

Abolition of the duty of the State to provide the National Health Service in England: a legal analysis

The Health and Social Care Bill 2011 would abolish both the general duty on the Secretary of State in place since 1946 to provide or to secure the provision of services in England for the purpose of promoting a comprehensive health service, and the specific duty on him or her to provide listed services. These duties are one of the fundamental legal bases, and arguably the most important legal basis, for the National Health Service. How this is proposed to be achieved is set out in the analysis below.

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The Health and Social Care Bill 2011 would, if enacted, be the fourth major piece of legislation setting out the statutory basis for the National Health Service in England since its establishment. Its three predecessors were the National Health Service Acts of 1946, of 1977 and of 2006 (currently in force).

The preceding statutes contained and contain, in almost verbatim form,¹ ministerial duties:

- generally to promote a comprehensive health service,
- for that purpose to provide or to secure the provision² of health services in accordance with the legislation, which must be free of charge, unless otherwise legally and expressly provided; and
- specifically to provide listed services, such as hospital accommodation and medical services.³

The Bill would not repeal or amend the promotion duty, which is set out in section 1(1) of the 2006 Act, as follows:

¹ A separate paper, entitled “The legal duty of the State to provide a National Health Service in England”, sets out the exact text of the provisions establishing these ministerial duties.

² The general duty in section 1(1) of the National Health Service Act 1946 on the Minister of Health to “secure the effective provision of services”, and repeated in section 1(1) of the National Health Service Act 1977, became a duty to “secure the provision of services” in section 1(2) of the National Health Service Act 2006.

³ Section 3(1) of the 1977 and 2006 Acts extended the list of services to cover such other services or facilities for the care of pregnant women, women who are breastfeeding, young children, for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as the Secretary of State considers are appropriate as part of the health service, as well as such other services or facilities as are required for the diagnosis and treatment of illness.

*“(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.”*

Indeed, the Bill would extend the ministerial duty “concurrently” to the National Health Service Commissioning Board. This would be achieved under Clause 5 of the Bill by inserting a new section 1D into the 2006 Act, subsection (2) of which would read as follows:

“(2) The Board is subject to the duty under section 1(1) concurrently with the Secretary of State except in relation to the part of the health service that is provided in pursuance of the public health functions of the Secretary of State or local authorities.”

Significant changes are proposed, however, in respect of the provision of health services.

At present, section 1(2) of the 2006 Act provides as follows:

“(2) The Secretary of State must for that purpose [i.e., the purpose of promoting a comprehensive health service] provide or secure the provision of services in accordance with this Act.”

And section 3(1) of the 2006 Act provides at present as follows:

*“(1) The Secretary of State must provide throughout England, to such extent as he considers necessary to meet all reasonable requirements—
(a) hospital accommodation,
(b) other accommodation for the purpose of any service provided under this Act,
(c) medical [defined to include surgical], dental, ophthalmic, nursing and ambulance services,
(d) such other services or facilities for the care of pregnant women, women who are breastfeeding and young children as he considers are appropriate as part of the health service,
(e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service,
(f) such other services or facilities as are required for the diagnosis and treatment of illness.”*

Clause 1(2) of the Bill would substitute section 1(2) of the 2006 Act with a new subsection (2) and would insert an additional subsection (2A). The new subsections (2) and (2A) would read as follows:

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

- (a) has the public health functions conferred by this Act, and*
 - (b) in exercising functions in relation to a body mentioned in subsection (2A), must act with a view to securing the provision of services for the purposes of the health service in accordance with this Act.*
- (2A) *Those bodies are—*
- (a) the National Health Service Commissioning Board;*
 - (b) commissioning consortia;*
 - (c) local authorities (as respects their public health functions)."*

Clause 9 of the Bill would amend section 3(1) of the 2006 (quoted above) by abolishing the Secretary of State's duty to provide the six categories of listed services, and replacing it with a duty on a commissioning consortium to:

"arrange for the provision of [those services] to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility".

Furthermore, currently section 3(1) of the 2006 Act requires the Secretary of State, in six special areas, to provide such other services or facilities (beyond hospital land other accommodation, and medical, dental, ophthalmic, nursing and ambulance services) as the Secretary of State considers are appropriate as part of the health service. These six areas are services or facilities for the prevention of illness, and services or facilities for five categories of people: pregnant women, women who are breastfeeding, young children, those suffering from illness and those who have suffered from illness. Clause 9 would amend section 3(1) by substituting in these six areas the Secretary of State's opinion of what is appropriate as part of the health service with the commissioning consortium's opinion.

It would appear that it is intended, for example, that a commissioning consortium would be given much leeway in making decisions of this nature, in view of Clause 4 of the Bill (proposing to insert a new section 1C into the 2006 Act), which distances the Secretary of State⁴ even further from a duty to provide services:

"In exercising functions in relation to the health service, the Secretary of State must, so far as is consistent with the interests of the health service, act with a view to securing—

- (a) that any other person exercising functions in relation to the health service or providing services for its purposes is free to exercise those functions or provide those services in the manner that it considers most appropriate, and*
- (b) that unnecessary burdens are not imposed on any such person."*

⁴ A similar so-called 'autonomy duty' is placed on the Commissioning Board by Clause 19, which would insert a new section 13E into the 2006 Act to similar effect.

The effect of Clauses 1(2) and 9 of the Bill would be to abolish both the general duty on the Secretary of State to provide or secure provision of health services in England, and the specific duty to provide listed services, respectively.

Instead, Clause 1(2) would give the Secretary of State a new duty: in exercising his or her functions in relation to the Commissioning Board and commissioning consortia (and local authorities, as respects their public health functions) to “act with a view to securing the provision of services for the purposes of the health service in accordance with this Act.”. This would not be a duty to provide or to secure provision of health services. It would be a duty in exercising functions in relation to the specified bodies to act with a view to securing provision. It would not *even* be a duty to exercise those functions in order to secure provision⁵ - though a duty expressed in these terms would, in any event, only be as strong as those other functions.

No provision of the Bill would pass on either the general duty or the specific duty to any other body.

Instead, Clause 5 of the Bill expands on the Commissioning Board’s concurrent promotion duty, as follows:

*“(3) For the purpose of discharging that duty, the Board—
(a) has the function of arranging for the provision of services for the purposes of the health service in England in accordance with this Act, and
(b) in exercising functions in relation to commissioning consortia, must act with a view to securing the provision of services for those purposes in accordance with this Act.”*

The Board, therefore, would not have the duty to provide or to secure the provision of services. It would simply have the “function” of “arranging” provision, and in exercising functions in relation to commissioning consortia, it would have the duty of acting with a view to securing provision.

A commissioning consortium would only have the duty to “arrange” provision, and then only to the extent it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility. Moreover, as regards services and facilities for illness prevention, pregnant women, women who are breastfeeding, young children, those suffering from illness and those who have suffered from illness, additional provision need only be “arranged” for persons for whom a consortium has responsibility – even if the consortium considers it necessary to meet their reasonable requirements - if the consortium also considers it appropriate as part of a health service.

⁵ “Functions” are defined as including powers and duties, in section 275(1) of the 2006 Act, unless the context otherwise requires.

To sum up, the effect of these proposed changes would be that no body would have the duty to provide health services, either generally or specifically. Instead, a miscellany of weaker duties would be placed on and divided amongst three bodies, in that:

- the Secretary of State would have a duty in exercising functions in relation to the NHS Commissioning Board and commissioning consortia to “act with a view to securing” provision of services;
- the Board would have the “function” of “arranging” provision, and the duty in exercising functions in relation to commissioning consortia to “act with a view to securing”; and
- a commissioning consortium would have a duty to “arrange” for the provision of services to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility; and would not need to arrange provision of services or facilities focusing on, for example, pregnant women, young children and after-care, unless the consortium regarded such provision appropriate as part of a health service.

Peter Roderick, 12th May 2011