusts agree with this view. It would not be possible for one of the constituent hospitals at CMFT or UHSM to be divested without jeopardising the merged Trusts' ability to provide the same range and quality of services, and deliver the benefits that have been laid out in its submissions to the CMA, and the wider benefits that the Trusts anticipate delivering following their merger. The Trusts do not have any proposal to make regarding possible behavioural remedies.

Whether the benefits proposed by the parties are RCBs

5. The Trusts, clearly, believe that the patient benefits they have put forward are RCBs as defined by the Act, and their patient benefits submission seeks to make this case.

6. NHS Improvement (NHSI), in its advice to the CMA, has taken the view that five out of the 15 benefits are not RCBs.[1] NHSI's advice to the CMA is limited in explaining why it believes that the five benefits do not qualify as RCBs. However, it has separately provided some additional explanation to the Trusts, and this has previously been shared with the CMA (on 24 June 2017).

7. In relation to Urology Cancer, NHSI believes that this benefit is not an RCB as it will be delivered regardless of the merger, and as such, it is not dependent on the merger taking place. This view appears to contrast with the CMA's provisional findings that the Urology Cancer reconfiguration cannot be accepted as sufficiently certain so as to be included in the counterfactual to the merger. The Trusts, as set out in their submission, believe that the merger allows an expectation to be formed that the Urology Cancer reconfiguration will be delivered in practice. The merger, by taking away the organisational incentives to obstruct or object to this reconfiguration, will enable and ensure a smooth implementation. In the absence of the merger, centring Urology Cancer services at either CMFT or UHSM would place the remainder of the urology services at that Trust at significant risk of being downgraded in the future. As a result, neither Trust if it remained independent would willingly see this take place, and would be likely to engage in the type of activity that has seen previous reconfiguration efforts delayed, compromised or abandoned.[2]

8. Regarding the Urology Patient Access benefit, where the merger will allow patients to access day case surgery at any of the merged Trusts' sites, NHSI has said in its supplementary feedback to the Trusts that insufficient information was provided as to why this increased choice would benefit patients. The Trusts, however, note that the legislation specifically identifies increased choice (along with lower prices and higher quality) as one of the forms that a RCB can take. As a result, the Trusts believe that NHSI's advice to the CMA in relation to this benefit is misplaced. The Trusts note that no other concerns have been raised by NHSI in relation to this benefit, and as such, believe that it should be accepted by the CMA.

9. Regarding the Fractured Neck of Femur benefit, the Trusts were disappointed that the feedback provided by NHSI (following the finalisation of NHSI's advice to the CMA) raises several points that had not previously been discussed with the Trusts regarding the level of detail contained in this patient benefits case. The Trusts are preparing a supplementary note which addresses the points raised by NHSI. The level of detail in the Fractured Neck of Femur benefits case is comparable with that set out in other patient benefits cases, and as such, the Trusts do not consider that there are further grounds for not accepting this benefits case.

10. Regarding Urology Seven Day Services and Community Midwifery, the Trusts believe that each of these benefits will be implemented following the merger and result in significant service improvements for patients. The Trusts, however, recognise that the hurdle for being recognised as an RCB is, rightly, a high one. In the time available since becoming aware of NHSI's advice to the CMA and the provision of NHSI's feedback to the Trusts it has not been possible to address the issues raised by NHSI, and as a result, the Trusts do

[1] These are the planned patient benefits in relation to Urology Cancer, Urology Seven Day Services, Urology Patient Access, Fractured Neck of Femur and Community Midwifery.
[2] At the very least, the experience of the General Surgery reconfiguration has shown that CMFT and UHSM, who are planning to merge, have been able to implement the planned changes much more quickly than other Trusts in Greater Manchester, which are remaining independent of each other (see paras 394-397 of the Trusts' patient benefits submission).

not plan to make further submissions in relation to these two benefits unless specifically requested to do so by the CMA.

Timing and certainty of the proposed benefits

11. NHSI's patient benefits advice to the CMA touches on three factors relevant to the timing and certainty of the proposed benefits, namely: (i) risks associated with delivering the planned patient benefits; (ii) the ability of the merged Trust to deliver the proposed benefits; and (iii) the incentives for the merged Trust to deliver the proposed benefits. Each of these points are addressed below.

Risks associated with delivering the proposed benefits

12. NHSI's advice to the CMA identifies several risks associated with delivering the merger successfully as a whole, which have implications for successful delivery of the planned patient benefits. The key excerpts from NHSI's advice are set out below.

> "We recognise that the transaction is a large undertaking for both parties and there are number of risks that the parties will need to manage as they move forward. These risks include the uncertainty around the parties' ability to affect significant cultural change across the two organisations amongst clinicians and other staff groups, as well as understanding the IT investment essential to enabling the full transaction benefits to be realised."
>
> "Also, a number of key areas of work remain outstanding for the parties, including detailed integration planning and the identification of clinical interdependencies across the hospitals to understand what, if any, significant service relocation could be undertaken. The parties have more work to do to determine the financial impact of the transaction …"
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> "Although the parties have done a great deal of work already, in our view, to ensure the proposals are implemented successfully they will need to undertake the planning work that is described in their current Integration Plan."

13. Regarding NHSI's comments, it is important to note that the Trusts' integration planning is at a point that should be expected at this stage of the transaction process. As a result, while NHSI rightly points out that there is more work to be done in relation to integration planning, this should not be interpreted as there being a higher level of risk of the Trusts not delivering the merger successfully.

14. In addition to integration planning, the Trusts have major work programmes on-going that address each of the areas identified in NHSI's advice, including IT integration planning (including identification of necessary investments), workforce integration planning and management of the financial aspects of the merger. In support, there are several points to note:

    - There is a formal governance structure in place to hold executives of the merged Trust to account for delivery of the integration plan.
    - A second Deputy Chief Executive has been introduced to the leadership structure for the proposed new Trust who will have dedicated responsibility for integration.

- Significant financial allocations have been made to support transformation, and posts are being actively recruited.

- Clinical engagement is a continued focus of the change programme, and cultural assessments of both Trusts have been conducted using national frameworks to derive a clear organisational development plan for the new Trust.

- A Greater Manchester level investment agreement with KPIs being finalised as a basis for holding the merged Trust to account for delivery.

15. Regarding clinical interdependencies, it is important to set out that the service relocations included in the patient benefits case do not raise major clinical interdependency issues. This is because each of the services where relocation is planned (e.g. cardiology, head and neck cancer, orthopaedics) involves a consolidation on to a site where these services are already delivered. There is no question of additional services having to be relocated to support the proposed new delivery models for these services. Further, none of the planned relocations will result in the withdrawal of services from a site that are critical to the delivery of other clinical services. (This, indeed, is one of the criteria on which the proposed patient benefits cases were selected for submission to the CMA.)[3]

16. NHSI's advice does not specifically reference public consultation requirements. However, the Trusts are mindful that this may be required by the relevant Health Scrutiny Committee in relation to one or two of the proposed service changes (e.g. cardiac surgery), and this has been allowed for in the Trusts' implementation plans for the proposed patient benefits. The Trusts are, however, confident that any requirement for public consultation will not represent a block to achieving service change, and the CMFT management team have significant experience of achieving service change that requires public consultation following their acquisition of Trafford Healthcare NHS Trust.

Ability of the merged Trust to deliver proposed benefits

17. The Trusts believe that they have both the management ability and have devoted the resources necessary to deliver the merger successfully, including the proposed patient benefits. This point has been emphasised in NHSI's advice to the CMA, which is set out below.

> "Drawing on the strengths of the existing management teams the merged trust should have the capability, capacity and experience to deliver the merger successfully and contribute to the transformation of health care services for the people of Greater Manchester …"
>
> "Integration delivery will be a key focus of the parties post-merger and the parties have demonstrated that this programme will be well resourced. These factors help to build confidence in the parties' ability to continue their work plan for successful implementation of the merger. We also note the level of clinical engagement which has taken place to date has been very encouraging."

[3] In relation to cardiac surgery services, perhaps the most significant of the service relocations that is being proposed, cardiology services will continue on each site where they are currently provided, and these will continue to be available to provide the support needed by other clinical services (e.g. maternity).

Incentives for the merged Trust to deliver proposed benefits

18. The main incentive for the merged Trust to deliver the proposed benefits is that they will improve services for patients. This is the primary motivation for service provision at an NHS acute trust.

19. On top of this, the merged Trust will have further incentives to deliver the proposed benefits that stem from both internal and external stakeholders. The incentives facing an NHS acute trust are, as the CMA has already acknowledged in its provisional findings on competition issues, considerably different to those faced by private sector business organisations, and this point is also relevant to the incentives for delivering the proposed benefits.

20. In terms of internal stakeholders, the proposed patient benefits reflect an extensive process of engagement with clinicians at both CMFT and UHSM. The proposed patient benefits, in many cases, represent a variety of initiatives that clinicians have sought to achieve over an extended period of time, but which have frequently been frustrated by organisational barriers. The transaction will give clinicians at the merged Trust, working with managers and without sound governance arrangements, the freedom to implement service changes that they believe will be better for patients.

21. The Board and executives of the merged Trust recognise that a failure to deliver the proposed patient benefits is likely to have a significant negative effect on the morale and engagement of clinicians at the merged Trust. This will have wider implications for Trust performance. As a result, the new management team at the merged Trust have a major incentive to deliver the proposed patient benefits given the wider impact this can be expected to have on Trust performance.

22. The Governors of the merged Trust will also play an important role in holding the Trust's Board and management team to account for the delivery of the proposed patient benefits. Governors at CMFT and UHSM have been involved in the patient benefits case as it has been developed, and will wish to ensure that it is fully delivered.

23. NHSI's advice to the CMA has also correctly pointed to the external stakeholders who will play a key role in ensuring that the Board and management of the merged Trust are held to account for the delivery of the proposed patient benefits. NHSI's advice to the CMA states that:

> "In addition the local autonomy and responsibility resulting from the Greater Manchester devolution programme means that local bodies are well-placed to oversee the changes taking place and ensure that the merged trust delivers improvements for patients."
>
> "NHS Improvement's approval for the transaction will be contingent on the parties demonstrating that they can deliver it successfully in accordance with our guidance. NHS Improvement will hold the parties to account for delivery of the transaction and implementation of changes for patients going forward."

24. Not delivering on the proposed patient benefits holds the risk that NHSI will not approve the transaction, or later, it will make a regulatory intervention. As the CMA would be aware, NHSI's powers are substantial and include the ability to effectively make changes to the management team at an acute trust. As part of the NHSI oversight arrangements, KPMG

will provide an independent assessment on governance matters as well as the integrity and deliverability of the integration plan.

25. Commissioners are also able to hold the merged Trust to account, including through mechanisms such as the Investment Agreement, through which significant amounts of transformation funding are being made available to the merged Trust. Finally, the CQC will also scrutinise the merged Trust as part of the registration process. Particular attention will be paid to the well-led framework and the Post Transaction Implementation Plan (PTIP).

26. It is also worth noting that the financial effects of the proposed benefits on the merged Trust are, by and large, positive. There are minimal cost implications, as set out in the patient benefits submission, and several will deliver financial benefits to the merged Trust as a result of shorter lengths of stay for patients. As a result, there is no risk of the merged Trust deciding, at a later point, not to proceed with the implementation of the proposed benefits on financial grounds.

Scale of the proposed benefits

27. As set out in the Trusts' patient benefits submission (see para 111), it is not easy (or even possible) to arrive at a single quantified measure of the size of the benefit that will be realised for each of the proposed benefits that can be aggregated across the patient benefit cases.

28. The Trusts have estimated the number of patients that will benefit from each measure (see Table 4.4 of the Trusts' submission). The Trusts have also identified the nature of the benefit in each case. This includes improved mortality outcomes, shorter lengths of stay in hospital, reduced time to treatment, reduced risk of complications or readmission, greater choice of treatment site, and financial savings for the merged Trust.[4] These benefits will frequently extend beyond the individual patients to family and friends who are able to see patients recover more quickly, do not need to provide the same level of support, or who will not have to deal with the loss and grief arising from patient mortality that can be avoided.

29. Even taking into account an exclusion of Urology Seven Day Services and Community Midwifery from the proposed benefits, the overall benefits arising from the Trusts' plans will directly benefit in the region of 24,000 patients each year.

Extent to which proposed benefits will be passed on to patients and/or commissioners

30. All of the benefits, with only one exception, take the form of improvements in the quality of clinical services that are provided to patients. There can be no question therefore of these benefits being realised in some form but the benefit not being passed through to patients. If these benefits are realised, they are, by definition, passed through to patients.

31. The financial saving identified in relation to General Surgery will be passed on to commissioners through improved financial performance at the merged Trust, and a reduced need for commissioners to provide additional funding to ensure the delivery of services.

[4] In many cases, these patients will benefit from a reduced risk of mortality or other adverse events. NHSI's advice, at times, appears to discount the value of a reduced risk of an adverse event as a benefit, and only wishes to count the number of patients where the actual outcome is avoided compared with previously. (The Trusts note that this is not consistent with best practice in carrying out cost-benefit analyses.)

Any other benefits

32. The Notice of Possible Remedies asks whether there are any other benefits not so far identified by the parties, which we should take into account, such as any further clinical benefits or financial savings likely to be generated by the merger.

33. The Trusts note that significant financial savings have been identified in the Trusts' financial modelling of the planned merger. These savings are derived from three main areas:

    - aligning length of stay across the merged Trust on best practice;
    - corporate support savings; and
    - clinical support savings.

34. Not all of these benefits meet the strict criteria necessary to qualify as a relevant customer benefit, and as such, have not been included in the Trusts' patient benefits submission. (The Trusts do, however, believe that the initiatives that are included in their financial modelling are sufficiently certain to make their inclusion appropriate.)

35. The Trusts, however, believe that a proportion of the corporate support savings, in particular, should be included as relevant customer benefits. This includes the savings that arise from adopting a single board structure and savings from integrating corporate functions into single structures, which are estimated to be in the region of £5.9 million per annum. This is modelled on the amount saved when CMFT integrated Trafford Healthcare Trust into corporate functions at CMFT.

Weighing benefits against a loss of competition

36. The Trusts note the comments made by the Panel in their provisional findings that:

> "competition does not occur on price, and accordingly it has not been possible to quantify the magnitude of any harm that may derive from any SLC …"
>
> "whilst the merger may be expected to give rise to an SLC in NHS elective and maternity services, any adverse effect resulting from such SLC is likely to be smaller than would be the case if the parties had a greater degree of regulatory, financial and clinical flexibility to compete vigorously on the price or quality of their services"

37. The number of patients that the merged Trust will see in those specialties where provisional SLC findings have been made is significant. There were 172,000 first outpatient appointments in these specialties in 2015-16, which is the best estimate of the total number of individuals that the merged Trust will see in these specialties each year. Only a proportion of these patients will be admitted to the hospital for treatment. In 2015-16, there were 80,000 admissions in those specialties where the CMA has reached provisional SLC findings.

38. The Trusts agree with the CMA that it is not possible to carry out a robust quantification of the magnitude of harm that may derive from any SLC. However, it is important to note that many patients in the 18 SLC specialties will be discharged after their first appointment, and only have limited contact with CMFT or UHSM. For these patients, a limited adverse effect

in relation to limited contact with the merged Trust seems to be an effect that is unlikely to be material.

39. The proposed patient benefits, on the other hand, focus on patients that will undergo significant treatment at the merged Trust. As set out above, even taking into account an exclusion of Urology Seven Day Services and Community Midwifery from the proposed benefits, the overall benefits arising from the Trusts' plans will directly benefit in the region of 24,000 patients each year.

40. The adverse effect of a merger-related price rise that has been avoided as a result of regulatory intervention in mergers in normal markets is often quantified at 5%.[5] Extrapolating this to an NHS acute trust merger, given the limited effects referred to in the CMA's provisional findings, it might be reasonable to think of the adverse effect for patients as being in the region of a 0.5% to 1.0% deterioration in the patient experience.

41. As set out above, the scale of the benefits for patients in the proposed patient benefit areas is substantial. These include improved mortality outcomes, reduced time to treatment, reduced risk of complications or readmission, shorter lengths of stay in hospital, and greater choice of treatment site.

42. For patients whose lives are extended, pain reduced, rehabilitation commenced more quickly, and health restored more effectively, these benefits are substantial and compelling. The Trusts believe that these benefits far outweigh any adverse effect that might arise from the provisional loss of competition identified by the Panel.

[5] This level ensures internal consistency with the competition analysis in a merger, which is likely to be significantly influenced by a market definition that has been arrived at using the framework of a SSNIP test.