NHS England's proposals – 'business as usual'

Why KONP does not support majority of proposed changes to NHS legislation

NHS England (NHSE) is running a form of 'engagement' with campaigners and the wider public, on proposals for changes to the almost universally hated 2012 Health and Social Care Act.

As opponents of that Act and all it stands for, Keep Our NHS Public (KONP) will support any changes which may offer the chance to unpick and reverse even parts of this damaging legislation.

However, we are also aware that this limited 'engagement' process is linked with a wider agenda for NHSE which we do not share or endorse. We do not lend any support to proposals that may prove part of a wider strategy that we have already made clear we reject.

This means that of the list of proposals set out in NHS England's 'NHS Legislation Survey' (page 26 of Implementing the Long Term Plan) we can only agree to *part of one of them* (number 2 on their check list): to revoke Section 75 of the Health and Social Care Act 2012.

Section 75

We were especially opposed to Section 75 (s75) and its regulations as one of the most damaging components of the 2012 Act – enforcing compulsory tendering of NHS clinical services – and we see no merit in retaining it. However, abolishing s75 is certainly no protection against further privatisation, or even against potential future large-scale monopoly contracts.

KONP proposals: ***We support any move for s75 to be revoked.***

However, we are under no illusions that scrapping this piece of legislation and its associated regulations (which the government could simply decide to rescind without any need for legislation if they chose to do so) would bring an end to contracting or to privatisation.

Nor are we in agreement with the other part of this proposal which is 'giving NHS commissioners more freedom to determine when a procurement process is needed, subject to a new best value test'. 'NHS commissioners' means NHS England and CCGs, and we have no confidence in the judgement of either on whether to put services out to tender. With precious few exceptions their track record is very poor, and CCGs have brought a massive

level of dislocation and fragmentation to services since they took over in 2013. Some CCGs have claimed their decisions have been forced by Section 75 of the Act. Others, we know, are clearly fully committed to contracting and to privatisation.

While NHSE claims the moral high ground of seeking to 'integrate' NHS services, their proposals do nothing to address the underlying marketisation and financialisation of the NHS.[1] KONP is particularly concerned about the potential for increased financialisation of the NHS through partnerships bids from NHS providers in alliance with private finance companies.

Rather than seeking to end the market system and competition, NHSE is merely modifying the way it works: even if its proposals were fully implemented, all the elements of the market would remain intact.

Competition and Markets Authority

The first proposal on the list is described as 'promoting collaboration'. It calls for the removal of the Competition and Markets Authority's role in reviewing foundation trust mergers.

The CMA is no safeguard of local access or accountability, and certainly no obstacle to privatisation: it serves primarily to regulate behaviour of private companies – supermarkets and bus companies. It argues strongly in favour of competition between NHS providers. **KONP believes the CMA has no legitimate role intervening in any element or decisions of the NHS or any public service.** But that's not what NHSE is saying. So, we must ask why NHSE only wants to stop the CMA intervening on one issue.

The answer comes under point number 5: 'managing the NHS's resources better,' which reveals that NHSE is seeking **powers to force through mergers.** However, much we disagree with the CMA, KONP cannot agree to that objective. We know from painful experience across the country that trust mergers are almost always a prelude to cutbacks and 'centralisation' of services that reduce local access.

[1] KONP is particularly concerned about the potential for increased financialisation of the NHS through NHS partnerships bids with private finance companies. Under EU Regulations both direct private capital participation in the contractor, or contractors generating over 20% of income from the open market, mean procurements cannot be treated as 'contracts between entities within the public sector' and so are subject to full EU procurement requirements. Financialisation in this context refers to the increasing influence of financial institutions and the market in the erstwhile public national health service.

We know mergers always reduce local accountability of trusts, and that they often have negative consequences for NHS staff: we are also against *any* merger being imposed from the outside and above by NHSE, and anything that makes that easier.

Public Contracts Regulations

As part of the same proposal NHSE also wants to 'remove arrangements between NHS commissioners and NHS providers from the scope of the Public Contracts Regulations'.

KONP proposals: **KONP is in favour of removing the NHS entirely from the scope of EU and UK procurement requirements, and this could be achieved readily within existing EU requirements for 'Non-economic Services of General Interest'.** Under EU laws, the Government can declare the NHS to be a 'non-economic service of general interest' and 'a service supplied in the exercise of governmental authority', asserting in this way the full competence of Parliament and the devolved bodies to legislate for the NHS without being trumped by EU competition law (for so long as the UK remains an EU Member State) and the World Trade Organisation's General Agreement on Trade in Services. KONP also seeks exclusion of the NHS from international trade deals.

However, so long as contracting remains in place, we are not in favour of NHSE's proposal to remove the NHS from the scope of Public Contracts Regulations. This might sound like a good thing, until we check the regulations, and find that they give scope for building into contracts equality considerations (such as access for people with disability), social and environmental issues, as well as exclusion of suppliers based on evidence of unsuitability including previous poor performance, and whether they are adequately equipped to do the job. The (EU) Public Contracts Directive also places a duty on the contracting authority to investigate tenders it considers abnormally low: this could have prevented contracting fiascos such as Hinchingbrooke Hospital (pre-2012 Act) and many of the patient transport services disastrously contracted out to private companies that failed. **Flawed and inadequate as they may be, so long as contracting remains in place we are not in favour of removing these requirements.**

Payments system

The third proposal on the list is to 'increase the flexibility of the national NHS payments system'. KONP were opposed to the introduction of the 'payment by results' system and the tariff that accompanied it in the mid 2000s: we said then that it was part of the marketisation of the NHS, and that the break up of block contracts and service level agreements was part of the process of opening up more NHS services for private providers. But to start to vary the tariff payments while leaving this system intact opens up new

possibilities for unequal treatment of one area compared with another, a new 'postcode lottery' that offers no benefits to patients – with all the changes decided from above by NHS England.

New NHS trusts

The fourth proposal is described as 'integrating care provision' and proposes the establishment of 'new NHS trusts to deliver integrated care'. This might sound relatively harmless if it were not for the fact that these new trusts, like the old trusts and foundation trusts would remain part of the provider network in the same unreformed market system.

The continued separation of commissioners and providers is not integration, simply a modified disintegration of services. Contracting would continue. The providers would continue to be in competition with each other and with the private sector: indeed the new trusts would be governed by the Integrated Care Provider contract that KONP, Health Campaigns Together, We Own It and others have campaigned against. KONP have argued that NHS services must be provided directly by public bodies, not through long-term commercial contracts which, over time, may transform NHS bodies into de facto commercial companies (albeit not-for-profit).

Under NHSE proposals, commissioning will remain in the hands of the same, in most cases, unreliable CCGs, advised by the same inadequate but costly management consultants. So, while we would prefer services to be delivered by new NHS trusts as public bodies rather than by secretive new bodies or private companies, the proposal is still not one we can support.

Joint Committees

Proposals 6,7 and 8 outline the limited NHS England vision of 'integration' through linking up the existing fragmented commissioners and providers into 'joint decision-making committees'. It's not clear which parts of the 2012 Act, if any, NHS England is proposing should be repealed or amended to allow these bodies to have any legal status, which they lack at present. But it's also clear that rolling together CCGs which are supposed to commission care for defined local populations breaks any local accountability and winds up with a body that is accountable to nobody – other than upwards to NHS England and its shadowy Regional Directorates.

We have seen increasingly far-reaching de facto, and now actual, mergers of CCGs, which have effectively disenfranchised local people over large areas of London and in many other areas. **We already have a clear example of what such an unaccountable regime could mean in practice, with the imposition by NHS England of a secretly negotiated and privatised contract for PET-CT scanning services on a 'Thames Valley' area spanning Oxford, Swindon and Milton Keynes, without any prior consultation in any of these areas,**

and which will worsen services for patients. It has been angrily challenged by Oxfordshire MPs from all parties, Oxfordshire's Tory-led county council, consultants and GPs – so far with no real concessions by NHS England which has threatened to sue consultants who criticise the contract and its implications. There has been little if any response from Swindon and Milton Keynes, which stand to receive an even worse deal than Oxford from a contract negotiated behind the scenes by the Arden GEM Commissioning Support Unit after a sketchy 'consultation' conducted three years ago.

So, when NHSE asks (point 8) 'Do you agree it should be easier for NHS England and CCGs to work together to commission care?' the answer has to be: 'No – not on the basis you propose'. We want no repetitions of the Oxfordshire PET-CT fiasco.

The Long Term Plan (page 30) calls for providers and commissioners in each 'Integrated Care System' to be brought together into 'a partnership board, drawn from and representing commissioners, trusts, primary care networks, and – with the clear expectation that they will wish to participate - local authorities, the voluntary and community sector and other partners'.

However, it's not clear what legal status or decision-making powers, if any, this board might have, since without a change in the law each of the component parts would retain their powers and duties, and the meetings would be a purely cosmetic exercise in 'integration'. We are also concerned at proposals that could give private providers a say in determining future provision.

KONP proposals: Keep Our NHS Public favours proposals, as set out in the NHS Reinstatement Bill, to **repeal the Health & Social Care Act** – but also to sweep away the apparatus of the market that divides the NHS.

KONP proposals: We therefore favour the **establishment of Health Board**s as public, accountable bodies that would plan and provide the full range of NHS services, with participation from elected councillors, community organisations and trade unions. That would be real integration *and* offer substantial savings from costs of contracting and running separate commissioners and providers.

KONP proposals: **Foundation trust status should be abolished, as part of the reintegration of trusts with commissioners into 150 or so new Health Boards mainly based on council boundaries.** (They largely have been rendered meaningless with most foundation trusts deep in deficit requiring bail-outs from the NHS.)

'Joined up national leadership'

Point 9 of the NHS England check list of proposals is a choice of ways for NHSE and NHS Improvement to work together in 'joined up national leadership'. A follow up point asks

whether we agree 'the Secretary of State should have the power to transfer or require delegation of ALB [Arm's Length Body] functions to other ALBs …'.

Once again this is the wrong answer to the wrong question and the wrong approach. We favour reintegration and reinstatement of the NHS that has been broken up by 30 years of marketising reforms, exacerbated by the 2012 Act.

KONP proposals: A starting point should be **restoring the responsibility of the Secretary of State to provide universal access to comprehensive health services – and establishing the accountability of NHSE (which should be brought together with the 'Arms Length Bodies' as an NHS Board) to the Secretary of State.**

KONP proposals: The quality of services should be monitored by locally-based independent bodies involving local patients and community groups, with the powers once enjoyed by Community Health Councils, and a national coordination on issues of common concern.

These changes outlined above would put our NHS back together again and, with the ending of the existing privatised contracts and steps to take back ownership of PFI hospitals, would be the basis to restore it as a genuinely integrated, publicly owned, publicly delivered and publicly accountable service.

NHSE's proposals may appear to look towards unpicking the Health & Social Care Act and overriding the structures of the market, but it's clear on closer examination that their proposals head in a very different direction from our aim of reintegrating the NHS. They are looking to a greater centralisation and top down control of a system, while we campaign for local accountability and transparency. They are driving towards 100% of NHS provision being via long-term commercial contracts while we challenge every instance of privatisation. These differences remain unchanged.

KONP will continue to press with our campaign allies We Own It and others for the repeal of Section 75. But, unlike NHS England, we seek the full repeal of the rest of the 2012 Act and scrapping a market system that has delivered no benefits but has added major costs and many other problems since it began under Margaret Thatcher in the 1989 White Paper.

See below background on the Health & Social Care Act 2012 and on Keep Our NHS Public

Background: The Health & Social Care Act 2012

The Health & Social Care Act is a monstrous piece of legislation, longer than the 1946 Act that set up the NHS, which was forced through parliament by Conservative and LibDem MPs and peers regardless of the near unanimous opposition of doctors, nurses, health professionals and health unions.

Its main provisions were to end the Secretary of State's direct responsibility for providing universal access to a comprehensive range of services; to create NHSE as a free-standing commissioning board; and entrench the division of the NHS into commissioners (over 200 newly created Clinical Commissioning Groups) on the one hand, and providers (NHS trusts, foundation trusts, private companies, charities and non-profit social enterprises) competing for contracts on the other.

This new competitive 'market' was enforced through Section 75 of the Act and its associated regulations, which require CCGs to carve up services into contracts and put them out to tender, fragmenting previously linked services, undermining the financial viability of trusts, and bringing unreliable and unsuitable private providers into the provision of clinical services.

Competition was to be enforced (and any serious collaboration between providers, or between providers and CCGs prevented) by an NHS regulator, Monitor, which has since been incorporated into NHS Improvement, and by, of all things, the Competition and Markets Authority (formerly the Monopolies and Mergers Commission) – a body set up to police and uphold the values of private business, which has just published a lengthy and fanciful document praising the role of competition in upholding standards in health care.

In the six years since the Act was given the Royal Assent its damaging impact and lack of any positive benefit has been increasingly visible for all to see: many of the fears expressed by campaigners such as KONP who fought from the outset to prevent it becoming law have proved accurate.

While a few CCGs have struggled to protect the NHS in a hostile environment, irresponsible contracts have been drawn up by clueless and irresponsible CCGs, splitting services away from trusts, and bundling them up for profit-seeking private contractors. Many of these have subsequently gone bust, or walked away when the profits failed to materialise, and poor services have led to mounting complaints. Long-term deals worth billions have been signed with private providers: more are currently being offered up for tender, even as Health Secretary Matt Hancock pledges no more privatisation on his watch in the face of this evidence.

For the past five years since the Five Year Forward View successive plans and projects from NHS England have focused not on competition but on 'integration' of services. However it

has been clear at each stage that this notion of 'integration' has been one that fits within the existing market system of commissioners and providers, and therefore falls well short of any conventional understanding of 'integration' into a single coherent whole – which would mean the reinstatement of the NHS as a unified public service.

Indeed the various incarnations of this idea – carving England into 44 areas for 'Sustainability and Transformation Plans' in 2016; proposals for 'Accountable Care Systems and Organisations', swiftly dropped in favour of 'Integrated Care Systems and Organisations', and more recently 'Integrated Care Provider' contracts – all combine an obsessive level of secrecy in their development with proposals for bodies that would lack either legal legitimacy or even a shred of local accountability to the communities they cover. The Long Term Plan published in January proposed each Integrated Care System would have

> 'a partnership board, drawn from and representing commissioners, trusts, primary care networks, and – with the clear expectation that they will wish to participate - local authorities, the voluntary and community sector and other partners;'

Such new boards would effectively supplant the existing public bodies. However, there is no commitment for them to meet in public, publish their board papers and minutes, be subject to the Freedom of Information Act, or to have any democratic participation from the communities they would cover. Some STPs have already established similar Boards – but they function in secret and have won no public acceptance. Plans for ICSs are being driven through with no consultation, and no transparency.

Worse, the ICSs and their 'partnership boards' would be subject to control by other unaccountable bodies set up by NHS England – Regional Directorates, which are similarly closed to any public scrutiny: they are only accountable upwards to NHS England, not downwards to local people.

We have a clear idea of the type of decisions we could expect from such bodies from the imposition by NHSE of a privatised PET-CT scanning contract on Oxford University Trust despite the opposition from MPs from all parties, the county council and all of the health professional required to work with the contract. Not only has NHSE ignored the complaints, they have even threatened legal action against the consultants who have pointed out the contract will damage the quality of care provided to cancer patients.

This is far from an exceptional case: The Long Term Plan spells out a commitment to extend new 'networks' for imaging services and pathology services which seem certain to lead to further large-scale privatisation across the country. Already in South London and the South East the first big pathology network contract, worth £2.25 billion over 15 years (with a 5-year extension options), again developed with no proper engagement with local people or with NHS staff, has no public sector bid, and others are likely to follow suit.

Nor has any convincing argument been offered to refute fears that larger-scale contracts for Integrated Care Providers could be won by, or substantially subcontracted to private health corporations, or by NHS Trusts in partnership bids with corporate finance bodies.

Background: Keep Our NHS Public

Keep Our NHS Public was founded in 2005 to fight the growing drive towards privatisation and marketisation of the NHS under New Labour. KONP has continued to fight consistently against privatisation since that time.

It has campaigned against all forms of privatisation including:

- contracting out by commissioners or by NHS Trusts
- Private Finance Initiatives (PFI)
- the use of private hospitals to treat NHS-funded patients, eg Independent Sector Treatment Centres
- measures to force patients towards private treatment by excluding lists of services.

KONP has opposed all forms of charges for treatment in the NHS, including the government's imposition of charges on overseas visitors.

We have also campaigned for safe and responsible levels of funding for the NHS, against cuts, mergers, rationalisation and closures that limit local access to care, and helped build strong local campaigns including the recently victorious campaigns to defend Charing Cross and Ealing hospitals against a massive reconfiguration plan in North West London ('Shaping a Healthier Future') that had recently been scrapped by the government, and other campaigns where local councils have been pressed to refer closures to the Secretary of State.

KONP was at the forefront of the establishment of Health Campaigns Together in the autumn of 2015 as a larger alliance of campaigners with health and other trade unions that has mounted three large-scale demonstrations 2017-18 and mobilising conferences including 'Reclaim Social Care' in 2018.