SPECIAL REPORT

NHS Legislative Proposals

FEBRUARY 2021

McDermott Will & Emery

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INTRODUCTION

On 11 February 2021, the UK Department of Health and Social Care published its White Paper setting out legislative proposals for a Health and Care Bill. The White Paper proposes wide changes to the structure of the NHS in England.

On the same day, NHS England published a consultation about the Proposed Provider Selection Regime. Responses to the consultation are due by 7 April 2021.

Many of the proposed changes have been welcomed by the NHS system particularly with respect to the co-ordination and integration of health and social care.

This summary reviews the proposed legislative changes and procurement consultation proposals thus far and discusses the effect such proposals, if adopted, would have on providers of NHS services in particular:

- The new NHS structures and contracting bodies
- Changes to NHS pricing
- Implications for Social Care
- The Proposed Provider Selection Regime

TIMELINE AND BACKGROUND

The Department has said that on current timeframes and subject to other parliamentary business, that the proposals will be implemented in 2022.

Many of these proposals have been in discussion for many years and were included in the NHS's recommendations to government and Parliament for an NHS Bill. These recommendations describe the legislative changes the NHS required to help it deliver the improved outcomes described in the NHS Long Term Plan.

NEW NHS STRUCTURES AND CONTRACTING BODIES

INTRODUCTION

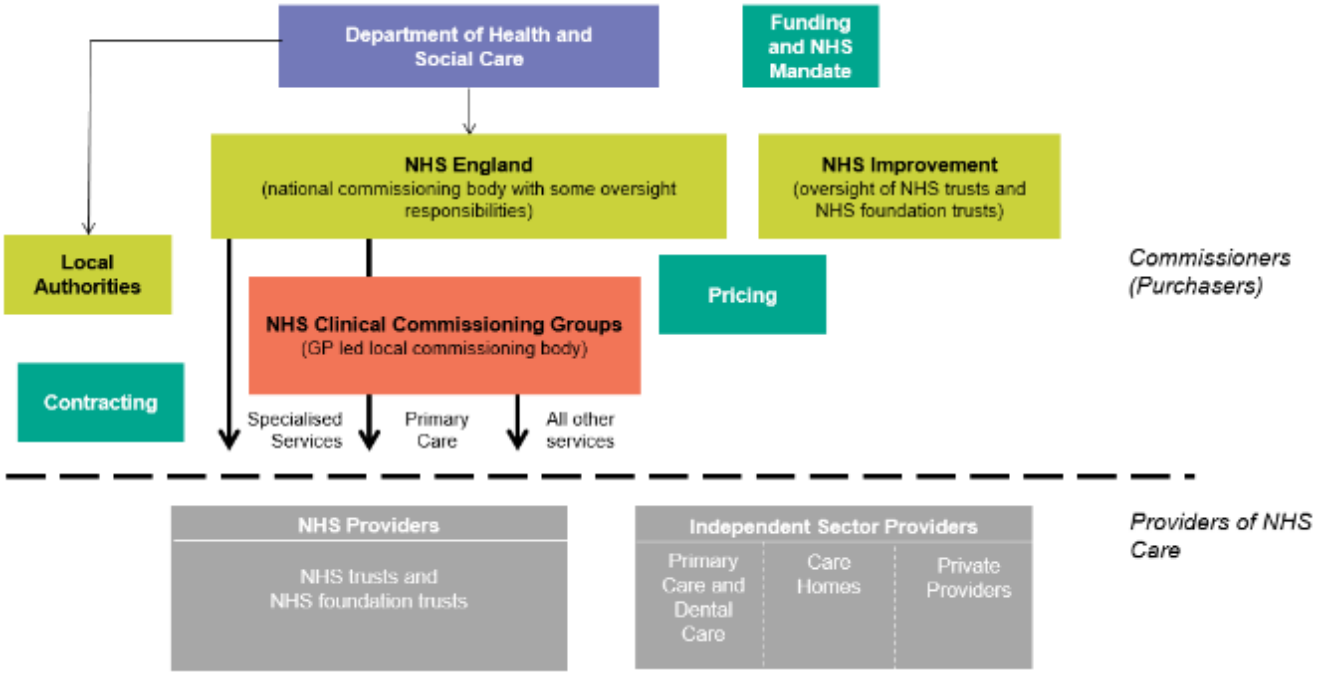
The White Paper states that the key aims of the legislative changes are to:

- ensure greater collaborative and integrated care systems (**ICS**)
- reduce bureaucracy (building on the proposals in Busting Bureaucracy in the NHS)
- improve accountability and enhance public confidence

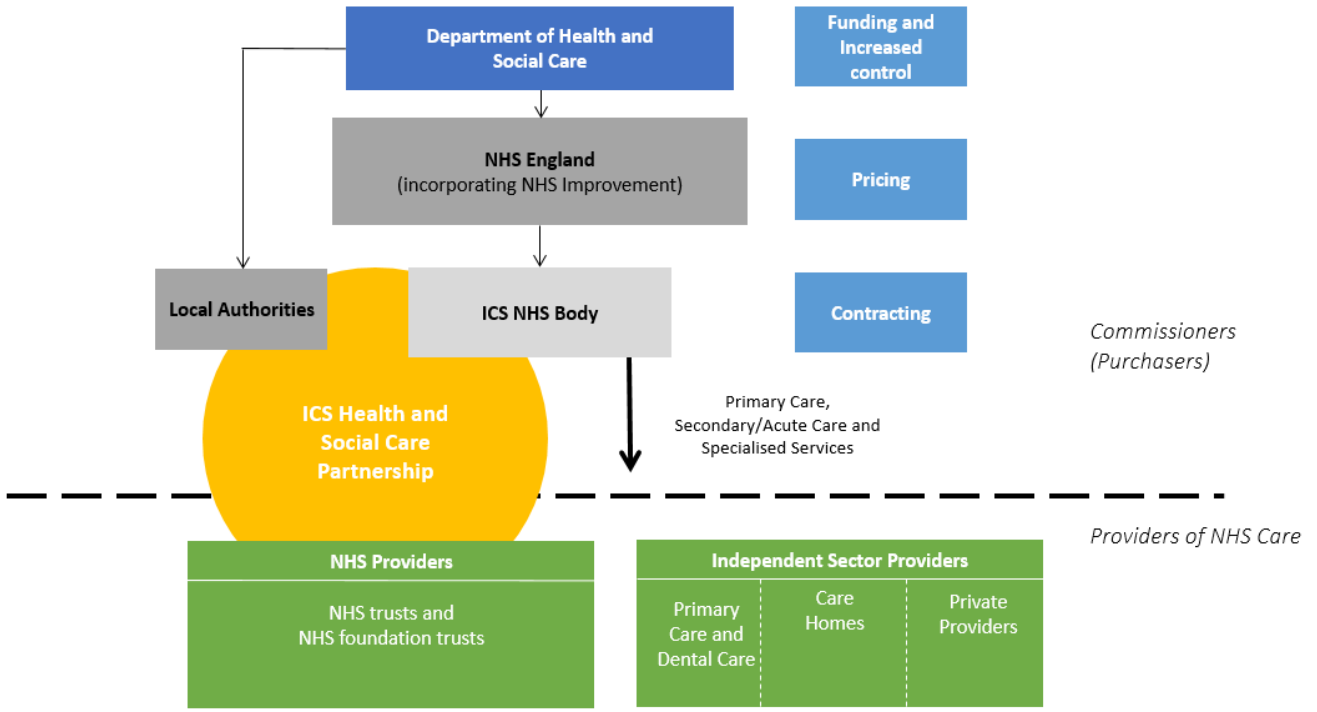
The changes include the abolition of clinical commissioning groups (**CCGs**) and NHS Improvement (**Monitor**) and significantly greater control by the Department of Health and Social Care over NHS England. In practice, most contracts held by providers will now be transferred to new statutory bodies called ICS NHS Bodies. These ICS NHS Bodies will also commission specialised services, primary care and dental services. In addition, statutory health and care partnerships will also be established.

The system changes are illustrated in the diagrams below.

CURRENT NHS SYSTEM



PROPOSED NHS SYSTEM



KEY TAKEAWAYS ON CHANGES TO THE NHS SYSTEM

1. **Funding and increased control**: The Department of Health and Social Care will have increased powers to direct NHS England and NHS providers. In part, this reflects powers that were removed in the Health and Social Care Act 2012 and a return to previous "system control." The annual NHS mandate will be replaced with a more flexible regime.

2. **NHS England**: NHS England will be merged with NHS Improvement (the provider regulatory bodies comprising Monitor and The Trust Development Authority) and will be subject to tighter controls by the Department of Health and Social Care. The responsibility for specialised and primary care commissioning will transfer to (or be delegated to) ICS NHS Bodies with NHS England continuing to provide oversight at a national level.

3. **ICS NHS Body or ICS Board**: These are new statutory bodies with 'allocative functions' of CCGs and additional specialised commissioning functions transferred from NHS England. Each ICS NHS Body will have a board and the chief executive will be the Accounting Officer. The board will include a minimum of a chair, chief executive officer and representatives from NHS trusts, GPs and local authorities. The ICS NHS Bodies will be able to delegate statutory commissioning functions to joint committees formed with NHS providers, which may also include representation from other bodies such as primary care networks, GPs, local authorities or the voluntary sector. ICS NHS Bodies will need to ensure "they have appropriate clinical advice". The ICS NHS Body will run the integrated care system and will be responsible for NHS planning and allocation decisions. It will be responsible for developing a plan for the health needs of the system, setting the strategic direction and explaining capital and revenue spend for NHS bodies.

4. **ICS Health and Social Care Partnership**: New statutory partnership (but not a separate statutory body) responsible for developing a plan for the health, public health, and social care needs of the ICS from which the ICS NHS Body will need take direction. The ICS Health and Social Care Partnership will have discretionary powers to appoint members and functions may be delegated to the ICS Health and Social Care Partnership. Independent and voluntary providers may be invited to join the ICS Health and Social Care Partnership. Further details are due to be published about how these bodies will operate.

CHANGES TO NHS PRICING

The White Paper states that the NHS Tariff does allow for flexibility but needs to be changed because the "payment by results" approach does not always facilitate new payment approaches or support the use of digital technology and services in the provision of care.

Changes are not fully described in detail but are said to allow for a simplified and streamlined pricing process.

In particular, the following changes are proposed:

1. 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.

2. NHS England could amend one or more provisions of the National Tariff during the period in which it has effect, with appropriate safeguards.

3. Remove the requirement for providers to apply to NHS Improvement for local modifications to tariff prices.

These changes need to be read alongside current proposals for the 2021/22 National Tariff, which include the wider use of blended payments and system wide control totals.

Providers of episodic care may want greater clarity on how the changes in the White Paper (including the removal of local modification applications) will affect the prices payable for their services and, in particular, whether pricing and selection of providers may be affected by "competition on price" or equal treatment for the same care services.

KEY TAKEAWAYS FOR SOCIAL CARE PROVIDERS

1. Health services commissioned by local authorities will fall within the Proposed Provider Selection Regime (*see below*).

2. Increased accountability through a new enhanced assurance framework examining the performance of local authorities. The Care Quality Commission will have a new duty to assess whether a local authority is delivering their adult social care duties with a power of the Secretary of State to intervene if an authority is failing to meet its duties.

3. Changes to data collection from social care. This will include the right to collect data from social care providers to better understand "this aspect of the system". This will include data on hours of care services provided, cost per person together with data on financial flows which will enable transparency on money flows to providers and their workforce. This is intended to be used to support improved co-operation and joint decision-making.

4. A new power for the Department of Health and Social Care to provide financial payments directly to providers (rather than through local authorities). The Health and Care Bill will not prescribe the circumstances when this power can be used but will act as a "foundation for future policy proposals". The Department of Health and Social Care has said these payments will be assessed on a case-by-case basis and will not be used to amend or replace the existing funding of adult social care and is anticipated to be used in exceptional circumstances.

5. Changes to the "discharge to assess" model so that assessments can take place after an individual has been discharged from acute care, rather than prior to discharge as is currently the case.

6. Social care services (including the funding and decision-making on pricing of care services) are not otherwise within the scope of the Health and Care Bill and the Department of Health and Social care has said that it is committed to bringing forward proposals on social care later this year.

PROPOSED PROVIDER SELECTION REGIME

INTRODUCTION

Alongside the Legislative Proposals White Paper, NHS England has published a consultation document about the Proposed Provider Selection Regime which:

- will replace the current regulations made under section 75 of the Health and Social Care Act (NHS (Procurement, Patient Choice and Competition)(No.2 Regulations 2013); and
- anticipates the removal of NHS contracting from the UK Public Contracts Regulations 2015.

The consultation document provides a list of questions that providers may respond to by April 7, 2021.

This document appears most likely to affect independent providers of NHS services or providers of contracts which are commonly subject to procurement (including community care, primary care and dental services).

Although the consultation document says that the rationale of this regime is to fix an expectation that "nearly all contracts for NHS services" should be

advertised and competitively tendered, in practice the vast majority of NHS services are not tendered.

WHAT SERVICES ARE IN SCOPE?

The new procurement regime will apply to all healthcare services provided to individuals and whether commissioned by local authorities or NHS bodies (NHS England, ICS NHS Bodies, NHS trusts and foundation trusts). In this document, these bodies are described as "**Decision-making Bodies**".

The proposals do not apply to social care services commissioned by local authorities alone but will apply to services through pooled fund arrangements (section 75 partnership agreements).

It also does not apply to purchasing of medical devices, non-clinical services, medicines or community pharmacy services. The purchasing of these services will be affected by the Green Paper on procurement (*see below*).

KEY TAKEAWAYS

- Arrangements for the delivery of NHS services must be transparent and in the best interests of patients, taxpayers and the population
- Procurement of contracts through competitive tendering is discretionary although certain criteria must be followed (*see below).*
- Four types of award:
  - » Continuation with incumbents: direct award without a competitive process
  - » New or Substantially changed services: direct awards without a competitive process
  - » Competitive procurements: discretionary process
  - » AQP selection: which is a continuation of the existing patient choice regime
- Reduced rights of legal challenge including where contracts are terminated and awarded to another provider without a competitive process.

The new Provider Selection Regime allows for significantly greater discretion for NHS bodies on when and how to use competitive processes. The Provider Selection Regime also allows for the direct award and continuation of contracting with providers in certain circumstances and, it appears that competitive tendering may become a "last resort" option.

WANT TO KNOW MORE ABOUT THIS REGIME?

The changes in the Proposed Provider Selection Regime have significant and far-reaching implications, particularly for providers of health services to the NHS. McDermott is providing detailed commentary and support to its clients on the impact of the Proposed Provider Selection Regime and you can access our detailed review here.

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