The continuing flaws in the NHS reorganisation

Briefing from John Healey MP, Labour Shadow Health Secretary
July 2011

After the Committee Stage

Labour has just finished leading the Parliamentary scrutiny of the amendments that were tabled for the re-run committee stage of the Health and Social Care Bill. This briefing is designed to update those with a continuing interest in the progress of the Bill following the committee's conclusion on 14 July.

Having examined the recommitted clauses and challenged the Government on its amendments, we are very concerned that the Government's post-pause changes to their NHS plans will be more complex, more costly and less likely to help the NHS change to meet the financial and service challenges it faces.

We are also very concerned that the many essential elements of the ideology and long-term purpose of the reorganisation – to break up the NHS and set it up as full-scale market – remain in place and need further challenge.

And we remain very concerned that forcing through the biggest NHS reorganisation in its history when finances are squeezed and all efforts should be dedicated to making sound efficiencies and improving services, is high-cost and high-risk. We believe the Prime Minister has made a serious and reckless misjudgement in this wholesale NHS reorganisation. We continue to believe and argue that many of the changes the NHS must make – and the aims the Government said it had in its plans – could largely be achieved without legislation and huge internal reorganisation.

These are the reasons Labour have opposed the legislation from the outset, but also sought to challenge and amend the provisions of the Bill.

63 of the 299 clauses of the Bill were reconsidered by the Bill Committee following the Prime Minister's "pause", the report of the Future Forum and the response of the Government. Some of the concerns raised by the Forum have been translated into amendments but gaps remain and the Government has signalled that intends to bring further amendments at later stage of the Bill.

We were dissatisfied that the speed with which the Bill was forced through reconvened committee stage did not allow for full consideration of the Bill, did not allow proper time to debate the amendments, and did not allow enough time for external organisations to examine and comment on the amendments before the committee stage began. We were especially critical that only those 63 clauses that the Government wanted to amend could be discussed, which prevented scrutiny of the consequences of those changes on other parts of the Bill and the NHS.

We were disappointed that not all of the recommendations of the Future Forum were met. We were also concerned that the Government's response to the Future Forum report promised changes to the Bill that have not yet been proposed in the amendments.

However, our concern, reflected in this briefing, extends beyond the legislation currently before Parliament, and includes the likely secondary legislation, future primary legislation, and the directions issued by the Department of Health in the implementation of the reorganisation.

Reorganising the reorganisation

The Government can't say how much their reorganisation will now cost or what savings it can now claim because the Bill's impact assessment is redundant and a new one will not be published before the Bill leaves the House of Commons. This meant that the House of Commons being asked to consider and approve legislation with no information on the public spending costs or savings.

Despite these risks and the natural desire for stability for those who work in the NHS it is essential that the Bill is subject to proper scrutiny. In its original form it was more than three times longer than the 1946 Act that set up the NHS and it has already been subjected to hundreds of amendments. As the NHS confederation pointed out "we are not confident that the different elements of the reforms will fit together and deliver a coherent system for patients".[1] Dr Jennifer Dixon of the Nuffield Trust said: "In some areas the full policy is not apparent… If a full thought-out policy was before us it might be better and easier to look at what was appropriate in legislation."[2]

It is essential that such a far reaching Bill is subject to proper parliamentary scrutiny by MPs, Lords and organisations concerned about the NHS. Furthermore there has been aggressive pre-legislative implementation and it is constitutionally questionable that this has proceeded so far before Parliament has given its approval. The convention that no steps be taken that cannot be undone if the legislation fails to pass is being severely strained. The chaos, confusion and wasted cost of the last year will continue unless Parliament is able to do its proper job by getting the legislation right.

Recommendations of the Future Forum

The report from the Future Forum was welcomed and accepted by the Government. David Cameron welcomed the report, saying "We have listened, we have learned, and we are improving our plans for the NHS. We come here today with a substantive package of changes, and for that I want to thank Steve Field, the Future Forum and everyone who took part."[3]

Andrew Lansley announced to the House of Commons, "We accept the NHS Future Forum's core recommendations".[4]

Despite this response the Future Forum made recommendations in a number of areas which have not been dealt with by amendments to the Bill. These include:

- The Future Forum raised concerns about promoting competition as an end in itself. Steve Field said the original Bill would destroy key services, and his report recommended that "the Bill should be changed to be very clear that Monitor's primary duty is not to promote competition, but to ensure the best care for patients."[5] It further

[1] NHS Confederation evidence, HSR 10, para 2.3.
[2] HSR, First sitting, c. 20.
[3] Prime Minister's speech on the NHS, 14 June 2011.
[4] Statement to House of Commons on NHS Future Forum, 14 June 2011
[5] NHS Future Forum: Summary Report, p. 25.

recommended that the Bill be changed to clarify that Monitor be a "sector regulator for health, not an 'economic regulator'".[6] However whilst the duty to promote competition has been removed, it has been replaced with a new duty of "preventing anti-competitive behaviour".[7] We are concerned that this flipping of the language may not substantially affect how Monitor carries out its duties, and therefore does not reflect the deep concerns expressed by those responding to the listening exercise. Furthermore, Monitor retains sweeping pro-competition powers, including concurrent powers with the Office for Fair Trade under the Competition Act 1998 and the Enterprise 2002. These powers, alongside the power to licence every provider to the NHS, have not been changed by the amendments.

- The Future Forum recommended that all providers of NHS-funded services should hold their Board meetings in public.[8] The Government rejected this recommendation in their response to the Future Forum.[9] This means decisions about NHS services will be made in private, marked 'commercial in confidence'.
- The Future Forum recommended Strategic Health Authorities' workforce functions should be safeguarded and transferred to a new organisation.[10] The Government did not table any amendments to achieve this, and prevented a vote on Labour's amendment to delay the abolition of SHAs until their education and training functions had been suitably transferred.[11]
- The Government's response to the Future Forum accepted the recommendation to establish clinical senates and networks to oversee strategic issues but this has been left out of their amendments.[12] This will be particularly concerning for the health charities that campaigned hard for strategic oversight of integrated care pathways.
- The Government's response to the Future Forum accepted that the system for designation – allowing hospital services to close without formal or public consultation – would be changed, but this has been left out of their amendments.[13] The clauses relating to insolvency, designation and a failure regime were not even included in the list of those to be considered during the re-run committee stage.
- The Government's response to the Future Forum accepted that existing NHS cooperation and competition rules would be put onto a statutory basis, but there is no reference to doing this in the amendments.[14] Instead, Monitor will still enforce the Competition Act.
- Professor Field admitted that the issue of the private patient income cap was not looked at by the Future Forum and stated that "the feeling was that the private patient cap should actually stay … but that it should be reviewed and set at a reasonable level".[15] The Government tabled no amendments to the clause abolishing the private patient income cap.
- The Government's response to the Future Forum stated "that we will require foundation trusts to produce separate accounts for NHS and private-funded services";[16] but this was not addressed by their amendments.

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[6] NHS Future Forum: Choice and Competition, p. 9.
[7] Health and Social Care Bill 2011, Clause 58(3).
[8] NHS Future Forum: Summary Report, p. 10.
[9] Government response to the NHS Future Forum report, para 4.29.
[10] NHS Future Forum: Summary Report, p. 29.
[11] HSR, Sixth sitting, c. 304.
[12] Government response to the NHS Future Forum report, para 3.18.
[13] Government response to the NHS Future Forum report, para 5.45.
[14] Government response to the NHS Future Forum report, para 5.16.
[15] HSR, First sitting, c. 14.
[16] Government response to the NHS Future Forum report, para 5.11.

More bureaucracy, cost and waste

We remain of the view that the reorganisation and the legislation is an unnecessary upheaval, and at a time when the NHS has to make substantial efficiency savings, will make meeting that challenge harder not easier.

The post-pause changes in the Government's plans for the NHS will mean more bureaucracy, more complexity, more cost, more waste and more power for new national quangos. The Bill will create at least five new national quangos to manage the NHS, centralising power into unelected bodies. The number of statutory commissioning bodies is increasing from 163 to over 500.[17] The Bill abolishes the PCTs as local commissioners and instead gives the job that they, one single body, are currently doing to at least 5 different ones: Clinical Commissioning Groups (CCGs), Health and Wellbeing boards, clinical senates, the NHS Commissioning Board and local authorities. More bodies will mean more lines of accountability, more complexity and more confusion about decision taking.

This has been a wasted year for the NHS, and the chaos and confusion will continue as the Government forces through the biggest reorganisation in the history of the health service.

- £850million will be spent on redundancies.[18]
- 2% of PCTs' budgets, almost £2bn, is being held back from patient care to cover the costs and risks of the reorganisation.[19]
- Hospitals are having to make deeper cost backs of an additional 2.5% because of the reorganisation in each of the next four years, or £1.1bn each year, on top of the 4% they are already having to find. The Foundation Trust regulator told hospitals to find the extra savings in a letter sent in April this year.[20]
- Chris Ham of the King's Fund has said that "it will lead to a more complex – you may want to call it more bureaucratic – structure than was originally proposed."[21]
- Jennifer Dixon of the Nuffield Trust has confirmed: "The only thing that I would add to what was just said is that the Bill is more complex and may therefore cost more"[22]

The greater bureaucracy, longer time scales and more complex accountabilities all mean the costs of reorganisation will be higher and the risks to patients services greater. It will be harder still for the NHS to make the reforms and sound efficiencies necessary to meet the big health care challenges for the future. This additional cost, waste and bureaucracy will see money being diverted away that could be spent on patient care.

Long-term plans for the NHS still in place

Despite the chorus of criticism, the unprecedented pause and the Future Forum's demolition job of the Government's NHS plans, the amendments the Government tabled fail properly to safeguard the NHS.

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[17] Dr Clare Gerada, Royal College of GPs: "The bureaucracy with the new Bill, post-pause, means that we have gone—we have calculated this—from 163 statutory organisations to a proposed 521, not counting the commissioning support organisations." HSR, Second sitting, c. 58.
[18] Answer to Parliamentary Question From Grahame Morris MP, 7 Feb 2011
[19] NHS Operating Framework, para 5.5
[20] 'Hospital efficiency target rockets', *Financial Times*, 28 April 2011.
[21] HSR, First sitting, c. 23
[22] HSR, First sitting, c. 23

The Government amendments still leave in place the essential elements of the Tories' long-term plan to set up the NHS as a full-scale market and break up the NHS as a national public service, so that patients will increasingly see the services on which they depend subject to the lottery of where they live.

David Cameron made a number of key pledges on the NHS during the pause.[23] They are the pledges many of which are already being or set to be broken, that we will hold him to as his reorganisation of the NHS proceeds:

- No privatisation;
- No cherry-picking by private providers;
- No new charges for healthcare;
- No competition for its own sake;
- Keep waiting lists low;
- Increase NHS spending;
- Retain the NHS as a universal service.

Setting up the NHS as a full-scale market

Economic regulation and the new regulator's pro-competition duties remain, competition enforcement powers have not been amended and the NHS's protection from the full force of UK and EU competition law will be removed by the changes in the Bill.

The Future Forum stated that "there was never any intention to introduce a market in the style of the utilities sector into healthcare" and that Monitor should be a "sector regulator for health not an 'economic regulator'."[24]

Part 3 of the Bill – 97 clauses – is still called "Economic regulation." Only 9 of these clauses were amended. This Part of the Bill replicates the regulation of the privatised utilities, according to the Government's own Explanatory Notes.[25] The long-term plans and free market ideology remain firmly intact.

The Government's amendments propose to change Monitor's specified duties but not the broad scope of its powers. Monitor will still have the power to enforce Competition Law and to fine hospitals by ten percent of their income for collaboration that is deemed to be anti-competitive. Competition Law has never before been enforced in the NHS, which has been protected as a public service.[26] The framework of Monitor's powers remains that of an economic regulator promoting competition in the utilities market, suitable for gas, telecoms, water and electricity, not one dedicated to improving patient care.

Furthermore, it was revealed during the committee stage that for all mergers or reconfigurations of hospital trust services worth over £70m, those mergers will be overseen, not by the supposedly health specific regulator, Monitor, but by the Office for Fair Trading, with its solely competition orientated duties.[27]

Whilst the initial duties of Monitor will be altered by the Government's amendments, these changes are partial. The Future Forum recommended Monitor should "promote choice,

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[23] Prime Minister's speech on the NHS, 16 May 2011; Prime Minister's speech on the NHS, 7 June 2011.
[24] NHS Future Forum: Choice and Competition, p. 9.
[25] Explanatory Notes, para 549.
[26] Answer to a Parliamentary Question from John Healey MP, 29 March 2011
[27] Paul Burstow, Care Minister: "The OFT would only consider mergers… where the body being acquired had a turnover of more than £70 million or where the resulting share of supply exceeded 25% of the market." HSR, Tenth sitting, c. 456.

collaboration and integration"[28] but the amendments do not do this. A new duty to promote integration has no definition, regulations or powers to back it up. There is to be no duty to promote collaboration, only a weaker 'regard'.

Instead, the Government's amendments give Monitor a new duty to "prevent anti-competitive behaviour." Unlike integration, this is defined by the Bill, as "behaviour which would... prevent, restrict or distort competition" – which is the exact same wording as the Competition Act 1998 and Amsterdam Treaty. The power and duties of Monitor in relation to competition remain much more powerful than its duties to promote integration and the interest of people who use health services.

The Bill still:

- Abolishes NHS Trusts, and alters the operating basis of Foundation Trusts towards being economic, rather than social, entities.
- Axes any cap on NHS hospitals treating private patients.
- Allows hospitals to close services without public consultation.
- Makes hospitals going bust subject to commercial insolvency law, with a limited system of support from the wider NHS for certain designated services.
- Exposes NHS services to the application of competition law for the first time, by shifting them from being social providers, with the protections that those organisations enjoy, to economic entities. Decisions about who provides what services in our NHS may end up being made by lawyers in Monitor and competition courts.

Breaking up the NHS as a national public service

The Government's response to the Future Forum promised that the role of the Secretary of State in providing the health service, established since 1946, would be restored.[29] However the key wording of section 1(2) of the NHS Act 2006 has been changed. Current legislation says that Secretary of State must "provide or secure the provision of services".[30] The Bill amended by the re-run committee says that "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".[31] This remains a weakening of the Secretary of State responsibility, requiring him to act through other agencies, rather than being directly responsible for the health service.

Since 1946, the Secretary of State has also been responsible for defining what constitutes the health service. Clause 9 of the Bill which leaves this to local CCGs is not being amended.[32] Section 3 of the 2006 Act currently says that the Secretary of State must provide a number of services throughout England "to such extent as he considers necessary to meet all reasonable requirements".[33] The Bill transfers this responsibility to CCGs. This means that while the Secretary of State is responsible for the promotion of the health service, and ensuring that that service is free of charge, CCGs will be able to determine what services actually constitute the health service.

The Bill still leaves open up the possibility of CCGs being able to charge 'top ups' for certain services they deem to be outside the definition of the health service, despite the claim by the Government to have ruled this out.

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[28] NHS Future Forum: Summary Report, p. 11.
[29] Government response to the NHS Future Forum report, para 2.8.
[30] National Health Service Act 2006, Section 1.
[31] Health and Social Care Bill 2011, Clause 1.
[32] Health and Social Care Bill 2011, Clause 10.
[33] National Health Service Act 2006, Section 3.

Labour's continuing concerns about the changes to the Secretary of State's duties have been confirmed in independent legal analysis from Peter Roderick, the public interest lawyer, who has made a formal submission of evidence to the Bill Committee.[34]

NICE recommendations remain weaker in the new system, with no guarantees in the amendments to safeguard rights of patients to NICE-approved drugs and treatments wherever they live.

The Bill abolishes SHAs and their role in educated and training the national workforce of the NHS. Despite promises made in their response to the Future Forum, the Government have not yet said how they will ensure national standards in the of education medical workforce.

The effect of these clauses will be to break up the NHS as a national public service, with the services on which patients depend subject to the lottery of where they live.

Governance and Accountability

Of all the areas of concern highlighted by the Future Forum, the Government has made the most concessions and changes on public accountability and democratic involvement in the NHS. The requirements on Foundation Trusts and the boards of CCGs to have non-executive directors and meet in public, and the extension of the duty to consult the public on service changes are welcome.

However concerns remain. The Government have not imposed the rules regulating business to be taken in public and that to be taken in private that currently applies to local authorities and PCTs.[35] Instead it has been left to Foundation Trusts and CCGs to determine which business to discuss in public and which in private – a weaker and more ambiguous arrangement.

The duty to consult the public and patients in NHS decision making has been improved, but the powers, independence and resources Healthwatch, (in its local and national forms, as a sub-committee of the CQC) remain too weak for it to properly fulfil its role of protecting and promoting patients' interest.

With new bodies, such as the clinical senates, introduced into the system architecture it is wholly unclear how accountability will work in practice. There will be a complex bureaucratic interplay between the NHS Commissioning Board (and its sub-national and local outposts), the economic regulator, clinical senates, clinical networks, CCGs, Health and Wellbeing Boards and Healthwatch.

[34] 'Fundamentals of NHS "still not safe" under latest version of Government's Health and Social Care Bill', dutytoprovide.net, 26 June 2011.
[35] Public Bodies (Admission to Meetings) Act 1960.