THE NHS BILL: SOME QUESTIONS with ANSWERS

One of the NHS Bill's 'architects' – barrister Peter Roderick – has put together the following responses, based on some of the points raised about the Bill.

"What legislation would the NHS Bill 2015 repeal? "

Response

"The Bill abolishes the purchaser-provider split and removes the internal and external markets. This requires repeal and modification of many statutory provisions which are not all listed in the Bill. They would be set out in regulations (Clause 25 of the NHS Bill). The second version of the Bill had imagined these being set out in a concurrent NHS (Consequential Provisions) Act 2015, as was done in 2006. But the House of Commons clerks said that it was not possible to refer to a non-existent Act, hence Clause 25."

"How far back does the Bill go in seeking to 'roll back' privatisation? To 2006 or further?"

Response

"The Bill reinstates section 1 of the 2006 Act as it was in 1977 (Clause 1), abolishes NHS trusts (dating from 1990), NHS foundation trusts and Monitor (dating from 2003). Regulations under Clause 25 would necessarily require abolition of the construct of NHS contracts (dating from 1990)."

"How would the Bill protect the NHS from trade and competition rules?"

Response

"The more the NHS relies on the market, the more that EU competition and procurement laws, and international trade rules, bite. These laws and rules have no place once the internal and external markets are removed. However at the moment Parliament's competence to remove these laws and rules is compromised and so needs to be reasserted. The Bill has five provisions to this end:

- it asserts that the NHS is a non-economic service of general interest, so denying application of EU competition rules (Clause 1(4)(a)),
- it asserts that the NHS is a service supplied in the exercise of governmental authority as a service supplied neither on a commercial basis, nor in competition with one or more suppliers, so denying application of the World Trade Organization's General Agreement on Trade in Services (Clause 1(4)(b)),
- it permits arrangements (such as contracts or grants) with voluntary organisations, and only exceptional and short-term arrangements with private companies, subject always to Clause 1(4) so that any such arrangements are not systematic and do not prevent the NHS from being a non-economic service of general interest or from being a service supplied non-commercially and without competition (Schedule 3, paragraph 1(c),
- it dis-applies the Public Contracts Regulations 2006 to such arrangements, so EU procurement laws don't apply (Clauses 8(14) and 9(8)),
- it asserts the competence of Parliament and the devolved legislatures to stop international treaties that affect the NHS, such as the proposed Transatlantic Trade and Investment Partnership (Clause 23)."

"Does the Bill need to go further to exclude the NHS from the scope of the 1998 Competition Act for national (UK) purposes?"

Response

"My understanding is that the Competition Act 1988 was applied to the NHS by s.72 of the 2012 Act. Clause 18 of the NHS Bill repeals this section. Are there other provisions that should be repealed? In my view, subject to further challenge, the Bill takes the NHS outwith the scope of national competition law. I have sought to repeal the legal basis of the internal market, so I need to be pointed to anything I have missed."

"Would PFI centralisation avoid detailed exposure of practice which most view as morally dishonest practice and some view as criminal, transforming blatant scams into national debt? Centralisation is the PFI lenders' own preferred plan, which the privatisation lobby have been pushing activists to endorse over the last year. Even McKinsey suggests (in QIPP 2009) that the PFI lenders should, rather than being paid off via PFI centralisation, instead be required to cooperate in renegotiating the deals down to fair value. Tory MPs too are demanding renegotiation to claw back some of the NHS's losses to PFI. " [1]

Response

"This is a substantive point. This is how I see it.

PFI debts exist. They burden the NHS, and should be taken off its back. They also burden the public purse in other areas. Ideally they should end. There are several issues that have to be considered in working how best to do that.

Clause 21 involves both centralisation and publication, and a duty on the Treasury to assess the debts, to explain them and to propose reductions. The duty to propose reductions can be exercised in any way – using possibilities within the contracts, concepts such as frustration, and simple renegotiation. The contracts cannot be "reversed". They can be broken, and compensation paid. But this would not necessarily lead to reduced payments – it would depend on what each PFI contract says about compensation, and if they are silent on compensation then the general rule is that the 'wronged' party must be put in the same position as they would have been had the contract not be broken. So if the general rule applied, the public purse would not in theory be any better off, save that the timing of payments would change. In any event, if Clause 21 was passed, I can't see how the Treasury could avoid assessing the cost of paying compensation as a part of working out what reduction proposals to pursue. Whether they would be prepared to break the contracts is another thing.

On the fraud point, I'm all for prosecutions where there's the criminal standard of evidence. Clause 21 doesn't impact on the function of the prosecuting authorities to investigate, which continues regardless. Pursuing and punishing individual cases however is not a systematic approach to reducing the debts.

There are several different ideas for reducing PFI debts, and I don't know which one is best, or whether a combination is needed. Clause 21 would provide a framework for doing so, but it's not the last word – though finding better words will need serious thought. "

"Why does the Bill allow for charges for some NHS services? Will this undermine equitable access to these NHS services?[2] Does this strengthen the policy direction towards co-payments and imply support for this policy?[3] And does this put at risk the TTIP/EU exemption?"

Response

"There has always been (what's wrongly described by many, including me, as) a 'charging' provision in the opening and framing section of the NHS Acts, in 1946, 1977 and 2006 – we merely repeat that.

[**1946:** *"The services so provided shall be free of charge, except where any provision of this Act expressly provides for the making and recovery of charges".* **1977:** *"The services so provided shall 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".* **2006:** *"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".* **2012:** *"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".* **Reinstatement Bill:** *"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".*]

But this is not a charging provision – it is a law requiring the services to be free, unless another law expressly says otherwise – this is always the legal position, as Parliament cannot bind itself, so even if the provision simply said that the services are free, Parliament could always pass another law saying otherwise – which is what the provision says. The real issue here is not the provision, but the fact that charges are levied.

I think it would be great if someone would provide me with a list of all the laws making charges, and we could put them in a repeal schedule. "

"Is the wording of the Bill now final, with no further opportunity for amendments?"

Response

"The Bill is not a block of concrete – I am absolutely open to reasoned argument and constructive criticisms."

References

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