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The Health Service Commissioners (Amendment) Bill

Bill 15 of 1999-2000

Sir Geoffrey Johnson Smith MP came fourth in the ballot for Private Members' Bills, and has brought forward a Bill drafted by the Consumers' Association which would amend the legislation governing the Health Service Commissioner (also known as the Ombudsman). At present, if a GP retires during an investigation by the Health Service Commissioner, the investigation cannot proceed, even though the GP will be able to continue practising, either privately or within the NHS as a locum. The Bill would close this loop-hole, both for GPs and for other primary care practitioners.

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Summary of main points

- The Health Service Commissioner, or Ombudsman, has powers under the *Health Service Commissioners Act 1993* to investigate cases where NHS patients have suffered injustice as a result of maladministration or failure in service. In 1996, his remit was extended to cover NHS practitioners working in primary care: GPs, dentists, pharmacists and opticians. Library Research Paper 95/126 discusses the Bill which led to this extension of his remit.
- However, the wording of the *Health Service Commissioners Act 1993* is such that GPs, and other primary care practitioners, no longer fall within the Commissioner's jurisdiction after they retire. This means that if a GP retires after the event which generated the complaint, but before (or even during) the Commissioner's investigation, the investigation cannot proceed. The current Health Service Commissioner, Michael Buckley, drew attention to this loophole in his 1998-99 Annual Report.
- The Consumers' Association has drafted a Bill to close this loophole, and this has been taken forward by Sir Geoffrey Johnson Smith who came fourth in the Private Members' ballot. The Bill has been welcomed by Members of all parties, and by the British Medical Association.
- The Bill will extend to England and Wales. While the *Health Service Commissioners Act 1993*, which it seeks to amend, also extends to Scotland, the subject matter of the Bill as it affects Scotland is now devolved to the Scottish Parliament.

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I Background: the current powers of the Health Service Commissioner

The Health Service Commissioner, or Ombudsman, has powers under the *Health Service Commissioners Act 1993* to investigate whether “maladministration” or service failure in the NHS has led to patients suffering injustice. His remit extends to England, Wales and Scotland.¹ The Commissioner is generally seen as the third and final tier of the NHS complaints system, as patients are expected to attempt to resolve their complaints at local level wherever possible. He does, however, have the discretion to investigate complaints which have not already exhausted the local procedures if he believes that it would be appropriate to do so.

Initially, the Health Service Commissioner’s remit was limited to administrative complaints about the hospital sector, or about a Health Authority’s decisions. However, the *Health Service Commissioners (Amendment) Act 1996* extended his authority both to primary care practitioners such as GPs and general dental practitioners, and to complaints concerned with clinical judgement. The Act also clarified that when NHS patients are being treated in the private sector the Ombudsman’s jurisdiction allows him to investigate the cases of those NHS patients, although he does not have jurisdiction over the private sector’s dealings with private patients. Some of the issues surrounding this increase in the Commissioner’s powers were discussed in a Library Research Paper 95/126, written for the Commons Second Reading of the *Health Service Commissioners (Amendment) Bill*.

The 1996 Act extended the Commissioner’s remit to primary care practitioners by inserting a new section 2A into the 1993 Act. Section 2A states that:

2A - (1) Persons are subject to investigation by the Health Service Commissioner for England if they are persons (whether individuals or bodies) undertaking to provide in England general medical services, general dental services, general ophthalmic services or pharmaceutical services under the National Health Service Act 1977.

Similar provision is made for Wales and Scotland in sections 2A(2) and 2A(3). While this definition covers GPs and other primary care practitioners who have a contract with their Health Authority to provide NHS primary care services, it does not include GPs practising privately or acting as “locums”. Moreover, GPs who retire from the NHS, and hence no longer have a contract with a Health Authority to provide general medical services, will no longer be “persons subject to investigation”. This means that if a GP retires in the middle of an investigation by the Commissioner, the investigation must stop, even if the GP continues to practise either privately or as a locum.

¹ The Act makes provisions for separate Commissioners for England, Wales and Scotland, but in practice the posts have always been held by one person.

The Commissioner raised his inability to investigate retired GPs in his 1998/99 Annual Report:

A further issue on which I have expressed my concerns to the Department of Health is my inability to investigate complaints against GPs who retire or cease NHS work after the events complained of – or even during my investigation. I have received advice from Counsel that the wording of the *Health Service Commissioners Act 1993* precludes me from investigating such a complaint if the GP has left NHS work since the event complained of, and requires me to discontinue my investigation if the GP retires before or during my investigation. That occurred in two cases in 1998-99. In my view this is a clear injustice. It is unfair to complainants, and has the effect of giving GPs – and by the same token, other FHS practitioners [ie dentists, opticians and pharmacists] – immunity from investigation by me after they retire, which is not shared by clinicians employed by Health Authorities and Trusts: I may investigate their actions after they retire, in the context of a complaint against their employing organisation. I hope that it will prove possible to find an early legislative opportunity to put this matter right.²

The Consumers' Association has been campaigning for some time for improvements that it believes should be made to the NHS complaints system, including expanding the role of the Health Service Commissioner to include the private health sector. It has also advocated the benefits of having a single point of access to the ombudsman schemes for health, housing and social services complaints. The Association has made the following points about the "loophole" which prevents the Commissioner from investigating complaints where a GP, or other primary care practitioner, has retired from NHS practice:

- Complaints which have been deemed worthy of investigation by the Health Service Commissioner's Office are not seen through to their logical conclusion;
- important information about a practitioner's performance may never come to light while the individual practitioner can continue to treat other patients;
- practitioners who are concerned about the outcome of the Health Service Ombudsman's investigation can simply retire from NHS practice as a means of avoiding having to answer for their actions;
- Patients are denied their right to have their complaint thoroughly considered and investigated.³

² Health Service Commissioner for England, Scotland and Wales, *Annual Report 1998-99*, para 4.13

³ "Health service complaints procedure: Consumers' Association campaign", attached to Consumers' Association press release 8 December 1999

II The Bill

After coming fourth in the Private Members' ballot, Sir Geoffrey Johnson Smith announced that he would take up a Bill drafted by the Consumers' Association to remove the loophole under which retired GPs, dentists, opticians or pharmacists cannot be investigated by the Health Service Commissioner. The *Health Service Commissioners (Amendment) Bill*⁴ had its formal First Reading on 15 December 1999 and is due to have its Second Reading on 3 March 2000.

The Bill itself is very short. Clause 1(2) amends section 2A of the *Health Service Commissioners Act 1993*, so that persons may be investigated by the Commissioner if they are **or were at the time of the action complained of** providing general medical, dental, pharmaceutical or ophthalmic services. This means that GPs and other primary care practitioners could be investigated by the Health Service Commissioner if they were contracting to provide NHS services at the time of the complaint, even if they have subsequently retired. Clause 1(3) makes the same amendment to the definition of independent providers of healthcare, where care is being provided under arrangements with the NHS. This would allow the Commissioner to investigate the actions of a private practitioner who had provided treatment to an NHS patient under contract with a health service body such as Health Authority or NHS trust, even if the practitioner no longer treats NHS patients in this way.

Clause 2 provides for the Bill to be enacted three months after it is passed. It extends to England and Wales, but not to Scotland.

The Bill only addresses the specific issue of retired GPs and other primary care practitioners. It does not seek to implement any of the other changes to the Health Service Commissioner's remit which have been called for by the Consumers' Association, such as the extension of his jurisdiction to the private sector.

III Responses to the Bill

There appears to be a general welcome for the Bill. In a article in *The House Magazine*, Sir Geoffrey stated that it had all-party support.⁵ Michael Buckley, the current Health Service Commissioner, was quoted by the Consumers' Association as saying:

I fully support this Bill. In my annual report of 1998-99, I called for this issue to be taken up as soon as possible. I am delighted that Sir Geoffrey, supported by the Consumers' Association, has taken this issue up.⁶

⁴ Bill 15 of 1999-2000

⁵ *The House Magazine*, 31 January 2000, p 12

⁶ Consumers' Association press release, 8 December 2000

Although one GP was quoted in the medical journal *Pulse* as saying that the change was “more about revenge than justice”,¹ the British Medical Association has welcomed the measure, stating:

Although the BMA has not yet had sight of the Bill, the BMA would support such an initiative to ensure that a complaint against a GP could be investigated regardless of whether or not the GP retired from the NHS and to remove the loophole through which GPs can evade investigation. Information as to the performance of the doctor revealed in the investigation would assist in the assessment of the GP as part of the revalidation process and as part of any investigation by the General Medical Council.²

The Medical Defence Union (MDU), on the other hand, has suggested that the changes will be “irrelevant”, as the Health Service Commissioner’s powers are not sufficiently strong to give GPs an incentive to retire in order to avoid an investigation. An MDU spokesman was quoted as saying that where GPs have retired before an investigation this may have been “purely coincidental” and that “GPs have nothing to fear” from the changes.³ However, the MDU feel that the quoted comments are misleading. Dr Patrick Hoyte, deputy head of advisory services at the MDU, issued the following statement clarifying the MDU's position:

The MDU would like to point out that the comments in the GP article attributed to the MDU in relation to the proposed private members bill to extend the Health Service Commissioner’s powers to investigate complaints once a doctor has retired are inaccurate.

For the record, the MDU’s view is that the Health Service Commission does have the power to impose sanctions if he considers that a GP has not responded to a complaint correctly. For example, he may choose to ‘name and shame’ the doctor concerned. The MDU does believe that currently if a doctor retires before a complaint has been fully investigated this is almost certainly coincidental. We believe it is entirely fair that a doctor could be expected to answer a complaint even after he has retired and would expect to assist our members to do so.⁴

⁷ “Complaints may follow GPs into retirement”, *Pulse*, 11 December 1999, p 17

⁸ BMA briefing for the Second Reading, 28 February 2000

⁹ “MPs’ move to close complaints loophole dismissed”, *GP*, 17 December 1999, p 2

¹⁰ MDU, 2 March 2000.