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First steps on the road to a new NHS bill

The Government announced in its Queen Speech its intention to bring forward measures to support and strengthen the NHS and that new laws will be taken forward to help implement the Long Term Plan.

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The prospect of a new NHS bill to help the NHS deliver the Long Term Plan and integration as well as to address issues such as the requirement for the competitive tendering of NHS healthcare services and collaborative commissioning has been talked about for some time. Today, the Government announced in its Queen Speech its intention to bring forward measures to support and strengthen the NHS. It was also announced that new laws will be taken forward to help implement the Long Term Plan.

Beyond noting that the intention to bring forward new laws to help with the implementation of the Long Term Plan (something which is not necessarily needed but which may make implementation easier), there was no further detail as to what that would entail. However, if the Government is in agreement with the proposal put to it by NHS England and NHS Improvement in September, such a bill will likely cover a range sensitive and thorny issues.

However, whilst the detail of the Government's own proposals are, at this stage, unknown it would be a surprise to see a bill brought forward which provided for an administrative reorganisation of the NHS as this is something NHS England and NHS Improvement have said they do not want.

NHS England and NHS Improvement's proposals

The proposal from the regulators of NHS organisations both reflects and responds to the Health and Social Care Select Committee's report and that may mean that it forms the blue print for the new bill. If that is the case we can expect the following areas to be addressed.

Partnership working

There was recognition that formal organisational change was not supported and so the proposals relating to partnership working are intended to build on the current framework; address specific issues that have been identified and provide clarity to the arrangements (e.g. through the introduction of the triple aim).

The proposals include enabling commissioners and providers of NHS services to come together and make legally bind decisions about their statutory functions (see Recommendation 14). These joint committees will be able to include local authorities, primary care network representation, voluntary sector organisation representation and other organisation representatives.

When an ICS Partnership Board is established as a joint committee under the proposed new arrangements then it should comply with key transparency requirements, including;

- Making decisions in public;
- Minuting meetings and publishing meeting papers;
- Maintaining registers of interest;
- Holding an annual general meeting and publishing an annual report.

This is consistent with the recommendations of the Health and Social Care Select Committee.

In addition, the current restrictions that apply to CCG secondary care clinicians and registered nurses will be relaxed, enabling these roles to be drawn from individuals who are from local provider organisations (Recommendation 15).

Statutory guidance on the use of joint appointments has also been requested and NHSE&I suggest that consideration is given to whether an explicit statutory power is needed to enable this. In the event that such guidance is developed (which seems likely), NHSE&I would consult on the application of such guidance (Recommendation 16).

There was broad support for the proposed introduction of the ‘triple aim’ of better health for everyone, better care for all patients and efficient use of NHS resources but it was noted that agreement was needed on what each term meant and the paper helpfully sets out what NHSE&I understand by these terms (Recommendation 17). Broadly speaking the triple aim will provide a clear consistent framework against which all NHS partners are expected to operate but note that it would need to be applied contractually to local authorities (or through other partnership arrangements) as they would not otherwise be required to comply with the duty.

NHS England and CCGs will also be able to work together more easily, including in relation to specialised services and public health functions (see Recommendations 18, 19, 20, 21, 22 in particular).

Getting better value for the NHS – procurement of NHS healthcare services

NHS England and NHS Improvement are advocating for a change to the procurement regime for NHS funded healthcare services. Their proposal is for these services to move outside the current Light Touch Regime of the Public Contracts Regulations 2015 and instead be subject to an alternative regime (Recommendation 5). This would also see the National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations) 2013 revoked and the power to make such regulations repealed (Recommendation 4).

That alternative regime will likely establish if and how procurements for NHS funded healthcare services should be undertaken and it is proposed would be addressed through statutory guidance (Recommendation 6). Such a regime will no doubt be expected to take account of key issues such as patient choice, integration with other services and quality of care and will be developed following a public consultation exercise.

If such a regime is proposed it remains to be seen whether this assists with the commissioning of integrated services that include social care services which may still be subject to the current procurement regime.

Future of NHS Trusts

The proposals in this regard are intended to eliminate the uncertainty around the NHS trust model which crept in as a result of the NHS trust abolition provisions in the Health and Social Care Act 2012. Recommendation 12 is that the Secretary of State should continue to have the power to establish NHS trusts and that NSH trusts should continue to be part of the NHS legislative framework. In this regard the Regulators also want to see the revocation of the provisions in the 2012 Act which allow for the abolition of NHS trusts. It is thought that this will be provide confidence around the retention of the NHS trust model and the power for the Secretary of State to establish new NHS trusts.

The Regulators concur with the Health and Social Care Select Committee’s recommendations that non-statutory providers should not be able to hold an ICP contract. Therefore, the establishment of new NHS trusts is seen as potentially key to enabling the developments of ICPs within ICSs. However, as with many of the issues addressed in the proposal many of the Recommendations are intertwined. In order for a positon to be adopted which reserved ICP contracts to statutory providers Recommendations 5 and 6 would also need to be adopted.

The role of the Competition and Markets Authority

The role of the CMA in the NHS has always sparked debate and two of the first three Recommendations from NHS England and NHS Improvement aim to change its role in relation to the NHS.

Over the last few years there have been a number of NHS trust mergers/acquisitions involving foundation trusts and these have been investigated by the CMA. The value of the CMA’s involvement in such matters from both a time and cost perspective has been questioned and Recommendation 1 seeks to take such mergers outside the jurisdiction of the CMA under the Enterprise Act. Instead the proposal is that NHS England and NHS Improvement would continue to review merger/acquisitions transactions involving NHS trusts/foundation trusts.

Recommendation 3, seeks to remove the CMA's role of determining contested licence conditions and National Tariff provisions which, under the current regime have to be referred to the CMA by NHS Improvement. Changing this approach will, form the Regulators' point of view ensure that decisions are taken by those organisations best placed to ensure that it is the interests of the NHS as a whole which are served when these issues are considered.

National tariff

A number of proposals are set out in relation to the national tariff, with the underlying aim of enabling greater flexibility into the national tariff. For example, this would "better support implementation of a 'blended payment' approach (mix of fixed and variable elements" (as has been introduced for emergency care). The proposals envisage that locally determined arrangements, such as forecast activity for a relevant service agreed between the commissioner and a provider of that service could be referred to when a national formula is set. In addition, to address difficulties that arose in relation to the maternity care pathway, it is also proposed (Recommendation 11) that section 7A public health services could form part of the national tariff, with the aim of enabling better integration of public health services with local commissioned services (such as childhood immunisation and maternity services).

How close are we?

There is a long way to go before any new bill passes into law and whether and, if so, how we exit the European Union together with the result of any general election may yet impact on the Government's intended course of action.

For now, the law remains as it is and the challenge to deliver the Long Term Plan neither goes away nor is suspended. To discuss how your organisation can deliver against the Long Term Plan within the current statutory framework, how we are working with ICS around the country or what the proposals for the NHS bill mean for you do get in contact with Rachel Whitaker or Charlotte Harpin.

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