Department of Health & Social Care

From the Lord Kamall
Parliamentary Under Secretary of State for Innovation (Lords)

39 Victoria Street
London
SW1H 0EU
Tel: 020 7210 4850

To: Baroness Drake
By email: constitution@parliament.uk

18th February 2022

Dear Baroness Drake,

Government Response to the Select Committee on the Constitution Report - Health and Care Bill (9th Report of Session 2021-2022)

Thank you for your report following the Constitution Committee's (the Committee's) scrutiny of the Health and Care Bill ("the Bill"). The Government has carefully reviewed your report and considered the points you have raised. Our response to the Committee's findings of the Bill as a whole, and the specific clauses raised, is set out below.

Due scrutiny and responsibility to Parliament

The Committee's finding:

3. We regret that the powers under this important and complex bill are structured in a way that hampers greater detailed parliamentary scrutiny, and note that the Bill itself was not subject to pre-legislative scrutiny.

The Government's response:

The Government agrees with the Committee regarding the importance of ensuring legislation is subject to appropriate public and Parliamentary scrutiny. The core provisions of the Bill were subject to public engagement by NHS England in February 2019, which received over 130,000 responses from members of the public and stakeholders within the health and care system. This engagement was followed by a Health and Social Care Select Committee inquiry launched in March 2019, with findings published in June 2019. Following publication of the government white paper, *Integration and Innovation: Working together to improve health and social care for all,* in February 2021, the Health and Social Care Select Committee launched another inquiry, reviewing the majority of the policies in the Bill as introduced to the House of Commons and publishing its findings on 14 May 2021. We would therefore suggest that the policies in the Bill did receive due consideration before the Bill was introduced to Parliament. Furthermore, the Bill provisions relating to the Health Services Safety Investigations Body (HSSIB) were subject to pre-legislative scrutiny by a Joint Committee of the House of Lords and House of Commons from May to July 2018. The HSSIB provisions were subsequently introduced to the House of Lords and progressed to Second Reading stage prior to the calling of the General Election of 12 December 2019. The majority of the recommendations from the Joint Committee's Report are now reflected in the current proposals for establishing the HSSIB as set out in this Bill.

The Government is committed to ensuring sufficient autonomy for the health service to respond to local needs. The central ambition of this Bill is to facilitate the delivery of more community and person-centred services by creating a legislative framework that encourages collaboration, dismantles organisational silos, and strengthens integration. To effectively deliver this type of healthcare system, this Bill will empower the local leaders of Integrated Care Boards and clinicians with the flexibility to design solutions that work for local population needs. The removal of the duties to promote autonomy (via clause 64) should not be considered in isolation. The Bill provides great flexibility at a local level which Ministers have continually referenced during debates in both Houses during the passage of this Bill. Therefore, this Bill does embrace the need for local flexibility and commissioners and providers' ability to function in a manner that can respond effectively to local needs.

However, this considered, we agree with the Committee that it is equally important that those delivering services in a taxpayer system remain accountable to Ministers, Parliament, and the public. That is why we have not amended section 1(3) of the NHS Act 2006 (as inserted by the Health and Social Care Act 2012) since the Government feels that it is right that we are clear that the Secretary of State retains ministerial responsibility to Parliament for the provision of the health service in England. However, we are seeking to ensure appropriate accountability through the measures identified in your report, including the powers of direction, reconfigurations and ALB transfer of functions. The Government believes that this Bill offers sufficient accountability to Parliament, not only through the scrutiny of the legislation, but through the core intent of its policies. The provisions set out in this Bill to transfer functions between Arm's Length Bodies (ALBs) will enable the Secretary of State to ensure that healthcare functions are being carried out by the bodies best placed to manage them in a fully transparent way. These bodies will then be held duly accountable for the delivery of those functions in the same way that they are for their existing responsibilities.

Delegated Powers, 'disguised legislation' and 'soft law'

The Committee's findings:

12. We echo the concerns of the Delegated Powers and Regulatory Reform Committee about the extent and nature of the delegated powers in the Bill, which make it difficult to assess the likely impact of the proposed legislation.

16. We are concerned that guidance, directions and rules arising from the Bill amount to "disguised legislation" and are not subject to parliamentary control.

18. The House should ensure that the Government sets out in the Bill the meaning and effect of different types of 'soft law' arising from the Bill.

The Government's response:

In my response to the Delegated Powers and Regulatory Reform Committee (DPRRC) report on the Bill, sent on 10 January, I outlined our reasoning for the delegated powers proposals in the Bill. Further to this, I hope to reassure the Committee that where delegated powers have been proposed, the Government is committed to ensuring the most appropriate procedures are used so Parliament has due oversight or their use.

The Government firmly believes that the use of guidance, directions, rules and the publication of documents in the Bill are proportionate and necessary to facilitate the agility required for the effective operation of the healthcare system and do not amount to 'disguised legislation'. In many instances, the powers in the Bill allow the setting out of complex operational details which are better illustrated by examples and guidance instead of legislation.

One of the core intentions of this Bill is to provide greater legislative flexibility within the healthcare system, as requested by the system itself. Efforts to foster greater integration within health and care have been hampered by the need to develop bureaucratic workarounds to legislative complexities. Building flexibility into the healthcare system reflects the dynamic nature of the sector and will allow it to adapt in future as new medicines, treatments and technologies emerge to tackle evolving healthcare challenges. Guidance and other documents can be used to keep pace with emergent best practice as the system evolves. As such, the use of delegated powers has been proposed, where necessary, to enable NHS England, arm's length bodies and the Secretary of State to manage this landscape in an agile and responsive way.

It is also necessary that Parliamentary time is protected and used appropriately. Therefore, this Bill proposes regulations where fuller scrutiny from Parliament is most appropriate.

The Government recognises that the Bill contains a significant number of powers to make directions and rules, and to publish guidance, but believes these are appropriate for the reasons set out above. In response to the Committee's recommendation to ensure that the Government sets out in the Bill the meaning and effect of different types of 'soft law' arising from the Bill, we note that there is a strong precedent of using such different types of soft law in the health system. The meaning and effect of each is clear from the face of the Bill and well understood by the bodies involved in the delivery of the health and care system. Directions are legally binding on the bodies to whom they are addressed and can be given by means of statutory instrument or in writing (see section 273 of the NHS Act 2006). Rules are also legally binding and are given by means of statutory instrument (see section 272 of the NHS Act 2006). Guidance may be given to assist users of the legislation to apply and interpret it, or it may have a stronger role if the legislation requires bodies to have regard to it, as, for example, in new section 14Z26(7) of the NHS Act 2006, which would be inserted by [clause 14] of the Bill.

Clause 20:

The Committee's endorsement of DPRRC:

17. We endorse the recommendation of the Delegated Powers and Regulatory Reform Committee that the power in clause 20 to impose legal liability merely by publishing a document without any parliamentary scrutiny should be removed from the Bill.

The Government's response:

As we set out in our response to the DPRRC, this power has an existing precedent. The power allows NHS England to determine the circumstances in which one Integrated Care Board will be liable to pay for services provided to that person by services commissioned by another Integrated Care Board. NHS England already has the equivalent power relating to Clinical Commissioning Groups (section 14Z7 of NHS Act 2006) which has been used regularly to resolve disputes and provide clarity on CCG responsibilities. Currently, the document published in accordance with that power is NHS England's *Who Pays?* Guidance, which is publicly available. It specifies the situations where responsibility for payments by CCGS differs from that for commissioning.

Due to the technical complexity of these provisions, it is considered most suitable for NHS England to publish a document, illustrated with examples given through guidance, rather than for the rules to appear on the face of the Bill. The Government, therefore, believes that this power is reasonable and appropriate as a means of allowing NHS England to ensure patients can access services across the NHS and that the relevant commissioning body is charged accordingly.

Local autonomy and ministerial accountability

The Committee's finding:

6. We note that the current Bill does not alter section 1(3) of the Health and Social Care Act 2012, which ensures that the Secretary of State retains "ministerial responsibility to Parliament for the provision of the health service".

Clause 64:

The Committee's finding:

10. Clause 64 would remove section 5 of the Health and Social Care Act 2012, which requires the Secretary of State to have regard to the desirability of maintaining the autonomy of health service functions. Coupled with new powers for the Secretary of State of oversight, delegation and transfer of functions, this 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.

The Government's response:
There is no desire to alter the balance between the Government's constitutional responsibility for the provision of health care and providers' ability to respond to local needs. The legislative changes proposed are designed to strengthen local leadership and empower local organisations to respond and make decisions about their population, whilst also allowing for national accountability. This is why clause 64 also repeals NHS England's duty to promote autonomy, to facilitate and support collaboration between NHS England and system partners. This makes it easier for organisations to work together to respond more effectively to local needs. Alongside our wider measures to promote integrated care, new guidance in relation to the duty to cooperate will ensure that system partners have the support and clarity they need to cooperate effectively.

We must be clear on the powers and levers that the Government itself has to discharge and the roles for which it is democratically accountable. That is why there is the suite of proposals in this Bill that assert the Secretary of State's ability to intervene and make decisions – not as a substitute for clinical expertise, but in setting clear direction or resolving disputes. The removal of the Secretary of State's duty under clause 64 will support the introduction of the powers in clauses 37, 38 and 39, which are based on a genuine need to ensure that the consolidation of powers within NHS England is accompanied by enhanced ministerial accountability. As mentioned, the powers for the Secretary of State to transfer functions in Part 3 of the Bill are a key part of our ambition to provide the system with more flexibility to better adapt to change as well as increasing consistency and coherence in the ALB landscape. The Secretary of State will always have to go back to Parliament before making any changes. As with all delegated legislation, Parliament will play a crucial role in scrutinising proposals, ensuring there is clarity around responsibilities and holding Government to account.

Clause 144 + Schedule 17

The Committee's endorsement of DPRRC:

21. We endorse the conclusion of the Delegated Powers and Regulatory Reform Committee that the power to define unhealthy food and drink products should be exercised exclusively through the making of regulations and not also through the making of guidance.

The Government's response:

As outlined in our response to the DPRRC and at Committee Stage in the House of Lords, this Bill references technical guidance in order to determine which products are in scope of the restrictions on advertising.

The Nutrient Profiling Model (NPM) has been subject to scientific scrutiny, extensive consultation and review over a number of years. The NPM scoring system provides an overall assessment of the nutritional content of products considered by balancing beneficial nutrients (fruit, vegetables and nuts, fibre and protein content) against components of food that children should eat less of (saturated fat, sugar, salt, and calories). The content of the guidance document is technical in nature. There are unlikely to be policy issues that attract in-depth Parliamentary debate and consideration.

The Nutrient Profiling Technical guidance of January 2011 is an extraneous document familiar to industry, which is already referenced in secondary legislation without the need to be separately laid before Parliament. We consider this is consistent with the approach to guidance set out in the Supreme Court's decision in R (Alvi) v Secretary of State for the Home Department [2012] UKSC 33. This guidance has been used for advertising restrictions for less healthy food and drink products by Ofcom since 2007 to determine what can be advertised around child-specific programming on TV, although outside of a statutory framework. It is also used in a similar way in the promotions and placement restrictions for less healthy food and drink, which were made law on 2 December 2021 and will come into force on 1 October 2022 (**The Food (Promotion and Placement) (England) Regulations 2021** SI 2021/1368). Aligning the approach taken in respect of advertising restrictions in the proposed primary and secondary legislation with both the current child specific advertising restrictions and the new promotions and placement restrictions will help reduce the burden on industry.

Furthermore, the Government introduced in this bill a statutory duty to consult prior to any future changes to the technical guidance through an amendment at Commons Report stage. Industry will therefore be able to feed in on any proposed changes that may affect their legal rights and/or liabilities. The power to change the technical guidance is also subject to the affirmative procedure and is subject to Parliamentary scrutiny should the Government decide to use different guidance to determine the scope of restrictions in future.

The Committee's recommendation:

24. The House should consider amending Schedule 17 to require either the consultation of the relevant devolved administration or the consent of the relevant devolved legislature if the Secretary of State were to use this power to enact regulations modifying devolved legislation.

The Government's response:

The Government believes that it is not necessary to include a consent mechanism for the Devolved Legislatures before it makes consequential amendments to their legislation as set out under schedule 17 of the Bill. This is because the restrictions on less healthy food and drink advertising

regulate internet services and broadcasting, both of which are reserved matters under all three devolved settlements. Therefore, any requirement to obtain consent to make consequential amendments that might be needed in respect of regulations made under section 368Z20 of the Communications Act 2003 are unnecessary and may hinder the effectiveness of the UK Government's ability and power to regulate on this reserved matter of broadcasting and internet services across the UK. The proposed power in schedule 17 is limited to making consequential or transitional amendments to devolved legislation and is therefore a narrow power only. Furthermore, in practice, any amendments to such legislation would be discussed with the Devolved Administrations prior to and throughout the drafting process, in line with wider good practice.

The Government is grateful to the Committee once again for its report and hopes it is reassured by the responses above to the points it raises. As ever, the Government would be more than happy to discuss if the Committee requires any further information.

Yours sincerely,

LORD KAMALL