



Briefing Paper

28th February 2012

Health and Social Care Bill House of Lords Report Stage Briefing: Competition

Royal College of General Practitioners

Overview

At the beginning of February 2012 the RCGP wrote to the Prime Minister calling for the withdrawal of the Health and Social Care Bill in its entirety. This decision was made following careful consideration of the amendments to the Bill published by the Government on 1st February 2012, and responses received from Ministers following our requests for clarification on our and our members' concerns.

Whilst the RCGP has consistently said that we support the principle of greater involvement of clinicians in designing and shaping services to meet the needs of their local population, in our view this does not necessitate the sweeping structural changes in England that would be introduced by the Health and Social Care Bill.

We are particularly concerned that increasing competition within the NHS will have a damaging effect on patient care and will fragment the services that the NHS provides at a time when we need a renewed emphasis on collaboration and integration.

Ahead of competition being scrutinised by Peers at Report Stage, the following briefing provides the RCGP's views on which areas of the Bill relating to competition will be most damaging, and which amendments we believe could help mitigate that damage.

This briefing relates to competition only – the RCPG set out our wider concerns about the Bill in a briefing sent to Parliamentarians at the beginning of the Report Stage, available on our website [here](#).

RCGP View on Amendments Relating to Competition

1. The RCGP would like to see amendments that remove Part 3 of the Bill in its entirety

The RCGP believes that competition, where it can be shown to enhance patient care can bring benefits to the health service and there are many examples of voluntary sector organisations delivering excellent care. However, the proposed introduction of 'any qualified provider' and the functions of Monitor in relation to competition risk opening the health service to increasing

fragmentation at a time when providing more integrated services should be prioritised. We think that the damage to patient care potentially caused by the Bill could be mitigated by removing Part 3 in its entirety.

In the College's view the Bill will unleash the full force of competition in the NHS without adequate evidence to show that this will benefit patients. A recent King's Fund report found that competition and choice in contestable services may inadvertently cause deterioration in the quality of essential services provided by financially challenged trusts. Market forces alone will rarely drive trusts into voluntary agreement to reconfigure services in ways that will improve the quality of patient care as well as drive down costs.¹

Evidence from other countries shows that competition results in fragmentation of services. The organisation and delivery of health care in a nation state is not suited to competitive market mechanisms, as health care is a natural monopoly that requires strategic, regional and local planning. The use of health care is unpredictable and a pooling of risks is necessary to mitigate against this.

For the growing share of elderly patients with multiple conditions, competition around pathways could carve health services into multiple vertical slices that manage care one condition at a time. Although co-ordination would improve along each pathway, new forms of fragmentation across pathways for multiple conditions could make care less holistic and harder for the patient to navigate².

In Clause 97 of the Bill, the Government has tabled amendments to give Monitor the power to set and enforce license conditions for the purposes of enabling integration and enabling cooperation. This is welcome, and addresses the concern previously voiced by the College that the new duty on Monitor to promote integration, introduced following the "pause", had no regulations or powers to back it up. Despite this, it remains open to Monitor to rule that the integration of services raises competition concerns.

The College believes the current system of regulation that allows a limited degree of competition allows the NHS to function equitably and fairly. **We therefore call for Part 3 of the Bill on the regulation of health and adult social care services to be removed in its entirety.**

Other Potential Amendments on Competition

Should Part 3 remain in the Bill, the College would wish to see clarification and further amendments from the Government in the following areas.

2. The RCGP supports amendment 165, which will ensure that Monitor must exercise its functions with a view to preventing anti-collaborative behaviour.

¹ Reconfiguring hospital services: Lessons from South East London. Kings Fund 3 March 2011
<http://www.kingsfund.org.uk/publications/reconfiguring.html>

² Ham C (2007). 'The right kind of competition?' *Journal of Health Services Research and Policy*, vol 12, no 1, pp 54–5.

As a result of Monitor's continuing role and the emphasis on competition there is likely to be a great deal of confusion about when to collaborate, despite amendments put forward by the Government to clause 97.

For example, there are no provisions in the Bill to permit Monitor and the NHS Commissioning Board to grant waivers to clinical commissioning groups wishing to pursue larger-scale integration or long-term contracts from being subject to challenge under competition rules, choice policies or procurement guidelines.

The Dutch system provides a useful practical example of how the imposition of a competition regulator such as Monitor affects health care provision. The Dutch GP association, a national body, has been recently fined 7.7 million Euros (£6.4 million) for a "bad case of anti-competitive behaviour" for working to ensure that all areas of the country were adequately provided with GP services. The RCGP believes that amendment 165 will help ensure we avoid such a situation occurring in the NHS as a result of the Bill.

3. The College supports amendments 174 and 174a which seek to ensure that integration is taken into account and promoted when resolving conflicts between the functions of Monitor.

Despite the amendments made to the Bill so far, conflicts remain between Monitor's key functions on competition and integration, generating uncertainty over how Monitor will support integration in practice. These amendments will ensure that integration is placed at the heart of Monitor's functions.

4. The RCGP supports amendment 177, which will ensure that the NHS is given protection from European competition law so that it is not obstructed in carrying out its duties

European competition law aims to ensure that free competition prevails. Article 106 of Treaty on the Functioning of the European Union makes clear that competition law will be applied generally, but not where public services being provided might be obstructed and describes these public services as 'services of general economic interest'.

Amendment 177 aims to insert a new Clause at the start of chapter 2 on competition which clarifies that the provision of the NHS is a service of general economic interest and is therefore awarded protection under article 106 so that competition law does not obstruct its functioning.

There have been arguments put forward that the amendments to protect the NHS from competition law are futile as it already applies to the NHS and has done so since the last Government but it is the College's view that this argument only serves to strengthen the justification for why this clarification is needed.

5. The College supports amendment 178 that places a new duty on NHS providers of health care services to co-operate with each other across health and social care and have particular regard to the integration of services.

Integration requires the coordination of complex sets of services within a coherent care package and often requires costly investment – ranging from visible, often large-scale expenditure on

electronic health records and other IT, to procedures to enhance communication, and governance changes. As such, it cannot be undertaken lightly.

The chances of providers working together to introduce such arrangements is greatly improved if they are subject to a joint incentive to do so. These amendments would ensure that the Bill genuinely enshrines collaboration and integration in service provision.

6. The RCGP supports amendments 186 to 188 that remove clauses 78 to 80 and as a result removes the Competition Commission's duty to review the development of competition in the provision of health care services for the purposes of the NHS, and the exercise by Monitor of its functions in relation to this.

Under the Bill, the Office of Fair Trading and the Competition Commission will be the sole organisations with responsibility for investigating provider and commissioner behaviour, whereas at present, the Co-operation and Competition Panel (which will be abolished in April 2012) also advises the Department of Health and Monitor on whether for example to permit mergers involving NHS trusts and foundation trusts in England.

The College believes that as the NHS is not a utility like water, gas and electricity, and therefore should not be regulated like one.

FURTHER INFORMATION

- Further briefing materials on the Health and Social Care Bill from the Royal College of General Practitioners are available on the College's website here:
http://www.rcgp.org.uk/policy/health_bill.aspx.

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