

**Dear Sir/Madam**

### **Conflicts of interest – response to NHSE consultation**

The British Medical Association (BMA) is an apolitical professional association and independent trade union, representing doctors and medical students from all branches of medicine across the UK and supporting them to deliver the highest standards of patient care. On average our membership this year has been around 170,000. We very much welcome the opportunity to respond to an issue of considerable importance to our members.

Overall we see the increased emphasis on transparency and probity in all areas of public life as a positive development and one very much to be welcomed. Conflicts of interest are an inescapable part of much professional life. We are committed to transparency and support a strong presumption in favour of openness. To this end we have produced guidance for our members in this area for many years. Following the implementation of the Health and Social Care Act, and the creation, by the government, of structural conflicts of interest throughout the commissioning process we have responded to the concerns of our members by developing comprehensive guidance on identifying, declaring and managing conflicts of interest. This includes separate guidance for doctors as commissioners and as providers.

We do, however, have a number of concerns about the recommendations in the consultation document. As a matter of principle, given that conflicts of interest – or competing interests – are now such a widespread feature of modern health care delivery, it is important that they are disclosed throughout the health economy, including at the highest levels. For example, the Secretary of State for Health has simultaneous ministerial responsibility for both the NHS and the pharmaceutical industry – which a reasonable person could easily perceive to be a conflict of interest.

This is also an area in which there can be some tension between the public interest in transparency and the privacy rights of individuals. Where the privacy interests of individuals are engaged, and obligations to disclose information imposed, those obligations must be both proportionate, and likely to achieve their intended aim. We have serious concerns as to whether such an appropriate balance has been achieved in relation to a number of the recommendations.

Another important issue raised by the consultation, but not discussed, is the question of trust in the medical profession. The maintenance of trust in the doctor-patient relationship, and in the medical profession more widely, is clearly of enormous public interest. Disclosure of the right sort of information in the right way can facilitate trust. But trust can also be damaged by over-regulation, micro-management and the creation of a culture of suspicion. Again we do not think that the recommendations achieve the necessary balance.

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Listed as a Trade Union under the Trade Union and Labour Relations Act 1974.

### **Defining conflicts of interest**

The definition of conflicts of interest given in the consultation document is confusing. Rather than giving a clear definition it instead describes those situations in which a conflict of interest might arise. In places it is contradictory and far too broad to be able to guide doctors in identifying relevant conflicts of interest. The concept of 'potential' conflicts of interests is particularly unhelpful as its reach is almost unlimited. We suggest an alternative, more focussed definition: "A conflict of interest is a situation in which a person's judgement regarding his or her duty is likely to be adversely affected by a secondary/additional/further interest held by that person."

### **Gifts**

The recommendations concerning gifts to doctors from patients would introduce significant changes for general practitioners. Currently GPs are under no obligation to decline gifts and need to register any gift they receive in excess of £100, rather than the £50 suggested in the consultation document. We do not consider the possibility of receiving gifts from patients amounts to a conflict of interest, even a perceived or potential conflict of interest. While it is easy to see why receiving gifts from commercial organisations would be problematic – the gifts would presumably be given in the hope of a favourable adaptation of practice – it is not clear why, for example, a bequest from a patient should be refused due to conflicts of interest. Many of the gifts offered to doctors have been the expressions of gratitude for many years of care. Any doctor seeking to coerce a patient into giving gifts would be in breach of GMC guidance and vulnerable to serious disciplinary action. In our view the obligation to decline any gifts in excess of fifty pounds is disproportionate and we can see no reason to change the current contract.

### **Declaration of private practice income**

This section of the consultation document has generated significant controversy, particularly following NHS England's press briefings at the time the consultation was released. In general, given the very clear separation of private and NHS work, we do not think consultants undertaking private work in this context are subject to a conflict of interest. Even using the very wide definition given in the consultation document, it is difficult to see why consultants treating their NHS patients would reasonably perceive their judgment to be influenced by interests arising from their private practice. We are not talking here about misuse. Any consultant who were to misuse NHS facilities or otherwise contravene the code of conduct would likely be in breach of contract and subject to sanctions both as an employee, and, potentially, by the GMC. In so far as there is a problem here, which is unclear, good management would seem to be the appropriate solution.

A number of specific points follow:

- NHS consultants are already required to adhere to the Code of Conduct for Private Practice. The Code of Conduct outlines the recommended standards of best practice for NHS consultants in

England with regards to private practice. Key principle 1.4 of the Code of Conduct clearly states that NHS consultants should work in collaboration with NHS trusts to avoid any conflict of interest between private and NHS work. Additionally, it is essential that NHS consultants and NHS organisations minimise the risk of any perceived conflicts of interest. Although consultants can engage in both NHS and private work, Key principle 1.4 is clear in that NHS services should not be disturbed when consultants are catering for private patients.

- With regards to disclosure of information about Private Practice, paragraph 2.1 of the Code of Conduct and schedule 9, paragraph 3 of the NHS Terms and Conditions for Consultants (England – 2003) require consultants to disclose details of private engagements, including the timing, location and type of activity. Further, consultants are required to divulge any private work which may lead to any actual or perceived conflict of interest. Disclosure of this information already takes place during the annual job planning process. Schedule 9, paragraph 6 of the NHS Terms and Conditions for consultants (England – 2003) states that regular private commitments must be noted in the Job Plan. Effective job planning helps to minimise any potential conflicts of interests between different commitments.
- If there is going to be any conflict of interest, NHS commitments should take precedence over private work as per paragraph 2.3 of the Code of Conduct and schedule 9 paragraph 5 of the NHS Terms and Conditions for consultants (England – 2003). Paragraph 2.4 requires that consultants should prioritise NHS emergency work over private commitments, while they are on call for the NHS, including any emergency cover that they agree to provide for NHS colleagues.
- At the discretion of some NHS employers, private practice may be conducted in tandem with NHS scheduled activities. Paragraph 2.8 states that “In these circumstances, the consultants should ensure that any private practices are provided with the explicit knowledge and agreement of the employer and that there is no detriment to the quality or timeliness of services for NHS patients.”
- The guidance makes it clear that NHS patients are eligible to choose between NHS and private treatment, opting in and out at any stage and as per paragraph 2.13 of the code of conduct, patients referred for an NHS treatment following a private consultation should join any NHS waiting list at the same point as if the consultation or treatment were an NHS service.
- NHS organisations are required to have procedures for handling concerns about the conduct, performance and health of doctors. Action is taken if a consultant is found to be breaching his/her contract. This could include the need to put restrictions in place on the doctor’s practice. This is covered in the Department of Health’s guidelines *Maintaining High Professional Standards in the Modern NHS*.
- The Terms and Conditions of Service and Code of Conduct for Private Practice clearly set out the rules under which consultants must conduct their private practice and if they fail to adhere to the rules, they can be subject to disciplinary action, up to and including dismissal. Having studied

the issue carefully, we can find no correlation between income and conflict of interest and find no justification to require consultants to disclose his or her income.

- We mentioned earlier that this is an area in which the public interest in transparency needs to be appropriately balanced with the privacy interests of private individuals. Given that the focus of the consultation is on conflicts of interest, the disclosure of the amount of remuneration is unlikely to shed much light on relevant factors. The level of remuneration is not an effective surrogate marker for activity – fees vary enormously – and much will depend upon the nature of the contract, rather than on the presence or absence of a relevant conflict of interest. If, as we believe, the disclosure of bracketed earnings is unlikely to reveal relevant information, the breach of privacy interests is consequently disproportionate and cannot be supported.
- Although we do not support the suggestion that consultants should disclose their private practice income, we note that the proposal is that income should be declared in three wide bands: less than fifty thousand pounds; less than a hundred thousand pounds; more than a hundred thousand pounds. Given that very many doctors receive modest sums for public speaking or other engagements, many would fall into the first band despite earning very small amounts. By aggregating them in this way it could give the misleading impression that large numbers of doctors are earning in the region of fifty thousand pounds from private work which would be inaccurate. If this proposal is to go ahead we would also like to be given a clear indication of how this information will be used, and to whom it will be disclosed.
- Any obligation to disclose non-NHS income would have to be clear that this refers, as suggested in the consultation document, to income for private gain. Medical academics, for example, do earn fees for work outside their main contracts but this is usually remitted back to their employing institution. It is important that this work is not discouraged as it promotes both a culture of research excellence, and the interests of medicine in the UK.

#### **NHS-funded services contracted to a third party**

Regarding the delivery of NHS-funded services contracted to a third party, our position is that doctors and their employers must comply with the ‘Study of restrictions on consultants in relation to NHS work during non-contracted hours’ (Co-operation and Competition Panel, 2009) in order to prevent a breach of the Principles and Rules for Co-operation and Competition. The expectations are that there should be no restriction on a doctor’s ability to work for other providers of NHS services apart from:

- Where restrictions are imposed as part of a package of measures to address patient safety concerns arising from the specific performance of that individual
- To prevent an individual holding a strategic management position (at the level of divisional director or above) in more than one organisation or holding a strategic management position in

one organisation while assisting another to tender for NHS-funded services, or assisting more than one organisation to respond to the same tender for NHS services.

This guidance is supported by legal advice received by the BMA. Our position remains that consultants employed by the NHS are contractually entitled to undertake private practice work, subject to the restrictions outlined above which may otherwise bring them into conflict with their implied duty of fidelity.

### **Loyalty interests**

We have mentioned in relation to disclosure of income that the consultation raises questions about how to draw the right balance between the public interest in probity and individual privacy rights. The obligation to disclose links with charitable organisations providing services to the NHS seems well-supported: it is easy to see how this could be perceived to be a meaningful conflict of interest. It is less clear however that the obligation to disclose political positions, where they are unlinked to any health service commitment, is either necessary or proportionate. Again it is not clear that the right balance has been struck between the relevant interests and this should be reconsidered.

We hope you find this response useful and would be happy to discuss any of the issues raised here in more detail.

Yours faithfully

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Director of Policy  
British Medical Association