

**SUBMISSION BY THE RT HON LORD OWEN CH FRCP
TO THE HOUSE OF LORDS DELEGATED POWERS AND REGULATORY
REFORM COMMITTEE**

HEALTH AND SOCIAL CARE BILL

Background

Following correspondence with the Chairman I submit the following for the consideration of the Committee. First, a little explanation as to the background and why I am submitting to this Committee at such short notice.

The Committee will be aware of the 18th Report of the Select Committee on the Constitution printed on 14 September 2011 on the Health and Social Care Bill. I share their concerns, in particular, as expressed in heavy type in paras 17-19. As the Committee may also be aware Lord Peter Hennessy and I had tabled the following amendment to the Second Reading Debate of the Health and Social Care Bill.

Lord Owen to move, as an amendment to the above motion, at end to insert:

" , with the exception of the following clauses and schedules, which shall be committed to a select committee: Clauses 1 to 5; Clauses 8 to 10; Clause 47; Clause 58; Schedule 8; Clauses 59 to 73; Schedule 9; Clauses 74 to 99; Schedule 10; Clauses 100 to 105; Schedule 11; Clauses 106 to 118; Schedule 12; Clauses 119 to 147; Schedule 13; Clauses 165 to 176; Schedule 14; Clause 177; Clause 294; Schedules 23 and 24; Clauses 295 and 296; and that it be an instruction to the select committee that it reports Clauses 1 to 5, 8 to 10 and 47 to the House by 10 January 2012, and the rest of the Clauses and Schedules listed by the end of February 2012."

An amended version focusing only on duties and powers of the Secretary of State has now been tabled leaving out aspects of the Bill in relation to our specific concerns over delegated powers, particularly, but not exclusively, related to Part 3 Monitor, Clauses 58-79.

Lord Owen to move, as an amendment to Earl Howe's motion:

"and that a Select Committee shall be appointed to examine and make recommendations to the House on the issues raised by the 18th Report of the Constitution Committee, namely the Government's and Parliament's constitutional responsibilities with regard to the NHS, in particular to clarify (a) the extent to which the Secretary of State remains responsible and accountable for the comprehensive health service, and (b) individual Ministerial responsibility to Parliament, and to report on the extent to which legal accountability to the courts is fragmented; that this House requests that the services of Parliamentary Counsel be available to the Committee; and that the Committee shall report no later than 19 December 2011."

Narrowing our amendment will have the advantage of freeing up any Select Committee to report back to the House before the House rises for the Christmas recess on the issues highlighted by the Constitution Committee and it should also thereby be clearly seen as not blocking the passage of the Bill before the new session of Parliament begins. Inevitably there will be some overlap between what is

the preserve of this Committee and any special Select Committee that may be appointed.

Submission

Para 57 of the Department of Health Memorandum sets out, I believe, a key issue of principle for your Committee. Does the Committee believe that it is right on parliamentary and constitutional grounds that the "detailed provisions of the services to be provided and the groups to whom they must be provided" should continue to be set out in primary legislation as has been the practice in the NHS since 1948?

I submit that if the words National Health Service are to continue to be used in legislative language then these details must be spelt out as in existing legislation on the face of this Bill. The Government's refusal to do so could be so as to obscure from Parliament that the services to be provided and the groups to whom they must be provided may to be reduced and under the proposed new system this would not easily be apparent.

I urge the Committee to insist that these matters are not covered under delegated powers but are set out in primary legislation. What is at issue here is whether universal access is maintained openly as at present with reserve powers for the Secretary of State to ensure in the last analysis a continued answerability for comprehensive health cover to Parliament. At present PCTs must secure provision of seven key areas and the Secretary of State has to secure provision in other key areas. In addition there are also, as yet unresolved, questions about resource allocation and patient coverage for example whether allocation is to be based on ONS census population data or simply GP lists. These issues also ought to be included on the face of the Bill and not left to regulations which at this stage Parliament has not even seen and they should be affirmative.

I also believe more reserve powers for the Secretary of State are essential on the face of the Bill and are not left to regulations. Just as in the global financial crisis in 2007, which started with Northern Rock and spread in the UK to engulf three major banks, so an economic crisis could spread in the NHS. When in the early 1970s UK inflation was rising at over 20% Area Health Board budgets were under immense strain and I, as Minister of Health, under Barbara Castle, needed to ensure constant extra infusions authorised from the Treasury by the Department on a monthly - even in some cases weekly - basis. Decentralised systems need fail safe systems and a systemic failure that could quickly go through the new system proposed for the NHS is something Parliament should ensure is provided for in regulation. A pandemic spreading into this country would also throw great strains on the NHS and threaten its cohesion. Here the Secretary of State needs reserve powers in relation to public health.

At such times the public look to a Prime Minister for direction and for a Secretary of State to be ready and able to safeguard the health of the whole nation. This issue is fundamental and why we believe Clauses 1-5 and 8-10 and consequential matters in other Clauses need deliberative scrutiny by a Select Committee in addition to the scrutiny of this Delegated Powers and Regulatory Reform Committee.

Clause 10 raises fundamental questions about whether the Secretary of State ought to have reserve powers over CCGs and ways of overriding or adjusting the Secretary of State 's yearly Mandate to the NHS Commissioning Board in cases of impending as well as absolute failure.

The Committee may feel some of this goes beyond its terms of reference. But the issue is covered in Para 19 of the Department's Memorandum which attempts to explain why there is not a general power of direction. The argument that the Secretary of State can only promote but never be empowered to intercede over provision is unconvincing. It was never part of the cross party acceptance of creating an internal market in the NHS that an external market would develop as provided for in this Bill. In any NHS worthy of the name provision should be made for the Secretary of State to make directions and regulations in times of emergencies across all their duties and responsibilities. Otherwise why go on using the term NHS? It is also worth remembering that such powers are retained in Scotland, Wales and Northern Ireland. I recognise that in a decentralised health service as envisaged in this Bill the Secretary of State will not be as involved in managerial decisions as hitherto, some distancing, some rebalancing is necessary. Also if the Secretary of State is exercising such an exceptional power to intervene it should be done by affirmative resolutions.

A power of direction either through writing or through negative regulation does exist for the Secretary of State to direct Monitor para Clause 67 discussed in para 619 to 621 in the Department's memorandum. I welcome this as far as it goes, but even here I believe it should be by an affirmative resolution.

On clauses 71 to 73 the power of regulation, contrary to para 626 where it is argued in the Memorandum that the detail should not have been on the face of the Bill there is a strong case that it should be. If the Committee disagree with this I would at least urge you to consider making them affirmative orders as they cover very sensitive political issues.

On Clause 152 I believe the date should be specified on the face of the Bill for the transfer. And if this is not done it should only occur after the Secretary of State lays an affirmative order.

In relation to The National Institute for Health and Care Excellence clauses 234, 235, 236, 237, 238, 239 and 242, should be by affirmative order. The reason is independence. NICE has been very well established internationally as well as in the UK as being an independent body. That needs to be protected by the most demanding form of parliamentary scrutiny of any major regulations brought forward by the Secretary of State.

DAVID OWEN

10 October 2011