

Health & Social Care Bill 2011
House of Lords Committee stage

Clauses 59-63 - Monitor

Briefing No. 9

Clauses 59 to 63 of the Bill deal with the duties of Monitor to which amendments 261 and 265ZZA relate.

Contrary to recent government statements¹, **the Secretary of State's overarching duty to promote a comprehensive health service is significantly weakened by the Bill (see Briefings on 1, clause 6, 7 and 10).**

The Bill would establish Monitor as a provider regulator for the NHS-funded health sector. **Monitor would not have a primary overarching duty to promote a comprehensive service**; its main duty would be to promote health care services which are (a) "economic, efficient and effective", and (b) maintain or improve "the quality of the service" (Clause 59(1)).

The sole provision with reference to a comprehensive health service requires that Monitor "exercise its functions in a manner consistent with the performance by the Secretary of State of the duty" to provide a comprehensive health service (Clause 59(9)).

However, this duty is only one of a number of general duties that under Clause 63 Monitor can disregard in the event of a conflict among them (Clause 63(1)).

Any general duty may be set aside without reference to ministers even though "a significant impact" on providers or users of health services or on the general public may result (Clause 63(5)(6)).

Monitor has drafted proposals for a licensing framework and these show that notwithstanding a government amendment that removes promotion of competition as its main duty, Monitor continues to emphasise economic regulation at the expense of all other general duties.

Amendments 261 and 265 seek in part to strengthen the duties of the Secretary of State and below we provide a rationale for supporting them.

Background

The Bill transfers to Monitor the Secretary of State's responsibilities for regulating the health care sector.

The Futures Forum concluded in June 2011 that "at a national level, there needs to be absolute clarity that the Secretary of State for Health is ultimately accountable to Parliament for a comprehensive health service – a responsibility against which he

¹ HL Deb, 14 November 2011, c493

should annually report. **This is too fundamental a principle on which to allow ambiguity.**²

In its response to the Futures Forum the Government stated “that the Secretary of State will be responsible - as now - for promoting a comprehensive health service.”³ And on 14th November 2011 Earle Howe told the Lords that the Bill **reinforces and does not “dilute the Secretary of State's overarching duty”**: “Let me be clear: the Bill's provisions would in no way dilute the Secretary of State's overarching duty. Indeed, they are intended further to reinforce the promotion of a comprehensive health service rather than to undermine it.”⁴

However, on 30th September the House of Lords Select Committee on Constitution noted that the transfer of responsibilities to Monitor **represents a loss of responsibility on the part of the Secretary of State.**⁵

Monitor's duties

Monitor's main duty is to:

“protect and promote the interests of people who use health care services by promoting provision of health care services which—
(a) is economic, efficient and effective, and
(b) maintains or improves the quality of the services. (Lords Bill, Clause 59(1))”

Monitor does not have a primary duty to promote a comprehensive health service but “must exercise its functions in a manner consistent with the performance by the Secretary of State of the duty under section 1(1) of the National Health Service Act 2006 (promotion of comprehensive health service).” (Lords Bill, Clause 59(9)) In the explanatory notes this requirement is interpreted to mean, “Monitor should not take any action that is not consistent with the promotion of a comprehensive health service.”⁶

This provision under 59(9) is, however, but one of several general duties set out in clauses 59 - 62. These general duties include the promotion of competition among providers and duties with respect to access to services, the promotion of research, the need for education and training, improvement in quality and reductions in inequality.

However, apart from the main duty, each of the general duties may be set aside by Monitor in the event of a conflict among them. Clause 63(1) provides that “In a case where Monitor concludes that any of its general duties conflict with each other, **it must secure that the conflict is resolved in the manner it considers best.**” **Though this resolution may involve “a significant impact” on providers or users of health services or on the general public, Monitor is only required to publish a statement when this is the case (63(5)(6)).**

² Futures Forum, Final Report

³ Government response to FF

⁴ HL Deb, 14 November 2011, c493

⁵ HL Paper 197, 30 September 2011, paragraph 16.

⁶ Health and Social Care Bill 2011 (Lords version). Explanatory Notes, p108.

How Monitor interprets its duties under the Bill

Monitor emphasis is on economic regulation in its interpretation of the Bill.

On the 15th November 2011 Monitor issued for consultation draft proposals for a regulatory framework, “Developing the new NHS Provider Licence: A Framework Document”⁷. The proposals concern the licensing regime for providers. Monitor says the licence would be central to its regulatory approach: “Our licensing regime would be the principal mechanism by which we would influence the behaviour of providers of NHS- funded health care services⁸.”

In chapter 5 of the framework Monitor states what actions it will take with respect to its responsibilities. There are dedicated chapters only for pricing, competition and integration, and failure; the other general duties including access, education and training, and inequality monitoring and reduction are not discussed. .

Specifically, the proposals **do not include acknowledgement of the Secretary of State’s principal duty to promote a comprehensive health service** nor a means for ensuring that Monitor acts consistently with that duty when exercising its own functions nor any reference to the need to protect the integrity and viability of local service or the means whereby they shall be protected.

Moreover, the proposed framework includes reference to an agreement between Monitor and the Department of Health to remove ministerial controls over foundation trusts that are currently used to secure comprehensive health services. By October 2012 the Department of Health will withdraw foundation trusts’ “terms of authorization” that set out the services to be provided and volume of activity, and mandate education and training for staff.

Thus, Monitor has interpreted its proposed duties so as:

- **to omit in the license framework any reference to the Secretary of State’s principal duty**
- with the Department of Health, to remove by October 2012 foundation trusts’ “terms of authorization” currently used to promote a comprehensive service
- not to consider potential for conflict between duties with respect to a comprehensive health system and those with respect to competition

Monitor’s interpretation of its duties under the Bill contradicts the Government’s assurances regarding the Secretary of State’s principal duty. The Bill and Monitor’s draft proposals are inconsistent with the Government’s stated policy and Earl Howe’s account of its intentions given to the Lords.

Amendments 261 and 265ZZA seek in part to remove these inconsistencies and strengthen Secretary of State’s duties and should be supported.

⁷ Monitor. Developing the new NHS Provider Licence, 15 November 2011.

⁸ Monitor. Developing the new NHS Provider Licence, 15 November 2011, p18.

Amendment 261 inserts the following sub-clause in clause 59:

“The main duty of Monitor is to exercise its functions to support the duties of the Secretary of State as set out in section 1 of this Act as provided for in regulations.”

Amendment 265ZZA inserts the following sub-clause in clause 59:

“Monitor shall be under a duty (known as the “duty of cooperation”) to ensure that any provider organisation which is regulated by it shall both plan to provide and shall provide its services in ways that promote efficient and effective cooperation between providers of health care services as part of health services provided under this Act, and in particular shall both plan and provide services that further the objectives of”

Allyson Pollock, Professor of Public Health Research and Policy at Queen Mary University of London

David Price, Senior Research Fellow at Queen Mary University of London

4 December 2011