



HOUSE OF LORDS

Select Committee on the Constitution

---

---

18th Report of Session 2010–12

# Health and Social Care Bill

Report

---

Ordered to be printed 14 September 2011 and published 30 September 2011

---

Published by the Authority of the House of Lords

*London* : The Stationery Office Limited  
£price

HL Paper 197

### *Select Committee on the Constitution*

The Constitution Committee is appointed by the House of Lords in each session with the following terms of reference:

To examine the constitutional implications of all public bills coming before the House; and to keep under review the operation of the constitution.

### *Current Membership*

Lord Crickhowell  
Lord Goldsmith  
Lord Hart of Chilton  
Lord Irvine of Lairg  
Baroness Jay of Paddington (Chairman)  
Lord Norton of Louth  
Lord Pannick  
Lord Powell of Bayswater  
Lord Rennard  
Lord Renton of Mount Harry  
Lord Rodgers of Quarry Bank  
Lord Shaw of Northstead

### *Declaration of Interests*

A full list of Members' interests can be found in the Register of Lords' Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>

Professor Adam Tomkins, Legal Adviser, is a Member of and unpaid Ad Hoc Legal Adviser to Republic.

### *Publications*

All publications of the Committee are available on the internet at:

<http://www.parliament.uk/hlconstitution>

### *Parliament Live*

Live coverage of debates and public sessions of the Committee's meetings are available at

<http://www.parliamentlive.tv>

### *General Information*

General Information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at:

<http://www.parliament.uk/business/lords>

### *Committee Staff*

The current staff of the Committee are Emily Baldock (Clerk), Stuart Stoner (Policy Analyst) and Nicola Barker (Committee Assistant).

### *Contact Details*

All correspondence should be addressed to the Clerk of the Select Committee on the Constitution, Committee Office, House of Lords, London, SW1A 0PW.

The telephone number for general enquiries is 020 7219 1228/5960

The Committee's email address is: [constitution@parliament.uk](mailto:constitution@parliament.uk)

# Health and Social Care Bill

1. The Constitution Committee is appointed “to examine the constitutional implications of all public Bills coming before the House; and to keep under review the operation of the constitution”. In carrying out the former function, we endeavour to identify questions of principle that arise from proposed legislation and which affect a principal part of the constitution.
2. This report draws to the attention of the House one aspect of the Health and Social Care Bill. We may in due course additionally report on further aspects of the Bill.
3. The National Health Service (NHS) in England is governed by the National Health Service Act 2006 (NHS Act 2006). This Act was a consolidating measure: the provisions with which we are here concerned long pre-date it and indeed, in most instances, go back to the founding of the NHS in 1946. The Health and Social Care Bill seeks substantially to amend the NHS Act 2006 in numerous respects.
4. In this report we focus on one of the key amendments which the Bill seeks to make. **We are concerned that the Bill, if enacted in its current form, may risk diluting the Government’s constitutional responsibilities with regard to the NHS.** We note that at report stage in the House of Commons the Minister undertook, if it proved necessary, “to offer clarification or make amendments to put beyond legal doubt the fact that the Secretary of State remains responsible and accountable for the comprehensive health service that we all want to see”.<sup>1</sup>
5. **For the reasons given below, we consider that it may well be necessary to amend the Bill in order to put this matter “beyond legal doubt”.**
6. In order to explain our concerns, we set out first the current law, then the changes which the Bill seeks to make, and finally our reasons for reporting these changes to the House.
7. The NHS Act 2006, section 1 provides as follows:
  - (1) The Secretary of State must continue the promotion in England of a comprehensive health service designed to secure improvement—
    - (a) in the physical and mental health of the people of England, and
    - (b) in the prevention, diagnosis and treatment of illness.
  - (2) The Secretary of State must for that purpose provide or secure the provision of services in accordance with this Act.
  - (3) The services so provided must be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment, whenever passed.
8. The NHS Act 2006, section 3(1) provides as follows:
  - (1) The Secretary of State must provide throughout England, to such extent as he considers necessary to meet all reasonable requirements—
    - (a) hospital accommodation,
    - (b) other accommodation for the purpose of any service provided under this Act,

---

<sup>1</sup> HC Deb 7 September 2011 col 404 (Mr Paul Burstow, Minister of State, Department of Health).

- (c) medical, dental, ophthalmic, nursing and ambulance services,
  - (d) such other services or facilities for the care of pregnant women, women who are breastfeeding and young children as he considers are appropriate as part of the health service,
  - (e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service,
  - (f) such other services or facilities as are required for the diagnosis and treatment of illness.
9. The courts have made it clear that the Secretary of State's duties in these sections are to be read together. In the leading case of *R v North and East Devon Health Authority, ex parte Coughlan*, Lord Woolf MR in the Court of Appeal ruled, for example, that the Secretary of State (in section 1) "has the duty to continue to promote a comprehensive free health service and he must never, in making a decision under section 3, disregard that duty ..."<sup>23</sup>
10. In practice the Secretary of State delegates many of his functions to primary care trusts (PCTs): see, for example, NHS Act 2006, section 7. However, this does not alter the legal position that, as the law stands, it is the Secretary of State who is constitutionally responsible for NHS provision in England.<sup>4</sup>
11. Clause 1 of the current Bill substitutes for section 1 of the NHS Act 2006 a new section. The new section would provide as follows:
- (1) The Secretary of State must continue the promotion in England of a comprehensive health service designed to secure improvement—
    - (a) in the physical and mental health of the people of England, and
    - (b) in the prevention, diagnosis and treatment of illness.
  - (2) For that purpose, the Secretary of State must exercise the functions conferred by this Act so as to secure that services are provided in accordance with this Act.
  - (3) The services provided as part of the health service in England must be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment, whenever passed.
12. Clause 10 of the Bill amends section 3(1) of the NHS Act 2006. As amended, section 3(1) would provide as follows:
- (1) A clinical commissioning group [CCG] must arrange for the provision of the following to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility—
    - (a) hospital accommodation,
    - (b) other accommodation for the purpose of any service provided under this Act,
    - (c) medical, dental, ophthalmic, nursing and ambulance services,

---

<sup>2</sup> [2001] QB 213.

<sup>3</sup> This case proceeded under the National Health Service Act 1977, which was itself a consolidating measure. The wording is slightly changed but the core duties have thus far remained the same.

<sup>4</sup> To emphasise: the point is not that the Secretary of State and the Department of Health currently provide healthcare services that, under the Bill, would be provided instead by clinical commissioning groups. The point is that the Secretary of State is constitutionally and legally responsible for the provision of healthcare under the NHS Act 2006.

- (d) such other services or facilities for the care of pregnant women, women who are breastfeeding and young children as the [CCG] considers are appropriate as part of the health service,
  - (e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as the [CCG] considers are appropriate as part of the health service,
  - (f) such other services or facilities as are required for the diagnosis and treatment of illness.
13. Three things are apparent from these clauses. First, the duty currently placed on the Secretary of State (in the NHS Act 2006, section 1(2)) to “provide or secure the provision of services in accordance with this Act” is replaced with a duty on him to exercise his functions “so as to secure that services are provided in accordance with this Act”. Secondly, the duty currently imposed on the Secretary of State under section 3(1) of the NHS Act 2006 is removed from him and is placed instead on clinical commissioning groups. Thirdly, it follows that the chain of duties and responsibilities that the Court of Appeal in *Coughlan* ruled must be read as a whole would be broken. Under the Bill the statutory duties in section 1 will remain with the Secretary of State, whereas the statutory duties in section 3 will be imposed on CCGs.
14. Moreover, in interpreting the extent of the change brought about by these provisions, consideration must be given to clause 4 of the Bill, which would insert a new section 1C into the 2006 Act. This clause imposes a new duty on the Secretary of State to promote autonomy. Thus, the Secretary of State “must, so far as is consistent with the interests of the health service, act with a view to securing (a) 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 (b) that unnecessary burdens are not imposed on any such person”. This provision underscores the extent to which the chain of constitutional responsibility as regards the NHS is severed.
15. The Government have stated that it is not their intention to dilute the Secretary of State’s constitutional responsibilities with regard to the NHS. In its response to the recommendations of the NHS Future Forum, the Department of Health stated the following:<sup>5</sup>
- 2.6 As the Future Forum’s report highlights, some people are concerned that the Bill could weaken the Government’s accountability for the health service. As a consequence of establishing a dedicated NHS Commissioning Board, the Bill currently removes the Secretary of State’s current direct duty to “provide or secure the provision of services”, and this has been interpreted by some as reducing Ministers’ responsibility. There have even been some fears that the core principles of the NHS could be weakened.
- 2.7 This has not been our intention. We want to reinforce the principles and values of the NHS and strengthen overall Ministerial accountability. However, the Forum is right to point out that the current drafting of the Bill is not clear enough, and we will amend it.
- 2.8 Our policy is that the Secretary of State will be responsible—as now—for promoting a comprehensive health service. The wording of

---

<sup>5</sup> Cm 8113, June 2011.

section 1(1) of the 2006 NHS Act will remain unchanged in legislation, as it has since the founding NHS Act of 1946. We will amend the Bill to make this clear.

2.9 We will also make clear that the Secretary of State will retain ultimate accountability for securing the provision of services, though rather than securing services directly, the Secretary of State will be exercising his duty in future through his relationship with the NHS bodies to be established through the Bill, for example the NHS Commissioning Board by way of the “mandate”.

2.10 We will make clear that Ministers are responsible, not for direct operational management, but for overseeing and holding to account the national bodies—in particular, the NHS Commissioning Board and the regulators—backed by extensive powers of intervention in the event of significant failure.

16. The Department of Health document, *Response to Stakeholder Questions on the Future Role and Functions of the Secretary of State*, (dated August 2011)<sup>6</sup> states that the re-wording of section 1(2) “does not in any way undermine Secretary of State’s accountability or responsibility for the health service which remains unchanged since the founding of the NHS” [*sic*].<sup>7</sup> However, the Explanatory Notes to the Bill state that the amendment to section 1(2) “reflects the fact that the commissioning and provision of services will no longer be delegated by the Secretary of State, but will be directly conferred on the organisations responsible”.<sup>8</sup> That is to say: it is the NHS Commissioning Board and the CCGs that will be responsible for commissioning and providing services, not the Secretary of State.
17. The Government have argued that the Bill “strengthens the overall accountability of the Secretary of State for Health”,<sup>9</sup> citing clauses 49 and 50 as support for this view. Under clause 49 the Secretary of State must “keep under review the effectiveness” of a range of NHS bodies. These include the NHS Commissioning Board but do not include CCGs. Under clause 50 the Secretary of State must publish an annual report on the performance of the health service in England. **While these clauses will make a modest contribution towards accountability, the House will wish carefully to consider whether they are sufficient.**
18. The combination of these changes<sup>10</sup> matters, constitutionally, because **it is not clear whether the existing structures of political and legal accountability with regard to the NHS will continue to operate as they have done hitherto if the Bill is passed in its current form. As such, the House will wish carefully to consider whether these changes pose an undue risk either that individual ministerial responsibility to Parliament will be diluted or that legal accountability to the courts will be fragmented.**
19. **Moreover, it is not self-evident that the proposed changes are a necessary component of the Government’s reform package. Given the uncertainty as to the interpretation of the provisions proposed in the Bill, could not the relevant wording contained in the 2006 Act be retained?**

---

<sup>6</sup> See [http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/documents/digitalasset/dh\\_129483.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_129483.pdf).

<sup>7</sup> *Ibid*, para 6.

<sup>8</sup> Explanatory Notes, para 67.

<sup>9</sup> See [http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/documents/digitalasset/dh\\_129483.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_129483.pdf), para 3.

<sup>10</sup> The changes to section 1(2) and to section 3(1), and the new section 1C.