House of Lords, Monday 19 March 2012

Health and Social Care Bill

Petition

3.07 pm

Lord Owen:
My Lords, I beg leave to present a Petition from 38 Degrees, which prays that, in considering the matter of the NHS risk register, noble Lords remember that risks posed to our NHS by the Health and Social Care Bill are matters of significant public concern. The Petition, which I have already deposited with the Clerk of the Parliaments, bears over 486,000 electronic signatures.
Petition presented.

3.08 pm

Moved by

Earl Howe
That the Bill be now read a third time.
Amendment to the Motion
Moved by
Lord Owen
To leave out from "that" to the end and insert "the Bill be not read a third time until the House has had an opportunity to consider the detailed reasons for the first-tier tribunal decision that the transition risk register be disclosed and the Government's response thereto, or until the last practical opportunity which would allow the Bill to receive Royal Assent before Prorogation".
Lord Owen:
My Lords, this is rather a strange situation. We are coming to the end of an extraordinarily long process of debate, yet there is still one element that is not directly related to the Bill and much more concerns constitutional questions and the Freedom of Information Act. Throughout the Bill, various attempts have been made—mainly by those on the Cross Benches and the Opposition, it must be admitted—to use the Freedom of Information Act to reveal more information. That is a common situation that will be familiar to all Peers: in opposition we seek to use the Freedom of Information Act and in government we tend to try to clamp down on it. I myself tried to obtain the legal advice to the previous Labour Government in 2006 on the implications for introducing "any willing provider" provisions and other aspects as regards EU legislation. The Information Commissioner rejected my application. I

accept that because the Freedom of Information Act has been very well established, with a commissioner who makes recommendations. These can be challenged by government or any other interested party. The commissioners can then decide on whether to uphold them and then there is a further appeal.

What is extremely unusual about the request that this register be disclosed—the transitional register, which relates more to the legislation—is that two decisions under the Freedom of Information Act have upheld disclosure. It was a surprise to quite a lot of us that the first decision by the Information Commissioner was that the register be disclosed—in fact, there are two registers. What became interesting was that the tribunal was going to have the matter referred to it. I pay tribute to the noble Earl, Lord Howe, who, on behalf of the Government, recognising the dilemma that we might be in in this House, having come to our normal discussions on the Bill and wanting to hear a decision, asked the chairman of the tribunal, Professor Angel, to bring forward his hearings. That was done and the tribunal sat on the 5th and 6th of this month. Again, its decision was against the Government and was that this register which relates to the peculiar circumstances of this very complex and long legislation should be disclosed.

It is fair to say that the Government have another appeal procedure open to them. There is another tribunal that they can go to. I make it clear that I do not believe that any Freedom of Information Act worth the name would ride roughshod over the legitimate case of the Government to hold back information and, furthermore, to receive information that is confidential to them during the process of legislation or of good government. As we know, the previous Cabinet Secretary went to the tribunal and argued—and I do not disagree—that civil servants, when asked to make risk assessments, wanted to feel confident that they could raise the unspeakable, if you like, with Ministers and not feel hesitant about bringing forward risks.

However, risks go to the core of this legislation, and that is the most important thing about it. The issue before the House is whether the risks of continuing with the legislation—no one believes that there are no risks—are greater than the risks of stopping the legislation. Few would disagree that there must be some risks in stopping legislation, having continued with it this far. This is, if one likes, a balance of judgment. My premise and my plea to the House is that, before making a final decision, all those who respect freedom of information and the world that we now live in with a viable Freedom of Information Act should at least await the decision of Professor Angel and the tribunal. That is all I ask for.

The question is a practical one. Are there enough weeks or days available to the House before Prorogation? I took soundings and it was very clear—certainly among Cross-Benchers, who I am bound to talk to

more than others—that there was no belief that this issue should block the legislation; they did not think that it would be appropriate. There was a lot of substance in their argument. Whatever one's views about the Bill, that can be discussed at Third Reading. The question here was whether we could frame an amendment that would give the Government the freedom to bring this issue back before Prorogation. I used the words,

"until the last practical opportunity which would allow the Bill to receive Royal Assent before Prorogation".

We are not therefore discussing whether the Bill should go forward. This is not by any standard a blocking measure. Nor, I suggest to the House, would we really be sensible to make a decision in principle whether the tribunal's judgment should be upheld. It is anyhow, as I said, open to the Government to go to another appeal.

What seems to me pretty important is to listen to what the tribunal has decided. It has made a complex judgment, because it decided that the overall risk assessment should not be published but the transitional risk assessment should. A lot of people are still not sure how that distinction could have been made, but it has. We passed the legislation for freedom of information. I think it was an extremely good piece of legislation. It was put on the statute book in 2000 and was modified in 2005. As I said, it is not a complete licence for anyone to go in to get everything published that they might want. There are checks and balances. It seems to me that we should respect those checks and balances and await the decision.

There is a political and practical reason also, quite outside that. Those of us who have spent many hours and days on the Bill know that we can easily be in a bubble in which we discuss the line by line amendments and the practical wording of the legislation, but I suggest to the House that we are in a very unusual situation. On Friday, the result of a poll held among members and fellows of the Royal College of Physicians was announced. I have an interest to declare. I am a fellow of the Royal College of Physicians and I voted. Thirty-five per cent voted, which, given the circumstances—ballots also go to overseas members—was a pretty high poll, and 69 per cent voted that the legislation should not go forward. Only 6 per cent believed that it should.

Everyone in this House makes their own judgment about a Bill. Pressures from outside, electronic petitions and opinion polls among royal societies come and go and we still make our decisions. I have no complaints about that and I do not believe that the medical profession has any particular monopoly of wisdom on this issue. What is staggering about the legislation is how it has been opposed by practically everybody who works in the health service. I refer not just to unions such as the BMA and the Royal College of Nursing, which have dual functions, both representing their professional bodies. Every royal college that balloted

its members has come up with that conclusion.
All I am saying to the House in all sincerity is that we should follow due process on this Bill. Let us demonstrate to everybody that, even if they disagree with it, if the Bill is passed, they must co-operate with the legislation of the House. They must accept it in good will as the judgment of Parliament and they must work within the legislation. But do not leave unfinished business, do not leave out one massively important issue, which is to hear the view of the tribunal that we erected in the legislation and gave the freedom to make a judgment, and which has twice opposed the Government's judgment. I rest my case.

At end of debate on the Motion:

Lord Owen:
My Lords, we have heard a lot of speeches and I do not intend to take long, but I reiterate—if any noble Lord has come in late to this debate—that they should again read the amendment. It makes it clear that what we are trying to do is find enough time—a matter of a few weeks—to hear the opinion of the tribunal that has found against the Government on the disclosure of the risk register. That is a provision within the Freedom of Information Act and follows the earlier decision against the Government arguing for the disclosure of the transitional risk register by the commissioner.
It is pretty unusual for the Government to find two such rulings against them, and it seems perfectly legitimate, before making a final decision—which I readily concede has to be made before prorogation—to give the courtesy, let alone anything else, of hearing the judgment. It is almost as if we are afraid of the judgment.
In fairness to Professor Angel, we heard from the former Lord Chancellor about his credentials. People do not sit on the tribunal for freedom of information just on one case. They have made many different judgments; they know the issues. With respect to the former Permanent Cabinet Secretaries who have spoken, those who sit on the tribunal know the issues—I do not say as well as former Cabinet Secretaries, but they were looking at it from one side of the equation, the well-being of the Civil Service and the service and information they gave to Ministers. The Freedom of Information Act looks at it from a wider perspective. It looks at it for the good governance of the country as a whole. It urges people to look at why we have open government and greater transparency: because people find it much easier then to accept democratic decisions. This is about a democratic process.

Lord Alderdice:
My Lords, I have listened carefully to what the noble Lord, Lord Owen, has said. My understanding from his earlier intervention was that he felt

it important for your Lordships' House to understand what was in the transitional risk register so that that would inform its debate on Third Reading. In the light of what my noble friend Lord Howe said—that it is almost certain that that material would not come into the public domain over the next few weeks, as I think that the noble Lord accepts—all that would come into the public domain over the next few weeks would be the reasons why the judgment was made, not the content of the transitional risk register itself. Therefore, I just want to be clear that the noble Lord is saying that all that your Lordships' House could do would be to debate the reasons of the tribunal, not the content of the risk register. I am not clear how the reasons of the tribunal would inform our Third Reading debate.

Lord Owen:

It is exactly the wording of the amendment,
"to consider the detailed reasons for the first-tier tribunal decision",
if there is sufficient time. This is the issue of freedom of information. I have already openly admitted that Governments tend to restrict information and Oppositions want the maximum amount of information. That is the inherent tension which the Freedom of Information Act was established to try to resolve. It seems wiser to listen to those voices. The noble Earl raised the question of constitutional issues. The Bill raises some serious constitutional issues. The Government have no mandate for the Bill. They specifically went to the electorate and said that there would be no top-down reorganisation of the National Health Service. That is considered by a lot of people outside this House to be a flagrant lie. That is one constitutional issue.

Noble Lords:

Oh!

Lord Owen:

I said that people outside this House consider it to be a flagrant lie. I have been around Parliament long enough to know what I cannot say and what I can.

There is another aspect to the Bill. The Government also fought an election on the basis of a constitutional promise that there would be no increase in the powers of EU legislation unless there was a referendum. There are very serious questions about the Bill as to the impact on EU legislation and the extent to which we will see the Commission making decisions on the National Health Service that it has not hitherto thought it either wise or, possibly, empowered to make. That is the second big constitutional question.

Lord Clement-Jones:

My Lords—

Lord Owen:

No, the noble Lord has had his say. All I am saying now to the House is that this is a decision on which there are strong opinions in many ways.

A lot of Members will vote just on the basis that under no circumstances do they want risk registers published.
I say only this—that when companies are having an IPO, we legislate for them to produce the fullest, most detailed risk register of this. We also empower them in their annual, and in the case of America in their quarterly, statements to reveal risk registers at a penalty of going to court if they lie about it. There were times in this debate when I almost thought we were being asked to give a complete carte blanche to the Civil Service to say what it liked irrespective. I hope that is not the position of the Cabinet Secretaries and the Permanent Secretaries. It is possible that either a commissioner or a tribunal might look at a risk register and think that there were flagrant factual errors.
I think it is very dangerous to use "principle" on this question, if I may say so to the noble Earl. The principle surely cannot be that under the Freedom of Information Act some risk registers might never need to be published in the public good. That is a judgment on which, as he says, one can then go to appeal on. However, there comes a point when one would have to judge against the background of repeated demands for disclosure. It is on this that the House must make up its mind. Can we wait a couple of weeks—three at the most—before the House prorogues to hear the words of the chairman of the appeal tribunal to whom we in the Freedom of Information Act gave the power to make that decision? The fact that it is against the Government does not mean we should give them a carte blanche, and I hope that this House will not do so. I wish therefore to test the opinion of the House.
4.41 pm
Division on Lord Owen's amendment.
Contents 213; Not-Contents 328.
Amendment disagreed.