

NHS Legislation Engagement Survey
Quarry House
Quarry Hill
Leeds
West Yorkshire
LS2 7UE

By email
25 April 2019

Dear Sir/Madam

Implementing the NHS Long Term Plan: Proposals for possible changes to legislation

On behalf of ICSA: The Governance Institute I am pleased to provide feedback on the above consultation regarding possible changes to legislation to facilitate the successful implementation of the NHS Long Term Plan.

ICSA: The Governance Institute is the professional body for governance. We have members in all sectors and our Royal Charter purpose is to lead 'effective governance and efficient administration of commerce, industry and public affairs'. With more than 125 years' experience, we work with regulators and policy makers to champion high standards of governance and provide qualifications, training and guidance.

We are the professional body qualifying and supporting Chartered Secretaries, corporate governance, risk and compliance professionals in all sectors of the UK economy. Members are educated in a range of topics including finance, company law, administration and governance, which enables them to add value to any organisation. We welcome the opportunity to contribute to this consultation.

General comments

ICSA supports the Long Term Plan's aspiration to move towards integrated care arrangements and appreciates the need to make precision alterations to the existing NHS framework as there is currently no appetite, time or will to introduce wholesale changes. However, there are times when tinkering around the edges rather than tackling the issues in a holistic manner can be unhelpful. ICSA therefore suggests that any changes in legislation resulting from this consultation should be firmly placed within a wider roadmap for a future NHS operating framework that can be implemented in a timely and proportionate manner. As such, this initial stage used judiciously could be seen as providing the foundation for more wide-ranging changes in the future, without the need to start from scratch.

We welcome the opportunity these proposals present to reduce bureaucracy, duplication and confusion in the system and improve transparency, collaboration and accountability. The desired outcomes



however, cannot be achieved solely through structural change and will require evolved mind-sets and a different culture to ensure integration delivers for patients and the public.

Some of the proposals will return power to the 'centre' and could undermine efforts to build local stakeholder and engagement into the wider NHS system. This could have adverse effects on both Foundation Trusts and CCGs and it is unclear whether this was the intention or not. If it is, due consideration needs to be given to how effective and proportionate local engagement and accountability can be built in to future frameworks.

In developing new ways of working, it is important that thought be given to the governance arrangements. Good governance will facilitate effective, entrepreneurial and prudent leadership and management of each entity so that it can deliver the long-term success required of it, operating within the wider system. It will establish the cultures and norms expected of the organisation and provide mechanisms to enable a range of stakeholders to hold it to account, not just regulators. If the changing nature of the NHS to a more collaborative system is to be a success, the governance arrangements must be effective, appropriate and proportionate. This is one area where the proposals would benefit from more detail, especially in delivering a system that can demonstrate accountability on many levels.

Consultation specific questions

Should the law be changed to prioritise integration and collaboration in the NHS through the changes we recommend?

As detailed in this elsewhere in this submission, there is a growing realisation that the current framework governing the NHS does not provide the ideal structures, values and culture for delivering improved healthcare and efficiency via greater integration and collaboration. As such, ICSA agrees that there is an increasing need for legislation to be changed to ensure that future plans for the NHS, and for those who work in and benefit from its services, can be implemented with the best chance of success. It is unclear whether the proposals provide the mechanisms required to make the vision in the Long Term Plan a complete success. A wider piece of work outlining a roadmap to the future changes required to fully support integrated services would be helpful in more clearly signposting the direction of travel and anticipating the future legislative and regulatory changes required to deliver that vision. With forethought and planning, this exercise of highlighting immediate changes could deliver a strong foundation for future incremental changes.

Promoting Collaboration:

Do you agree with our proposals to remove the Competition and Markets Authority's functions to review mergers involving NHS Foundation Trusts?

The experience of mergers and acquisitions in the NHS is varied and evidence of benefits from them mixed. From the perspective of having a body oversee such developments with an understanding of the complexities of the NHS system, the proposal appears to be sensible in delivering more streamlined, balanced and nuanced decisions. However, any changes must weigh the financial sustainability of the organisation or local system against the priorities of patient choice and the delivery of safe and high quality care in the future.

Do you agree with our proposals to remove NHS Improvement's powers to enforce competition?

Whether competition in the NHS has been a success, or not, the proposal suggests that the internal market is to be replaced with increased collaboration, partnership and integration. A power to enforce competition therefore would be at odds with the overriding culture and values required to make integration a success in accordance with the 'triple aim' detailed below (see the section on shared responsibility). Removing the power in these circumstances seems sensible, especially if resources allocated to this function can be redeployed to supporting collaboration and integration.

Do you agree with our proposals to remove the need for contested National Tariff provisions or licence conditions to be referred to the CMA?

Removing the CMA will not negate the need for another body to ensure the system is fair, proportionate and transparent in its oversight. But a different body may include specific NHS knowledge and values that make decisions more streamlined and in accordance with the overarching themes of the Long Term Plan.

Getting better value for the NHS:

Do you agree with our proposals to free up procurement rules including revoking s75 of HSC Act 2012 and giving commissioners more freedom to determine when a procurement process is needed, subject to a new best value test?

The issue of commissioning within the current NHS architecture has proved challenging for commissioners trying to balance the best uses of limited resource against the threat of legal challenges. A 'best value' test may provide an opportunity to clarify and simplify the process for competitive tendering in the NHS for commissioners. However, without greater detail as to what a 'best value' test would look like and how it would be implemented and appealed against, it is difficult to say in advance whether the changes would have the desired effect in operation.

Wider concerns pertaining to commissioning also need to be resolved before such a test could be introduced, such as the application of EU competition regulations, the current freedoms of NHS Foundation Trusts, and the future role of CCGs if the purchaser/provider split is to be reduced or removed.

Indeed there are a number of proposals within the document that directly challenge the existing freedoms and autonomy of NHS Foundation Trusts within the NHS system. A wider roadmap for future changes would help to clarify the thinking around the ongoing nature and activities of NHS FTs, and other NHS structures, and whether their removal or diminution will have adverse impacts on local accountability, service design, quality care and overall governance. Making specific alterations now, without an eye to the future architecture of the NHS, could prove costly.

Finally, a clearer articulation of what procurement processes and systems might be introduced to promote behaviour that delivered commissioning decisions in the best interests of patients and the wider public would be helpful.

Increasing the flexibility of national payment systems:

Do you agree with our proposals to increase the flexibility of the national NHS payments system?

If the Long Term Plan is to deliver quality and efficient health care in a more integrated manner, it would appear that the existing NHS payments system should be amended in order to fully support the transition to integrated care systems that cover whole populations. Any flexibility in payment systems might however, require some form of oversight if it is discovered that anti-competitive behaviours are evident which do not ultimately benefit the patient. Increases in flexibility should not be matched with an increase in complexity for those navigating the system, especially if an organisation attracts funding from different parts of the system and geographical locations.

Integrating care provisions:

Do you agree that it should be possible to establish new NHS trusts to deliver integrated care?

The NHS should be enabled to deliver integrated care for the benefit of patients and the wider public. Contracts alone are unlikely to achieve the desired effect but, where the current system could accommodate a 'lead provider' role to hold the contract, this may be more sensible in the short to medium term rather than creating a 'halfway house' structure that is later dismantled with some costs.

While new entities and frameworks may be required to deliver this type of care, it is more likely that success will come from creating an NHS architecture that is shaped with the fulfilment of that aim, and not from shoe-horning new models into current structures and frameworks which were designed for a different operating model. A wider roadmap for transition to integrated care systems would help with identifying the long term structural needs, including organisation forms, regulatory regimes and accountability arrangements.

Changing the NHS environment to one where collaboration and partnership is valued above competition will require a fundamental cultural change from service and entity leaders. This will be quite a challenge for some that have been led and influenced by different stimuli in existence since the introduction of the internal market.

An external, but essential, factor in the likely success of integrate care will depend on the role of local government. Partnership between the NHS and local authorities to deliver health and social care is fundamental to the Long Term Plan, but little is said in the proposals as to how this would be achieved. It may be that the document limits itself to changes within NHS legislation, but an integrated system does not operate in isolation.

Managing the NHS's resources better:

Do you agree that there should be targeted powers to direct mergers or acquisitions involving NHS Foundation Trusts in specific circumstances where there is clear patient benefit?

While there is a clear argument for such directions to be made, and be more straightforward to implement, where trusts have financial concerns, it is unclear what evidence there is to support the need for mergers and acquisitions where the benefit delivered will be to patients in terms of improved health care services and experiences.

Should the proposal be agreed, due consideration should be given to the process and criteria used to assess the need for a direction to merge or acquire another provider, along with the opportunity for the NHS Foundation Trust to appeal any decision to an independent panel. Such directions will also challenge the autonomy of NHS FTs and the decisions of their boards. However, other sectors have regulators that can direct entities to take particular actions and this has not unduly affected the decision-making powers of boards in these sectors.

To assist in the evaluation of whether mergers or acquisitions deliver real benefit to patients and the system, ICSA recommends that a systemic review is planned. This might be, for example, after a number of years of exercising the power or when a number of mergers have taken place and changes have been implemented, both before and after the introduction of this new power. The evidence of this review should inform a decision on whether to continue with the power or look at other ways to improve collaboration for the benefit of patients.

Do you agree that it should be possible to set annual capital spending limits for NHS Foundation Trusts?

The current arrangements for Foundation Trusts may or may not be the cause of inconsistent capital projections and other systemic practices may be in play, but introducing this proposal would limit the current autonomy of NHS Foundation Trusts. This, combined with other proposals in this document suggest that the Foundation Trust model with its freedoms, autonomy, governance and accountability arrangements has a limited future in the NHS. As part of the wider NHS roadmap mentioned above, time spent now considering the future of NHS FTs and how that future could be created would be a worthwhile longer-term investment.

Every part of the NHS working together:

Do you agree that CCGs and NHS providers be able to create joint decision-making committees to support integrated care systems (ICSs)?

The current framework is being stretched and contorted to make it possible for different NHS entities to collaborate and work in partnership in order to deliver greater integration. The situation is unsustainable and would not benefit from another 'fudge' which does not improve decision making, efficiency, effectiveness, transparency or accountability.

If the overarching plan is integration between different parts of the NHS and external partners in the local area, more transformational changes would ensure that there are no areas for confusion or misunderstanding and improve transparency and accountability. That said, if there are aspects of these proposals that don't require primary or secondary legislation, then those different options should be investigated further to assess their viability.

Do you agree that the nurse and secondary care doctor on CCG governing bodies be able to come from local providers?

It is unclear how this provision would remedy the inherent conflicts of interests built into the CCG governing body and it does not really address the issue at hand – the need for greater insight into local provider priorities and challenges. There are other ways in which that insight could be gained, including

the formal attendance of appropriate senior managers from local providers to deliver presentations and reports to the CCG governing body on a regular basis.

By allowing nurses and secondary care doctors to join CCGs in the area of their local provider / employer there is the risk that a nurse or doctor will be unclear as to their role on that governing body: is it to act in the best interests of the CCG or to represent the views of the local provider – their employer? A similar confusion may also be experienced by the other members of the CCG governing body, including its executive leaders, and within the management team of the provider organisation. Other bodies with a membership drawn from interested parties have, and continue to, successfully managed such conflicts, but these tend to be a minority within the group and are balanced by a majority of ‘independent’ members. This would not be the case here and the proposal embeds additional conflicts within the set up. For the system to garner the ongoing trust and support of a wide range of stakeholders, conflicts of interests should be limited.

Do you agree that there should be greater flexibility for CCGs and NHS providers to make joint appointments?

There may be situations where this flexibility is helpful. However, any new power should be placed within a governance arrangement that is fit for purpose and provides appropriate levels of accountability.

Shared responsibility for the NHS:

Do you agree that NHS commissioners and providers should have a shared duty to promote the ‘triple aim’ of better health for everyone, better care for all patients and to use NHS resources efficiently?

The ‘triple aim’ appears commendable, but it is unclear if this aim could be achieved via means other than introducing a new duty, which could compete with existing legal duties of individual entities wishing to work together.

Planning our services together:

Do you agree that it should be easier for NHS England and CCGs to work together to commission care?

Given the intention to develop wholly integrated care services, one option might be to include arrangements for all involved in health and social care to work together more easily rather than just those organisations with a focus on commissioning. The separation of the commissioner from the provider role is reduced in other proposals and it would be fruitful in the long run if a wider group of interested bodies were involved in service design, commissioning and delivery thereby building a stronger partnership based on understanding and respect of local and national needs.

Joined-up national leadership:

Which of these options to join up national leadership do you prefer?

- a) combine NHS England and NHS Improvement
- b) provide flexibility for NHS England and NHS Improvement to work more closely together
- c) neither of the above.

If the 'triple aim' of better health for everyone, better care for all patients and to use NHS resources efficiently, is to be achieved, NHSE and NHSI should be formally combined with a clearly defined mandate, duties, powers and accountabilities. The current arrangement, hindered by existing legislation, does not provide for optimum clarity of understanding, efficiency or accountability within the system or the wider public.

Do you agree that the Secretary of State should have power to transfer, or require delegation of, ALB functions to other ALBs, and create new functions of ALBs, with appropriate safeguards?

This proposal would benefit from a better explanation as to why there is the need for the Secretary of State to have these powers, how they would be used and what the benefits to patients and the wider public would be. Articulating the safeguards mentioned would also be useful in understanding how these powers might be used, and abused, in the future.

I trust the above comments are helpful. Should you require any clarification or have questions, please do not hesitate to contact me directly.

Yours faithfully,

Louise Thomson FCIS
Head of Policy, Not for Profit
ICSA: The Governance Institute
Tel: 020 7612 7040
Email: lthomson@icsa.org.uk