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The Commissioner/Provider divide.

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Landmark Chambers

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Introduction

- Topics to be considered:
  - The Commissioner / Provider divide
  - The Role of the Secretary of State
  - Commissioners
  - Providers
  - Contractual obligations
    - Commissioner requested services
    - Commissioner requested changes

Keeping a judicial distance …

"As a consequence of successive legislative reforms, the provision of healthcare under the auspices of the National Health Service ("NHS") in England is a complex web of organisations with separate roles to play in the provision of services to patients …"

"It is unnecessary for the purposes of this judgment to set out these arrangements in detail …."

Key legislation

- National Health Act 2006, as amended principally by:
- Health Act 2009;
- Health and Social Care Act 2012

Some things never change …

- “So much misrepresentation has been engaged in by the B.M.A. that the doctors who have voted or are voting in the plebiscite are doing so under a complete misapprehension of what the Health Service is. It has been frightening to speak to some doctors and to learn the extent to which their representatives have failed to inform them about the facts of the case. I have even spoken to representatives of the doctors who have attended the various conferences which have been held in London, and at which the members of the negotiating committee were supposed to have reported their discussions with me, and they themselves did not and do not understand what the facts are”.

Why Jeremy Hunt may be in trouble …

- 72% consider the NHS to be "a symbol of what is great about Britain and we must do everything we can to maintain it“

- 21% it as "a great project for its time, but we probably cannot maintain its current form”.

The Commissioner / Provider divide in a nutshell

- NHS bodies can be broadly divided into commissioners, providers and regulators;
- Funds are provided by the Department of Health to Clinical Commissioning Groups (CCGs) in order to commission NHS services for the patients for which each CCG has statutory responsibility. The funds are provided via NHS England;
- CCGs are under a statutory duty to make "arrangements" with providers under which providers of NHS services agreed to deliver clinical services to NHS patients in exchange for payments made by commissioners to the providers;
- NHS providers must provide NHS services in accordance with their contractual obligations; and
- NHS providers have legal duties of care to NHS patients;

Budget

- Original budget for the NHS = £437m (roughly £15bn at today’s values).
- For 2015/2016 the overall NHS Budget was c.£116bn.
- Expenditure on the NHS was c.3.5% of GDP in 1950, rising to c.8% on 2010
- Netherlands and Sweden > 10%

The Secretary of State: s.1 of the 2006 Act

- (1) The Secretary of State must continue the promotion in England of a comprehensive health service designed to secure improvement—
- (a) in the physical and mental health of the people of England, and (b) in the prevention, diagnosis and treatment of physical and mental illness.
- (2) For that purpose, the Secretary of State must exercise the functions conferred by this Act so as to secure that services are provided in accordance with this Act.
- (3)The Secretary of State retains ministerial responsibility to Parliament for the provision of the health service in England.

Mandate – before the start of every financial year

- The Secretary of State must specify in the mandate—
- the objectives that the Secretary of State considers the Board should seek to achieve in the exercise of its functions during that financial year and such subsequent financial years as the Secretary of State considers appropriate, and
- any requirements that the Secretary of State considers it necessary to impose on the Board for the purpose of ensuring that it achieves those objectives.
- The Secretary of State must also specify in the mandate the amounts that the Secretary of State has decided to specify in relation to the financial year for the purposes of section 223D(2) and (3) (limits on capital and revenue resource use)….

Ex p. Coughlan [2001] 2 QB 213

- 25. When exercising his judgment he has to bear in mind the comprehensive service which he is under a duty to promote as set out in section 1. However, as long as he pays due regard to that duty, the fact that the service will not be comprehensive does not mean that he is necessarily contravening either section 1 or section 3. The truth is that, while he has the duty to continue to promote a comprehensive free health service and he must never, in making a decision under section 3, disregard that duty, a comprehensive health service may never, for human, financial and other resource reasons, be achievable. Recent history has demonstrated that the pace of developments as to what is possible by way of medical treatment, coupled with the ever increasing expectations of the public, mean that the resources of the NHS are and are likely to continue, at least in the foreseeable future, to be insufficient to meet demand.

Ex p. Coughlan (2)

- 26 In exercising his judgment the Secretary of State is entitled to take into account the resources available to him and the demands on those resources. In R v Secretary of State for Social Services, Ex p Hincks (1980) 1 BMLR 93 the Court of Appeal held that section 3(1) of the 1977 Act does not impose an absolute duty to provide the specified services. The Secretary of State is entitled to have regard to the resources made available to him under current government economic policy.

Commissioners – a sick system?

- With around 400 separate local organisations each responsible for commissioning different health and social care services, the current organisational landscape is fragmented and unsustainable

NHS England

- The trading name for the National Health Service Commissioning Board;
- statutory body, section 1H of the 2006 Act (inserted by s.9 of the 2012 Act).
- responsible for commissioning the contracts for GPs (primary care), pharmacists, and dentists as well as certain specialist NHS services.
- also licenses Clinical Commissioning Groups (CCGs).
- Regulatory role
- Strategic role: NHS England also has a strategic stance – see for example its *Five Year Forward View*, October 2014.

CCGs

- The sole legal function of the CCGs is as commissioners of NHS services.
- CCGs are also the product of statute: see s.1I of the 2006 Act;
- Duties set out by s.3 of the 2006 Act: must arrange for the provision of the following to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility …. hospital accommodation, other accommodation; medical, dental, ophthalmic, nursing and ambulance services, breastfeeding and young children….

CCGs (2)

- Membership bodies, with local GP practices as the members;
- Led by an elected Governing Body made up of GPs, other clinicians including a nurse and a secondary care consultant, and lay members;
- Responsible for about 60% of the NHS budget; or £60 billion per year;
- Responsible for healthcare commissioning such as mental health services, urgent and emergency care, elective hospital services, and community care; and
- Independent, and accountable to the Secretary of State for Health through NHS England

Local Authorities

- Each local authority must take such steps as it considers appropriate for improving the health of the people in its area.

- E.g. breastfeeding campaigns, obesity and weight reduction services, Health checks, Sexual health services, Stopping smoking, Drug and alcohol support services, Mental health and wellbeing, Physical activity, Workplace health, and preventing excess winter deaths.

Health & Wellbeing Boards

- A Health and Wellbeing Board must, for the purpose of advancing the health and wellbeing of the people in its area, encourage persons who arrange for the provision of any health or social care services in that area to work in an integrated manner.

Providers: GPs

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- The Board must, to the extent that it considers necessary to meet all reasonable requirements, exercise its powers so as to secure the provision of primary medical services throughout England.

- The Board may (in addition to any other power conferred on it) make such arrangements for the provision of primary medical services as it considers appropriate; and it may, in particular, make contractual arrangements with any person.

Dental Practices

- Almost all dental practices are private sector business
- Run under contract with NHS England, as to which see Part 5 of the 2006 Act (Dental Services) and the NHS (General Dental Services Contracts) Regulations 2005.

NHS Trusts

- established by the Secretary of State pursuant to s.25 of the 2006 Act;
- statutory duty to exercise their functions "effectively, efficiently and economically": see s.26 of the 2006 Act;
- Detailed provision as to their established, powers and duties is set out in Schedule 4 of the Act;
- Further provision about their financing set out in Schedule 5;
- Supported by the NHS Trust Development Authority (NHSTDA).

The demise of NHS Trusts?

- NHS Trusts will become a NHS Foundation Trust, or be taken over by a Foundation Trust, by April 2016

- Optimistic, to say the least.

NHS Foundation Trusts

- public benefit corporations;
- accountable to local people, who can become board members and governors;
- Public involvement is also secured by consultation requirements;
- cannot be made subject of a Direction made by the Secretary of State;
- financial freedoms;
- regulated and licenced by Monitor.

Quarterly report: 19.2.16

- 182 out of the 241 NHS providers reported a deficit for the second quarter of the year
- overall, the NHS provider sector reported a year-to-date deficit of £1.6 billion – £358 million worse than planned
- delayed discharges are estimated to have cost NHS providers £270 million over the first 6 months of this financial year
- the provider sector spent £1.8 billion on contract and agency staff – almost double what they planned.

Commissioner requested services

- the services which a Trust Special Administrator must provide if the NHS Trust or NHS Foundation Trust went into special administration: see chapter 5A of the 2006 Act.
- Location Specific Services are commissioner requested services which must be provided *in the locality* in the event of special administration.
- Monitor: all the services that the CCGs and NHS England presently require providers to deliver under their existing contracts are to be treated as Commissioner Requested Services and are also to be designated as mandated services which the Trust is required to provide as conditions attached to the Monitor licence under s97(1)(i).

Commissioner requested changes

- both NHS commissioners and providers agree to make a defined set of changes to NHS acute services and make changes to the acute services contract so as to give effect to the proposed reconfiguration of NHS services; or

- an NHS commissioner is the sole decision maker about a proposed set of changes to NHS acute services and then makes proposed changes to the acute services contract so as to give effect to the proposed reconfiguration of NHS services <u>which the provider accepts</u>.

But what if …

- The effect of the Commissioner Requested Changes means that other services provided by the trust cannot continue to be provided for the benefit of the health service; or

- Commissioner Requested Changes have meant that other services are not financially viable for the NHS Trust to continue to deliver.

A lawful promise …

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- ***Specialist services provided locally***
- *Whilst emergency and high-risk General Surgery operations will not be provided at General Hospitals any,* ***the other parts of hospital care will still be provided locally.*** *For example, there will be rapid access clinics for patients arriving at A & E who need urgent surgical assessment. Similarly, following an emergency operation, patients can Asee the surgeon in an outpatient clinic at their local General Hospital. Increasingly, other specialist care will be provided in a local General Hospital – for example specific cancer or chemotherapy treatments.*