Response to the
National Health Service (Amended Duties and Powers) Bill 2014, published on 7th November 2014 ("the Efford Bill")

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Summary

The Efford Bill's proposed repeal of the 'Competition' sections of the 2012 Health and Social Care Act is (subject to one point of clarification) to be welcomed as a step in the right direction of reducing procurement and tendering procedures.

At the same time, however, the Bill accepts the 2012 Act's abolition of the Secretary of State's duty to provide – remarkably, given the long title of the Bill. It would replace it with a commissioning duty that would put in place a 100% commissioner-provider split and so extend the market structures that have been increasingly applied to the NHS over the last 25 years beyond the pre-2012 position.

The Bill gives rise to a number of points of concern. As well as not abolishing the commissioner-provider split, it would for example:

- appear to defer unnecessarily to EU competition law;
- leave untouched the power of clinical commissioning groups (CCGs) to arrange services they consider appropriate;
- not reverse the 2012 Act's prospective abolition of NHS trusts, and their transformation into NHS foundation trusts or take over by private companies; and
- leave Monitor in place with the same main duty, without a statutory purpose and continuing to licence private providers.

Further clarification is also required as regards the provisions covering the Transatlantic Trade and Investment Partnership Treaty, The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013, and use of the term ''service of general economic interest".

A Table in the Appendix below sets out our provisional views as to whether some of the key provisions in the Bill deserve to be supported or opposed and where clarification is needed.

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1. Repeal of 'Competition' sections

The Bill proposes to repeal the 'Competition' sections of the 2012 Health and Social Care Act. Subject to one point of clarification, this is to be welcomed as a step in the right direction of reducing procurement and tendering procedures. This reduction would appear to be the result of Clause 10, which would repeal sections 72-80 of the 2012 Act, entitled 'Competition'.

This would, for example, remove the power to make regulations on procurement, patient choice and competition under section 75 - although the Bill does not expressly state that the current Regulations made under section 75 - The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 - would be revoked. This needs clarification.

2. More duties and powers to the Secretary of State

The Bill proposes to give more duties and powers over the NHS to the Secretary of State, compared with the position since the 2012 Health and Social Care Act.

These include:

- the duty to arrange provision of listed services (currently the duty of CCGs), with powers to delegate this duty to, and to direct, NHS England and CCGs (Clause 3);

- a general power to direct CCGs and NHS England (as well as NHS trusts and Special Health Authorities, as currently) (Clause 5);

- a power to direct that NHS foundation trusts and NHS trusts cannot raise more than an unspecified percentage of their income from (essentially)

private patients – including the power to direct different percentages for different individual trusts (Clauses 7 and 8); and

- having to give consent to any merger involving an NHS trust of foundation trusts or to their acquisition or disposal of significant property (Clause 12).

3. Points of concern

The Bill gives rise to a number of points of concern:

(1) It would not "re-establish the Secretary of State's legal duty to provide national health services in England", as stated in the long title of the Bill. This is because Clause 1 of the Bill repeats the 2012 Act's 'duty to exercise functions to secure provision' – rather than the 'duty to provide or secure provision' in place from 1946-2012; and because Clause 3 is a 'duty to arrange provision' rather than a 'duty to provide' as it was until the 2012 Act[1] – and Clause 3 also drops the long-standing requirement to do so "throughout England".

(2) The Bill imposes a duty on the Secretary of State to "ensure that the health service is a public service which delivers services of a general economic interest and operates on the basis of social solidarity" (Clause 1(2)(b)).

The concept of "services of general economic interest" derives from Articles 14 and 106(2) of the Treaty on the Functioning of the European Union and Protocol No 26 of that Treaty. The European Commission and Member States share competence for these services insofar as Member States may seek derogations from EU competition rules subject to the agreement of the Commission. Agreement must be sought on a case-by-case basis. By contrast, the Commission has no authority over services of general non-economic interest, which are entirely the responsibility of member states. The terms are not defined and citing several court cases[2] the European Commission has said that Member States "have considerable discretion when it comes to defining what they regard as services of general economic interest".[3]

[1] This is a correction. The original version of this response read "until the 1946 Act".
[2] Case T-17/02 *Fred Olsen* [2005] ECR II-2031, paragraph 216; Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraphs 166-169; Case T-309/04 *TV2* [2008] ECR II-2935, paragraphs 113 *et seq*.
[3] *Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest,*

It has not been determined whether the NHS is a service of general economic activity. For example, in 2003 the Spanish Health Service was held by the Euroepan Court of Justice not to be such a service.[4] It is at least strongly arguable that the NHS is also not such a service.

Last year the Commission stated that "[t]he organisation of public hospitals which are an integral part of a national health service and are almost entirely based on the principle of solidarity, funded directly from social security contributions and other State resources, and which provide their services free of charge to affiliated persons on the basis of universal coverage" are an example of "non-economic activities of a purely social nature."[5]

The Bill therefore appears to defer to EU competition law unnecessarily by imposing this duty on the Secretary of State.

(3) The Bill would render the NHS a 100% commissioner/provider service. This was not the position before the 2012 Act, and so in this respect the Bill would extend the market in the NHS beyond its previous position under Labour governments – for example, Primary Care Trusts were both providers and commissioners. Yet commissioning remains an unproven policy. In 2010 the Health Select Committee damned commissioning as "20 years of costly failure".[6]

(4) The Bill leaves in place the wide power of CCGs to commission health services they consider appropriate under section 3A of the NHS Act 2006, inserted in 2012. This power allows CCGs to operate outside the Secretary of State's duty proposed in Clause 3 (which only replaces section 3 of the 2006 Act). The power in Clause 5 to direct CCGs about the exercise of their duties and powers could be used to limit the operation of section 3A, but whether and the extent to which this would happen in practice would depend on the particular government, and it could not be used to take the power away.

Brussels, 29.4.2013 SWD(2013) 53 final/2, Commission Staff Working Document, available here: http://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf

[4] Case T-319/99 FENIN [2003] ECR II-357

[5] See note 2, at page 33.

[6] http://www.parliament.uk/business/news/2010/03/20-years-of-costly-failure-mps-verdict-on-nhs-commissioning/

(5) The Bill would not reverse the 2012 Act's prospective abolition of NHS trusts, and their transformation into NHS foundation trusts or take over by private companies. The 2012 Act requires all NHS trusts to become NHS foundation trusts, and if they cannot they will be merged, closed or taken over by private companies. This would remain the position.

(6) The Bill would leave Monitor in place with the same main duty, without a statutory purpose and continuing to licence private providers.

4. A number of the provisions also require clarification

(1) The Transatlantic Trade and Investment Partnership Treaty

Clause 14 provides that ratification of the Transatlantic Trade and Investment Partnership Treaty shall not cause any legally enforceable procurement or competition obligations to be imposed on any NHS body entering into any arrangement for the provision of health services, in England, Scotland, Wales and Northern Ireland.

This raises a number of questions:

(i) Ratification of a treaty follows signature. It is a step required for a treaty to become binding in international law. Once ratification has occurred therefore, the obligations referred to would become binding in international law. So Clause 14 appears to purport to set up a conflict between the UK's international obligations and domestic law. We are not convinced that this formulation would have that effect and clarification is needed as to whether Clause 14 would be effective.

(ii) The heading of Clause 14 is "NHS exemptions from proposed [TTIP]". However, the text of the Clause does not exempt the NHS. Rather, its terms are limited to "procurement or competition obligations to be imposed on any NHS body entering into any arrangement for the provision of health services". It should therefore be clarified whether it would extend to obligations of the UK (as opposed to obligations of any NHS body), whether it would apply to both commissioners and providers, and the definition of NHS body should be made clear. It should also be explained why it would not extend to other obligations, such as (for example) the ousting of the

jurisdiction of the UK courts, or to the rights of private companies to bid for contracts.

(2) The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013

These Regulations were made under section 75, of the 2012 Act, which would be repealed. They require commissioners (for example) to advertise new NHS contracts unless the services are only capable of being provided by a single provider. The Bill does not provide that these Regulations would be revoked, although its repeal of section 75 would mean that no future regulations of this type could be made. It might be implied that the Regulations would be revoked, but this should be clarified.

(3) 'Service of general economic interest'

In view of the apparently unnecessary engagement of EU competence by characterising the NHS as a service of general economic interest – and considering other provisions in the Bill which appear to point in the opposite direction (e.g., the service being operated on basis of social solidarity (Clause 1(2)((b), and commissioners and providers not being "undertakings" for the purposes of the Competition Act 1998 (Clause 11(b)) – it would be helpful for an explanation to be provided for use of the term in Clause 1(2)(b).

5. Conclusion

The Bill's proposed repeal of the 'Competition' sections of the 2012 Health and Social Care Act is (subject to one point of clarification) to be welcomed as a step in the right direction of reducing procurement and tendering procedures.

At the same time, however, the Bill accepts the 2012 Act's abolition of the Secretary of State's duty to provide – remarkably, given the long title of the Bill. It would replace it with a commissioning duty that would put in place a 100% commissioner-provider split and so extend the market structures that have been increasingly applied to the NHS over the last 25 years beyond the pre-2012 position.

Appendix

The Table below sets out our provisional views as to whether some of the key provisions in the Bill deserve to be supported or opposed and where clarification is needed.

We are currently taking no position on Clauses 7 and 8, regarding the private patient income cap, as it is impossible to know where it will be set, and the power to make differences between trusts appears as another way of allowing those trusts that already raise a high proportion of their income from private patients to continue to do so.

Clause	Response
1 (Duty on the Secretary of State to promote comprehensive health service), substituting a new section for s.1 of the NHS Act 2006	Oppose new s.1(1) and new s.1(2)(a), and replace with 1946-2012 wording Clarification sought of new s.1(2)(b) Support new s.1(2)(c) Oppose new s.1(3) (2012 insertion) Support new s.1(4) (long-standing provision)
2 (Exercise of the Secretary of State's powers), inserting a new section as s.2C of the NHS Act 2006 (Duties and guidance in respect of cooperation and social solidarity)	Support
3 (Duty on the Secretary of State regarding provision of certain services), substituting a new section 3 of the NHS Act 2006	Oppose new s.3(1), and replace with duty to provide throughout England
5 (Power of Secretary of State to direct certain health service bodies), substituting a new s.8 of the NHS Act 2006	Support and extend
10 (Repeals)	Support, but clarification sought regarding the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013
11 (Exemptions from the Competition Act 1998)	Support
14 (NHS exemptions from proposed Transatlantic Trade and Investment Partnership Treaty)	Clarification sought