Written evidence reported to the House.
Clause 55 under consideration when the Committee adjourned till this day at One o’clock.
Members who wish to have copies of the Official Report of Proceedings in General Committees sent to them are requested to give notice to that effect at the Vote Office.

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not later than

Monday 11 July 2011

STRICT ADHERENCE TO THIS ARRANGEMENT WILL GREATLY FACILITATE THE PROMPT PUBLICATION OF THE BOUND VOLUMES OF PROCEEDINGS IN GENERAL COMMITTEES
The Committee consisted of the following Members:

**Chairs:** † MR JIM HOOD, MR ROGER GALE, MR MIKE HANCOCK, DR WILLIAM MCCREA

† Abrahams, Debbie *(Oldham East and Saddleworth)* (Lab)
† Barron, Mr Kevin *(Rother Valley)* (Lab)
† Blenkinsop, Tom *(Middlesbrough South and East Cleveland)* (Lab)
† Brine, Mr Steve *(Winchester)* (Con)
† Burns, Mr Simon *(Minister of State, Department of Health)*
† Burstow, Paul *(Minister of State, Department of Health)*
† Byles, Dan *(North Warwickshire)* (Con)
† Crabb, Stephen *(Preseli Pembrokeshire)* (Con)
† de Bois, Nick *(Enfield North)* (Con)
† James, Margot *(Stourbridge)* (Con)
† Kendall, Liz *(Leicester West)* (Lab)
† Lefroy, Jeremy *(Stafford)* (Con)
† Morgan, Nicky *(Loughborough)* (Con)
† Morris, Grahame M. *(Easington)* (Lab)
† O’Donnell, Fiona *(East Lothian)* (Lab)
† Poulter, Dr Daniel *(Central Suffolk and North Ipswich)* (Con)
† Pugh, John *(Southport)* (LD)
† Shannon, Jim *(Strangford)* (DUP)
† Smith, Owen *(Pontypridd)* (Lab)
† Soubry, Anna *(Broxtowe)* (Con)
† Sturdy, Julian *(York Outer)* (Con)
† Thornberry, Emily *(Islington South and Finsbury)* (Lab)
† Turner, Karl *(Kingston upon Hull East)* (Lab)
† Wilson, Phil *(Sedgefield)* (Lab)

Sarah Davies, Mark Etherton, Committee Clerks

† attended the Committee
Public Bill Committee

Thursday 7 July 2011

(Morning)

[Mr Jim Hood in the Chair]

Health and Social Care
(Re-committed) Bill

Written evidence to be reported to the House

HSR 22 Dr Lucy Reynolds
HSR 23 Finance and Leasing Association
HSR 24 National Voices
HSR 25 National Association of Links Members
HSR 26 Chartered Society of Physiotherapy
HSR 27 Neurological Alliance
HSR 28 Association of British Healthcare Industries (ABHI)
HSR 29 Devon County Council
HSR 30 Chartered Institute of Public Finance and Accountancy
HSR 31 Representing over 100 members of the public
HSR 32 From members of the public
HSR 33 Royal College of General Practitioners

9 am

Clause 55

Monitor

Question proposed, That the clause stand part of the Bill.

Owen Smith (Pontypridd) (Lab): It is a pleasure, Mr Hood, to serve again under your chairmanship.

Clause 55 is crucial. It is the first clause of part 3, and the Opposition have always said that it is the absolute heart of the Bill. Monitor, the body established under clause 55, is the beating heart of part 3. Our view is clear: even though the clause has come back to us in its re-committed form, the functions of Monitor are effectively unchanged. The pause and the Government’s response to the listening exercise were, as we said when the Bill was re-committed, a political fix—a smokescreen. I intend to demonstrate the extent to which it was a smokescreen, and to show that the clauses that we are intending to demonstrate the extent to which it was a political fix—a smokescreen. I intend to show that the clauses that we are considering today, beginning with the establishment of Monitor, are where the smoke is thickest.

The Opposition’s job is to blow away the smoke and wave it away for the public, to reveal to them and to the other place precisely what sits at the back of that wreath of smoke—[Interruption.]

The Chair: Order. We have only just started the day. The Chair will not take heckling from Members on either Bench. I warn Members that there will be no chuckling and no whispering, and that the Committee should give the best of order to the person addressing the Committee.

Owen Smith: I am exceptionally grateful to you, Mr Hood; despite the fact that I enjoy the heckling, I appreciate your intervention.

In truth, and despite the extensive changes that we have seen from the Government, I contest that Monitor is essentially unchanged in form and function, in instinct and intent, and in power and purpose. Some of the words have been changed, or juggled about; some have been moved up and some have been moved down, but the core of Monitor’s role is completely unchanged.

That, as we all know—we in Committee and others outside the Committee have endlessly said so—introduces a much greater degree of competition into the NHS between the public, private and voluntary sector providers, yet despite the changes presented by the Government as the antecedents of the Bill, it is still overwhelmingly a publicly delivered, publicly owned and publicly funded service. In the Minister’s words, the Government want to create a genuine market in the NHS—and that desire remains intact, despite the changes.

John Pugh (Southport) (LD): On the hon. Gentleman’s central premise, why did the British Medical Association say in its submission to the Committee that the role of Monitor had been significantly diluted? Does the BMA know something that the hon. Gentleman does not?

Owen Smith: By “the BMA”, of course, the hon. Gentleman means Hamish Meldrum, the BMA chair—[Hon. Members: “Ah!”] I am being absolutely accurate; there is a slight distinction between the words that we heard from Hamish Meldrum and the feedback that Dr Meldrum got at the BMA conference.

Critically, when giving evidence to the Committee, Hamish Meldrum conceded that he had not had the chance to read the Bill all the way through. I intend to show today that the Bill is largely unchanged in respect of Monitor. I suspect that that will cause ears to prick up in the BMA, and that it may want to reassess its opinion of the changes. [Interruption.] Ultimately, of course, as my right hon. Friend the Member for Rother Valley says from the Back Benches, the BMA remains opposed to the Bill.

We are dealing with the heart of the Bill. The BMA has not suddenly come round to saying that the Bill is a good idea. The BMA says that there have been some changes. My point is that those changes are insubstantial and insufficient and do not change the Government’s core intention.

Mr Steve Brine (Winchester) (Con): For the record, when I asked Dr Meldrum for his opinion in our evidence session, he said very clearly—the record will show this—that he had the benefit and privilege of leading a national organisation and that therefore his opinion was not relevant. I think that it is slightly cheeky to suggest that Dr Meldrum’s opinion is different from the BMA’s.

Owen Smith: I do not think that it is cheeky in any way, shape or form. I was merely pointing out that there was a difference of opinion, on the very day when we spoke to Dr Meldrum, between the expressed views of the delegates to the conference in lovely Cardiff and the opinion expressed by Dr Meldrum. More importantly, I am sure that once we have looked through the smoke and past the mirrors put up by this set of changes and these twiddles with the words—the gobbledygook that
has been introduced both by the evidence that we heard from the Secretary of State and in the Bill through the amendments—I will be able to show that Monitor’s core responsibilities and core role are unchanged.

**John Pugh:** I certainly accept what the hon. Gentleman has said—there was a difference of opinion between Hamish Meldrum and the delegates. They had a slight variation of opinion, but who does the hon. Gentleman think had a longer time to survey what the Government had changed?

**Owen Smith:** I think that they both had precisely the same amount of time. As far as I am aware, the amendments to the Bill were not shared with Dr Meldrum before their publication, so he had as much time as anyone else to read them on the web once the Department of Health published them—unless the hon. Gentleman knows something that I do not and Dr Meldrum had advance sight of the amendments, to try to warm him up to them.

Of course, the key point is that Government Members do not really think that the Bill has been changed. In fact, I am sure that they have been privately assured that the Government’s core intention to introduce a more competitive market into the NHS remains. They want to see competition in the NHS because they believe that such competition will deliver a more efficient allocation of resources, drive economies and incentivise innovation. They believe that about markets across the piece and they believe that it can be applied in the NHS just as it can to “the butcher, the brewer or the baker”.

**The Chair:** Order. The hon. Gentleman does not have to give me the reference.

**Owen Smith:** Indeed. You, Mr Hood, know your Adam Smith, but perhaps the Liberals on the Front Bench do not. I am sure that the Tories will be working on them; the Minister probably has an Adam Smith primer sitting on his desk somewhere to bring him up to speed.

People do not have to take my word for it that the intention is unchanged. All we have to go on is what the Government have written down themselves. The impact assessment, in the section that deals with the establishment of Monitor, which relates specifically to clause 55, talks about what is wrong in the NHS as the Government see it and why change needs to be introduced. It asks at the beginning:

“What is the problem under consideration?”

It says that there is a need for “a change to regulation to promote competition”.

That is on page 33 of the impact assessment. It goes on to say:

“There is very clear evidence from across services and countries that competition produces superior outcomes to centralised management and monopoly provision. Competition is more effective where markets are highly contestable and contestability requires that organisations are able to expand/enter the market and contract/exit particular markets in response to consumer preferences... Competition in health services would be a more effective lever for efficiency improvement if it were easier for good providers to expand their offer and enter new markets, forcing out inferior providers”—hospitals, I presume, or other bits of the NHS. It says that we would end up with a better health service.

So what is the answer? The answer is given as “Liberalisation of providers, an independent regulator, new rules and regulatory framework”.

That new regulatory system will “better enable providers to respond to patient demand” and allow “good provision to force out poor provision.”

**The Minister of State, Department of Health (Mr Simon Burns):** Can the hon. Gentleman explain how that differs from what the former leader of his party, the right hon. Member for Kirkcaldy and Cowdenbeath (Mr Brown), said to the Liaison Committee only three years ago? He said:

“We have been asking in people from the private sector to review what we can do to give them a better chance to compete for contracts...so the independent sector increases its role, will continue to increase its role and, in a wider and broader range of areas, will have a bigger role in the years to come”.

**Owen Smith:** That statement was made—[Interruption.]

**The Chair:** Order. I do not want to be jumping up and down to bring hon. Members to order in this sitting.

**Owen Smith:** Thank you, Mr Hood. The fundamental difference, of course, is that when the Labour Government were in office, we did not turn our face to competition overall. We introduced some competition, but within a regulated framework and prescribed parameters, and with specific targets for treating specific problems—usually elective care, and usually to reduce waiting times. What was the net impact of our changes at the end of our 13 years in government? Less than 5% of NHS services were delivered, paid for or dealt with by the private sector.

**Mr Burns:** How is that relevant?

**Owen Smith:** It is relevant because we are not talking about competition alongside co-operation, in specific circumstances, tightly regulated and closely prescribed without subjecting the NHS to the full force of the market and the competition law pertaining at EU and UK level. The result of our changes was that just 5% of the NHS was affected. There is a radical difference between that and wholly opening up the market to a complete free-for-all and allowing free market provisions to apply.

**Mr Burns** indicated dissent.

**Owen Smith:** The Minister shakes his head, but am I alone in understanding the language of the impact assessment to be entirely in keeping with the sort of evidence that we heard from the Office of Fair Trading?

**The Minister of State, Department of Health (Paul Burstow):** The hon. Gentleman is probably alone in his understanding of the impact assessment. As he knows, there is a new one to come, which will reflect the changes that the Government are making to the Bill.

**Owen Smith:** That is extremely interesting. I presume that the Minister will say that the Government have changed their mind completely about competition being...
the principal reason for driving efficiency in the NHS, which is detailed in hundreds of pages in the Bill and the impact assessment. Has he thrown all that out for integration of competition?

Graham M. Morris (Easington) (Lab): I am grateful for the opportunity to make a point specifically on the clause. The impression has been given that the Government have somehow made a U-turn—but it is a feint, and my contention is borne out in evidence to the Bill Committee by Dr Meldrum. When asked about the role of Monitor, he said that

“there is still a concern that although there has been some improvement, the issues have not been totally addressed. Some of the comments that have been made by Ministers”

that is, Ministers in the current Government, not in the Government three years ago—

“to the private sector for example, reassuring them that there is not too much change, have not helped with that.”—[Official Report, Health and Social Care (Re-committed) Bill Public Bill Committee, 28 June 2011; c. 53, Q124.]

Owen Smith: My hon. Friend is absolutely right, and that is reflective of the smoke and mirrors that I intend to blow past today.

Dan Byles (North Warwickshire) (Con): Will the hon. Gentleman give way?

Owen Smith: I will make some progress, if I may.

Owen Smith: I have been generous. I want to return to what the Minister, the hon. Member for Sutton and Cheam, said a moment ago. I cannot wait to see this fabled impact assessment, which will, effectivly, show us the new form of the Bill. It will set out the heart of the Bill: it will set out not just new facts and figures, but fundamental changes. Will we get a paragraph that fundamentally disagrees with paragraph B106 of the previous impact assessment, which specifically said that Monitor’s job was to

“promote competition and address the structural barriers to effective competition”? To that end.

“it is proposed that the independent regulator will become the sole body responsible for...competition in the health sector”. That is interesting, given that we have now heard about the Co-operation and Competition Panel’s powers to enforce key aspects of competition law, which will be concurrent with those of the Office of Fair Trading.

The principal point that I am making is that Monitor’s powers have not changed one jot. It has not been given new powers to enable integration. Its powers to promote competition have not changed one iota. Therefore, its core—what it is able and intended to do—is unchanged. We look forward to hearing from the Minister precisely how it has not changed.

Far more helpful than the impact assessment, and indeed Ministers, who have been noticeably unhelpful in clarifying their real intentions—it is unclear whether they have performed a U-turn, as my hon. Friend the Member for Easington said, or whether things have changed—has been Mr Bennett, Monitor’s chair-designate. Before, during and after the pause, he has been very explicit—slightly contradictory, but very explicit—about what he thinks.

Mr Bennett previously worked in energy and other areas as an adviser to industry for McKinsey. In February, he told The Times newspaper:

“We, in the UK, have done this in other sectors before. We did it in gas, we did it in power, we did it in telecoms...We’ve done it in rail, we’ve done it in water, so there’s actually 20 years of experience in taking monopolistic, monolithic markets”— the NHS, I presume—

“and providers and exposing them to economic regulation.”

Dismissing suggestions that the NHS might not be exactly analogous to E.ON or ScottishPower, he went on to say:

“It is too easy to say, ‘How can you compare buying electricity with buying healthcare services?...I would say...there are important similarities and that’s what convinces me that choice and competition will work in the NHS as it did in...other sectors.’

Nick de Bois (Enfield North) (Con): I thank the hon. Gentleman for giving way. He is being generous with his time, and I welcome what I think is his first presentation from the Opposition Front Bench. I draw the Committee’s attention to my register of interests, which shows that I have built exhibition stands for some members of the industry.

I am confused. I am not sure whether the hon. Gentleman is arguing for or against a principle. He seems to be saying, “Some’s okay—5%’ll do.” Would 10%, 15% or 20% be okay? It seems a weak argument to say, “We’re not really sure, but 5%’ll do.”

Owen Smith: It is not confused or weak in any way, shape or form; it is very specific. I am saying that the Labour Government agreed that introducing some measure of competition was worth while in certain areas of the NHS, to deal with capacity issues, particularly in respect of elective surgical procedures. However, it was always tightly prescribed and carefully regulated, and we certainly never contemplated applying the Competition Act 1998 to the NHS to facilitate the opening-up of the market and the entry and exit of providers—that is, the closure of public services and the opening of private or other public services. We never considered any of those things, and we ended up with just less than 5%.

Dan Byles: A moment ago, the hon. Gentleman referred to 5% of care provision coming from the private sector, and allowed those private providers to cherry-pick areas as an adviser to industry for McKinsey. In February, Mr Bennett previously worked in energy and other sectors before. We did it in gas, we did it in power, we did it in telecoms...We’ve done it in rail, we’ve done it in water, so there’s actually 20 years of experience in taking monopolistic, monolithic markets”—the NHS, I presume—

“and providers and exposing them to economic regulation.”

Dismissing suggestions that the NHS might not be exactly analogous to E.ON or ScottishPower, he went on to say:

“It is too easy to say, ‘How can you compare buying electricity with buying healthcare services?...I would say...there are important similarities and that’s what convinces me that choice and competition will work in the NHS as it did in...other sectors.’

Owen Smith: I am confused. I am not sure whether the hon.
At the time, I thought that was pretty revealing and that it cut through some of the obfuscation and spin coming from the Government.

During the pause, Mr Bennett went on to change his view; in fact, at one level, he seems to have undergone something of a damascene conversion. In the lecture to the Cass business school on 11 May, which I mentioned earlier, he said:

“much has been made about the extent to which regulation of healthcare can or should be based on the regulation of the utilities sector.”

Indeed, much had been made of that—by Mr Bennett, only a couple of weeks previously. I do not think that anybody else raised the issue before, other than a bit in our consideration of the Bill. However, Mr Bennett went on:

“To be very clear, healthcare is not the same as utilities.”

Right. Okay. We were pleased that he had spotted that health care was not like the utilities; we were quite chuffed about that, because that is what we had been saying. We did not think that we had been getting through, but clearly we had.

However, things got even better. Mr Bennett went on to say that Monitor would “seek to achieve a healthy combination of competition and collaboration through the approach we take.”

At that point, I thought, “Well, this bloke’s been converted. He worked for Tony Blair. Perhaps he’s finally understood what we were trying to do with a bit of competition, but mainly allowing the NHS to collaborate and integrate.” I thought this was good stuff. We thought that competition can play a role and deliver results for patients, such as through ISTCs dealing with hips or cataracts, but only if it is properly regulated, with clinical targets strategically planned across services, strategically planned regionally, and strategically planned by Government, as opposed to the free-for-all that will open up when there is greater autonomy combined with a free market.

We thought we were getting through to Monitor and that Dr Bennett was really starting to listen to us. Then, when we read the report from the Future Forum, we were almost ecstatic because its key recommendation was to remove Monitor’s primary duty to “promote competition” and instead change it to “protect and promote” the interests of patients. At that point, I was delighted. I thought, “We’ve really struck home. They wanted. They have removed the words and twiddled with the language, but in essence the powers remain unchanged.

To illustrate that, I turn again to the evidence we received on the same day as we heard from Professor Field from Dr David Bennett, the man in charge of Monitor. When asked whether the powers conferred on him, concurrent with those granted to the OFT, had changed, he said they had not changed and that “the proposals in the revisions are the same as they were originally.”

To clear myself of the charge of quoting selectively, which I am sure will be levelled at me, I will read out a bit more of his evidence. Dr Bennett continued:

“What has changed is that in addition to the Competition Act there are the sector-specific regimes.”

I think what he meant by that was the utilities regulators, such as Ofgem, Ofcom and perhaps the Co-operation and Competition Panel. He went on:

“There is one today, the principles and rules for co-operation and competition, as looked at by the Co-operation and Competition Panel. The proposal is that they continue to form the foundation of the new sector regime. The original intention was that there would be a sector regime”—

which gives the lie to the Government’s apparent suggestion that they were going to have an economic regulator and now they have a sector regulator; they were always one and the same, with no difference between them—

“and this makes it clearer that it is a continuation of the current regime.”

This is interesting stuff. Dr Bennett added “But in the application of that regime now, we will be subject to tougher requirements in terms of burden of proof, for example, when we think that it might be appropriate to introduce further competition. Those are the changes, but the concurrency with the Competition Act remains as it was.”—[Official Report, Health and Social Care (Re-committed) Public Bill Committee, 28 June 2011; Q. 77]

We heard, out of the mouth of the man in charge, that Monitor’s powers on competition would remain wholly unchanged by the amendment—I repeat, wholly unchanged.

Margot James (Stourbridge) (Con): I cannot understand where the hon. Gentleman is taking us with this damning indictment. The independent organisation that the hon. Members for Leicester West and for Islington South and Finsbury are fond of quoting, the King’s Fund, state in its written evidence to this Committee on the amendments to the Bill:

“We have consistently argued that competition should not be an end in itself, so we welcome the amendments to remove the duty on Monitor to promote competition and focus its primary duty on protecting and promoting patients’ interests.”

The fund goes on to make a number of more detailed supportive comments.

Owen Smith: Indeed it does, and although I hate to tell Chris Ham and others at the King’s Fund this, the wool has been pulled over their eyes. I am bold enough to say that at that point Chris Ham had breathed in a bit of the smoke and perhaps was not looking too clearly.

Let me be clear: what he was talking about there was the change in the wording to say that Monitor would no longer be promoting competition, but on the powers—Monitor’s ability to promote competition or inhibit
anti-competitive practices, which is the other side of the same coin—there is not a scintilla of difference between them. Apart from the explanation that the Secretary of State gave us, which is yet more gobbledygook, there is no fundamental difference, and I suspect that the King’s Fund would now concede that Monitor’s core powers remain unchanged.

**Mr Burns:** The hon. Gentleman seems to be slightly going around in circles. It comes as a tremendous surprise to my hon. Friends that he should now be extolling, in certain circumstances, the virtues of competition in the NHS; during the whole of the previous Committee session, he was trying to make the case that there was no competition before we came to power and that Labour did not agree with it. He also seemed to say—

[Interruption.] The hon. Member for Islington South and Finsbury was not here when you made your ruling, Mr Hood.

**The Chair:** Order. Let me remind the Minister that this is an intervention and he should be brief.

**Mr Burns:** It is nice to see the way this is playing out. The hon. Gentleman said that the previous Labour Government did not consider applying the Competition Act to the NHS. I have to say to him that it was the previous Labour Government who introduced the Competition Act to the NHS.

**Owen Smith:** I will respond directly to that point. What the Minister says is fundamentally untrue—the Competition Act was not created to be applied to the NHS. The Government allege that the Act always might have applied to the NHS. We contest that legal definition of the extent to which the Competition Act has applied hitherto to the NHS.

The reality is that the British state has always been able to defend the NHS as largely a state-provided service without a real market or multiple providers, so it has not fallen within the remit of the Competition Act. That is our interpretation. We believe that it has been misleading of the Government to suggest, on repeated occasions, that the Competition Act always applied to the NHS. If the Minister can point to a single instance of a challenge to the NHS under the Competition Act during our 13 years in government, I would be impressed—because there was not one.

**Dr Poulter:** I am struggling to reconcile that with some of the other points that we have heard. We had a good debate in the Room next door with Professor Corrigan, who was Tony Blair’s special adviser on health. He said that we had to introduce competition to help drive down the waiting lists, which the hon. Gentleman was so concerned about the other day. Can he reconcile his position with that?

**Owen Smith:** I presume that the hon. Gentleman has been listening. Earlier on, I said that competition was introduced within prescribed areas, with targets, regional planning and a strategy, in order to tackle, in particular, waiting times for important elective surgery, such as hips and cataracts and other conditions where the Independent Sector Treatment Centre operates. There is a league of difference between that and what is proposed here.

**Emily Thornberry** (Islington South and Finsbury) (Lab): Let me remind hon. Members that we have asked the Government to disclose their legal advice in relation to competition. Indeed, when we attempted to call a lawyer with expertise on competition law as a witness, Government Members objected.

**Owen Smith:** I entirely agree.

**Tom Blenkinsop** (Middlesbrough South and East Cleveland) (Lab): The point is that the NHS was subject to the Competition Act, as are all services in the UK. However, as the Minister should know, the NHS is covered under category B services in the European competition rules and is therefore exempt from the Act’s full requirements. The notion that the NHS was already subject to the Competition Act in the same way that this Bill is writing it in—forcing the NHS to be a player in the market rather than the market itself—is wholly untrue.

9.30 am

**Owen Smith:** Again, I entirely agree. As my hon. Friend has clearly pointed out, this area is contested. It is not a settled, legal view that competition law has always applied to the NHS. In fact, a significant body of legal opinion says that that is not the case because of the nature of the services provided. The extent to which there is state provision, with few entrants into the market, affords the Government the ability to argue that it is not a real market and therefore should not be subject to competition law. That has been the basis on which the NHS has defended itself when it has been challenged previously.

That will change because competition will be written into the script. The language has changed a little, but the powers in respect of competition remain unchanged. The other thing that we heard from Mr Bennett is that the burden of proof requiring Monitor to demonstrate where it should apply competition has apparently been increased. I shall come back to that in a moment.

A further thing that has changed with Monitor is the application of a contradictory and far weaker duty to enable health care services, which we will come on to in the debate under clause 56. At the moment, I do not think that that is entirely reconcilable or, more importantly, that it is of equal weight. The desire to prevent anti-competitive behaviour, with specific powers attached, and to enable integration where it is in patients’ interests implies that integration is often not in patients’ interests. I presume that we are talking about vertical integration or cartel behaviour, as it would probably be called in other legislation. There is a big difference between powers specifically designed to prevent and the desire to enable without any powers.

First, what about the change in language? In essence, the duty to promote competition has been taken out and replaced with a duty to prevent anti-competitive behaviour. That is described elsewhere in the Bill as behaviour that would

“prevent, restrict or distort competition”.

**Emily Thornberry:** The point is that the NHS was subject to the Competition Act, as are all services in the UK.
When I read that I thought, “This sounds very familiar to me.” I have worked with the Office of Fair Trading in the past, in industry and business, on market studies—and, indeed, in the health care sector. I turned to the Competition Act 1998 to look for the words “prevent, restrict or distort competition”.

I did not have to go very far; in fact, I got to part I, section 2. Section 1 is simply entitled “Enactments replaced.” The title of the first principal section has the words: “preventing, restricting or distorting competition.”

I thought, “My gosh that’s very familiar. That’s precisely what the Government have described as anti-competitive behaviour.” Section 2 goes on to describe such behaviour as being to “directly or indirectly fix purchase or selling prices or any other trading conditions”.

Well, the NHS currently does that; it fixes prices in the tariff and fixes trading conditions through contracts. That is standard practice in the NHS between hospitals and doctors. The description goes on: “limit or control production, markets, technical development or investment”.

Well, the NHS clearly does that lots. It limits and controls how many doctors it will need and precisely which services it will offer. That will clearly be subject to challenge. The Act mentions something else: “share markets or sources of supply”.

I suggest that it is absolutely vital in the NHS to share markets and sources of supply. Apparently, that will potentially be ruled out when competition law applies. The Act gives a further definition: “apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage”.

That might, for example, involve someone working with a local GP consortium and deciding that they are going to give the business for their cataract operations to the local hospital, as they have always done. In future, of course, that will be a problem because in deciding to go to their local hospital, someone is disapplying the ability of other providers elsewhere in the country, which they have never treated with previously, to apply. The Act also states: “make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

Again, that is a clear example of where the NHS does draw up contracts and does not get all the potential providers available in the country—the market, in other words—to tender and submit bids. It does not do that, and it would be hugely unwieldy if it did. The likely result would be that it might be undercut and have to “exit the market”, to use the language of the Bill.

**Dan Byles:** I thank the hon. Gentleman for giving way, and I welcome him to his position; I believe it is the first time he has spoken from the Front Bench.

**Owen Smith:** In this Bill.

**Dan Byles:** It is a pleasure.

I have two points. The hon. Gentleman clearly misunderstands things, even as he reads them out. His suggestion that a contract with doctors and nurses from a hospital or the use of preferred supplier lists are somehow uncompetitive demonstrates that he does not understand the words he reads from the document.

Both the King’s Fund and Monitor, when talking about the current situation, made it clear that there is no change in how European competition law or the Competition Act applies across the UK. Having Monitor as a sector-specific regulator protects the NHS, because there is a sector-specific regulator that understands the subtleties—

**The Chair:** Order. Owen Smith.

**Owen Smith:** There are two points that I would like to address. Clearly, the hon. Gentleman is drinking his Front-Bench Kool-Aid on the issue of whether things have changed. That is an Americanism; forgive me.

He gets two points fundamentally wrong. One is that, of course, Monitor was always going to be a sector-specific regulator. We keep hearing, “It is all right now. It is a sector-specific regulator.” As far as I was aware, it was not going to regulate gas or white goods in its spare time—it was always largely going to be looking at health care and the NHS.

As to the notion of a new sector-specific regulator that will know about health care, I would have been worried if it had not known about health care. I am still worried that essentially it involves a bunch of accountants who do not know about health care. Now it is meant to judge quality in the NHS and determine, on the basis of medical, clinical decisions, whether competition or integration are appropriate. That worries me.

My second point is that we cannot be certain that those things I read out will not apply in the NHS. We cannot be certain, because they have not been applied hitherto. I will again quote David Bennett. If the hon. Member for North Warwickshire listens for a moment, he will hear that even the man in charge of Monitor does not know whether competition law is going to bite harder in future. [Interruption.] He does, does he?

**Dan Byles:** That is not what I said.

**Owen Smith:** It will be interesting if David Bennett does, because he told us only a week last Tuesday, when some hon. Members were clearly not listening:

“If you were fearful that the Competition Act might be applied in an undesirable way to the health sector—we do not really know the extent to which it is applicable because it has not been tested; in the way these things work, until you have had cases in the courts to determine exactly what applies where, you cannot be sure.”—[Official Report, Health and Social Care (Re-Committted) Public Bill Committee, 28 June 2011; c. 35, Q79.]

The fact that there is a sector regulator means that it will all be okay, he went on to say.

**Dan Byles:** Can I come back on that?

**Owen Smith:** I do not need the hon. Gentleman to come back. David Bennett, damned out of his own mouth, said that we do not know how competition law is going to apply—[Interruption.]

**The Chair:** Order.

**Mr Burns:** Calm down, dear.

**Owen Smith:** I am perfectly calm—merely enjoying myself, Minister.
Grahame M. Morris: On competition policy, there is a point that arises in a later clause but is relevant to our current discussion. Given the reference to regular reviews by the Competition Commission, which will report back to the Minister, it seems that the health service is going to be subject to more reviews by the Competition Commission than the BSkyB bid.

Owen Smith: That is almost as funny as the Government’s squirming over that issue, but there we go.

Because the language had changed a bit, we wanted to know what the Secretary of State thought about that and Monitor now. On the same day as the Committee heard David Bennett say he did not have a clue how competition was going to apply in future, because it had not yet been tested in the courts, I asked the Secretary of State what he thought of the change of language on Monitor’s duties meant, as language is very important. Before agreeing that “language is very important”, he said:

“The shift for Monitor is to continue to exercise the extent of competition law within the NHS but, as we have made clear, to do it through the Co-operation and Competition Panel”—that was new; we had not heard that it would work through the Co-operation and Competition Panel—“that was previously established using the same principles and rules.”

I thought that was quite interesting and new. We thought the Co-operation and Competition Panel would be scrapped—once there is a sector regulator in charge of competition, why would the Co-operation and Competition Panel be needed? I shall return to that in a minute.

The Secretary of State added:

“We are talking about shifting from an ex ante intervention to one that is, as it were, an ex post examination of where there might be clear evidence of damage to patients interests.”—[Official Report, Health and Social Care (Re-committed) Public Bill Committee, 28 June 2011: c. 90, Q185.]

That struck a chord with me, because having worked with the OFT, I know that it is very fond of the phrases, “ex post” and “ex ante”; in fact, they are used in most of its documentation to describe whether it intervenes through a market study, for example, to assess whether there is anti-competitive practice in a market, which is of course ex ante, or it investigates whether there is collusion, cartels or anti-competitive mergers, which is ex post. It is very interesting that Monitor, which we assumed would investigate ex ante—through market studies—will now only look ex post, and do so through something called “the Co-operation and Competition Panel”.

That raises several important questions. First, why do we need Monitor at all? If we have principles, rules and regulations called “the co-operation and competition regulations” operating already and Monitor is to operate through them, what do we need Monitor for? It does not make any sense at all. Secondly, how will it operate through the Co-operation and Competition Panel and what are the associated costs?

I looked up the Co-operation and Competition Panel because, I confess, I did not know much about it. It is a very interesting organisation. As far as I can tell, it has about 10 or 15 executive members—the great and the good of health care—and about 20 staff. Strangely, it did not produce a business plan for 2010-11. I do not know whether that was because it assumed that it would be done in once Monitor came into existence, but I would say it is a fair bet that that was the reason. Its business plan for 2009-10 clearly shows that it costs just £2.8 million, as opposed to £130 million a year—or £500 million, I do not know. The other thing we do not know, because we have not seen the impact assessment, is how much the costs of Monitor will increase now that it needs, as David Bennett told us the other day, a whole bunch of new people that we do not have yet—that is, clinicians—to advise whether competition can be applied, or integration ought to be applied, because of the effect on the quality of patient care?

Mr Kevin Barron (Rother Valley) (Lab): My hon. Friend’s is right on the mark in terms of what the recommitted Bill should and should not do. Earlier this week, we were given evidence from the Nuffield Trust that “The Government’s Response to the NHS Future Forum Report also undertook to incorporate the existing Co-operation and Competition Panel into Monitor, giving them a ‘statutory underpinning’ in the process. It should be noted that this commitment is not immediately apparent in the re-committed Bill.”

Why that statutory underpinning of the Co-operation and Competition Panel is not apparent is the question that, hopefully, the Minister will answer at some stage in the debate.

9.45 am

Owen Smith: I was going to make that point myself, but I could not have made it anywhere near as well or as eloquently as my right hon. Friend, with his significant experience of legislating on health care.

We do not know why we need the Co-operation and Competition Panel employing a handful of people at a cost of £2.8 million, but apparently it is being kept on so that it can be worked through—to use the Secretary of State’s phrase—by the £150-million Monitor. That prompts the question: when was it decided that the Co-operation and Competition Panel would be retained? Has that been factored in? No reference has been made to it in the impact assessment. When was it decided that that additional cost would be placed on the public purse? Several of the Co-operation and Competition Panel’s documents make it clear that it expected to cease to operate in 2012, when the new competition regime was applied.

I want to know what the Health Secretary meant when he said that the principles and rules for co-operation and competition would be operated, so I looked them up. Interestingly, the introduction to the rules states that they “have been reviewed to ensure they are consistent with the White Paper: Equity and Excellence: Liberating the NHS”.

That is a change from the rules that were set up by the Labour Government. The question is which set of rules will apply: the old rules or the new ones? If it is the new rules, will principle 7 apply? I would be grateful if the Minister would tell us, because the NHS will be operating under these rules. Principle 7 is about the conduct of individual organisations, and it states:

“Providers must not refuse to accept services or to supply essential services to commissioners where this restricts commissioner or patient choice against patients’ and taxpayers’ interests.”
The interesting thing is that that principle does not currently apply in the NHS, as specified in the explanatory note on principle 7, which states:

“In certain circumstances, individual providers may have the ability to restrict choice or competition by refusing to use services supplied by others or refusing to supply essential services to others. For example, an established provider with a powerful position in a local market might be able to prevent commissioners from transforming services and introducing new providers by refusing to supply essential services such as hospital consultants to them...While this type of co-operation is essential”—

“further work is needed before Principle 7 can be applied to the NHS. Principle 7 is therefore included as guidance only and will not be applied from October 2010”.

The principles under which the regulator will apparently be operating through do not apply the type of competition that is specified in the Bill. It cannot operate precisely through these principles; they will have to be re-amended if they are to be the spear through which Monitor will operate in future. I would be grateful if the Minister cleared that up for us.

Crucially, this all shows that the Government are making it up as they go along. They are like Wallace and Gromit laying the track as the train runs down it; they really do not know what they are doing.

**Mr Barron:** Which one is which?

**Owen Smith:** I hesitate to say. It is quite hard to tell. I think Wallace is in charge.

This also demonstrates that the amendments to Monitor are merely a smokescreen. The Government are tacking things on, patching things up, throwing new mud in our eyes and trying to obscure the fact that the powers are unchanged.

**Nick de Bois:** I am grateful to the hon. Gentleman for his time. I know that he is trying to throw up smoke and mirrors, but would it not have a little more authenticity if the author of the Future Forum report, having no doubt read many of the amendments by now, had come out and backed his cause? That is clearly not the case.

**Owen Smith:** That individual’s job is done. He has presented his findings to Government, and he is probably disappointed that not all of them have been taken up. He ought to be disappointed about the fact that the Government have not taken on the crucial recommendation 16, which relates to a role for HealthWatch—something that we were meant to discuss the other evening—in overseeing conflicts of interest in the NHS. The Government have drifted away from that one.

**Fiona O’Donnell:** There is another area on which the Government have yet respond. Professor Field acknowledged in his evidence that he had not made a recommendation on the cap on private patients in foundation trusts, where competition and privatisation could run riot to the detriment of NHS patients. Will there be an amendment on that?

**The Chair:** Order. Hon. Members should stick to clause stand part.

**Owen Smith:** I am grateful to you for that advice, Mr Hood.

Sticking to clause stand part and the Secretary of State’s explanation of the meaning of the changes relating to Monitor, I return to the cryptic gobbledygook about its work being ex post as opposed to ex ante. That struck me as significant and peculiar. We had understood from what we heard from Ministers and David Bennett that Monitor would range over the NHS and proactively look at where it thought there were problems and issues. David Bennett said, for example:

“We might look across the whole country and say, ‘There’s something odd here; all diabetes care is being provided by the local incumbent hospital’.

Gosh, would not that be odd, if the local hospital were providing diabetes care? It would be truly terrible. I would be really worried if the hospital “or whoever”, as Mr Bennett put it, were providing diabetes care. He went on:

“Yet it’s not at all obvious to us why this isn’t a more competitive market”

why there are not, say, diabetes specialist clinics run by Assura Medical, which operates widely in the constituency of the Minister of State, the hon. Member for Sutton and Cheam, and why other players are not entering the market. I thought, when I read that, that the Government had clearly changed their view. Monitor will not be doing that any more, but will simply be looking, ex post, at what has happened. It will not be ranging over things, looking at the market and worrying about whether there should be more providers.

I assume, therefore, that in the revised impact assessment that Ministers keep telling us to watch out for—we are waiting with bated breath—paragraph B107 will be amended to cut out the fifth bullet point, which states that the fourth, I think, principal duty of Monitor is to:

“Carry out market studies to investigate markets where competition is not functioning properly. It will have power to refer malfunctioning markets”—

such as those in which the incumbent hospital delivers the diabetes care to patients in the area—

“for investigation (for all publicly and privately funded healthcare and adult social care)”."

**Fiona O’Donnell:** Does my hon. Friend think that sounds more like promoting competition or preventing anti-competition?

**Owen Smith:** I think I have made my view extremely clear: I do not think I could get a fag paper between the meaning of promoting competition and preventing, restricting or distorting anti-competitive behaviour. They are one and the same and the Government have been blowing smoke again, suggesting that there is a fundamental change. The reality is that the powers are unchanged, and so is the extent to which competition will run riot.

In conclusion—

**Mr Burns:** Oh dear.

**Owen Smith:** I know, you were enjoying it, weren’t you?

**The Chair:** Yes, I am enjoying it, but I ask the hon. Gentleman to carry on with his remarks.

**Owen Smith:** Apologies, Mr Hood. I am grateful to hear that you are enjoying it, though. I confess that I am, too.
[Owen Smith]

The reason we are so worried is that, going by what David Bennett says, we just do not know the extent to which competition might be applied in the NHS, because it has not been tested yet in the courts. We do not know whether there is going to be wholesale, free market, let-it-rip competition. As we speak, Hanover Healthcare, which provides private mental health services, is challenging an NHS hospital through the Co-operation and Competition Panel by suggesting that it is effectively being frozen out of the local market by not being allowed to tender or bid for business.

Our fundamental concern is that the Co-operation and Competition Panel is not a statutory body. It does not have powers to intervene in the market and it is not enabled, through the Competition Act 1998 and the monopolies and mergers legislation, to intervene in the marketplace. The Co-operation and Competition Panel is a radically, fundamentally different body that provides advice to the Secretary of State, who is ultimately responsible for determining whether there ought to be more competition and whether there have been anti-competitive or cartel behaviours, or integration that is against the interests of patients. That determination will pass from the Secretary of State to an arm’s-length quango operating under legislation, like the Office of Fair Trading, and under a duty to afford a level playing field to public and private providers in the NHS.

The other key question is where does all that end up? How will the NHS look in 10 or 20 years’ time once the floodgates have been opened and the market has been allowed effectively to set prices and to determine which services should be introduced? Can we be sanguine that there will not be wholesale private entry into the market and that there will not be price competition? The Bill is not clear on that and, crucially, David Bennett, the bloke who will be in charge of the body, is not clear on that. Or, rather, he is clear that price competition ultimately, at some point down the line, is a good idea. To quote him again, he said that

“in the early stages, competition will be on quality not on price… in a world where we cannot easily measure quality, if you allow price competition there is a very real risk that quality will fall. And there is even evidence that happens. But you can see it being used for simpler procedures where you can measure quality well. It will be very limited at first, and it will appear only slowly… I would not want to see price competition ruled out… price competition is a way”

to drive

“productivity improvement.”

I will conclude with one final remark, which, again, is from David Bennett. Asked whether he worries that in future there will be “Tesco-style chains of hospitals” up and down the land, he said that it will be a matter for providers. He said that it will not happen quickly, but it might happen eventually. Effectively, once there are multiple providers in the marketplace, the law of supply and demand will apply. That is what Government Members want, because, as I said at the start, they believe that competition is always the most efficient means to deliver economies, drive innovation and achieve value for money, irrespective of the sector. They think it is true for telecoms and utilities, and they are right, but health care is fundamentally different. The NHS is fundamentally different, and creating Monitor using such economic forces, as Adam Smith understood in the case of the butcher, the brewer and the baker, will be wholly detrimental to the future of the NHS.

The Chair: I have good news for the Committee. I inadvertently said at the beginning that today is the last day of the Bill, but I was a week early. I saw the Ministers panicking as they thought about all the speeches they have prepared for next week. Obviously, next Thursday morning I will announce, “Today is the last day.”

10 am

Mr Barron: It is a pleasure to follow my hon. Friend the Member for Pontypridd, who excellently summarised one of the major conflicts remaining in the Bill, which, if it is not sorted out, will be a major problem both on Third Reading and in another place.

The hon. Member for Enfield North suggested to my hon. Friend that the author of the Future Forum’s response seems to be happy with the Bill as amended. I want to take Members back to last week’s evidence session, when I brought up something of an old chestnut in relation to the clause that says that mergers between NHS trusts and other bodies will be a matter for the Office of Fair Trading and the Competition Commission. I asked Professor Field:

“Really the question I should be posing to you is this: what is the difference, if any, between a sector regulator and an economic regulator? What does this mean?”

He replied:

“We had long discussions with people out there in the NHS, with Monitor, and with the people who wrote the original part of the Bill, and we discussed the issues of a sector regulator and how that sector regulator’s role should be just about health and not about a broad group of utilities.”

He went on to say that the wording suggested:

“It was about removing the initial promoting of competition. It was about inserting words about collaboration and choice. So we wanted to say that we felt Monitor should exist, but should not have promoting competition as its prime aim.”

I then asked him:

“So the Office of Fair Trading and the Competition Commission should have no role to play in terms of the merger of NHS trusts?”

He replied:

“That is a very good question.”

That is the same reply I got from the Minister when I asked him, in a previous sitting of the Committee, about the operation of clause 65, which remains unamended. I told Professor Field:

“I have asked it before in this Committee in a previous life and I still have not had an answer as to whether they should or should not.”

He replied that there had been discussions around that and I asked him:

“So should the OFT have a role in NHS trust mergers?”

He said:

“I personally believe that it should not and that the sector regulator should predominate.”—[Official Report, Health and Social Care (Re-Committed) Public Bill Committee, 28 June 2011; c. 12, Q17-19.]

I also put that question to the four witnesses from, effectively, the trade unions—Dr Meldrum and others. Replying to the question about the Office of Fair Trading
and competition, and referring to the comments made by Mr Bennett in that morning’s evidence session, Dr Carter, from the Royal College of Nursing, said:

“I have not seen those comments but that concerns us.”

That was in relation to this provision staying in the Bill. Sir Richard Thompson replied to the same question:

“I understand that if there were mergers, it might be considered to be anti-competitive and that worries me.”

I mentioned clause 65 to Sir Neil Douglas. He said that he was, “Deeply concerned.” Dr Meldrum said:

“I never like to personalise things, but it is another comment from the head of Monitor that has not been exactly helpful in reassuring people that the role of Monitor has changed and that we are seeing a move much more to collaboration and appropriate choice, rather than focusing on competition as an end in itself and not just one of many means to an end.”—[Official Report, Health and Social Care (Re-Commenced) Public Bill Committee, 28 June 2011; c. 52, Q117-119.]

**Owen Smith:** Will my right hon. Friend confirm my understanding that, at present, the body responsible for looking at mergers is the Co-operation and Competition Panel? That is why this question is vital and pertains wholly to the role of Monitor, because we understand that Monitor will be the relevant body in future, but with the same powers as the OFT, and that it will look at mergers.

**Mr Barron:** That is exactly right. The evidence taken by the Future Forum—I have said it before, both in Committee and on the Floor of the House—was that the issue of introduction of competition, in this way and in these organisations, is beyond what has happened in the past. We have had managed competition—we accept that. There are 80 clauses in the Bill bringing in competition law, yet hon. Members on the Government Benches keep saying that there is no change from what happened under the previous Government, so why have we got these clauses in the Bill? [Interruption.]

**The Chair:** Order. This is a Standing Committee, not a choir.

**Mr Barron:** Let me return to clause 55. I intervened on my hon. Friend the Member for Pontypridd earlier on what the Nuffield Trust said in its memorandum to the Committee. Let me repeat that evidence:

“The Government’s Response to the NHS Future Forum Report also undertook to incorporate the existing Co-operation and Competition Panel into Monitor, giving them a ‘statutory underpinning’ in the process.”

That has not happened up to now, although I do not know whether there is an intention to do that at a later stage of the Bill, either on the Floor of the House or in another place. I assume that people outside, however, expect it to happen during proceedings on the re-committed Bill.

We took evidence from Monitor last Tuesday. Again, I brought up the issue of clause 65 and the Enterprise Act 2002, and the point about any mergers between NHS trusts or mergers with other businesses being referred to the Office of Fair Trading or the Competition Commission. Dr Bennett said:

“The NHS today is covered by competition rules in two fundamental ways. First, the UK Competition Act, which embodies EU competition law, applies across the whole of the UK economy.”

We have heard all that before, which I accept. That happens now regardless of any clauses in the Bill, as I understand it, which prompts the question: why are the clauses included? We have never really had an answer to that.

**Dr Bennett continued:**

“The second way in which there is already a competition regime in the NHS is through the principles and rules of co-operation and competition established by the previous Government. Those set out rules that determine, among other things, how competition should be applied in the health sector. The Co-operation and Competition Panel today looks at the application of those rules, hears complaints if people are concerned that they are not being followed, and will take a view. Today it advises either us, as the foundation trust regulator, or the Department of Health if it falls in its area, where it sees an infringement of the rules. Then we or the Department decide what to do about it. Those things are true today and, in principle, they do not change under the new proposals.”

There is still the issue of why the OFT and Monitor would play a part, as opposed to the Co-operation and Competition Panel, which has a role in this area.

I asked the second witness, Sonia Brown, whether she had a view on my question—you chaired this sitting, Mr Hood, if my memory serves me well. She said:

“On the mergers? The intention under the Bill is that foundation trusts will be subject to merger control by the Office of Fair Trading and, if necessary, by the Competition Commission. That is the idea that sits behind the Bill.”—[Official Report, Health and Social Care (Re-Commenced) Public Bill Committee, 28 June 2011; c. 37-38, Q64-85.]

That completely contradicts what the Nuffield Trust said about the Government’s response to the Future Forum, and that contradiction has been laid out in evidence by the people who would have statutory responsibility if clause 55 and the rest of the Bill are agreed.

**Liz Kendall** (Leicester West) (Lab): My right hon. Friend rightly points out that it would not be up to the Secretary of State or commissioners to decide whether hospitals merge; it would be up to the OFT and the Competition Commission. Is he aware of whether those bodies have any expertise whatever in health and health care?

**Mr Barron:** I assumed that the Future Forum’s request to have a sector regulator that understands health, which has been granted, was fine. I think that the expectation, however, was that the Co-operation and Competition Panel would be statutorily underpinned and would be the body to look into such matters. As the Bill stands, clause 65 states that it is a matter for the OFT and the Competition Commission.

**The Chair:** Order. I remind the right hon. Gentleman that the debate is on clause 55 stand part.

**Mr Barron:** I have said nothing more than what my hon. Friend the Member for Pontypridd said. We are talking about a sector regulator, Monitor. The Minister might not like these concerns being put to him, as they were by the Future Forum’s members. It was suggested that competition, as the Bill originally sought to introduce it, would destabilise the NHS. That concern remains, because many of the clauses remain. Monitor needs to have what was offered to it; it was to have the power,
and the Co-operation and Competition Panel was to have statutory underpinning, when the Bill came back into Committee. I do not believe that that is what has happened, and neither do people outside, witnesses included. I wait to see what the Minister has to say.

**John Pugh:** Perhaps I should not be drawn into this discussion, but the hon. Member for Pontypridd has prompted me to say things that I would prefer to have said later, when we dig down into the detail. He is a clever, amusing and articulate chap and, as has been said, he has treated us to an emotional rollercoaster, but he might have slightly misjudged the occasion. We are here to scrutinise legislation, and clear minds are probably a little better than emotional rollercoastering. That said, he has overused what I describe in most political debates as hyperbole. He said that the legislation had not changed one iota, and that there was no scintilla of difference. He has pleased his friends and cheered them up enormously on a grim Thursday morning, but he has not added a great deal to the character of the debate. When he reads his remarks in print tomorrow morning, he will find that he said in one place that we do not know whether there will be fully fledged competition, and in another that yes, there will be such competition. That is the problem with constructing a largely forensic argument.

**Owen Smith:** I enjoy the hon. Gentleman’s contributions, too, but with the greatest respect, I think that he is slightly misrepresenting what I said. I said that in respect of the powers granted in the Bill to Monitor, concurrent with those of the Office of Fair Trading, there is no change—not one jot or iota—and I fundamentally stand by that point.

**John Pugh:** I accept that the hon. Gentleman said that, but I just do not think that it is a plausible line to pursue. He is not supported by Monitor, Chris Ham, Hamish Meldrum—we could go on for some time. It must be a problem to him in constructing his argument that people who are obviously not stupid, motivated or political happen not to agree with him.

**Owen Smith:** Will the hon. Gentleman give way?

**John Pugh:** No, I will not give way at this point, because I want to press on. In a few minutes, I will read out the bit from Monitor that the hon. Gentleman did not mention and which does not help his cause, to prove that his argument is largely forensic, rather than a wholly plausible one that should satisfy him. He made the broad accusation that we want to see, on competition, references to Adam Smith. I do not believe that anyone actually reads Adam Smith. His is an extraordinarily boring book, a bit like “Das Kapital,” which was passed by the Prussian censors because no one could be bothered to read it. People quote from Adam Smith without actually reading him. His is an extraordinarily well-read book, and the Co-operation and Competition Panel was to have statutory underpinning, when the Bill came back into Committee. I do not believe that that is what has happened, and neither do people outside, witnesses included. I wait to see what the Minister has to say.

**The Chair:** Order. This is a very interesting debate, but it is not helping us here.

**John Pugh:** I take it as highly plausible that the Bill is changed in at least two respects: competition is no longer placed as the main driver for improvement; and the phrase “promoting competition” is dropped. That might displease some Opposition Members, because they took steps when in government to encourage competition and therefore thought that it had some sort of basis. That is on record, and we will not go into that or say for the moment how that approach was different from the Government’s, but the hon. Member for Islington South and Finsbury, to whom I listen with almost as much attention as I do the hon. Member for Pontypridd, said in our first debate on these clause that KPMG established that with level-playing-field competition the NHS was cheaper, with its overall costs down by 14%. If someone is in favour of the public sector, they might see competition as having distinct advantages as long as, crucially, there is a level playing field.

**Liz Kendall:** Can the hon. Gentleman explain why 85 clauses add competition to the Bill?

**John Pugh:** No. I was going to ask the hon. Lady to explain why everyone on the Opposition side of the Committee stood on a manifesto that explicitly gave patients the right to choose from any provider; they were all elected on that manifesto.

**The Chair:** Order. I have generously tried to invite Members for being unruly, but I will if we do not get better order.

**John Pugh:** I will be brief, because we have a great deal to talk about. I should like to deal with two specific points that will occur time and again in this debate, particularly if the hon. Member for Pontypridd prosecutes his case, as I assume he will. First, he tries to suggest that there is no difference between preventing competition and anti-competitive behaviour. In fact he made that suggestion to Dr Bennett, whom he quoted at some length, but the bit he did not quote was when Dr Bennett said that the change of wording “significantly raises the burden of proof on us.”—[Official Report, Health and Social Care (Re-committed) Public Bill Committee, 28 June 2011; c. 32, Q68.]

**Owen Smith:** I did quote that.
I argue that there is a serious conceptual distinction here—so when the words are changed, the meaning is changed. Stamping out anti-competitive behaviour may be a necessary condition for having an unfettered competitive market, but it is not a sufficient condition. That applies in lots of other circumstances, when we talk about things other than competition. There is a huge difference between stopping conflict and promoting peace or stamping out gross aspects of racism and encouraging racial harmony. They are different.

Let me give an example of where the conceptual distinction works—when it is put into law and it makes a difference, or should make a difference, unless the law is much odder than I suppose. Socialism, for example, can be promoted, but many of those liberals and so on who went out to the Spanish civil war to stop the Falangists from exterminating people were not into promoting socialism at all; they were just stopping activity that was designed to stamp out socialism. So that is a real-time example of where this conceptual difference genuinely works.

Another matter that will come up time and again is EU competition law. The hon. Member for Pontypridd said on several occasions that there is gross uncertainty and that the Government are adding to it in some peculiar way. I have not done enough research on this, but I have a book from the Library on governance and health systems in Europe. It has an excellent section on EU competition law and public service. It is probably a definitive work, which I recommend to hon. Members. It makes a crucial point that affects all our deliberations:

“The treatment of health care by European competition law encapsulates more clearly than almost any other public service a key dilemma: to what extent are public services subject to the norms of competition law and the internal market...? As we shall see, neither the European courts nor the Commission has so far provided a completely clear set of answers to these questions”.

In other words, the legal environment at the very top is completely opaque, playing off laws about competition and various parts of legislation against other laws about solidarity.

Liz Kendall: Would the hon. Gentleman agree that the point is that when we add 85 clauses on competition, have a policy of any willing provider and remove the private patient cap, that forces the issue? We are saying that this is a market. This has not been an issue before because it is clear that the NHS has been a social organisation, with social aims and objectives. The only reason why the Government have to set up Monitor to protect the NHS from competition law is that they are adding competition law to the Bill and turning the NHS into more of a market with their policies. Does the hon. Gentleman see that?

John Pugh: The hon. Lady is wise enough in such matters to know that the previous Government set up the Co-operation and Competition Panel, because they saw the exact problem of the framework of European law plus varied providers. [Interruption.] We can discuss the prevalence of one set of nouns over another, but the question is not how often nouns are used; it is for what purpose and to what effect they are used.

The Government have not published their advice, and that is perhaps a problem, but there are various precedents and legal and constitutional reasons as to why they may not. Even if they did, however, it would not make European law any less opaque than it currently is. I am totally convinced that if there is no sector regulator of some sort, whether it is the Co-operation and Competition Panel, Monitor or Monitor made in the shape or form of the Co-operation and Competition Panel, the situation is a whole lot worse.

Mr Burns: I am stunned that no one else wants to speak, because I had seen other people standing; the eloquence of my hon. Friend the Member for Southport has obviously silenced them. We have had an interesting and particularly wide-ranging discussion. No doubt we will not have to debate the first group of amendments at such length, because we seem to have dealt with several issues within it. I will confine my remarks to clause 55.

Like most of my hon. Friends, I found the speech of the hon. Member for Pontypridd entertaining, witty and lengthy. He promised us that he was going to clear away the fog and smoke during his remarks. I fear that he has let the Committee down in that respect, however, because he has not kept his promise—he has actually thickened the smoke and confusion with his rhetoric.

As I listened to the hon. Gentleman, I thought of those movies that one saw when one was a child about the wild west, featuring cowboys and Indians and the snake oil salesman who tries to sell his quack remedies. Unfortunately, my hon. Friends will not have been convinced by his quackery.

Clause 55 is a remarkably short clause—but one would not have thought so listening to some of today’s contributions. It simply states that the

“body corporate known as the Independent Regulator of NHS Foundation Trusts—

(a) is to continue to exist, and

(b) is to be known as Monitor”,

and from that flows a diverse and wide-ranging debate. I will stick to the rules, however, and keep to the clause stand part debate, and I cannot imagine at this point that there is anything that I can take as an intervention.

The Government believe that, for providers to be able to exercise their functions and freedoms to improve services, the environment in which they operate must be fair, stable and transparent. The policy aims to liberate providers from hierarchical management and to create a consistent framework of regulation across all types of providers. The Future Forum stated in the “Choice and competition” report:

“It remains crucial there is a vigorous regulator that ensures fair play and tackles bad practice.”

Monitor’s key role is to protect and promote the interests of patients. It will regulate all providers of NHS-funded health care services, and support commissioners in ensuring the continuity of essential services. It will also, with the NHS commissioning board, set the prices to be paid for NHS services and address anti-competitive behaviour that acts against patients’ interests. I am surprised that some have come to the conclusion that competition and anti-competitive prices are exactly the same.

10.25 am

The Chairman adjourned the Committee without Question put (Standing Order No. 88).

Adjourned till this day at One o’clock.