From the Earl Howe
Parliamentary Under Secretary of State for Quality (Lords)

Department of Health

Richmond House
79 Whitehall
London
SW1A 2NS

Tel: 020 7210 3000

Baroness Jay of Paddington
Chairman
Select Committee of the Constitution
House of Lords
London
SW1A 0PW

10 OCT 2011

Dear Margaret,

HEALTH AND SOCIAL CARE BILL: 18th REPORT OF SESSION 2010-12

1. I would like to thank you for the Committee's report on the Health and Social Care Bill. I am grateful for the consideration paid to the Bill and welcome the opportunity to address the issues raised in this report. I trust that the House will give the findings of this report and the Government's response the due consideration these matters deserve.

2. The Committee raised four substantive points in relation to the Bill, which the Government has considered carefully and which I will attempt to answer in turn. You conclude "that it may well be necessary to amend the Bill in order to put this matter 'beyond legal doubt'."[1]

The Bill's impact on ministerial responsibility and accountability for the NHS

3. Your report raises concerns about ministerial responsibility and accountability for the NHS. We consider ministerial responsibility and accountability to be of the utmost importance and thank the Committee for its deliberations on this subject. However, we do not agree that the Bill places undue risk on the Government's accountability for the NHS to Parliament or the courts. The report says:

[1] Paragraph 5, *18th Report of Session 2010-2012, Health and Social Care Bill;* House of Lords Select Committee on the Constitution (30/9/11)

> **"We are concerned that the Bill, if enacted in its current form, may risk diluting the Government's constitutional responsibilities with regard to the NHS."[2]**

And:

> **"It is not clear whether the existing structures of political and legal accountability with regard to the NHS will continue to operate as they have done hitherto if the Bill is passed in its current form. As such, the House will wish carefully to consider whether these changes pose an undue risk either that individual ministerial responsibility to Parliament will be diluted or that legal accountability to the courts will be fragmented."[3]**

4. As the Committee highlights, the Bill proposes to amend the NHS Act 2006, which currently places a duty on the Secretary of State to 'provide or secure the provision of services' in accordance with the Act.[4]

5. The Government's proposed amendment will place a duty on the Secretary of State to 'exercise the functions conferred by this Act so as to secure that services are provided in accordance with this Act'.[5]

6. The Government accepts that replacing the Secretary of State's duty to 'provide or secure the provision of services' with a duty 'to secure that services are provided' does alter the Secretary of State's political accountability in so much as he will no longer have a statutory duty to provide or commission services which is at present delegated to NHS bodies. This does not reduce the overall responsibility that the Secretary of State has for the NHS. The Secretary of State retains

---

[2] Paragraph 4, ibid.
[3] Paragraph 18, ibid.
[4] NHS Act 2006, Section 1(2)
[5] Health and Social Care Bill 2011, Section 1(2)
[6] NHS Act 2006, Section 3(1)
[7] Health and Social Care Bill 2011, Section 10(1)
[8] Health and Social Care Bill 2011, Section 1(1)
[9] NHS Act 2006, Section 1(1)
[10] NHS Act 2006, Section 3(1)
[11] Health and Social Care Bill 2011, Section 1E (2)
[12] Paragraph 17, *18th Report of Session 2010-2012, Health and Social Care Bill;* House of Lords Select Committee on the Constitution (30/9/11)
[13] Paragraph 19, *18th Report of Session 2010-2012, Health and Social Care Bill;* House of Lords Select Committee on the Constitution (30/9/11)
[14] The Secretary of State will be able to secure public health services by providing or commissioning them himself, under new sections 2A and 2B – see clauses 8 and 9.
[15] Paragraph 14, *18th Report of Session 2010-2012, Health and Social Care Bill;* House of Lords Select Committee on the Constitution (30/9/11)

political accountability for the NHS and legal accountability for the statutory functions placed on him.

7. The Bill also proposes to remove the duty on the Secretary of State to 'provide throughout England, to such extent as he considers necessary to meet all reasonable requirements'[6]. This duty will now be placed on clinical commissioning groups ("CCGs") which 'must arrange for the provision ... to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility'[7].

8. The purpose here of removing the Secretary of State's duty to provide particular services and instead giving the function of commissioning those services to the NHS Commissioning Board ("the Board") and CCGs is simply to make clear that it should not be the responsibility of ministers to provide or commission services directly. Currently the Secretary of State uses directions to delegate the duty in section 3 to Primary Care Trusts ("PCTs"), and to direct them about its exercise. The Government's policy is that the Board and CCGs should not be subject to a general power of direction and should instead use their professional expertise to act in the best interests of patients, free from political micromanagement. In practice, the Bill will change little; there will continue to be no involvement in the commissioning process for Whitehall or the Secretary of State.

9. Furthermore, this Bill will not change the long shared policy aim of all the main parties in England to secure a commissioner/provider split in NHS services in order to avoid conflicts of interest and maximise value for money for patients and taxpayers. By explicitly removing the Secretary of State's duty to provide, legislation will better reflect what has been the reality of the NHS for years.

10. Currently, PCTs commission rather than provide the majority of their services, and once PCTs complete the process of transferring their community health services provider arms, the separation will be complete. In these circumstances, the Secretary of State's duty to provide under section 1(2) of the 2006 Act would no longer be necessary or appropriate, in the light of the policy that neither the Secretary of State nor NHS commissioners would be providing NHS services. Even without the rest of the Government's modernisation programme, there would be a case for removing the duty to provide, so that the legal framework accurately reflects the practical realities.

11. Removing the duty to provide and giving CCGs the function of commissioning does not mean that the Secretary of State no longer

has any control or influence over the NHS. In addition to the overarching duty to promote a comprehensive health service[8] and his duty – for that purpose – to exercise his other functions so as to secure that services are provided, the Bill gives the Secretary of State extensive powers of oversight and stewardship of the NHS.

12. For example, the Secretary of State will have a wide range of functions to set national objectives, requirements and parameters for the health service, including:

- the duty to issue a mandate setting objectives and requirements for the NHS Commissioning Board (new section 13A in clause 20);
- "standing rules" regulations imposing requirements on the Board and CCGs (clause 17);
- regulations determining how the Board authorises or intervenes in CCGs (new sections 14C and 14Z20 in clause 22);
- regulations setting procurement rules for commissioners to follow (clause 71);
- a power of veto over Monitor's first proposed set of general licence conditions for providers; and
- regulations defining which health or social care services should be subject to regulation by the Care Quality Commission and defining the safety and quality requirements that those services should be regulated against (sections 8 and 20 of the Health and Social Care Act 2008).

13. The Bill also places overarching duties on the Secretary of State in relation to the health service, such as duties about improving the quality of care and reducing inequalities (clauses 2 and 3), and a duty to report annually on the performance of the health service (clause 50).

14. These powers and duties together make the Secretary of State's responsibility for the NHS clearer than ever before.

15. To make clear that Ministers are responsible for overseeing the NHS and holding it to account, the Bill creates an explicit duty to keep under review how effectively all the national NHS bodies are performing their functions (clause 49). The Secretary of State will have extensive powers of intervention in the event of a significant failure by any of those bodies.

16. The Committee's report argues that the Bill would break the link between the Secretary of State's duty to promote a comprehensive

health service[9] and the duty to provide or arrange services[10] in the NHS Act, 2006. Whilst it is true CCGs do not have a duty to promote the comprehensive health service in the Bill, this does not mean they can simply disregard it. It is clear from the Bill that a comprehensive health service must continue to be promoted in England. It is also clear that the key specific duties and powers in the 2006 Act (as amended by the Bill), including section 3, have been imposed or conferred so that such a service can be promoted. This means that CCGs must have regard to the duty of the Secretary of State to promote a comprehensive health service

17. As stated in earlier paragraphs, the Secretary of State and the Board will have powers and duties in place to ensure that if the level of services that are being commissioned by CCGs mean that there is a risk to the provision of a comprehensive health service, they will step in to rectify this. For example, the Board will be subject to the duty[11] to promote the comprehensive health service and will set the commissioning outcomes framework and maintain a national oversight of CCGs to this end. And, if there was any risk that CCGs might fail to commission an important service, the Secretary of State would have power to make "standing rules" regulations to require this service to be commissioned.

18. In relation to the accusation that the Bill poses a risk of fragmentation of legal accountability to the courts, whilst CCGs would be the target of any legal challenges to decisions about the commissioning/provision of health services, this largely reflects the current situation. Under the current system, PCTs and not the Secretary of State are the proper target of such legal challenges, even though PCTs are exercising the Secretary of State's functions. The PCTs are the bodies making decisions about local services and are therefore liable to judicial review. Paragraph 16 of Schedule 3 to the 2006 Act means that, even when exercising the Secretary of State's functions, any liabilities incurred are enforceable against the PCTs and not the Secretary of State.

19. Similarly, in future it will be CCGs which are subject to legal challenge about local decisions. The Secretary of State could also be challenged by way of judicial review in relation to his statutory duty to secure that services are provided, as could the Board in relation to its corresponding duty in new section 1E(3)(b) to exercise its functions in relation to CCGs in that way. This mirrors the current system, whereby the Secretary of State and Strategic Health Authorities ("SHAs") could also be subject to judicial review. As such, we reject the notion that fragmentation of legal accountability will occur under the new Bill.

The Bill's specific provisions for ensuring ministerial accountability

20. The Committee's report questions whether the measures set out in the Bill will do enough to achieve proper ministerial accountability for the NHS. The Government firmly believes that it does. The Committee's report says:

> **"Under clause 49 the Secretary of State must 'keep under review the effectiveness' of a range of NHS bodies. These include the NHS Commissioning Board but do not include CCGs. Under Clause 50 the Secretary of State must publish an annual report on the performance of the health service in England. While these clauses will make a modest contribution towards accountability, the House will wish carefully to consider whether they are sufficient."[12]**

21. As explained above, clauses 49 and 50 are only a part of the package of ways in which accountability will be assured in the new system. The fundamental provisions which mean that the Secretary of State will continue to be politically and legally accountable for the NHS are his duties to promote a comprehensive health service and to exercise his functions so as to secure that services are provided.

22. The Bill will improve Ministerial accountability to Parliament and the public. For the first time the Secretary of State will have to report to Parliament on the performance of national NHS bodies and the state of the NHS as a whole.

23. Currently, the Secretary of State has sweeping powers to decide how large parts of the NHS operate, through wide powers of delegation and direction over PCTs and SHAs. For example, the way in which NHS services are commissioned, the way that providers are paid, and the way that competition works in the NHS are largely decided by the Minister of the day, with little or no direct accountability to Parliament. Yet, as the debate around this Bill has illustrated, these are all fundamental issues where Parliament has a strong view and a legitimate interest. Under our proposals, it will be Parliament that decides, through the Bill, the key parameters of how NHS care is commissioned and regulated. Detailed requirements will be set out in regulations (which are subject to Parliamentary scrutiny) rather than in directions (which are not).

The need to amend the current Act

24. The Committee asks whether it is necessary to amend the relevant sections of the NHS Act 2006 at all. The Committee's report says:

> **"It is not self-evident that the proposed changes are a necessary component of the Government's reform package. Given the uncertainty as to the interpretation of the provisions proposed in the Bill, could not the relevant wording contained in the 2006 Act be retained?"**[13]

25. The Government considers that changing the 2006 Act is vital. Section 1(2) of the 2006 Act needs to be amended to remove the Secretary of State's duty to provide services in accordance with the Act, in order to reflect the changes to the legal framework for the NHS made by the Bill. This is particularly true because:

a. The functions relating to commissioning services are to be conferred directly on the NHS Commissioning Board and CCGs, rather than relying on the current system of directions to PCTs to perform the Secretary of State's functions.

b. The Secretary of State, the Board and CCGs will not have the function of providing NHS services. The Board and CCGs are to be responsible for the commissioning of services but not provision.

c. The Secretary of State will secure the provision of services by exercising his functions in relation to other bodies, for example through the mandate, rather than as in the 2006 Act where the function of providing or commissioning services is placed on the Secretary of State who in turn delegates it to NHS bodies by directions.

26. The Government's policy is that responsibility for commissioning NHS services should be imposed clearly in primary legislation on the bodies who will actually carry out that function, not on the Secretary of State, who does not in practice commission or provide services under the current system. In the Government's view, outside of the cases of significant failure or emergencies which are catered for in the Bill, the Secretary of State should not have direct responsibility for commissioning when these functions have been conferred upon CCGs and the Board by Parliament. This provides greater clarity and accountability for the NHS.

27. In addition, as discussed in paragraphs 9 and 10 of this letter, the Government's policy is that neither the Secretary of State, nor the

NHS bodies responsible for securing local services, should be providing NHS services. This means the Department, the Board and CCGs should not be directly managing NHS hospitals or other facilities, nor employing the staff providing NHS services[14].

28. It is for these reasons that the proposed changes to sections 1 and 3 of the 2006 Act do represent a necessary component of the proposed reform package.

The Secretary of State's duty to promote autonomy

29. The report points to the new duty to promote autonomy in the health service placed on the Secretary of State as a further indicator that constitutional accountability for the NHS will be severed. The Government believes that devolving day-to-day decision-making to front-line organisations is essential to improving the quality of the NHS and making services more responsive to patients. The duty in clause 4 around promoting autonomy is important to support and reinforce this. But it will in no way remove overall responsibility from Ministers, and the duty will always be subservient to the greater interests of the health service.

30. The Committee's report says of the duty to promote autonomy (Section 4):

> **"This provision underscores the extent to which the chain of constitutional responsibility as regard to the NHS is severed."[15]**

31. The duty on the Secretary of State to act with a view to securing autonomy is subject to the words "so far as is consistent with the interests of the health service". This means that the interests of the health service must always take priority. That wording must also be seen in the overall context of the Bill, in particular the duty to promote the comprehensive health service and the new duty to the improve the quality of services. The effective discharge of these core duties is plainly in the interests of the health service and takes precedence over the promotion of autonomy. The duty of autonomy will never prevent the Secretary of State intervening in the interests of the health service.

32. The specific purpose of the autonomy duty is to free frontline professionals to focus on improving outcomes for patients rather than looking up to Whitehall. It requires the Secretary of State to always consider the impact of his actions on health service organisations and

ensure that he is acting proportionately. It does not undermine his overarching duty to promote a comprehensive health service nor does it enable ministers to abdicate responsibility for the NHS.

Conclusion

33. I would once again like to thank the Committee for examining the constitutional implications of the current Bill. Whilst we accept that specific responsibilities will change as new NHS bodies are set up, the Government does not believe that this in any way diminishes ultimate ministerial accountability or responsibility for the NHS. Indeed we believe the measures set out in it strengthen and make accountability and responsibility clearer than it has ever been. We do not consider any amendments necessary to put this matter 'beyond legal doubt'.

34. In order to ensure that the House can consider our response to the Committee's report in advance of the Bill's second reading, I am copying in all members of the Committee and providing copies for interested Peers in for the Printed Papers Office. I am also placing a copy in the library of the House.

Yours ever,

Freddie

EARL HOWE