

**Health & Social Care Bill**  
**House of Lords Committee stage**

**Briefing Note 3**

**Peers should vote for Amendment 3 on Wednesday 2<sup>nd</sup> November in order to stop the government abolishing the Secretary of State's duty to provide the health service in England and to protect a comprehensive health service for England**

We are at a critical moment in the debate over the government's wish to abolish the duty of the Secretary of State to provide the health service in England.

We are concerned that the House of Lords should not accept abolition of this duty when it continues its debate on Clause 1 of the Health and Social Care Bill on Wednesday 2<sup>nd</sup> November 2011. To do so would undermine a comprehensive service because it would facilitate selection of patients and services by commissioners and providers.

There are four positions:<sup>1</sup>

(1) The government wants to abolish the duty. If Clause 1 is allowed to stand this will happen (see Appendix).

(2) Amendment 5, tabled by Labour and some cross benchers, is a minor amendment to Clause 1. It will not prevent abolition of the duty.

(3) A Liberal Democrat/Labour/cross-bench amendment would preserve the duty (Amendment 3), as requested by the Constitution Committee. It would basically keep the same words that have been in place since the 1946 National Health Service Act. Crucially the amendment **acts as a bridge between** the duty to promote in section 1(1) and the duty to provide in section 3(1) of the National Health Service Act 2006 Act. It would also lay the necessary foundation for further essential changes to the Bill.

(4) Lord Mackay of Clashfern has tabled two amendments that are reported to have the support of government and some Liberal Democrat and cross-bench peers.

---

<sup>1</sup> A more detailed legal analysis of the amendments is available here:  
<http://www.38degrees.org.uk/page/-/documents/38%20Degrees%20Legal%20Briefing%20Clause%201.pdf>

These amendments would have the effect of **abolishing the Secretary of State's duty to provide the health service in England**, and would do two other things.

First, the amendments basically restate the government's Clause, and add particular reference to the Secretary of State's power to intervene when:

- there are failures by the NHS Commissioning Board, NICE, Monitor, the Care Quality Commission and the Information Centre;
- in an emergency, services are not being provided; or
- there are breaches of the duty to cooperate, especially by Monitor and the Care Quality Commission.

This is not the same as having a legal duty to provide the health service in England.

Second, the MacKay amendment declares that the Secretary of State retains ultimate responsibility to Parliament for the provision of the health service in England. This statement was described by Lord Harris of Haringey in the debate last week as "very strange" language, not found in Acts of Parliament. It is a political, rather than a legal statement, and may not be acceptable to Parliamentary drafters.

**Peers committed to a comprehensive, universal NHS throughout England should support Amendment 3 in the first instance. This amendment has been tabled by Liberal Democrat Baroness Williams of Crosby, cross bencher Lord Patel, Labour's frontbench spokesperson Baroness Thornton and Constitution Committee Chair Baroness Jay of Paddington.**

Allyson Pollock, professor of public health research and policy, Queen Mary, University of London; David Price, senior research fellow, Queen Mary, University of London; Peter Roderick, public interest lawyer; and Tim Treuherz, retired head of legal services, Vale of White Horse District Council

28<sup>th</sup> October 2011

## Appendix

### Clause 1

#### 1 Secretary of State's duty to promote comprehensive health service

For section 1 of the National Health Service Act 2006 (Secretary of State's duty to promote health service) substitute –

##### **"1 Secretary of State's duty to promote comprehensive health service**

- (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."

### Amendment 3

**BARONESS WILLIAMS OF CROSBY, LORD PATEL, BARONESS THORNTON,  
BARONESS JAY OF PADDINGTON**

Page 2, leave out lines 2 to 4 and insert—

"(2) The Secretary of State must for that purpose provide or secure the provision of services according to this Act."

### Amendments 4 and 8

**[4] LORD MACKAY OF CLASHFERN**

Page 2, leave out lines 2 to 4 and insert—

"(2) For that purpose, the Secretary of State—

- (a) retains ultimate responsibility to Parliament for the provision of the health service in England, and
- (b) must exercise the intervention and other functions of the Secretary of State in relation to that health service so as to secure that services are provided in accordance with this Act.”

**[8] LORD MACKAY OF CLASHFERN**

Page 2, line 7, at end insert—

- “(4) For the purposes of this section, the intervention functions of the Secretary of State in relation to the health service in England are the functions of the Secretary of State under—
- (a) section 13Z1 (failure by the Board to discharge any of its functions),
  - (b) section 253 (emergency powers),
  - (c) section 82 of the Health and Social Care Act 2008 (failure by Care Quality Commission to discharge functions),
  - (d) section 67 of the Health and Social Care Act 2011 (Monitor: failure to perform functions),
  - (e) section 242 of that Act (failure by NICE to discharge any of its functions),
  - (f) section 266 of that Act (failure by the Information Centre to discharge any of its functions), and
  - (g) section 285 of that Act (breaches of duties to co-operate).”

**Amendment 5**

**BARONESS THORNTON, LORD HUNT OF KINGS HEATH, BARONESS FINLAY OF LLANDAFF, LORD WALTON OF DETCHANT**

Page 2, line 3, after “to” insert “provide or”