Browne Jacobson

Integration and innovation: working together to improve health and social care for all [Part 2] - reducing bureaucracy

In this update we set out and consider reducing bureaucracy.

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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 Reducing bureaucracy 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.

Reducing bureaucracy

1. Competition

Competition has been a much discussed issue since the introduction of s.75 of the Health and Social Care Act 2012 (HSCA). It also, by its very nature, impacts on the extent to which organisations can work together. Therefore, and building on the experience of the last few years, the government want to take forward proposals to legislate to clarify the central role of collaboration in driving performance and quality in the system, rather than competition. As a result, they are proposing to remove:

- The Competition and Merger Authority's (CMA) function to review mergers involving NHS foundation trusts. The CMA's jurisdiction in relation to transactions involving non-NHS bodies (e.g. between an NHS Trust/FT and private enterprise) and other health matters (e.g. drug pricing) would be unchanged.
- NHS Improvement's specific competition functions and its general duty to prevent anti-competitive behaviour.
- The need for NHS England to refer contested licence conditions or National Tariff provisions to the CMA.

That will obviously impact on the internal market for health services which has been created and this proposal fits with the intention to introduce an NHS Provider Selection Regime, which will seek to eliminate the need for competitive tendering from clinical services where it adds limited or no value. With regard to whether removing competition as proposed will impact on the drive for service improvement then, consideration should be given to the proposal that the main role of a merged NHS England and NHS Improvement, is on supporting improvements in health outcomes, the quality of care and use of NHS resources.

The competition created within the NHS through the changes brought in by the HSCA, has been met with mixed reviews. Some viewed it as an unnecessary increase in bureaucracy and others viewed it as an opportunity to grow. Whichever view you hold, it is clear the proposal in the White Paper is aimed at supporting the need for health and social care organisations to collaborate and work together to meet people's health and care needs, in an efficient, effective and economic way.

2. Arranging healthcare services

Very much linked to the proposals on competition are the legislative proposals to remove the current procurement rules which apply for NHS and public health commissioners when arranging healthcare services. This will be done by creating the powers to remove the commissioning of these services from the scope of the Public Contracts Regulations 2015, as well as repealing s.75 HSCA and the Procurement, Patient Choice and Competition Regulations 2013.

As mentioned in Part 1 of our review of the White Paper and also the subject of a separate article, the new NHS Provider Selection Regime will be informed by NHS England's public consultation. Its aims are to enable collaboration and collective decision-making, recognising that competition is not the only way of driving service improvement, reduce bureaucracy on commissioners and providers alike, and eliminate the need for competitive tendering where it adds limited or no value. Therefore, commissioners will be under duties to act in the best interests of patients, taxpayers, and the local population when making decisions about arranging healthcare services.

It is anticipated that there will continue to be an important role for voluntary and independent sector providers, but it is intended that where there is no value in running a competitive procurement process, services can be arranged with the most appropriate provider. The NHS will continue to be free at the point of care and an aim of the proposals is to ensure that where a service can only be provided by an NHS provider e.g. A&E provision, that this process is as streamlined as possible.

As to non-clinical services, such as those provided by professional services, then they will remain subject to Cabinet Office public procurement rules.

These proposals fit with those relating to competition above, so as to remove the internal market which has arisen and give ICSs greater flexibility in their processes to commission clinical services. In giving this flexibility, the government also make clear that voluntary and independent sector providers will continue to have an important role to play and from consideration of the proposals NHS England published in 2019, it is reasonable to anticipate that NHS providers will develop collaborative relationships with those providers in order to deliver care pathways and integrated care contracts.

3. National Tariff

The government has indicated it will take forward NHS England's proposals on the National Tariff, by amending the legislation to enable the National Tariff to support the right financial framework for integration whilst maintaining the financial rigour and benchmarking that tariff offers. This includes:

- Where NHS England specifies a service in the National Tariff, then the national price set for that service may be either a fixed amount or a price described as a formula.
- NHS England could amend one or more provisions of the National Tariff during the period which it has effect, with appropriate safeguards.
- Remove the requirement for providers to apply to NHS Improvement for local modifications to tariff prices.
- NHS England should be able to include provisions in the National Tariff on pricing of NHS public health services where exercising public health functions delegated by the Secretary of State for Health and Social Care (SSHSC).

The new flexibility, which is proposed on tariff, will support the movement of greater local decision-making into each ICS and give them greater control to meet the new financial duties that will apply. Certainly, it will be important to be clear on financial rigour as provider collaboratives and alliances develop.

4. New Trusts

The ability for the SSHSC to establish an NHS Trust was not actually repealed, although that was the intention with the introduction of the HSCA. As result, no new trusts, save through merger, have been established. In line with the SSHSC having greater direct involvement with the NHS then the government proposes to allow the creation of new NHS trusts with the overriding objective of ensuring the health system is structured to deliver the best outcomes for whole population health and respond to emerging priorities. The proposal is in line with the overarching aim to ensure the system is flexible and adaptable into the future, and wherever possible avoids the need for complex workarounds to deliver system priorities.

In respect of how new NHS trusts will be created then the proposal is that ICSs can apply to the Secretary of State to create a new trust, although any new trust will be subject to appropriate engagement and consultation. The full process will be set out in guidance, which it is

presumed will form part of the powers given to the SSHSC.

Given the repeal of s.75 HSCA and proposals to enable a health and care system, then it seems sensible to give the power formally back to the SSHSC to establish new NHS trusts and for that power to be used, in response to the needs of ICSs. The proposal supports the suggestion that whilst new legislation will create ICSs, the actual local governance to deliver their plan will be for each ICS to determine.

5. Removing Local Education Training Boards (LETBs)

The government proposes amending the Care Act 2014 (which sets out the functions and constitution of Health Education England (HEE) and LETBs) to remove LETBs from statute. It is believed removing LETBs from statute with their functions continuing to be undertaken by HEE (and reporting to the HEE Board) will provide HEE with the flexibility to adapt its regional operating model over time. Equally, this proposal fits with that to give the SSHSC a statutory duty to publish a document outlining the workforce planning and supply system at national, regional and local level.

This is another proposal to streamline how the NHS operates and remove, what the government considers to be unnecessary bureaucracy by placing the LETB functions with HEE.

Comment

It would appear the proposals in the Reducing bureaucracy section of the White Paper are aimed at removing the internal market and giving ICSs the local flexibility to meet the objectives they have set themselves to meet the aims of the Long Term Plan. In stating that, it also apparent that detail is still needed on how the NHS Provider Selection Regime will operate and the extent of the flexibilities which each ICS will have with regard to tariff and patient choice. These will also be considerations when any ICS looks at seeking to request the SSHSC establish a new and more integrated NHS trust.

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