
Addendum to briefing notes on Government amendments to the Health and Social Care Bill: Lords Report Stage

March 2012

Addendum – amendments tabled March 5

Monitor’s transitional intervention powers over NHS foundation trusts

These amendments are designed to respond to the concerns we have heard about Monitor’s ability to intervene in a foundation trust, firstly by clarifying the drafting of the clauses to make clearer which powers are transitional and which are enduring, and secondly by amending the arrangements for the removal of the transitional powers.

Clarifying the purpose and scope of the transitional intervention powers – Amendments 1 to 4

1. Under the Bill, Monitor would have enduring powers, both during and after the transitional period, to require an FT to take (or not to take) particular action to ensure continuity of NHS services. Monitor would also have the ability to require an FT to suspend, remove or replace directors or governors, in exceptional cases, to address a very serious breach of licence conditions.
2. In addition, for a transitional period, Monitor would also retain express power to suspend, remove or replace FT directors or governors, directly. As now, this power could only be exercised in the event that an FT failed to comply with a notice to suspend, remove or replace directors or governors itself. This transitional arrangement would allow time for the Department to work with Monitor, the Foundation Trust Network and others to support FT governors to develop their capability in holding their boards to account.
3. We recognise, however, that the Bill’s current drafting may not be as clear as it could be and that this has led to some confusion about which powers would be transitional and which would be enduring. These amendments to clause 111 are designed to clarify the position.

Amending the arrangements for removal of the transitional intervention powers – Amendments 5 to 9, 12 and 13

4. As described above, the amendments to clause 111 are designed to clarify that Monitor would have **enduring** powers to direct an FT to take a particular action (or

not to take action) to comply with licence conditions and, in exceptional circumstances, to require an FT to suspend, remove or replace directors or governors. In addition, for a transitional period, clause 111 would give Monitor **express** powers to suspend, remove or replace FT directors or governors, directly. As currently drafted, the Bill provides that these transitional powers would end in April 2016 (or, for FTs authorised after 1 April 2014, for two years after the date of authorisation). This period could be extended for trusts with weak governance by means of an order made by the Secretary of State.

5. We have heard the concerns expressed about the importance of making clear that Monitor should retain these express powers for as long as Parliament considered necessary. These amendments therefore provide that the powers will continue unless and until the Secretary of State makes an order to withdraw them, either for some or all foundation trusts. Monitor would be required to set criteria for determining where this would be appropriate, which would be subject to consultation and approval by the Secretary of State.
6. The first such order by the Secretary of State could not be made before 1 April 2016 (or, in the case of foundation trusts authorised after 31 March 2014, before two years after the date of their authorisation). The amendments then make provision for the Secretary of State to make further orders to withdraw the powers in relation to additional FTs, or groups of FTs, in line with Monitor's criteria.

FT private patient income cap

7. These two amendments complement the amendments made at Lords Committee, adding further safeguards around the removal of the FT private patient cap. They increase transparency around plans to earn non-NHS income, and strengthen the role of governors in scrutinising such plans.

Forward planning and governor scrutiny – Amendments 10 and 11

8. The amendments would require foundation trust directors to detail in their organisation's annual plans (forward plans) any planned activities to earn non-NHS income, including from private patients, and the income they expect to earn from

those activities. Foundation trust directors are already required by statute to prepare a forward plan for each financial year and, in doing so, to have regard to the views of the board of governors.

9. The amendment would mean that, in considering the forward plans, the board of governors would have to be satisfied that any plans for proposed increases in non-NHS income would not to any significant extent interfere with the foundation trust's principal legal purpose to provide NHS services, or its other functions.
10. Plans to increase non-NHS income very significantly – that is, a proposal to increase by 5 percentage points or more the proportion of total income earned from non-NHS work – would have to be agreed by a majority of the governors in a vote. So, for example, the powers which enable governors to vote on proposed increases to the proportion of a trust's non-NHS income would be triggered where that increase was from 2% to 7% or more, or from 3% to 8% or more, of its total income.
11. Foundation trusts are locally accountable NHS bodies: the public already elect the majority of governors of each foundation trust. These changes (to section 43 of the NHS Act 2006, via clause 163) serve to strengthen local accountability in foundation trusts. They would ensure greater transparency to governors, who represent the public and NHS staff, and give them a strong role in overseeing plans by their organisation to earn private income. The amendment would complement the provision in clause 163(3), inserted during Lords Committee, which would require each foundation trust to provide information in their annual report about how non-NHS income has impacted on their NHS services.
12. In the event of any concerns that directors were pursuing non-NHS activity that was not in the interests of NHS patients, governors could use new and existing statutory powers to hold them to account. For example, governors would be able to require directors to attend a special meeting where they could vote on motions about the performance of their trust and of its directors. If necessary, governors could use their existing statutory power to remove the chair and non-executive directors of the board of directors.