Health & Social Care Bill 2011
House of Lords Report Stage

Briefing Note 10: RED LINES FOR PEERS ON THE NHS BILL

This Briefing sets out the key safeguards required for the NHS. It addresses the concerns raised by Clause 1,4,and 12 (formerly 10) in previous briefings. This briefing should be read with Briefing note number 11 on Clauses 1, 4 and 12 (formerly 10), and the Constitution Committee's follow-up report Dec 2011.

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RED LINES FOR PEERS ON THE NHS BILL

The principle that health care is an essential and universal public service, not a marketable commodity, has been at the heart of the NHS since its founding in 1948. Successive Parliaments have upheld this principle, maintaining the NHS as an equitable, comprehensive and highly efficient health service available throughout England, and requiring services to be provided for everyone.

The Health and Social Care Bill in its present form puts these fundamentals at risk, by making the health care system more of a market, which is wasteful, inconsistent with the duty to secure comprehensive healthcare, and potentially irreversible.

We urge the House of Lords to ensure that the Bill is amended to guarantee in full the key safeguards set out below:

1) The Secretary of State must have the duty to secure provision of comprehensive and equitable health care for the whole of the population of England, taking action whenever there are problems. [1]

2) Clinical Commissioning Groups (CCGs), operating on behalf of the Secretary of State, must make sure that comprehensive and equitable health care is available for everyone and be responsible for all residents living in single geographically defined areas that are contiguous, without being able to pick and choose patients. [2]

3) Nothing must be done which undermines the ability of the Secretary of State to fulfill the duty to secure provision of comprehensive and equitable health care, by bringing more of the NHS within the scope of EU competition law so that, in particular:

- there must be no increase in the commercial contracting of health services; [3]
- the current authorization system for central regulation of Foundation Trusts must be retained; [4]
- the statutory functions of CCGs must be carried out by NHS staff, with CCG finances being used solely for the benefit of patients; [5]
- statutory and enforceable codes of conduct must be laid down for all NHS bodies, underpinned by sanctions which are rigorously policed; [6] and
- information about commercial contracting, including the planning, procurement, financing and monitoring of health care provision and associated services, must be published as a matter of course. [7]

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End Notes

[1] The apparent perception that "Clause 1 has been sorted" is not correct. Clause 1 of the Bill must include a free-standing duty to secure provision. It does not currently include such a duty, and neither does the amendment suggested by the Constitution Committee in its follow-up report of 14th December 2011, available here:

http://www.publications.parliament.uk/pa/ld201012/ldselect/ldconst/240/24002.htm.

The reasons why Clause 1 has not been sorted are set out in Briefing Note 11, on Clauses 1, 4 and 12 of the Bill, following the Constitution Committee's follow-up report. This is available here:

http://www.allysonpollock.co.uk/administrator/components/com_article/attach/2012-01-09/AP_2012_Pollock_HouseOfLordsBriefing11_C1412_09Jan12.pdf

This guarantee also requires removal of Clause 4, the hands-off clause. Briefing Note 11 also sets out the reasons why the Constitution Committee's amendment to that Clause, which would remove one of the main concerns with the Clause, would leave several others untouched.

For further information, see in particular the first four Briefing Notes listed on and accessible from this webpage: http://www.healthprofessionals4nhs.co.uk/briefings/
Counsel's opinion on this aspect of the Bill is available here:
http://38degrees.3cdn.net/75856a0564e9244f2a_rum6i66sh.pdf

[2] This means that CCGs must have unfragmented area responsibilities like Primary Care Trusts, and have clear and sensible relationships to local authority boundaries to facilitate joint working. This would provide the organisational framework for the arrangement of equitable and needs-based resource allocation and coherent population-based information systems. Clause 12 of the Bill (formerly Clause 10), in particular, needs amending to achieve this safeguard.

For further information, see in particular the Briefing Note on Clause 1, 10, 11 and 172 accessible from this webpage: http://www.healthprofessionals4nhs.co.uk/briefings/

[3] This means that the Bill must not lead to EU competition law applying to more health services as a result of, for example, more competitive tendering and provision, because this is inconsistent with the Secretary of State's duty to secure provision of such services. Counsel's legal opinion has also drawn attention to six aspects of the Bill that make it "likely that Foundation Trusts, [CCGs] and their constituent members will all fall within the definition of 'undertaking' for the purposes of domestic and European competition law". These include a clearer distinction between commissioners and providers of health services, which makes market economy principles easier to apply, backed up by the hands-off Clause; Foundation Trusts being no longer restricted in provision of both NHS and private services, and the private income cap removed; and giving Monitor the function to enforce the Competition Act and European competition law.

Counsel's opinion on this aspect of the Bill is available here:
http://38degrees.3cdn.net/b01df9f37ac81ffb2e_zhm6bnldz.pdf

[4] By October 2012 the Department of Health will withdraw the "terms of authorization" for Foundation Trusts that set out the services to be provided and volume of activity, and mandate staff education and training by Trusts. The private patient income cap is also to be relaxed under the terms of the Bill. These controls are currently used to secure comprehensive health services by ensuring that there is sufficient central regulation over NHS trusts operating in a market.

Their modification or dilution will lead to NHS hospitals run by Foundation Trusts having duties similar to private hospitals contracting with the NHS. These changes should not occur and so amendments are needed, in particular, to Clauses 158 and 179 of the Bill.

For further information, see Monitor's publication, *Developing the new NHS Provider Licence: A Framework Document* (November 2011), available here: http://www.monitor-nhsft.gov.uk/home/news-events-and-publications/our-publications/browse-category/consultations/consultations-and-e-2

[5] This means that because CCGs are publicly-funded statutory bodies which must operate on behalf of the Secretary of State, their functions must be carried out by NHS staff. This will ensure that private companies and partnerships such as McKinsey and PWC would not be able to exercise CCG statutory functions. Contracting-out of non-statutory functions would continue to be permitted. Using CCG finances solely for the benefit of patients means that money must not be given to CCGs that can be distributed to their members (the so-called 'quality premium'). Amendments are therefore needed, in particular, to Clause 24 and Schedule 2 of the Bill, and to Clause 26: new s.223K in relation to quality premiums.

For further information, see in particular this Briefing Note on (what was then) Clause 22, Schedule 2 and GP commissioning available here: http://allysonpollock.co.uk/administrator/components/com_article/attach/2011-11-28/AP_2011_Pollock_HouseOfLordsBriefing8C22_Sch2_28Nov11.pdf

[6] This means that conflict of interest provisions must be set out on the face of the Bill or in secondary legislation (as they are for PCTs), with enforceable sanctions (unlike the Nolan Principles). All NHS bodies must be covered by such standard provisions, including the Commissioning Board, CCGs and Foundation Trusts. CCG-designed provisions, as currently envisaged, varying from CCG-to-CCG, will not suffice. Regulations under Clause 73(3) would appear capable of delivering in part this guarantee.

For further information, see in particular this Briefing Note on conflicts of interest available here: http://allysonpollock.co.uk/administrator/components/com_article/attach/2011-11-30/AP_2011_Treuherz_HouseOfLordsBriefing_Cl22_ConflictsOfInterest_30Nov11.pdf

[7] This means that timely public access to contracts and to all financial information and models, including at invitation-to-negotiate and at outline and full business case stages, must be guaranteed both before and after contracts are signed. The Bill needs to include detailed publication duties on commissioners, so that recourse to making Freedom of Information Act requests - which are often rejected, responded to late, subjected to a lengthy appeal procedure and which give public authorities plenty of room to protect commercial interests – is not necessary. There must be no hiding behind commercial confidentiality.

For further information, see for example *Commercial confidentiality: a cloak for policy failure*, available here: http://allysonpollock.co.uk/administrator/components/com_article/attach/2011-09-15/BJGP_2009_Pollock_CommercialConfidentiality.pdf