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ANALYSIS

Health and Social Care Bill 2011: a legal basis for charging and providing fewer health services to people in England

Despite recent amendments to English health bill in response to opposition, **Allyson Pollock**, **David Price**, and **Peter Roderick** argue that it will enable charging for health services that are currently free

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Entitlement to free health services in England will be curtailed by the Health and Social Care Bill currently before parliament.[1] The bill sets out a new statutory framework that would abolish the duty of primary care trusts (PCTs) to secure health services for everyone living in a defined geographical area. New clinical commissioning groups (CCGs) will arrange provision of fewer government funded health services and determine the scope of these services independently of the secretary of state for health. They may delegate this decision to commercial companies. The bill also provides for health services to be arranged by local authorities, with provision for new charging powers for services currently provided free through the NHS (clauses 1, 12, 13, 17, and 49), and it will give the secretary of state an extraordinary power to exclude people from the health service. Taken together the measures would facilitate the transition from tax financed healthcare to the mixed financing model of the United States. We provide an analysis of the key legal reforms that will govern policy development and implementation if the bill is enacted.

Repeal of the health secretary's duty to provide health services

Under current law the secretary of state has a duty to "promote" a comprehensive health service and, for that purpose, a duty to provide specific services throughout England to meet all reasonable requirements.[2] Although the secretary of state will continue to have a duty to "promote" a comprehensive health service, clause 12 of the bill changes the duty to provide to a duty to arrange, which it transfers from the health secretary to CCGs. This weakens the health secretary's overarching duty because primary legislation no longer specifies the measures he or she must take to promote a comprehensive health service.

Recent amendments would mean that the secretary of state "retains ministerial responsibility to Parliament for the provision of the health service in England."[3] However, this would not restore the link between the duties to promote and to provide and would continue to allow deregulation of provision under the measures we describe below.

Abolition of area based responsibilities

Clause 33 of the bill would abolish primary care trusts, and clause 12 in effect abolishes their area based responsibilities. Unlike PCTs, CCGs will not have to provide health services for everyone living within a defined, contiguous, geographical area. Instead, a CCG will be responsible for people on the lists of its constituent primary care providers, which may draw patients from anywhere in the country. Clause 12 of the bill requires CCGs to take responsibility for "persons who usually reside in" their area but are not with another CCG, but they will not necessarily be responsible for anybody else, such as temporary residents, visitors, or workers who have not registered with a member of the group—except for "emergency care."

Legal basis for CCGs arranging fewer government funded health services

CCGs would be required to arrange fewer statutory services than PCTs currently provide or arrange for areas. Under current "functions regulations,"[4] PCTs must provide or secure the following services on behalf of everyone in a specified geographical area:

- Accident and emergency services and ambulance services
- Services provided at walk-in centres
- Facilities and services for testing for, and preventing the spread of, genitourinary infections and diseases and for

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treating and caring for persons with such infections or diseases

- Medical inspection and treatment of pupils
- Services relating to contraception
- Health promotion services
- Services in connection with drug and alcohol misuse
- Any other services that the secretary of state may direct.

These regulations will be repealed, and the bill does not require CCGs to secure the above services. They have to arrange only ambulance services and "emergency care" for everyone living in the area defined in their constitutions. The bill therefore establishes a legal basis for CCGs to secure fewer government funded health services.

The bill also transfers from the secretary of state to CCGs the power to determine what is "appropriate as part of the health service" for certain individuals. The services concerned are care of pregnant and breastfeeding women, care of young children, prevention of illness, care of people with illnesses, and aftercare of people who have been ill.

In this way CCGs may decide what is appropriate for government funding. Moreover, decisions about what is appropriate can be delegated to commercial companies and, under rules set out in schedule 2 of the bill, need not be made by general practitioners, other clinicians, or NHS staff.

Two further provisions change substantially the context in which decisions about which services are appropriate for government funding will be taken. Firstly, clause 103 of the bill requires all providers of health services to draw up patient eligibility and selection criteria as a condition of their licence. According to the bill, the criteria must be applied where there is a choice of providers to determine "whether a person is eligible, or is to be selected, to receive health care services provided by the licence holder for the purposes of the NHS." For the first time in the history of the NHS, access to government funded health services will therefore be a function of providers' selection policies as well as of CCGs' determination of what is appropriate as part of government funded health services under clause 12.

Secondly, the bill would abolish the duty of local providers under the Community Care (Delayed Discharges etc) Act 2003 to give notice to local authorities when a patient discharge from hospital is considered "unlikely to be safe […] unless one or more community care services are made available."[5]

Healthcare functions of local authorities, CCGs, and secretary of state will overlap

Under new public health functions, the bill establishes a parallel health service in the local authority sector. The public health functions give local authorities powers to arrange, among other things, "services or facilities for the prevention, diagnosis or treatment of illness" (box). Similar functions are also conferred on CCGs and on the secretary of state. The government acknowledges that responsibilities will overlap but does not make clear which services must be provided by which body as part of the centrally funded government health service and which may be subject to the new charging powers.[6]

The powers are set out in new sections 2A and 2B, which cover, respectively, public health protection duties of the secretary of state that may be delegated to local authorities (under section 6C(1)) and public health improvement functions of local authorities and the secretary of state (box).

Local authorities do not have to provide services that are not arranged by CCGs

There is no legal requirement under new section 2A and 2B for any of the services that are not arranged by CCGs to be provided by local authorities. By not imposing on local authorities a duty to provide or arrange the provision of these services—the only stated exception to date being sexual health services—the bill establishes the legal basis for not providing these services.

There have been a number of government statements about what government health budget will fund and assurances that "the public health budget will fund the NHS to commission certain public health services, which will include immunisation programmes, contraceptive services, screening programmes, public healthcare for those in prison or custody, and children's public health services from pregnancy [sic] to age five (including health visiting)."[6] However, virtually none of these services is mandated in the bill and the government has indicated that a wide range of services may not be mandated in the future.[7]

How new charges can apply

The bill would allow charges to be introduced for services provided or commissioned by local authorities under their public health functions or under public health functions that the secretary of state has delegated to them (see box). In addition, where services fall out of the functions regulations and where CCGs or their commercial companies decide that certain services are no longer appropriate as part of the government funded health service, commercial providers would be able to offer services privately and to charge for them.

People may be excluded from health services

Current law does not permit anybody to be excluded from the health service.[2] However, the bill includes a measure that would allow restrictions of the people for whom CCGs must arrange provision. Under Clause 12, new section 3(1A) of the 2006 Act would state: "For the purposes of this section, a clinical commissioning group has responsibility for—(a) persons who are provided with primary medical services by a member of the group, and (b) persons who usually reside in the group's area and are not provided with primary medical services by a member of any clinical commissioning group." New section 3(1D) states: "Regulations may provide that subsection (1A) does not apply—(a) in relation to persons of a prescribed description (which may include a description framed by reference to the primary medical services with which the persons are provided); (b) in prescribed circumstances."

Explanatory notes to the bill suggest that the power will be used to exclude "people who are resident in Scotland but registered with a practice that is a member of a CCG," and possibly "temporary residents." Residents of Northern Ireland and Wales would also be affected. However, as drafted new section 3(1D) would also allow the secretary of state to make regulations to exclude people receiving primary medical services under particular types of contract, such as those entered into by large corporate providers. Patients receiving care from providers with alternative provider of medical services (APMS) contracts, for example, could cease to be NHS patients, and their care would no longer have to be provided free of charge.

Public health functions that are subject to new charging powers

Section 2A: Secretary of state duty as to protection of public health that may be delegated to local authorities

- Research or such other steps as the secretary of state considers appropriate for advancing knowledge and understanding;
- Microbiological or other technical services (whether in laboratories or otherwise)
- Vaccination, immunisation, or screening services
- Other services or facilities for the prevention, diagnosis, or treatment of illness
- Training
- Information and advice
- Services of any person or any facilities

Section 2B: Functions of local authorities and the secretary of state as to improvement of public health

- Information and advice
- Services or facilities designed to promote healthy living (by helping people address behaviour that is detrimental to health or in any other way)
- Services or facilities for the prevention, diagnosis, or treatment of illness
- Financial incentives to encourage people to adopt healthier lifestyles
- Assistance (including financial assistance) to help people minimise any risks to health arising from their accommodation or environment
- Training for people working or seeking to work in health improvement

Conclusion

Legal analysis shows that the bill would allow reductions in government funded health services as a consequence of decisions made independently of the secretary of state by a range of bodies. The bill also fails to make clear who is ultimately responsible for people's health services, and it creates new powers for charging. It signals the basis for a shift from a mainly tax financed health service to one in which patients may have to pay for services currently free at point of delivery. The government has been unable to show, as it has argued, that these changes are "vital."[6] It does not have a mandate for the legal destruction of the founding principles of the NHS.

Contributors and sources: AMP and DP have researched and written extensively on health systems and health policy issues. This article arose out of 15 legal and policy briefings for the House of Lords. PR is a public health lawyer. He has written several legal analyses of the bill since May 2011 and has coauthored many briefings for peers: www.dutytoprovide.net. AMP, DP, and PR contributed equally to the article.

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