

The Queen's speech and the NHS: Is secondary legislation the new primary legislation?

*Seasoned political observers may have been scratching their heads after yesterday's Queen's speech and wondering: where are all the big ticket Bills that are going to dominate this parliament? Many expected a majority Government with four years before the next General Election to announce Bills by the bucket load, argues **Sally Percy**, but this year's speech left us with a moderate raft of legislation rather than the usual mix of party faithful crowd pleasers and daring and radical Bills we have come to expect.*



Perhaps the least surprising element of yesterday's speech was the lack of legislation concerning the NHS directly; this has become standard practice in recent years. Why, then, a relatively minimalist legislative programme and what does this say about the future prospects for primary legislation and, in particular, the reform of the NHS this parliament?

The Brexit effect

The Queen's 65th speech to Parliament comes just five weeks ahead of the referendum the UK's membership of the EU. Little else has occupied minds at Westminster in recent months and many policy developments, not least relating to the NHS, have been drawn into the vortex of the Brexit debate. Setting out a legislative programme in this context is therefore a careful balancing act, with the Prime Minister eager not to inflame tensions between those on opposing sides of the debate in his own party, or beyond.

Better to be safe than sorry

Yesterday's speech was also a product of experience. Six years into an austerity programme, in the wake of a number of recent U-turns and with the benefit of hindsight on challenges associated with delivering major reform through primary legislation – exemplified by the 2012 Health and Social Care Act – the Government has stuck to playing a safe game this time round. From the decision not to announce but rather further consult on a proposed British Bill of Rights to reiterating many of the announcements in March's Budget, the risk of this year's Queen's Speech courting controversy was significantly mitigated.

The NHS: all quiet on the western front?

Despite a leaner than average legislative programme, the cupboard was not completely bare for the NHS. A new, heavily trailed NHS Bill to address so called 'health tourism' represents the Government's first foray into health specific primary legislation in four years.

A number of other confirmed Bills will have implications for the NHS, including pre-announced legislation to introduce a sugar tax on certain soft drinks from April 2018 and the Prison and Courts Reform Bill, which will grant prison governors foundation trust-style autonomy over issues from education to healthcare. The only surprise came in the form of those Bills that were expected but didn't materialise, notably to create a new Public Services Ombudsman and focus on the new Healthcare Safety Investigation Branch.

Despite there being no associated legislation, the Government's manifesto pledge to deliver a seven day NHS was however signposted in the speech and a significant section of the accompanying background note was dedicated to setting out the associated benefits of the policy. That the Government's commitment to this policy priority is unwavering is clear. What is not is why so little formal parliamentary time has been devoted to assessing the merits of biggest reform the health service will undergo in this Parliament and how seven day services will be defined, resourced and delivered, without placing untenable demands on providers of NHS services. We hope for significant progress on this over the course of 2016/17.

Secondary legislation – the new kid on the block

The absence of any major health Bills for a fourth consecutive year suggests the traumatic experience of securing the safe parliamentary passage of the Health and Social Care Act 2012 casts a long shadow. Whilst Secretaries of State are usually keen to make their name off the back of major pieces of legislation, big Bills are a damaged brand at the Department of Health. For now, it remains the case that of the tools to drive NHS reform at the Government's disposal, primary legislation currently remains out of favour.

How, then, does the Government's desire to deliver the NHS Five Year Forward View within the NHS's allocated budget square with an aversion to primary legislation, given the structural reform required nationally and locally to realise this vision?

In the first year of this Parliament, we have seen an increasing trend, in health and other areas, for the Government to deliver significant policy change through secondary legislation. This lower profile legislative channel tends to not to attract substantial media attention, is often not widely consulted on with the relevant sector and is subject to less scrutiny (though as tax credits revolt in the House of Lords illustrated last year, this is not always the case).

In the last six months alone, secondary legislation has been used to remove the ability of NHS trusts and foundation trusts to object to the NHS tariff, through which trusts are paid for the work they carry out, effectively to create the new health regulator, NHS Improvement, and to increase the fees that NHS providers must pay the Care Quality Commission by up to 75 per cent.

All this means that the secondary legislative process is of increasing importance, with the engagement of parliamentarians and sector representatives, including membership bodies such as NHS Providers, vital to ensuring appropriate scrutiny and accountability on decisions with material impact for frontline NHS and other public services.

It is therefore with particular interest that we await the Government's forthcoming response to Lord Strathclyde's review of the role the House of Lords should play in scrutinising secondary legislation. With the prospect that the Lords will lose their ability to vote down secondary legislation, the health sector in particular will need to be alert to the implications for the NHS. Together with the inevitability that the longest serving Secretary of State for Health will at some point pass the baton to a successor, and the temptation they will face to make their mark through legislative reform, the NHS is far from off the legislative agenda. We will be watching this space. .

About the Author

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