

NATIONAL HEALTH SERVICE (AMENDED DUTIES AND POWERS) BILL [HL]

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the National Health Service (Amended Duties and Powers) Bill [HL]. They have been prepared in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

COMMENTARY ON CLAUSES

Clause 1 – Secretary of State’s duties to promote and provide a comprehensive and integrated health service

3. This Clause, in conjunction with Clause 4, would reinstate the Secretary of State’s legal duty to provide the NHS in England. It would do so by effectively repealing the abolition of that duty as a result of section 1 of the Health and Social Care Act 2012, and by reproducing the corresponding provision applying in Scotland, namely section 1(1) of the National Health Service (Scotland) Act 1978.

4. Reproducing that provision would also mean that the duty would be to promote a comprehensive and integrated service. Including an integrated service within the government’s fundamental duty would cohere with and provide a central basis for the various integration duties imposed by the 2012 Act on the NHS Commissioning Board (the Board) (s.13N), on clinical commissioning groups (CCGs) (s.14Z1), on Monitor (s.62(4) and s.96), and on Health and Wellbeing Boards (s.195), as well as for the power given to local authorities and CCGs to make a statement about integration in the joint health and wellbeing strategy (s.193). In this way, re-establishing the Secretary of State’s duties and powers to the NHS in England could be done - and strengthened as a response to the integration provisions of the 2012 Act - without further reorganization.

5. The Clause would also strengthen the duty in England by requiring the Secretary of State to provide or secure the effective provision of services. This requirement was contained in the National Health Service Acts of 1946 and 1977, but was removed in the National Health Service Act 2006. The 2006 Act also de-coupled the duty to provide from the duty to promote, and this Clause would return both duties to the same subsection, in line with the 1946 and 1977 Acts and, in Scotland, the 1978 Act.

6. The title of section 1 of the 2006 Act (“Secretary of State's duty to promote health service”) would revert to the title of section 1 of the National Health Service Act 1977, which made no distinction between the connected duties of promotion and provision.

7. Subsection (3) clarifies that the services provided under the 2006 Act or under the 2012 Act, whether directly or indirectly, would be so provided in furtherance of the Secretary of State’s duty. These would include services provided as a result of arrangements made by the Board, CCGs and local authorities.

Clause 2 - Abolition of the duties of autonomy

8. This clause would repeal the two sections inserted into the 2006 Act which require the Secretary of State and the NHS Commissioning Board, respectively, to have regard to the desirability of securing, so far as consistent with the interests of the health service, that any other person exercising functions in relation to the health service or providing services for its purposes is free to exercise those functions or provide those services in the manner that it considers most appropriate, and that unnecessary burdens are not imposed on any such person. These duties are incompatible with a national health service which the Secretary of State would, under this Bill, again have the duty to provide.

9. However, certain elements of section 1D of the 2006 Act in relation to the Secretary of State’s power of directions would be retained under Clause 5(3) and (4) of the Bill.

Clause 3 - Concurrent duty of and commissioning by the NHS Commissioning Board

10. Clause 3(1) would repeal section 1H(2) of the 2006 Act, inserted by section 9 of the 2012 Act, which subjects the Board to the duty under section 1(1) of the 2006 Act concurrently with the Secretary of State (except in relation to the public health functions of the Secretary of State and of local authorities).

11. That repeal requires an amendment to the opening words of section 1H(3) of the 2006 Act, and this would be effected by Clause 3(2) which would make clear that the Board’s

commissioning functions are for the purpose of furthering the Secretary of State's duty under section 1(1) of that Act.

Clause 4 - Secretary of State's duty as to provision of certain services

12. This clause would reinstate the duty of the Secretary of State to provide hospital accommodation, services and facilities as specified in section 3(1) of the 2006 Act, and would extend it to include the duty, in the alternative, to secure their effective provision. This extension reflects the wording of section 1(1), and acknowledges that the government itself will not usually be providing services directly.

13. Because the focus of the Bill is to re-establish the Secretary of State's duties without a further reorganization, the 2012 Act's transfer of this duty to each CCG (and, in the process, modifying it to a duty to arrange provision) would remain, but would be amended in order to make clear that a CCG's duty was for the purpose of implementing the Secretary of State's prior duty.

14. If the Secretary of State did not consider that implementation by CCGs of their individual duties was resulting in the provision of hospital accommodation, services and facilities as specified which he or she considered necessary to meet all reasonable requirements throughout England, the Secretary of State would be able to issue directions under Clause 5.

15. The power could be exercised, for example, if implementation of the 2012 Act risked putting the Secretary of State in breach of his duties under sections 1(1) and 3 (as modified by this Bill). For example, regulations can be made under the 2012 Act to exclude people from services (section 3(1D)), and only emergency care need be provided for everybody (pursuant to section 3(1C)). These new provisions were part of the shift effected by that Act, away from the Secretary of State's area-based responsibility under s.3(1) ("throughout England") - subsequently delegated to Primary Care Trusts established by order with responsibilities based on electoral wards - to list-based responsibilities of CCGs ("persons for whom a CCG is responsible"). If this shift were to result in everybody in England not being provided for, directions to one or more CCG under Clause 5, for example, would be able to rectify the situation, and could require addressing the approach to the resource allocation formula.

Clause 5 – Power of directions to QUANGOs and other bodies

16. This Clause would give the Secretary of State a general power of giving directions to those quasi-autonomous non-governmental organisations (QUANGOs) and other bodies with health service functions and contracts who may be given emergency directions under section 253 of the 2006 Act (as amended by section 47 of the 2012 Act). This general power would be additional to other powers given to the Secretary of State by the 2012 Act to give directions in other specific circumstances (for example, to direct the Board to exercise any of

his or her functions relating to the provision of primary medical services, or to require a clinical commissioning group to use specified banking facilities).

17. Clause 5(3) would seek to address concerns that the power of directions might be used in particular circumstances to impose an undesirable form of centralised control. It would therefore require the Secretary of State, before issuing relevant directions, to have regard to the desirability of, firstly, protecting and promoting the health of patients and the public. Such protection and promotion is an underlying purpose motivating establishment of the NHS, and is, for example, one of the key responsibilities of Good Medical Practice for doctors registered with the General Medical Council.

18. Secondly, regard would have to be had to the desirability of the QUANGOs and other bodies receiving directions being free to perform their functions in the manner that they consider best calculated to promote the comprehensive and integrated health service. This requirement is based on part of the duty of autonomy that was introduced in the 2012 Act, with modifications to its precise terms and the circumstances in which the duty would arise. It could arise, for example, in situations envisaged by the Medical Innovation Bill where it might be desirable to support responsible innovation in cases where evidence to support particular courses of treatment or management is unavailable or uncertain.

19. Thirdly, under Clause 5(3)(b) regard would also have to be had to the desirability of ensuring cooperation among the same bodies.

20. Clause 5(4) would preserve the purpose of section 1D(2) of the 2012 Act, namely to preserve the precedence and priority of the duties to promote and provide under section 1.

Clause 6 – Monitor

21. Currently, there is no objective underpinning Monitor's powers and duties – unlike Ofgem, for example. This Clause would make clear that the end to which its functions under the Health and Social Care Act 2012 must be directed is the comprehensive and integrated health service that it is the Secretary of State's duty to promote and provide under the National Health Service Act 2006.

22. This Clause would also - by inserting into the 2012 Act a new section 61A(2) and by repealing section 62(9) - reinstate the duty of Monitor to act consistently with the Secretary of State's duties to promote and provide. Parliament had imposed that duty on Monitor both in section 32 of the 2006 Act and in section 3 of the Health and Social Care (Community Health and Standards) Act 2003 (although in those enactments Monitor's duty also extended to acting consistently with the Secretary of State's duty in relation to university clinical teaching and research). The 2012 Act, in section 62(9), only imposed a duty on

Monitor in relation to the duty to promote under section 1(1) of the 2006 Act, hence its proposed repeal under this Clause.

Clause 7 – Amendment to competition requirements

23. This Clause would repeal the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 (SI 2013 No. 500).

24. Paragraph (c) of subsection (1) of section 75 of the Health and Social Care Act 2012 would be amended, and a new paragraph (d) inserted, so that the purposes of regulations under that subsection - which would impose requirements on the Board and CCGs in commissioning health care services for the purposes of the NHS - would include securing that the Board and CCGs face no impediments, are free to choose in a way which best serves patients' interests, would have a full range of options and would be under no legal obligation to foster markets. Any regulations made in the future would have to take into account the new wording of paragraphs (c) and (d).

Clause 8 - Public register of NHS contracts

This Clause would require NHS bodies - such as the Board, CCGs and Foundation Trusts - to establish and maintain public registers of contracts which they have entered into in relation to the provision of health services.

As private companies increasingly receive public money to provide health services, awarding such contracts must be demonstrated to be the best option. Disclosure of the contracts, and of pre-contractual documentation which makes the business case, would do that; and would enable the public to know what services to expect at what cost to the public purse. This Clause would, for example, ensure that the costs and payments made under contracts such as the agreements with Circle to run the Hinchingbrooke Hospital and with a subsidiary of Netcare to provide elective procedures to NHS patients in Tayside, would be disclosed proactively.

Clause 9 – Treaty requirements

25. This Clause follows the spirit of the example of section 6 of the European Assembly Elections Act 1978 which provided for any increase in the powers of the Assembly, now

called the European Parliament, to be ratified by the United Kingdom only if there had been prior approval by an Act of Parliament.

26. The Clause would make it impossible for any trade, investment or similar international agreement in effect to legislate for the NHS without Parliament (or the relevant devolved legislature) giving its approval prior to signature or agreement.

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*These notes refer to the National Health Service (Amended Duties and Powers) Bill [HL]
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