Browne Jacobson

Integration and innovation: working together to improve health and social care for all [Part 3] - enhancing public confidence and accountability

In this update we set out and consider enhancing public confidence and accountability.

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In the Foreword to the 'Integration and innovation: working together to improve health and social care for all' White Paper it is stated that:

> *At its heart, however, this Bill is about backing our health and care system and everyone who works in it. Our proposals build on the NHS's own – those in the Long Term Plan. We're also outlining steps to support everyone who works to meet people's health and care needs. Taken together, they will help us build back better after Covid.*

Below, each legal proposal in the section on Enhancing public confidence and accountability is set out and considered. The other sections will be considered in separate articles and we will also publish more detailed articles on specific topics. However, overall it is apparent that the proposals do enable the development of an integrated care system which is not possible under the current legislative framework.

In setting out a brief overview of the proposals for legislation the headings in the White Paper have been adopted.

Enhancing public confidence and accountability

1. Merging NHS England, Monitor and NHS Trust Development Authority and Secretary of State powers of direction

The purpose of this proposal, to formally merge NHS England and NHS Improvement, is to remove the remaining bureaucratic and legislative barriers, so that NHSEI will legally be one organisation to provide unified national leadership for the NHS. The indication from the White Paper is that the new merged body will be called NHS England.

As a newly merged public body, NHS England will remain answerable to the Secretary of State for Health and Social Care (SSHSC) and Parliament for all aspects of NHS performance, finance and care transformation. Recognising this evolution from combining the different bodies current functions, the government are also bringing forward a complementary proposal to ensure the SSHSC has appropriate intervention powers with respect to NHS England. It is intended this will maintain clinical and day to day operational independence for the NHS but will support accountability by allowing the SSHSC to formally direct NHS England in relation to relevant functions. This will support system accountability and agility, and also enable the Government to support NHS England to align its work effectively with wider priorities for health and social care, thereby reinforcing the accountability of the SSHSC and Government for the NHS and the wider health and care system.

The three bodies that will merge to create the new NHS England have already been effectively working together as a single organisation for over two years. In formally merging the bodies then clarity on system leadership is provided and it should enable a more flexible approach to developing integrated care systems across the country. As to the re-establishment of greater intervention powers for the SSHSC, it has been apparent for some time that the Government has wanted to reverse those aspects of the Health and Social Care Act 2012.

2. The NHS Mandate

The Mandate will cover the merged NHS England statutory body and to allow it to set direction in a more strategic way than currently permitted by the annual cycle, the Government's proposal is to replace the current legislative requirement to have a new mandate each year with a new requirement to always have a mandate in place. In so doing, they are seeking to provide the flexibility for the Mandate to be replaced to respond to changing strategic needs, emerging evidence on deliverability or appropriateness of objectives, or external events, rather than having to wait until the next annual opportunity.

Other proposed changes are that NHS England's capital and resource limits will now be set within the annual financial directions, rather than the Mandate. Also, that the current legal provisions on integration (the Better Care Fund), which currently rely on the NHS mandate, will be recreated as a standalone power, that means they can meet the policy intention for the Better Care Fund even where Mandates are not replaced annually.

These proposals fit with giving the system greater flexibility to be able to plan for the future and also react to emerging strategic needs, such as a pandemic.

3. Reconfigurations intervention power

The Government's view is that the current system for reconfigurations works well for most service changes, and so it will remain in place for the majority of changes in the future. However, it does want to broaden the SSHSC's powers to intervene as currently that can only happen on receiving a local authority referral, following which he may commission the Independent Reconfiguration Panel to provide recommendations to enable him to make his decision on the referral.

Therefore, the Government is proposing to broaden the scope for potential ministerial intervention in reconfigurations, creating a clear line of accountability, by allowing the SSHSC to intervene at any point in the reconfiguration process. In doing so, he will be required to seek appropriate advice in advance of any decision, including in relation to value for money, and subsequently publish it in a transparent manner.

To support this new intervention power, it is proposed a new process for reconfiguration will be introduced that will enable the SSHSC to intervene earlier and also to enable speedier local decision-making. New statutory guidance on how the new process will work, as well as removing the current local authority referral process to avoid creating any conflicts of interest, will be published in due course.

As to the role of the Independent Reconfiguration Panel, then that will end and be replaced by new arrangements.

The White Paper indicates that the Government does not anticipate this new intervention power being used with great frequency but where there are issues that Ministers have concluded need to be pressed to a resolution, this will provide a means of doing so.

It is correct to state that some service reconfigurations have been subject to a state of limbo in recent years as a result of a referral by a local authority to the SSHSC. The same can also be said of decisions on service reconfiguration being challenged by judicial review, although that type of challenge in terms of proceedings being commenced is subject to the need for 'promptness'. As ever, the devil will be in the detail of the new process, but the proposal does not suggest the whole overview and scrutiny role of local authorities will be removed and if that is to remain, then one question will be what ability will they have to challenge service reconfiguration decisions.

Alternatively, will they simply be able to request the SSHSC intervene or will we see greater resolution of disputes happening through the new ICS statutory body? It will also be interesting to see how the expertise which the IRP have developed over the years will be retained to support the new proposals.

Service reconfiguration has often been the subject of intense local debate and it will be interesting to see whether the new process, when announced, will enable easier resolution of differences in local communities so the NHS can proceed with often much needed changes.

4. Arm's Length Bodies (ALB) Transfer of Functions Power

During the course of the response to the Covid-19 pandemic the Government notes the need to streamline core activities across ALBs. As a result, the White Paper proposes creating a power in primary legislation for the SSHSC to transfer functions to and from specified ALBs. That will enable the SSHSC to review where functions are best delivered in order to support a more flexible, adaptive and responsive system. Further, in cases where an ALB becomes redundant as a result of transfer of its functions, this power will also include the ability to abolish that ALB.

The exercise of the powers will only be via a Statutory Instrument (SI), following formal consultation, including with devolved administrations where necessary.

This proposal does follow one of the White Paper's general purposes to create greater flexibility in the NHS framework to adapt and evolve to health needs as they develop.

5. Special Health Authorities Time Limits

There are currently five SpHAs, each with their own distinct and important roles. These are the NHS Business Services Authority (NHSBSA), the NHS Trust Development Authority (TDA), NHS Blood and Transplant (NHSBT), NHS Resolution (NHSR) and the NHS Counter Fraud Authority (NHSCFA).

The Government's proposal will remove the three-year time limit on all SpHAs. That is because they view the time limit as unnecessary, as the functions of the SpHAs are enduring, and inconsistent, as it currently only impacts the CFA. Therefore, in removing this time limit, the Government's view is that they are ensuring all SpHAs, both current and future ones, are treated equally in legislation and removing the bureaucratic, time consuming and duplicative process.

As with other proposals, this is very much looking at reducing bureaucracy that is unnecessary and creates delay.

6. Workforce Accountability

The White Paper is proposing to create a duty for the SSHSC to publish a document, once every five years, which sets out roles and responsibilities for workforce planning and supply in England. This document would:

- cover the NHS including primary, secondary, community care and where sections of the workforce are shared between health and social care e.g. registered nurses, and health and public health e.g. doctors and other regulated healthcare professions.
- describe the workforce planning and supply system including the roles of DHSC and its Arm's Length Bodies, NHS bodies and others and how they work together.
- not give any bodies additional functions to those they already have in statute
- be co-produced with (at a minimum) Health Education England and NHS England.

It is accepted that workforce issues created through Brexit and gaps in the availability of healthcare workers and clinicians need to be addressed. This proposal would, in the view of the Government, provide greater transparency in addressing the workforce issues.

Comment

The proposals in the White Paper on Enhancing public confidence and accountability, address a wide variety of issues but do centre on making clear where responsibility for functions will lie and support the proposals on reducing bureaucracy. Those over changes for dealing with concerns over service reconfigurations and addressing workforce issues, will undoubtedly be focussed on. Certainly, it will be interesting to see the further detail on how the new intervention process on reconfigurations will operate and what is contained in the new workforce planning document. Clearly, they will be important for the new ICS statutory bodies to understand when looking to address workforce issues or reconfigure how service are delivered.

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