

## Health & Social Care Bill 2011 House of Lords report stage

### Briefing note 12

#### **Earl Howe's response to the Constitution Committee's follow-up report and his letter dated 12<sup>th</sup> January 2012**

In his letter to peers dated 12<sup>th</sup> January 2012, entitled *Next steps on process for improving clauses on Secretary of State accountability*, Earl Howe has written that the government accepts the principle of the amendments proposed by the Constitution Committee in its follow-up report and the points of substance they address.

His letter sets out a number of possible alternative amendments, and invites peers to discuss these at a seminar on Wednesday 18<sup>th</sup> January.

This briefing is intended to assist peers in advance of that seminar. It should be read in conjunction with Briefing Note 11 dated 9<sup>th</sup> January 2011 on Clauses 1, 4, and 12 and the Committee's follow-up report.<sup>1</sup>

**In summary, the amendments put forward by Earl Howe and the Committee do not go to the heart of the policy behind the Bill to abolish the model of tax-financed universal health care on which the NHS is based.** Even with the amendments the Bill will still transform the English NHS from a nationally-mandated public service required of the government under primary legislation into a service based on commercial contracting, underpinned by ministerial and local discretion and secondary legislation, and exacerbated by non-accountability to Parliament of commissioners and providers.

#### **Amendments to Clause 1**

**Neither the amendments suggested by the Constitution Committee, nor the clarifications suggested by Earl Howe, would restore the duty to provide or secure provision of health services in accordance with the Act.**

The clarification suggested by Earl Howe in new section 1(3) makes explicit that "ministerial responsibility to Parliament" is not the same as a legal duty.

**We recommend that section 1(2) should be a free-standing legal duty to secure provision of health services.**

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<sup>1</sup> Available here: [http://allysonpollock.co.uk/administrator/components/com\\_article/attach/2012-01-09/20120109-AP\\_2012\\_Pollock\\_HouseOfLordsBriefing11\\_C1412\\_09Jan12.pdf](http://allysonpollock.co.uk/administrator/components/com_article/attach/2012-01-09/20120109-AP_2012_Pollock_HouseOfLordsBriefing11_C1412_09Jan12.pdf)

## **Amendments to clauses 4 & 22 (formerly clause 20)**

The amendments suggested by the Committee, and the clarifications offered by Earl Howe, remove one of main concerns about the hands-off clauses: the duties in Clause 1 (as presently formulated) could not be superseded and would take precedence. However, both possible amendments retain the principle that autonomy is desirable, would require the Secretary of State (and the Board) to accept that principle, and would be able to give considerable weight to it if so minded.

Clause 4 applies to all ministerial functions in relation to the health service. This means that the Secretary of State would still be obliged to accept and consider the desirability of not imposing unnecessary burdens in relation to (for example) the standing rules and the mandate and in relation to:

- public health functions of local authorities, for example, when making regulations about those functions under Clause 17: new s.6C(2);
- education, training and research, for example when exercising functions so as to secure that there is an effective system for the planning and delivery of education and training under Clause 6: new s.1E, and on promoting research under Clause 5: new s.1D; and
- professional registration and licensing, for example when making regulations under the Medical Act 1983, to the extent that these relate to the health service.

It should be clarified whether Clause 4 is intended to have the effect of requiring local authorities, educational establishments, and professional registration and licensing bodies to demonstrate why the requirements of their various policies are necessary; or whether, rather, such bodies are intended to be amongst those persons upon whom unnecessary burdens are not to be imposed.

In addition, commercial providers of health care would continue to have a basis for judicial review of what would become the highest-level NHS decisions, such as the content of the standing rules and the mandate. Commercial providers might also have a basis for seeking EU law and WTO trade law protections, from whose legally-mandated 'necessity tests' the concept of 'unnecessary burdens' appears to be derived.

## **Clause 12 (formerly clause 10)**

The Committee's suggested amendment to the functions of clinical commissioning groups (CCGs) would go some way to repairing the legal damage caused by decoupling the duty to promote from the duty to provide. Earl Howe's suggested extension of this would also be helpful.

Similarly, the proposed duty to have regard to the need to act consistently with the 'mandate'- (new section 3(1F)) would go some way to repairing the broken link between a minister or a Health Select Committee and the commissioning of services to patients. But because those services to patients would be delivered by commercial providers under contracts, any such repair would be of limited utility.

Neither amendment, however, would put CCGs be under a duty to promote a comprehensive service, and it is difficult to see how meaningful or effective the amendment would be because no CCG would have an England-wide remit.

The possible amendments suggested by Earl Howe in intervention powers (Clause 22:s.13Z1) and having regard to the NHS Constitution (new Clause) are to be welcomed.

Again, however, neither they nor the other amendments put forward by him go to the heart of the policy behind the Bill to abolish the model of tax-financed universal health care on which the NHS is based.

The Bill would transform the English NHS from a nationally-mandated public service required of the government under primary legislation into a service based on commercial contracting, underpinned by ministerial and local discretion and secondary legislation, and exacerbated by non-accountability to Parliament of commissioners and providers. Abolition of the duty of the Secretary of State to provide or secure provision of health services is the seminal change which brings this transformation about. The amendments suggested by Earl Howe and the Constitution Committee's amendments fall short of preventing it.

**We continue to recommend that peers do not allow this to happen, and draw their attention to the *Red lines for peers* paper circulated previously as Briefing Note 10.<sup>2</sup>**

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.

2) 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.

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

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<sup>2</sup> Available here: [http://allysonpollock.co.uk/administrator/components/com\\_article/attach/2012-01-09/20120109-AP\\_2012\\_Pollock\\_HouseOfLordsBriefing10\\_C1412\\_09Jan12.pdf](http://allysonpollock.co.uk/administrator/components/com_article/attach/2012-01-09/20120109-AP_2012_Pollock_HouseOfLordsBriefing10_C1412_09Jan12.pdf)

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;
- the current authorisation system for central regulation of foundation trusts must be retained;
- the statutory functions of CCGs must be carried out by NHS staff, with CCG finances being used solely for the benefit of patients;
- statutory and enforceable codes of conduct must be laid down for all NHS bodies, underpinned by sanctions which are rigorously policed; 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.

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17<sup>th</sup> January 2012