27 January 2022

The Health and Care Bill
House of Lords, Committee of the whole House
Clauses 4 and 91, and New Clause after Clause 80

NHS Providers is the membership organisation for the NHS hospital, mental health, community and ambulance services that treat patients and service users in the NHS. We help those NHS trusts and foundation trusts to deliver high-quality, patient-focused care by enabling them to learn from each other, acting as their public voice and helping shape the system in which they operate. NHS Providers has all trusts in voluntary membership, collectively accounting for £92bn of annual expenditure and employing more than one million staff.

The majority of the Health and Care Bill (the Bill) is focused on developing system working, with integrated care systems (ICSs) being put on a statutory footing. It also formally merges NHS England and NHS Improvement (NHSE/I), and makes changes relating to public health, social care and patient safety.

We support the opportunity the Bill presents to design the right system architecture that will deliver sustainable, high-quality care for the future. However, we also believe there are improvements that can be made which will make this the transformative piece of legislation the government wants it to be. NHS Providers has commented extensively on the Bill since its publication. Our briefings and written evidence to date can be found here. This briefing examines a number of amendments relating to Part 1 and Part 3 of the Bill.

Amendments and clauses covered in this briefing

- Amendments 225A, 225B, 225C (Clause 4: NHS England mandate: cancer outcome targets)
- Amendment 217 (New clause after Clause 80: Social care needs assessments)
- Amendments 229-230 (Clause 91: Scope of powers)

Clause 4: NHS England mandate: cancer outcome targets

Amendments 225A, 225B, 225C

Member's explanatory statement

This amendment means that cancer outcome objectives will have priority over any other objectives relating to cancer (not just those relating to cancer treatment).

NHS Providers' view

The government sets NHS England's objectives and requirements in the mandate under section 13A of the National Health Service Act 2006. The government's amendments to clause 4 in the Bill adds a further requirement to section 13A. Specifically, it requires the secretary of state to include objectives relating to cancer outcomes in the mandate that are defined in terms of outcomes. It further sets out that these objectives will have priority over any other objectives relating specifically to cancer.

Given the prevalence of cancer across England and its devastating impact on patients and families, adequate access to prompt, safe and effective diagnosis and treatment is fundamental. NHS England has already committed to improving how waiting times are calculated and improving performance measures to ensure they drive improvements for patients. In its clinically-led Review of NHS Access Standards, NHS England proposes a shift to a new Faster Diagnosis Standard, with a cancer diagnosis within 28 days of an urgent referral from an NHS screening programme or their GP, replacing the current 14-day window in which patients may see a specialist with no timeline in place to receive their diagnosis. This reflects the performance priorities clinicians have identified for cancer care, ultimately aimed at improving patient experience and outcomes. Trusts are currently in the process of moving towards the Faster Diagnosis Standard.

We understand the critical importance of improving cancer outcomes. Outcome data should form one important source of information for NHS England, ICBs and trusts to understand the performance of cancer care, particularly relative to other comparable countries. However, given that the clinical review of standards is relatively recent and gained broad support across the sector, in our view, its proposals should not be diverted or complicated with additional measures at this stage. Should this amendment be brought into the Bill, we would certainly urge full and thorough consultation with all relevant organisations and individuals on which outcomes might be under consideration to have priority over all other cancer objectives.

New Clause after Clause 80: Social care needs assessments

Amendment 217

Member's explanatory statement

This amendment would create protections for the provision of social care needs assessments. It includes requiring an assessment to be carried out either before a patient is discharged from hospital or within two weeks of discharge; and requiring ICBs to agree a process for the provision of assessments.

NHS Providers' view

While we support the intentions behind this amendment, which seeks to ensure the timely assessment of patients, we believe that some of the proposed changes go against the existing direction of travel with regards to the 'discharge to assess' policy. The requirement in amendment 2A that 'a social care needs assessment must be carried out…before a patient is discharged from hospital or within 2 weeks of the date of discharge', creates an arbitrary threshold, and runs contrary to the existing NHSE/I discharge guidance, which states that 'social care needs assessments and NHS Continuing Healthcare (NHS CHC) assessments…should be made in a community setting.' Ensuring patients are assessed after they are discharged from hospital is better for patient outcomes, enables a more accurate assessment of their needs and helps maintain flow across the health and care system.

We would suggest that recommendations around the appropriate timeframe for an initial needs assessment should be placed in guidance rather than legislation. Furthermore, the reference to penalties for not meeting the required timeframe would be both regressive (in terms of returning to a system of penalties that Delayed Transfers of Care previously enforced), and would fail to address the issues that sit behind delays in the delivery of initial assessments.

Clause 91: Scope of powers

Amendments 229-230

Member's explanatory statement

These amendments will narrow the scope of secretary of state's powers.

NHS Providers' view

Part 3 of the Bill as it stands would give the secretary of state a wide range of powers to modify the functions of a set of NHS arm's-length bodies without primary legislation.

While we recognise the logic of the secretary of state having powers to confer functions on and move responsibilities between arm's-length bodies via secondary legislation these new powers are far more extensive than that. There is a real danger that the application of the powers as currently drafted could threaten the stability, proper management and operational independence of key parts of the NHS. For example, the Bill currently prevents the secretary of state from making changes that would make NHS England redundant – but there is nothing to define that redundancy.

The House of Lords Constitution Committee report on the Bill, raises serious concerns about the range of secretary of state powers contained in this Bill and concludes that these new powers, coupled with new powers for the secretary of state of oversight, delegation and transfer of function, "could alter the balance between the Government's constitutional responsibility for the provision of health care and providers' ability to function in a manner that can respond effectively to local needs. It also risks undermining accountability by making it more difficult to understand which body is responsible for a particular function of the NHS."

Decisions about abolishing, changing or transferring functions between bodies should be carefully scrutinised by Parliament. In the absence of proper parliamentary scrutiny, we think that it is important to narrow the scope of these powers.

If the secretary of state believes that any of the functions of the relevant bodies should be abolished, or removed, then Parliament should have the opportunity to scrutinise those proposals. We support these amendments because they reduce the scope of these powers to conferring functions on a body, and remove the secretary of state's powers to: (1) to abolish the function of a body, (2) change the purpose or objective for which the body exercises a function, and (3) change the conditions under which the body exercises a function. Should it be necessary and appropriate to make these changes – which would substantially alter the functioning, oversight and regulation of the NHS and health research – the secretary of state would, as is proper, need to find another legislative route and ideally that would be done via primary legislation.