



Health and Social Care Bill: summary of Lords Committee and Report stages

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This note provides a summary of the key amendments to the *Health and Social Care Bill* made during the House of Lords Committee and Report stages, and at Third Reading. All these amendments were accepted when the Commons considered the Lords amendments. This note also provides an account of other clauses where the House of Lords divided, and information on calls for the release of the Department of Health's "risk registers" on the health reforms. It also links to briefings on earlier stages of the Bill's parliamentary scrutiny.

The House of Lords Second Reading of the *Health and Social Care Bill* took place on the 11 and 12 October 2011; a Committee of the whole House then considered the Bill, meeting 15 times between 25 October and 21 December 2011. The Bill had seven days of Report between 8 February and 13 March 2012 before its Third Reading in the Lords on 19 March 2012. The Commons consideration of Lords amendments took place on Tuesday 20 March 2012.

There have been 50 days of debate on the Bill, in Committees and on the floor of both Houses, and almost 2000 amendments have been agreed. The Government has introduced major changes to its legislation in response to the recommendations of the NHS Future Forum in the Summer of 2011 and at Commons Report stage. Before the Lords Report stage the Government tabled 137 amendments regarding ministerial accountability, patient involvement, education and training, health inequalities and service integration. This followed intensive discussions with Peers about their concerns, and recommendations from the House of Lords Constitution Committee.

The Government has also agreed to a number of other amendments, moved by Liberal Democrat, Labour and Crossbench Peers, including Liberal Democrat Peer's amendments relating to conflicts of interest, competition and the regulation of NHS foundation trust hospitals, as well as in other areas (the overall aims of the Liberal Democrat amendments were outlined in a letter from Nick Clegg and Baroness Williams to the Party's MPs and Peers, dated 27 February 2012).

Although Ministers have expressed some reluctance in agreeing to certain non-Government amendments there have been only two defeats for the Government on division, once during Committee and once during Report stage (the first regarding the payment of VAT by charities providing NHS services, and subsequently accepted with modifications, and the second to emphasise the importance of mental health services).

References to clause numbers refer to the numbering in [HL Bill 119-I](#) and the amendment numbers are those used in the debates in Committee and Report stage; a newer version of the Bill as amended on Report ([HL Bill 132-I](#)) is now available. The Government published [Explanatory Notes on the Lords Amendments](#) on 20 March 2012, with a revised numbering of amendments.

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1 Key amendments during Committee and Report stages¹

Committee stage

Government amendments were agreed during the Committee stage that would:

- Introduce a new duty for the Secretary of State to exercise his functions so as to secure “an effective system” for the planning and delivery of education and training for health service staff; and
- ensure that the majority of every NHS foundation trust's income must come from NHS service provision (in effect setting the cap on private income at 49%), and require every foundation trust to explain how its non-NHS income had benefited NHS services.

Only one non-Government amendment was agreed during the Lords Committee stage; Labour Lord Patel of Bradford's amendment introducing a new duty for the Secretary of State to have regard to the need to promote equality between charities providing NHS-funded services and NHS bodies, with regard to payment of VAT. This was agreed on division in the face of opposition from Government Ministers. Lord Patel of Bradford subsequently brought back amendments to this clause at Third Reading, which were supported by the Government.

Report stage

Following the Lords Committee stage the Government tabled 137 amendments for Report, regarding the accountability of the Secretary of State, patient involvement, education and training, health inequalities and service integration.²

During the first two days of Report the Lords agreed the following Government amendments relating to the Secretary of State's duties (the amendments relating to the accountability of the Secretary of State were tabled in response to concerns raised by the House of Lords Constitution Committee):

- Amendment to clause 1 to specify that the Secretary of State retains ministerial responsibility to Parliament for the provision of the health service in England.
- Amendment to clause 4 intended to clarify that in the event of a conflict between the Secretary of State's duties with regard to the promotion of autonomy and the promotion of the health service, it is the latter which takes precedence.
- Amendment to clause 5 to strengthen the Secretary of State's duty to promote research.

Government amendments were also agreed in the following areas:

- to clauses 29 and 30, and Schedule 5 relating to the public health functions of local authorities and the status of directors of public health.

¹ A list of the Government's minor and technical amendments is available on request. The NHS Confederation and Dod's Legislation Tracker have produced more detailed summaries of the key points from each day of debate.

² <http://healthandcare.dh.gov.uk/bill-amends/>

- to clause 97 in order to establish powers for Monitor to set and enforce licence conditions for the purposes of enabling integration and co-operation between healthcare providers.
- to clauses 180 to 188 and Schedule 15, regarding the establishment, organisational arrangement and function of HealthWatch England and Local HealthWatch bodies.
- to clauses 256 to 260, 266, 268 and 270, and to Schedules 23 and 24, regarding the use of personal information by the Health and Social Care Information Centre.

Liberal Democrat amendments at Report

On the 27 February 2012 Nick Clegg and Baroness Williams wrote to Liberal Democrat MPs and Peers to support amendments tabled by the Liberal Democrat Peers in the House of Lords. The letter describes these as “final” changes to the Bill, intended “to rule out beyond doubt any threat of a US-style market in the NHS”.³ In particular, the letter proposes to:

- remove “...the reviews by the Competition Commission from the Bill to make sure that the NHS is never treated like a private industry.” (See Lord Clement-Jones’ amendments to leave out clauses 78-80, clauses that would have provided for the Competition Commission to undertake reviews of the development of competition in the provision of NHS services every seven years);
- “...keep the independent regulator of Foundation Trusts, Monitor, to make sure hospitals always serve NHS patients first and foremost.” (See Government amendments to clause 111 to clarify that Monitor would have “enduring powers” to regulate foundation trusts);
- “...introduce measures to protect the NHS from any threat of takeover from US -style healthcare providers by insulating the NHS from the full force of competition law.” (assurances were given by Ministers during debates on Part 3 of the Bill);
- “...insist that anyone involved with a commissioning group is required to declare their own financial interests, so that the integrity of clinical commissioning groups is maintained.” (See Baroness Barker’s amendments to clause 24, to ensure there is a register of interests for CCGs); and
- “...put in place additional safeguards to the private income cap to make sure that Foundation Trusts cannot focus on private profits before patients.” (Government amendments to clause 163 would require an increase in the proportion of a foundation trusts private income of more than 5% to be approved by a majority vote of the foundation trust’s governors.).

Responding to urgent questions from the Shadow Health Secretary Andy Burnham on 28 February 2012, Andrew Lansley confirmed that the Government supported the changes outlined in the letter and that “we have been working together on [the amendments] in order to make sure there is further reassurance”.⁴

The Lords also agreed to other amendments moved by Liberal Democrat Peers at Report stage, with Government support, including:

³ See <http://www.bbc.co.uk/news/uk-politics-17175495> for full text of letter.

⁴ HC Deb 28 February 2012 c155 See also <http://www.bbc.co.uk/news/uk-politics-17265515>

- Lord Marks of Henley-on-Thames' amendment to clause 22, to clarify that the Secretary of State can intervene where he considers that the NHS Commissioning Board is failing to discharge its functions consistently with what he considers to be the interests of the health service, provided that he considers that the failure is significant. The Government accepted this amendment (and others relating to the Secretary of State's powers to intervene in other NHS bodies, and the Boards powers to intervene in CCGs, in the event of failure⁵).
- Lord Marks' and Baroness Williams' amendments to clause 64, Schedule 8 and introducing a new clause, to empower the Secretary of State to give guidance to Monitor in line with his overarching duties, to promote a comprehensive health service and improve health outcomes.
- Lord Clement-Jones' amendment to clause 77, to require the OFT to obtain advice from Monitor when reviewing a merger involving a foundation trust.

Other amendments at Report

The Lords also agreed the following amendments moved by other Peers, with Government support (or at least without being opposed by the Government):

- Crossbench Peer Lord Hennessy of Nympsfield's amendment introducing a new clause, providing a duty on the Secretary of State to have regard to the NHS Constitution when exercising his functions.
- Crossbench Peer Lord Patel's amendment to clause 6, regarding the Secretary of State's duties on education and training. The amendment would ensure that all providers of services commissioned as part of the health service, including NHS, private and public health providers, had a duty to co-operate with the Secretary of State in the discharge of his duty to ensure an effective education and training system.
- Crossbench Peer Baroness Murphy's amendment to Schedule 4, which would give the Secretary of State additional powers to direct the NHS Commissioning Board on the minimum amount of funding that it should transfer to local authorities in a given financial year.
- Labour Peer Lord Patel of Bradford's amendment to clause 39 about the provision of after-care for people with mental health problems, following periods of detention under the Mental Health Act 1983.
- Conservative Peer Baroness Cumberlege's amendment to clause 51, which would add HealthWatch England to the list of bodies the Secretary of State must keep under review.
- Labour Peer Lord Warner's Amendments 196ZA and 214G, to insert new clauses, providing for Monitor to notify commissioners if it considers that the continuation of health services is being put at risk by the configuration of services in a particular area.

⁵ HL Deb 29 February 2012 c1303-10. Amendment 176 to clause 69 relates to intervention in the event of a failure by Monitor. Amendment 258 to Clause 244 relates to NICE. Amendment 291 to clause 268 relates to the NHS Information Centre, and Amendment 296 relates to the Care Quality Commission.

- Conservative Peer Lord Ribeiro’s amendment to clause 236 to enable regulations requiring local authorities to comply with NICE recommendations to fund treatments under their public health functions.

One non-Government amendment was agreed at Report, after the Government was defeated on division:

- Crossbench Peer Lord Patel’s amendment to specify that the Secretary of State’s duty to secure improvements in the prevention, diagnosis and treatment of illness includes reference to physical and mental illness. This amendment is intended to emphasise the importance of mental illness and, as Lord Patel commented, to “promote parity of esteem between mental and physical health services.”

2 Summary of debates, amendments and divisions

Lords Second reading debate

On 12 October 2011 the House of Lords voted against a motion moved by Labour Peer Lord Rea to decline to give the Bill a Second Reading (Contents 220; Not-contents 354), and, by a narrower margin, voted against an amendment moved by Crossbench Peer Lord Owen to commit the clauses relating to the Government’s and Parliament’s constitutional responsibilities with regard to the NHS to a special select committee, to consider their constitutional impact (Contents 262, Not-contents 330).⁶

2.1 The Secretary of State’s duties

Duties to promote a comprehensive health service and to promote autonomy

Committee stage

The first two days of the Lords Committee stage were focused on clause 1 and 4 of the Bill, relating to the Secretary of State’s duty to promote a comprehensive health service, and to promote the autonomy of health services. A number of amendments to clause 1 were debated,⁷ although discussions focussed on Amendment 3, moved by Liberal Democrat Baroness Williams of Crosby, to restore the wording of section 1(2) of the *NHS Act 2006* (that the Secretary of State must provide or secure the provision of health services). Debate on the amendment, which continued onto the second day, discussed whether more clarity was needed in the wording of clause 1 to avoid diminishing the Secretary of State’s accountability for the NHS. Earl Howe argued that a further amendment tabled by Conservative Peer Lord Mackay (Amendment 4) would set out the Secretary of State’s powers and duties “very satisfactorily”.⁸

On the second day of debate the Committee agreed not to amend clause 1, or clause 4, in Committee and that there should be separate meetings before Report stage to discuss amendments to these clauses. Health Minister Earl Howe said he hoped that proposals based on these discussions could deliver a compromise solution:

“I believe that ... it would be profitable for me to engage with noble Lords in all parts of the House, both personally and with the help of my officials, between now and Report to try to reach consensus on these important matters...”

⁶ HL Deb 12 October 2011 c1711-23

⁷ For example, Amendment 1, moved by Labour spokesperson Baroness Thornton, to put a statement of the principles of the health service on the face of the Bill, was defeated on division (Contents 212; Not-Contents 244) (see HL Deb 25 October 2011, c685)

⁸ Amendment 4 would have provided that the Secretary of State had “ultimate responsibility” for the health service.

Clause 1 was agreed pending further amendments at Report stage following these discussions.⁹

The House of Lords Constitution Committee: ministerial accountability for the NHS

The House of Lords Constitution Committee reported on the *Health and Social Care Bill* in September 2011, in advance of the Lords Second Reading.¹⁰ The Committee recommended that the House carefully consider whether the Bill's provisions, were they to be enacted in their current form, posed an undue risk to maintaining ministerial and legal accountability for the NHS. The Government responded on 10 October 2011 and the Constitution Committee published a follow-up report on 20 December 2011. This latest report set out a number of amendments to the Bill which the Committee recommended as a reasonable means to address the concerns raised in its earlier report.¹¹

Report stage

On 12 January 2012 the Health Minister Earl Howe wrote to Peers to say he welcomed the Constitution Committee's proposed amendments, and that they provided "a strong foundation for agreeing a final package of amendments... in order to attract broad support from across the House." The Minister explained that, while accepting the substance behind the Constitution Committee's amendments, the Government had suggested some possible alternative wording. Changes to clause 1 proposed in the letter would "make clear" that the Secretary of State retains "ministerial responsibility to Parliament". The letter also explained that amendments to clause 4 would "(a) weaken the duty... and (b) make it explicitly subsidiary to the duty to promote a comprehensive health service."

On 2 February 2012 the Government tabled 137 amendments to the Bill in a range of areas, including changes to clarify the responsibility of the Secretary of State for the health service.¹²

Ministerial accountability for the NHS (amendment to clause 1 agreed at Report)

The House of Lords Constitution Committee proposed a set of amendments with the aim of clarifying that the Secretary of State retains Ministerial accountability and responsibility for the health service. The Government agreed to support the Committee's proposed amendment to clause 1 (Amendment 5), to specify that the Secretary of State retains ministerial responsibility to Parliament for the provision of the health service in England.¹³ The Amendment was agreed with cross-party support. Speaking for the Labour Opposition, Baroness Thornton said her party would support the amendment because "it is clearly an improvement on what was in the Bill originally", but that she was still perplexed as to why the wording in section 1 of the NHS Act 2006 had been altered to begin with.¹⁴

Precedence of duty to promote health service over duty to promote autonomy (amendment to clause 4 agreed at Report)

Following concerns about clause 4 (the Secretary of State's duty to promote autonomy) and how this would be reconciled with the Secretary of State's overall responsibility for the NHS,¹⁵ the Constitution Committee drafted amendments to this clause. The Committee

⁹ HL Deb 2 November 2011, c1249

¹⁰ 18th Report (2010–12) (HL Paper 197)

¹¹ 22nd Report (2010–12) (HL Paper 240) See also http://www.guardian.co.uk/society/2011/dec/20/lords-warning-minister-role-nhs?CMP=tw_t_gu

¹² A Department of Health briefing on this package of Government amendments is available here: <http://healthandcare.dh.gov.uk/bill-amends/>

¹³ HL Deb 8 February 2012, c307

¹⁴ *Ibid.* c306

¹⁵ HL Deb 9 November 2011, c267

proposed changing the duties to promote autonomy, making them explicitly subject to the Secretary of State's and NHS Commissioning Board's duties to promote a comprehensive health service and to exercise their functions so as to secure the provision of services.

The Government said it accepted the principle behind the Committee's proposed amendments and Earl Howe moved amendments (Amendments 8, 9, 34, 53 and 54), intended to make it clear that in the event of a conflict between the desirability of autonomy and the discharge of duties to promote the health service, it is the latter which takes precedence. The Lords agreed these amendments¹⁶ although Baroness Jay of Paddington, Chair of the Lords Constitution Committee, said she could not add her name to the amendments as the wording that the Government had chosen differed from the Committee's suggestions. Labour spokesperson Baroness Thornton spoke to her own Amendments 10 and 52 that would have entirely removed the clauses relating to autonomy.

Prevention, diagnosis and treatment of physical and mental illness (amendment to clause 1 agreed at Report)

The Lords narrowly agreed Amendment 1 on division (Contents 244; Not-Contents 240) moved by Crossbencher Lord Patel, to specify that the Secretary of State's duty to secure improvements in the prevention, diagnosis and treatment of illness includes reference to physical and mental illness. This amendment is intended to emphasise the importance of mental illness and, as the Lord commented, to "promote parity of esteem between mental and physical health services."

New or amended duties

Duty to secure education and training (New clause 6 introduced in Committee)

On the first day of the Committee stage, Peers debated Amendment 2, moved by Crossbenchers Lord Walton and Lord Patel, which sought to impose a duty on the Secretary of State regarding provision of education and training. The amendment was subsequently withdrawn by Lord Walton after assurances from the Health Minister Earl Howe that Government would introduce a new clause, providing a new duty for the Secretary of State to maintain "an effective system" for the planning and delivery of education and training for health service staff.¹⁷ The Committee later agreed Government Amendment 43, introducing the new clause (clause 6) relating to education and training.¹⁸

On the second day of Report the Lords agreed Amendment 13 to this new clause, moved by Lord Patel. The amendment would require all providers of services commissioned as part of the health service, including NHS, private and public health providers, to co-operate with the Secretary of State in the discharge of his duty to ensure an effective education and training system. The Health Minister Earl Howe said that having initially thought such an amendment "might not be needed", in the light of the support expressed during the debate, he was also willing to support it.¹⁹ The Lords also agreed Government amendments (Amendment 61 to clause 22 and Amendment 104 to clause 25), to introduce duties for the NHS Commissioning Board and CCGs to have regard to the need to promote education and training so as to assist the Secretary of State in the discharge of his duty.²⁰

¹⁶ Amendments 53 and 54 to clause 22, relating the NHS Commissioning Board, were agreed later (see HL Deb 27 February 2012 c1148)

¹⁷ HL Deb 25 October 2011, c726

¹⁸ HL Deb 9 November 2011 c300

¹⁹ HL Deb 13 February 2012 c571-2. A minor Government amendment (Amendment 15) to clause 6 was also agreed.

²⁰ HL Deb 27 February 2012 c1160 and HL Deb 29 February 2012 c1336

Duty to promote equality of provision (New clause 7 introduced in Committee)

The Committee of the whole House agreed Amendment 46 on division (Contents 195; Not-Contents 183), moved by Labour Peer Lord Patel of Bradford, introducing a new clause providing a duty for the Secretary of State to have regard to the need to promote equality for charities with regard to payment of VAT.²¹ Unlike NHS bodies, charities have to pay VAT on goods and supplies, which Lord Patel of Bradford argued places them at a competitive disadvantage when bidding for NHS contracts. The amendment would require the Secretary of State to report to Parliament within a year of the Bill becoming law on “the treatment for VAT of supplies by charities to bodies exercising functions on behalf of a minister of the crown of healthcare services or associated goods”.²²

Lord Patel of Bradford subsequently brought back amendments to this new clause at Third Reading, which were supported by the Government. The amended duty on the Secretary of State is now to report on and review the treatment of all providers of NHS services. Subsection (1) of this new clause would require the Secretary of State to lay a report before Parliament within a year on any matter, including taxation, which might affect the ability of health care providers to NHS-funded services.²³

Duty to promote research (amendment to clause 5 agreed at Report)

On the re-committal of the Bill to the Commons Public Bill Committee, following the listening exercise and the recommendations of the NHS Future Forum, the Government introduced a new clause giving the Secretary of State, the NHS Commissioning Board and CCGs a duty to have regard to the need to promote research within the health service. During the Committee stage a number of Peers suggested that the duties as worded were not strong enough²⁴ and in response the Government agreed to amend the Bill. During Report the Lords agreed Government Amendment 11 to clause 5, removing the words “to have regard to the need to” so that the Secretary of State duty is simply to “promote research”²⁵ (similarly Amendments 60 and 103 relate to the duties on the Board and CCGs).²⁶

Duty as to the NHS Constitution (New clause introduced at Report)

On the first day of Report, the Lords agreed Amendments 6, moved by Crossbench Lord Hennessy of Nympsfield, to introduce a new clause imposing a duty on the Secretary of State to have regard to the NHS Constitution when exercising his functions. Both Labour spokesperson Baroness Thornton and the Health Minister Earl Howe gave their support to the amendments.²⁷

Proposed amendments to the Secretary of State’s duties (disagreed on division during Report stage)

Duty of candour

Crossbench Peer Baroness Masham of Ilton moved Amendment 17, to insert a new clause requiring the Secretary of State to introduce a statutory duty of candour for all registered healthcare providers, to be open and transparent with patients when things went wrong.

²¹ HL Deb 14 November 2011 c465-7

²² “Labour Lords win concession on Health Bill”, *Health Service Journal*, 15 November, 2011

²³ HL Deb 19 March 2011 c661

²⁴ See HL Deb 9 November 2011 c273 for example.

²⁵ HL Deb 8 February 2012 c358

²⁶ Amendment 60 to clause 22 agreed HL Deb 27 February 2012 c1155

²⁷ On the re-committal of the Bill to the Commons Public Bill Committee, following the listening exercise and the recommendations of the NHS Future Forum, Government amendments to the Bill introduced new duties for commissioners of NHS services to promote the rights of patients as set out in the NHS Constitution.

Baroness Masham highlighted the support the amendment enjoyed from prominent patient and health organisations and Opposition whip Baroness Wheeler expressed Labour's support for the amendment. Responding for the Government, Earl Howe said that the Government preferred to place a duty of candour in the NHS standard contracts.²⁸ Responsibility for ensuring openness had to fall "as close to the front line as possible", he argued. The amendment was disagreed on division (Contents 198; Not-Contents 234).²⁹

Duty to reduce bureaucracy

Labour Peer Lord Hunt of Kings Heath moved Amendment 18, to insert a new clause introducing duty for the Secretary of State to reduce bureaucracy. The amendment was disagreed on division (Contents 169; Not-Contents 231).

2.2 The Secretary of State's powers with regard to the NHS Commissioning Board and other NHS bodies (amendments to clause 22)

Mandate to the NHS Commissioning Board

During the Committee stage Labour Peer Lord Warner moved Amendment 96 that would have limited the number of objectives that the Secretary of State's mandate to the Board could include. Amendments would have also allowed the Board to raise formal concerns about the content of the mandate (Amendment 98), and would have made provision for stronger parliamentary scrutiny (Amendment 100A).³⁰ Lord Hunt of King's Heath commented that this was "one of the most important groups of amendments". Amendments 98 and 100A were disagreed to on division.³¹ In response to calls for greater parliamentary scrutiny, the Minister, Earl Howe, said that the Government would introduce amendments at Report stage to ensure that the mandate would be subject to negative procedure³² (see Amendments 45 and 47 to clause 22 agreed at Report³³).

Powers to intervene in the running of NHS bodies in event of failure

During Committee Baroness Williams moved an amendment concerning the Secretary of State's power to intervene in the running of the Board in the case of failure. Her Liberal Democrat colleague Lord Marks of Henley-on-Thames argued that under the Bill's current provisions the threshold for intervention was "far too high".³⁴ A number of other Lords echoed concerns that the Secretary of State should have sufficient powers to intervene if there was a serious failure in the NHS. This amendment was withdrawn on the understanding that these issues would be looked at again at Report stage.³⁵ At Report stage Lord Marks moved Amendment 71 to clause 22, to clarify that the Secretary of State can intervene where he considers that the Board is failing to discharge its functions consistently with what he considers to be the interests of the health service, provided that he considers that the failure is significant. The Government accepted this amendment (and others relating to the

²⁸ The Government announced in its response to the NHS Future Forum on 20 June 2011 that it would introduce a "Duty of Candour" as a new contractual requirement on providers of NHS funded services.

²⁹ HL Deb 8 February 2012 c597-9

³⁰ HL Deb 22 November 2011 c947-8

³¹ Ibid. c964 (Content 198; Not-Content 230) and c990 (Content 201; Not-Content 220)

³² Ibid. c960

³³ HL Deb 27 February 2012 c1111

³⁴ HL Deb 30 November 2011 c271

³⁵ Ibid. c282

Secretary of State's powers to intervene in other NHS bodies, and the Boards powers to intervene in CCGs, in the event of failure³⁶).

2.3 Clinical Commissioning Groups (amendments to clause 24)

Conflicts of interest

A number of Peers raised concerns about the potential for conflicts of interests if CCGs are seen to make decisions in the interests of taxpayers, or their colleagues, rather than for their patients. During the Committee stage, Labour spokesperson Baroness Thornton moved an amendment (Amendment 156) to place additional requirements on CCGs to deal with conflicts of interests. A number of Labour, Liberal Democrat and Crossbench Peers supported the aims of the amendment but it was withdrawn on the basis that the issue would be raised at Report stage.

On the third day of Report Labour Peer Lord Hunt of Kings Heath moved Amendment 38C to clause 19, to require the Secretary of State to make "standing rules"³⁷ for how members of CCGs are required to register, manage and report conflicts of interests. Responding, the Minister Earl Howe argued that the Bill already provided safeguards in relation to conflicts of interest; in particular, CCGs would have to make arrangements in their constitutions for managing conflicts and ensuring the transparency in decision-making. Responding to concerns from Liberal Democrat Baroness Barker about whether members of commissioning support organisations could sit on CCG governing boards, Earl Howe gave a commitment that this would be prohibited through regulations.³⁸ Amendment 38B was disagreed on division (Contents 186; Not-Contents 259).

During the debate, Baroness Barker spoke to Amendments 79A, 82A, 86A and 86B to clause 24, which would require that there must be a register of interests of members of the CCG, its governing body, its sub-committees and its employees. This group of amendments was one of the five changes to the Bill outlined in Nick Clegg and Baroness Williams' letter of 27 February. Speaking for the Government, Earl Howe said he was "persuaded of the necessity to have a register of interests" and accepted the amendments tabled by Baroness Barker.³⁹ These amendments were agreed on 29 February 2012.⁴⁰

Other developments

During the Committee stage Lord Warner moved Amendment 159, part of a package of amendments intended to ensure that there would be an assessment of a CCG's competence before it was allowed to undertake its commissioning functions. The Amendment was disagreed on division (Contents 46; Not-Contents 106).⁴¹ At Report stage Lord Hunt moved Amendment 76, to provide for the chair and non-executive members of each CCG governing body to be appointed by an independent process. The amendment was disagreed on division (Contents 185; Not-Contents 282).

³⁶ HL Deb 29 February 2012 c1303-10. Amendments 113 and 114 to clause 25 relates to the NHS Commissioning Board's powers to intervene in the event of a failure by a CCG. Amendment 176 to clause 69 relates to the Secretary of State's powers to intervene in the event of a failure by Monitor. Amendment 258 to Clause 244 relates to NICE. Amendment 291 to clause 268 relates to the NHS Information Centre, and Amendment 296 relates to the Care Quality Commission.

³⁷ Clause 19 confers powers to make standing rules to maintain a number of existing arrangements within the NHS, including certain patient rights in the NHS constitution. In addition it gives the Secretary of State "backstop powers" to make standing rules to require the NHS Commissioning Board and clinical commissioning groups to do other things which he considers necessary for the purposes of the health service.

³⁸ HL Deb 27 February 2012 c1067

³⁹ HL Deb 27 February 2012 c1071

⁴⁰ HL Deb 29 February 2012 c1334-5

⁴¹ HL Deb 30 November 2011 c338-40

Other amendments to Parts 1 and 2 of the Bill

Public health functions of local government: directors of public health (amendments to clauses 29 and 30, and Schedule 5)

On the fourth day of Report Health Minister Earl Howe moved amendments relating to the public health functions of local authorities. The Lords agreed Amendment 124 to clause 29, which states that a local authority must have regard to any guidance given by the Secretary of State in relation to its director of public health, including guidance on appointment, termination of appointment and terms and conditions of management.⁴² This amendment was introduced in response to concerns expressed during the Committee stage that there should be a direct line of accountability between a director of public health and the local authority chief executive.

Following discussions in Committee about how to ensure that directors of public health have appropriately senior status, the Government brought forward Amendment 152 to Schedule 5, to add directors of public health to the list of statutory chief officers in the *Local Government and Housing Act 1989*. This, combined with statutory guidance, is intended to align directors of public health with other chief officers, including directors of adult social services and children services. In addition, the Lords agreed Government Amendment 128 to clause 30, which gives the Secretary of State the power to issue guidance on other local authority public health staff.⁴³

After-care arrangements under the Mental Health Act 1983 (amendment to clause 39)

On the fourth day of Report the Lords agreed Labour Peer Lord Patel of Bradford's Amendment 136A to clause 39 about the provision of after-care for people with mental health problems, following detention under the *Mental Health Act 1983*. Lord Patel said he feared clause 39 as originally drafted, would remove "the duty of co-operation in delivering aftercare services between the health service, the local authority and the voluntary sector" and "provides a backdoor route by which aftercare services for detained patients will become chargeable." The Amendment replaces the existing clause 39 with a new clause, which is intended to ensure that CCGs and local authorities retain a clear responsibility to provide appropriate after-care services and that they should act jointly in doing this. The Government spokesperson, Baroness Northover, said the Government did not feel there was anything in the original clause 39 that would have introduced charging for services but that in order to allay concerns about this, it had decided not to oppose the amendment. She commented that the Government would need to bring forward "a few technical amendments" at Third Reading to make consequential changes to ensure Lord Patel's amendment works properly.⁴⁴

Amendments were tabled to the new section by Lord Patel of Bradford at Third Reading stage, which were supported by the Government. Amendments 242, 248, 252, 304, 305, 318, 323, 331, 335, 336, 337 and 338 (as numbered in the [Explanatory Notes](#)) make consequential changes to various measures in the Bill in the light of the Government's acceptance of Lord Patel of Bradford's amendment. These amendments are intended to ensure that new functions imposed on CCGs will apply in relation to after-care services under section 117 of the *Mental Health Act 1983*, to ensure consistency in the restructured system.⁴⁵

⁴² HL Deb 29 February 2012 c1360

⁴³ HL Deb 29 February 2012 c1357

⁴⁴ HL Deb 29 February 2012 c1369

⁴⁵ HL Deb 19 March 2012 c676

Duty to keep effectiveness of HealthWatch England under review (amendment to clause 51)
The Lords agreed Conservative Baroness Cumberlege's Amendment 141 to clause 51, which would add HealthWatch England to the list of bodies the Secretary of State must keep under review. Earl Howe confirmed that the Government supported this amendment.⁴⁶

Powers to make payments to local authorities towards expenditure on community services (amendment to Schedule 4)

Paragraph 130 of Schedule 4 to the Bill would ensure that the NHS Commissioning Board and CCGs will have the same powers that primary care trusts currently have under the NHS Act 2006 to make payments to local authorities towards expenditure on community services. The Lords agreed Crossbencher Baroness Murphy's Amendment 148B to Schedule 4, which would give the Secretary of State additional powers to direct the NHS Commissioning Board on the minimum amount of funding that it should transfer to local authorities in a given financial year.⁴⁷ The Secretary of State would be able to specify in the directions the bodies to which those payments should be made, the amount that should be paid to each body and the functions in respect of which the payments must be made, and to amend these instructions if necessary. The Health Minister Earl Howe confirmed that the Government supported the amendment.⁴⁸

Other debates on Parts 1 and 2 of the Bill

Integration of services

During Report, Lord Warner moved amendment 38C to insert a new clause after clause 19, to define "integration" and its purpose, and to ensure that CCGs, the NHS Commissioning Board and Monitor's duties to improve integration were carried out in accordance with this definition. Responding, Earl Howe said that the Government had already taken a number of legislative and non-legislative steps to accelerate integration - the Bill created, for the first time, duties for NHS bodies to promote and encourage the commissioning and provision of integrated services. Amendment 38C was disagreed on division (Contents 206; Not-Contents 227).⁴⁹

Social enterprise and voluntary organisation capacity (clause 22)

During Committee stage Labour's Lord Rooker moved Amendment 137 to clause 22, to require the Board to build social enterprise and voluntary organisation capacity to provide health and social care. While his amendment received the support of some Liberal Democrat Peers and a division was called, Tellers for the Contents were not appointed and the Division could not proceed.⁵⁰

Abolition of Strategic Health Authorities (SHAs) (clause 32)

Lord Hunt of Kings Heath moved Amendment 236A to clause 32, to require the Secretary of State to only abolish SHAs once he was satisfied all their duties and functions were being fulfilled by other bodies. He said the amendment was designed to "illustrate the turbulence that the government have brought to the [health] service". He commented that as a result of the Government's decision to reorganise the current NHS structure, the NHS had lost a lot of its commissioning expertise and in future the clinical commissioning groups (CCGs) would have to buy this in; mainly from the private sector. Responding, the Health Minister Earl Howe said it was vital that SHAs and PCTs did not continue beyond April 2013, when the

⁴⁶ HL Deb 29 February 2012 c1388

⁴⁷ HL Deb 29 February 2012 c1390

⁴⁸ HL Deb 27 February 2012 c1103

⁴⁹ HL Deb 27 February 2012 c1094-7

⁵⁰ HL Deb 28 November 2011 c120

NHS Commissioning Board and CCGs would take on their responsibilities. If a CCG was unable to take on some or all of its commissioning responsibilities by April 2013 the Board would do so on its behalf, the Minister added. Amendment 236A was disagreed on division (Contents 170; Not-Contents 202).

HIV treatment for overseas visitors

Conservative Peer Lord Fowler moved Amendment 161, which proposed to introduce a new clause exempting overseas visitors from being charged for diagnosis and treatment of HIV, where they had been in the UK for at least 6 months. The Government spokesperson Baroness Northover said that the Government supported the change that the amendment proposed but not the sixth month exclusion. She also said the Department needed more time to finalise “clinical procedural safeguards and monitoring processes”. In seeking the amendments withdrawal, Baroness Northover offered an “absolute commitment” that the Department would introduce a statutory instrument to amend the current regulations for charging overseas visitors so that the current exemption for treatment of sexually transmitted infections also include HIV.⁵¹

Public Health England

Baroness Cumberlege moved Amendment 162, regarding the establishment of Public Health England as an Executive Agency of the Department of Health. The amendment would introduce a new clause to provide that the Public Health England board must have a non-executive chair and a majority of non-executive members in order to guarantee the bodies independence. Responding for the Government, Baroness Northover said the Government understood the aims of the amendment but did not agree it was the best option. Baroness Cumberlege welcomed the Government’s commitment to undertake further discussions on this matter and withdrew her amendment but said she did not rule out taking a similar amendment to Third Reading.⁵²

Social care

On the fifth day of Report Lord Warner moved Amendment 163AA, which would insert a new clause into the Bill giving the Secretary of State a duty to “secure the improvement in the quality of adult social care services through local social services authorities and qualified service providers registered with the Care Quality Commission”. Health Minister Earl Howe said he was in “complete agreement” on the importance of high-quality social care, but said he did not agree that the amendment was “the appropriate mechanism” to achieve Lord Warner’s goals. The Amendment was disagreed on division (Contents 203; Not-Contents 261).⁵³

2.4 Competition and the role of Monitor (Part 3)

Committee stage

The Committee debated a large number of Opposition amendments relating to Part 3 of the Bill, which would establish Monitor as the sector regulator for health services, enabling it to prevent anti-competitive behaviour and to oversee a failure regime for hospitals that got into financial difficulties.

Introducing her amendments, Labour spokesperson Baroness Thornton said they were intended to rewrite Part 3 of the Bill “to make it simpler and more coherent”. She said that the principles and rules for co-operation and competition (PRCC) introduced by the previous

⁵¹ HL Deb 29 February 2012 c1398

⁵² HL Deb 29 February 2012 c1416

⁵³ HL Deb 6 March 2012 c1679

Government should be left as the basis for the system: that the Co-operation and Competition Panel should retain its role of advising the Secretary of State on complaints about any breaches of the rules, and that the Secretary of State should continue to set the PRCC framework.

Earl Howe responded that the Government would continue to listen to suggestion about how this part of the Bill could be improved and highlighted four areas where he was sympathetic to the concerns raised by Lords:

The first is the Secretary of State's ability to specify matters that Monitor must take into account. I am sympathetic to noble Lords' concerns that we should clarify the mechanisms by which this can happen. The second is the conflicts between Monitor's functions. It has always been our intention that Monitor should take responsibility for making appropriate arrangements within its organisation to avoid potential conflicts. However, I will explore this further with Monitor in time to provide greater clarity and reassurance before Report stage. The third area is failures to co-operate. Again, I am sympathetic to noble Lords' concerns that Monitor should have the ability to address abuses and protect patients' interests. We believe that the safeguards in the Bill already achieve this aim, but we will look to ensure that Monitor is properly equipped to enforce this. The final issue is reviews by the Competition Commission, where I sympathise with noble Lords' concerns that the provisions as drafted may not yet fully reflect the revisions to Monitor's role that were introduced in response to the NHS Future Forum.⁵⁴

The Minister promised to write to Baroness Thornton to cover issues relating the competition law. The Opposition amendments were withdrawn on the basis that they would return to these matters on Report.

The application of competition law to the NHS (debate at Report)

Labour spokesperson Baroness Thornton moved amendment 163BZZA, to introduce a new clause to ensure that any regulatory functions under Part 3 of the Bill were “based on the principles of universality and social solidarity”. However, she said that following discussions with the Liberal Democrat team she supported Lord Clement-Jones’ Amendment 163BZZB to her amendment, that regulatory functions must instead “be in accordance with the provisions of Article 106 of the Treaty of the Functioning of the European Union” and specifically the sections on service of general economic interest. Baroness Thornton and Lord Clement-Jones acknowledged that competition law already applies to the NHS and that it was not possible, in the context of the Bill, to stop this being the case. However, as Lord Clement-Jones said, these amendments were intended “to provide some protection from the less desirable aspects of competition law”,⁵⁵ specifically by ensuring that the health service benefits from the exclusions that apply to services of general economic interest.⁵⁶

Responding to these amendments the Health Minister Earl Howe set out the various protections that the Bill would provide to insulate “against inappropriate application of competition law”. He said Monitor would be able to provide authoritative advice on how competition law applied to the NHS and could make the case for “block exemptions”. The Minister also gave a commitment that regulations issued under clause 73 would make

⁵⁴ HL Deb 13 December 2011 c1113-4

⁵⁵ HL Deb 6 March 2012 c1687

⁵⁶ Article 106 of the Treaty on the Functioning of the European Union states: "Undertakings entrusted with the operation of services of general economic interest ... shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them".

explicit that commissioning decisions must be transparent, accountable and in the best interests of patients.⁵⁷ Lord Clement-Jones welcomed the Ministers “very comprehensive” statement on the application of competition law and noted that “a law court would probably find it much more useful to have my noble friend’s fuller statement than simply some rather narrow amendment to the Bill” and that he preferred “the *Pepper v Hart* solution that has been found and proposed in these circumstances.” However, following objections to the withdrawal of his amendment to Amendment 163BZZB and it was disagreed on division (Contents 188; Not-Contents 278).⁵⁸

Baroness Thornton said it was disappointing that Liberal Democrat Peers had not voted for their own amendment and that relying on the Minister’s “strong statement” would mean that “...the protection comes when legal action starts to take place. I would prefer the protection to be in the Bill.”⁵⁹

Secretary of State’s guidance to Monitor (amendments to clause 64 and Schedule 8, and a new clause agreed at Report)

Amendment 166B, moved by Baroness Williams,⁶⁰ would introduce a new clause empowering the Secretary of State to give guidance to Monitor on any objectives in the Secretary of State’s mandate to the NHS Commissioning Board that he considered relevant to the exercise of Monitor’s functions. The amendment would require Monitor to have regard to that guidance, which must also be published and laid before Parliament. Amendments 173A to 173C to clause 64, tabled in Baroness Williams and Lord Marks’ names but moved by Earl Howe, contained similar provisions on guidance for Monitor to act with regard to the Outcomes Framework that will be issued by the Secretary of State to the NHS Commissioning Board (in connection with securing continuing improvement in the outcomes achieved by the health service). Amendment 163C moved by Lord Marks’ would require Monitor to issue a statement to explain how it has complied with the Secretary of State’s guidance on promoting comprehensive health services and improving the quality of services.⁶¹ The Lords agreed all these amendments without debate. Speaking to these amendments in an earlier debate Lord Marks described this group of amendments as “modest but important”:

“They seek to weave into the fabric of the Bill a clear role for the Secretary of State to give strategic guidance to Monitor in line with the Secretary of State’s overarching duties...”⁶²

Mergers involving NHS foundation trusts (amendment to clause 77)

The Lords agreed Amendment 184 to clause 77, moved by Lord Clement-Jones, without debate. This amendment would require the OFT to obtain advice from Monitor when reviewing a merger involving a foundation trust.⁶³

Reviews by the Competition Commission (amendments to leave out clauses 78 to 80)

Clauses 78 to 80 provide that the Competition Commission would undertake reviews of the development of competition in the provision of NHS services every seven years. Lord Clement Jones moved amendments 186 to 188 to entirely remove these clauses from the

⁵⁷ HL Deb 6 March 2012 c1689-1692

⁵⁸ HL Deb 6 March 2012 c1693

⁵⁹ HL Deb 6 March 2012 c1697

⁶⁰ HL Deb 6 March 2012 c1724

⁶¹ HL Deb 6 March 2012 c1719

⁶² HL Deb 6 March 2012 c1706

⁶³ HL Deb 6 March 2012 c1735

Bill. Health Minister Earl Howe moved a Government amendment to clause 78 that would ensure that reviews of competition in the NHS focussed on benefits to patients but he said that he would not oppose Lord Clement Jones amendments and these were agreed:

“On the basis that prescribed seven-year reviews may place too great an emphasis on competition in the NHS, and given the role of the Competition Commission, if it is the view of the House that Clauses 78, 79 and 80 should be removed from the Bill, I will not oppose Amendments 186, 187 and 188.”⁶⁴

Monitor’s powers to set licence conditions to enable the integration of services (amendments to clause 87)

Although clause 61 requires Monitor to exercise its functions with a view to enabling integration, concerns had been raised in Committee around the extent of Monitor’s role in enabling integration and co-operation. The Health Minister Earl Howe stated that the Government had listened to those concerns and, in response, had tabled Amendments 193 to 195 to clause 97 in order to establish powers for Monitor to set and enforce licence conditions for the purposes of enabling integration and co-operation between healthcare providers, where it would improve the quality or efficiency of services, or reduce inequalities. The amendments were agreed.⁶⁵

Lord Warner moved amendments 196ZA and 214G to insert new clauses, providing for Monitor to notify commissioners if it considers that the continuation of health services is being put at risk by the configuration of services. Lord Warner explained that Amendment 196ZA provides for Monitor to notify the NHS Commissioning Board or CCGs “when it can see that a licence holder’s conditions are likely to be imperilled by a current configuration of health services in the wider health economy-not just within that licence holder’s own individual trust.” He said that Amendment 214G would allow Monitor to look at applications by service providers to secure an adjustment in the price paid for a particular service to see whether “there is anything more significant behind that application and whether there is a risk to the sustainability of services in a particular area.”⁶⁶ The amendment would require the Board and CCGs to have regard to these notifications. Lord Warner thanked civil servants and Ministers for the technical help and support in drafting the amendments. Earl Howe responded that he was pleased to accept Lord Warner’s amendments, “which also reflect the King’s Fund recommendation on how the Bill could be improved to support vital service reconfiguration”⁶⁷, and amendments 196ZA and 214G were agreed.

The role of Monitor as regulator of Foundation Trusts (amendments to clause 111)

Labour spokesperson Baroness Thornton moved Amendment 163BA to clause 60 to provide that Monitor continue in its current role as regulator of NHS Foundation Trusts. Health Minister Earl Howe said that Monitor would in fact continue as the regulator of NHS Foundation Trusts anyway but he accepted the need for “greater clarity on what intervention powers Monitor would have over foundation trusts on an enduring basis as against what would be transitional.”⁶⁸ The Amendment was disagreed on division (Contents 183; Not-Contents 255).⁶⁹

⁶⁴ HL Deb 6 March 2012 c1741

⁶⁵ HL Deb 6 March 2012 c1747-8

⁶⁶ HL Deb 6 March 2012 c1749

⁶⁷ HL Deb 6 March 2012 c1751

⁶⁸ HL Deb 6 March 2012 c1710

⁶⁹ HL Deb 6 March 2012 c1716

Earl Howe moved Amendments 196C and 197A to 197C to clause 111 to clarify that Monitor would have “enduring powers” to require a foundation trust to remove directors or governors in cases of serious breach of license conditions. In addition the Minister moved Amendments 198A and 198B to clause 112, Amendments 199A and 199B to clause 113 and Amendment 200A to clause 114 to ensure that “transitional powers” to suspend foundation trust directors and governors directly, that would have expired in 2016, could be retained by Monitor, “unless and until the Secretary of State makes an order to withdraw it, either for all foundation trusts or individual trusts.”⁷⁰ Lord Clement-Jones thanked the Minister for his amendments and said they went a long way to meeting Liberal Democrat concerns about putting foundation trusts “on the same footing as all other provider licensees” from 2016. He withdrew his amendments that would have removed clauses 111 to 114 in their entirety and retained Monitor’s current regulatory powers over foundation trusts.⁷¹ The Government amendments were agreed.

Matters that Monitor must have regard to in exercising its functions (amendment to clause 64)

In Committee Baroness Murphy and Baroness Williams raised concerns about clause 64, which lists the range of matters that Monitor would be obliged to have regard to in carrying out its duties. Having agreed to reflect on these concerns, the Health Minister Earl Howe moved Amendments 168 to 171, in order “to rationalise the list and make it clear that maintaining patient safety would be the paramount consideration.” These amendments were agreed without debate.⁷²

Other debates and minor amendments to Part 3 of the Bill

Commissioning reviews

Labour spokesperson Baroness Thornton moved Amendment 178A to cause 73, which would entitle NHS commissioners to undertake a “Commissioning Review” to determine if the most appropriate way to deliver services is through the “conclusion of arrangements” with one or more health service bodies or NHS Foundation Trusts. The amendment would specify that any decision taken as the result of such a review “shall not constitute anti-competitive behaviour. Baroness Williams described the amendment as the “best effort of many legal minds” to ensure, so far as is possible, that arrangements made between different parts of the NHS will not be subject to legal challenge on competition grounds:

“The purpose is not to give unfair preference to NHS providers, or, indeed, to prevent third sector providers; the purpose is to free commissioners to make decisions that would have to pass the test of reasonableness in any event.”⁷³

The Health Minister Earl Howe responded that the amendment would create an arbitrary and unnecessary presumption in favour of NHS bodies and foundation trusts which would be likely to act against patients’ best interests. He said it would also increase the risk of commissioners facing legal challenge under procurement law, as procurement must be transparent and non-discriminatory.⁷⁴ The Amendment was disagreed on division (Contents 157; Not-Contents 203).⁷⁵

⁷⁰ HL Deb 6 March 2012 c1754

⁷¹ HL Deb 6 March 2012 c1755

⁷² HL Deb 6 March 2012 c1728

⁷³ HL Deb 6 March 2012 c1684

⁷⁴ HL Deb 6 March 2012 c1692

⁷⁵ HL Deb 6 March 2012 c1730

Anti-collaborative behaviour

Crossbench Baroness Finlay of Llandaff moved amendment 165 to clause 61, to add “preventing anti-collaborative behaviour” to the general duties of Monitor, to ensure this had equal status with the duty to prevent anti-competitive behaviour. The Minister responded that collaborative behaviour when it was in the interests of patients would be regarded by Monitor “as trumping the need for competition to be deployed in services.” The amendment was disagreed on division (Contents 171; Not-Contents 221).⁷⁶

The commencement of Part 3 of the Bill

Labour spokesperson Baroness Thornton moved Amendment 300A to clause 302 regarding the commencement of Part 3 of the Bill. The amendment would mean that this part of the Act would come in to force on a date to be determined by Parliament and not before April 2016. It would also require consultation with various NHS bodies and patient and staff representatives before this could be done. Baroness Thornton said that the delay in implementing Part 3 would help achieve Nicholson challenge efficiency savings, and would allow more time to build capacity and prepare for implementation. Health Minister Earl Howe responded that deferring Part 3 would leave the NHS “without a comprehensive and effective framework for sector regulation”. The amendment was disagreed on division (Contents 178; Not-Contents 237).⁷⁷

2.5 NHS Foundation Trusts

Governors (clause 150)

During the Committee stage Labour health spokesperson Baroness Thornton moved Amendment 296A, which would ensure that foundation trust (FT) governors had a right to attend all meetings of the FT Board and its sub-committees and have access to all relevant documents and papers. Health Minister Earl Howe responded that while he agreed with the principle that governors should have all the relevant information about their board’s activities in order to hold them to account, the amendment was too heavy handed and would prevent Boards from discussing confidential matters. Baroness Thornton maintained that she wanted to test the opinion of the House and the amendment was disagreed on division (Contents 126; Not-Contents 153).

Private income cap (amendments to clause 163)

The Committee agreed Government Amendment 299ZA that would ensure that the majority of every foundation trust’s income must come from NHS service provision (in effect setting the cap on private income at 49%). A further Government amendment (Amendment 299AZA) would require every FT to explain in its annual report how its non-NHS income had benefited NHS services.⁷⁸ Up to this point, the Bill, which removes the current caps on FTs’ private income, had not set any limit on private work. These amendments were introduced after concerns that increasing the number of private patients treated by FTs could have a negative impact on their NHS services.⁷⁹

During Report, Lord Hunt of King’s Heath moved Amendment 220A to remove the part of clause 163 that would require a foundation trust’s principal purpose to require it to earn the majority of its income from the NHS. The amendment was disagreed on division (Contents

⁷⁶ HL Deb 6 March 2012 c1721

⁷⁷ HL Deb 13 March 2012 c262

⁷⁸ The main debate on this amendment, and the private income cap in general is available here [HL Deb 15 December 2011 cc1464-76](#)

⁷⁹ [HL Deb 15 December 2011 cc1464-76](#)

154; Not-Contents 212).⁸⁰ Following discussions between the Ministers and Liberal Democrat Peers, Government Amendments 220BZA and 220BZB to clause 163 were agreed, to require an increase in the proportion of a foundation trusts private income of more than 5% to be approved by a majority vote of the foundation trust's governors.⁸¹

2.6 Public involvement and local government

HealthWatch England (amendments to clause 180)

Crossbencher Lord Patel moved Amendment 223A to clause 180, to change the constitution of HealthWatch England, establishing it as an independent body, rather than as a committee of the Care Quality Commission as envisaged under Government plans. The amendment was disagreed on division (Contents 165; Not-Contents 189).⁸²

Health Minister Earl Howe moved Amendments 225, 226 and 226ZA to 226ZG to clause 180. Amendments 225 and 226 are intended to allow regulations about HealthWatch England's membership, Amendment 226 would ensure that the regulations must require that the majority of members cannot be members of the CQC. As well as making some further technical amendments, Government Amendment 226ZG would enable HealthWatch England to make recommendations of a general nature to local authorities about the making of arrangements for local healthwatch organisations and, where HealthWatch England is of the opinion that local healthwatch organisations' activities are not being carried out properly, to draw this to the attention of the local authority. The Lords agreed the amendments.⁸³

Government Amendments 229 and 230 to clause 180 were agreed. Amendment 229 places a duty on it to send all local healthwatch organisations a copy of its annual report, following a suggested amendment by Labour Peer Lord Harris of Haringey in Committee.⁸⁴ Amendment 230 would ensure that HealthWatch England is subject to the requirements to hold public meetings as set out in the *Public Bodies (Admissions to Meetings) Act 1960*.⁸⁵

The Government welcomed Amendment 228 to clause 180, tabled by Conservative Lady Cumberlege and Liberal Democrat Lady Jolly, which places duties on CQC and HealthWatch England to have regard to guidance from the Secretary of State about managing conflicts between these bodies.⁸⁶ Amendments 229A and 234ZA moved by Baroness Jolly would allow for Local HealthWatch organisations to have a power to make recommendation to the HealthWatch England board of HealthWatch England, and to ensure that HealthWatch England has regard to these recommendations.⁸⁷

Local HealthWatch (amendments to clause 181)

The Government introduced a large group of amendments to clauses 181 to 188 and Schedule 15 (Amendments 231B and 231C, 234A, 235A to 235D, 236A to 236F, 237A, 238ZA to 238ZZM), regarding the establishment, organisational arrangement and function of Local HealthWatch bodies. Government spokesperson Baroness Northover moved Amendment 231B to leave out clause 181 relating to the constitution of Local HealthWatch

⁸⁰ HL Deb 8 March 2012 c1919

⁸¹ HL Deb 8 March 2012 c1922

⁸² HL Deb 8 March 2012 c1961

⁸³ HL Deb 8 March 2012 c1964

⁸⁴ HL Deb 8 March 2012 c1971

⁸⁵ HL Deb 8 March 2012 c1971

⁸⁶ HL Deb 8 March 2012 c1971

⁸⁷ HL Deb 8 March 2012 c1971 and c1994

as statutory corporate bodies. She said that “on reflection” the Government had “...realised that greater flexibility was needed over the organisational form of local healthwatch”:

We do not now think that prescribing from the centre that local healthwatch must be a statutory body corporate with an exact form is the best way forward.”⁸⁸

Lord Harris of Haringey expressed surprise at “an almost extraordinary volte-face by the government about how local healthwatch organisations are going to operate and proceed.” Opposition whip Baroness Wheeler expressed concern at “these cobbled together last minute changes to the status and organisational arrangements for local healthwatch,” and said “We are utterly opposed to depriving local healthwatch of its statutory status”. A number of others expressed concerns about how the changes would impact on the independence of Local HealthWatch with regard to local authorities, and about the role of social enterprises in representing patients’ interests but Amendment 231B was agreed on division (Contents 168; Not-Contents 91).⁸⁹ The other Government amendments in this group were agreed, including:

- Amendment 231C leaves out Schedule 15, which provided for the organisational structure of Local HealthWatch.
- Amendment 235C would allow a local authority to commission a community interest company, charity or other form of social enterprise that meets the prescribed criteria to be the Local HealthWatch for an area, and would allow the Local HealthWatch to make arrangements with others to carry out its functions.
- Amendment 236E gives the Secretary of State the ability to publish conflicts of interest guidance that both local authorities and Local HealthWatch would have to have regard to.

The Government agreed to support Amendments 234 and 235 moved by Liberal Democrat Baroness Jolly, to replace references to “people” with “local people” in Section 221 of the *Local Government and Public Involvement in Health Act 2007* and insert a definition of “local people”.⁹⁰

Health and Wellbeing Boards

Labour spokesman Lord Beecham moved Amendment 238H to clause 194, which would require CCG commissioning plans to be agreed by the relevant health and wellbeing board. He said that as CCGs would be responsible for £60 billion it was important that there should be a mechanism for greater democratic accountability. Health Minister Earl Howe responded that giving health and well-being boards a power of veto over commissioning plans would undermine their relationship with CCGs. The amendment was disagreed on division (Contents 59; Not-Contents 146).⁹¹

2.7 Other amendments and debates

The abolition of the General Social Care Council

⁸⁸ HL Deb 8 March 2012 c1977. The Department of Health has published [Local Healthwatch – the policy explained](#) (2 March 2012) to help explain its new amendments to the Health and Social Care Bill about local Healthwatch.

⁸⁹ HL Deb 8 March 2012 c1991

⁹⁰ HL Deb 8 March 2012 c1994

⁹¹ HL Deb 8 March 2012, c2012

Clause 211 of the Bill would abolish the General Social Care Council and transfer the responsibility for the regulation of social workers in England to the Health Professions Council. Lord Hunt of King's Heath moved Amendment 234 to leave out clause 211, this amendment was disagreed on division (Contents 180; Not-Contents 212).⁹²

NICE guidance to local authorities

Clause 236 enables provision to be made for the replication of the existing funding direction to require the NHS to fund drugs and treatments recommended by NICE technology appraisal guidance. However, as originally drafted, the clause would not enable provisions to be made that would apply to local authorities. As the Bill would also make provision for local authorities to fund public health drugs and treatments Conservative Peer Lord Ribeiro moved Amendment 256 to the clause to permit regulations to require local authorities to comply with NICE recommendations to fund treatments under their public health functions. The Government supported the amendment and it was agreed by the House.⁹³

The Health and Social Care Information Centre and patient confidentiality

The Bill establishes the Health and Social Care Information Centre, giving it powers in relation to the collection, analysis, publication or dissemination of information. In response to concerns expressed in Committee about patient confidentiality the Government introduced a large group of amendments intended to strengthen the protection of personal information. (Amendments 268, 272 to 291D and 297A to 297D, to clauses 256 to 260, 266, 268 and 270, to Schedules 23 and 24, and introducing two new clauses).

Government Amendment 268 would introduce a new clause to restrict the bodies that are able to request the centre to collect confidential personal information to Monitor, NICE, the CQC or any other body prescribed in regulations. It also restricts the making of such requests to a person to whom information may be lawfully disclosed-for example, because they have obtained consent or have a power in statute to require such disclosure-or where the information may be lawfully disclosed to the centre.

Government Amendment 272 would limit the circumstances in which the Information Centre can require the provision of confidential personal information. Government Amendments 280, 281, 282, 284, 285, 287 and 288 clarify when the Information Centre would be permitted to disseminate "person-identifiable" information about individuals, and when it may be directed to disseminate or not to disseminate information. Government Amendment 289 would introduce a new clause to require the Information Centre to publish a code of practice for health or social care bodies on how to deal with person-identifiable or other confidential information. Government Amendments 291A to 291D and 297A to 297D are intended to provide a degree of "future-proofing" to ensure that the exact requirements for the future development and delivery of informatics systems to support the health and care sector can be met. This group also includes a number of minor and technical amendments to improve the drafting of the clauses and to ensure that they can be effectively exercised in practice.

The abolition of the National Patient Safety Agency

Clause 277 of the Bill would abolish the National Patient Safety Agency (NPSA) and transfer the responsibility for national systems of reporting and learning of adverse events to the NHS

⁹² HL Deb 13 March 2012 c189-90

⁹³ HL Deb 13 March 2012 c197

Commissioning Board. Lord Hunt of King's Heath moved Amendment 292 to leave out clause 211, this amendment was disagreed on division (Contents 187; Not-Contents 244).⁹⁴

The Human Rights Act and home care providers

Crossbench Peer Baroness Greengross moved Amendment 292A, intended to provide certainty about the coverage of the Human Rights Act with respect to healthcare and home care providers. Health Minister Earl Howe said that in the Government's view all providers of publicly funded health and care services should consider themselves bound by the duties under the Act. He said the Government opposed the amendment because of concerns that it would have "serious and unhelpful" consequences for the wider interpretation of the Act. The amendment was disagreed on division (Contents 196; Not-Contents 253).⁹⁵

2.8 Consideration of Lords amendments

The Commons agreed all the Lords amendments during the consideration of Lords amendments on Tuesday 20 March 2012. Three votes took place, two on Opposition amendments and one to accept the remaining Lords amendments at the conclusion of the debate (details provided below) (numbering of amendments as in the [Explanatory Notes](#)):

- Opposition Amendment (a) to Lords Amendment 31 was defeated on division by a majority of 80 (Ayes 233; Noes 313). Lords Amendment 31 to clause 25 was tabled by the Liberal Democrat Baroness Barker. It would require CCGs to make arrangements to ensure that members and employees of CCGs to declare their interests in publicly accessible registers. Speaking to Opposition Amendment (a) to Lords Amendment 31, Labour Health spokesperson Liz Kendall said that it "would ensure that members of a clinical commissioning group would not be able to take part in discussions or decisions about services in which they had declared a registered interest, which is the same format as in local government".⁹⁶
- Opposition Amendment (b) to Lords Amendment 148 was defeated on division by a majority of 78 (Ayes 235; Noes 313). Lords Amendment 148 to clause 164 was introduced by the Government following discussions with Liberal Democrat Peers. It would require any proposal to increase a foundation trust's total private income by more than 5% to be approved by a majority vote of the foundation trust's governors.⁹⁷ Labour Amendment (b) to Lords Amendment 148 would have added that any proposed increase in private income would also have to be approved by Monitor.
- The House agreed remaining Lords Amendments 12, 43 to 53, 61, 62, 168 to 241, 243 to 245, 247, 249 to 251, 253 to 286, 288 to 291, 327, 333, 334 and 366 to 374. This group encompasses a number of Lords amendments relating to public health, public involvement, local government, the Health and Care Professions Council, the National Institute for Health and Clinical Excellence and the NHS Information Centre. The amendments were agreed to on division with a majority of 88 (Ayes 324; Noes 236).

⁹⁴ HL Deb 13 March 2012 c221

⁹⁵ HL Deb 13 March 2012 c242

⁹⁶ [HC Deb 20 March 2012 c697](#)

⁹⁷ HL Deb 8 March 2012 c1922

The Bill received its third reading by 316 votes to 251 on 7 September 2012 ([HC Deb 7 September 2011 c497](#)).

3 The NHS risk register

Throughout the Bill's Committee stage Labour spokesperson Baroness Thornton, and others, called for the publication of the Department of Health Transition Risk Register, which outlines risks relating to the development and implementation of the Government's health reforms.⁹⁸ This followed the Information Commissioner's judgement on 2 November 2011 that, in response to Freedom of Information requests from John Healy MP and the *Evening Standard*, the Department should disclose the transition risk register and strategic risk register (the latter covering the most important risks faced by the Department).⁹⁹ The Department had 35 days from the date the Commissioner's ruling was made to either publish the risk registers or to submit an appeal to the Information Tribunal. The Health Minister Earl Howe made a [statement to the Committee on 28 November 2011](#) in which he confirmed that the Government would appeal the Commissioner's decision.¹⁰⁰

The tribunal to hear the Government's appeal, originally planned to take place in April, was brought forward to 5 and 6 March 2012, in response to calls for the judgement to be known before the conclusion of the Lords Report stage. On Friday 9 March 2012 the tribunal announced that it had dismissed the Department's appeal against the Information Commissioner's decision "that the 10 November 2010 Transition Risk Register should be disclosed, except in relation to the name of a junior official which should be redacted"¹⁰¹ (although it agreed that the Department should not publish its strategic risk register). In response to a Private Notice Question on Monday 12 March 2012 the Health Minister Earl Howe said the Government were awaiting the detailed reasoning behind this decision:

The Parliamentary Under-Secretary of State, Department of Health (Earl Howe): My Lords, the tribunal has agreed that the department should not publish its strategic risk register but has upheld the Information Commissioner's initial decision notice on the transition risk register. However, we await the full judgment, which will contain the detailed reasoning for the decision. This makes it extremely difficult to make a decision on whether the Government wish to appeal this decision. I hope very much that the tribunal will give its full judgment as soon as possible.¹⁰²

In an emergency debate on the Health and Social Care Bill on Tuesday 20 March 2012, called by the Opposition (under standing order 24), the Shadow Secretary of State for Health, Andy Burnham, moved a motion: "That this House has considered the matter of whether the House should defer consideration of Lords Amendments to the Health and Social Care Bill until after disclosure of the NHS transitional risk register." He called on Members to vote against this motion "to show that we have not had enough time to debate these important issues." (see [HC Deb 20 March 2012 c659](#)). The Government won the vote by 82 votes (Ayes 328, Noes 246).

⁹⁸ See [HL Deb 14 November 2011, c453](#) for example.

⁹⁹ There have been a number of references in the press to other risk assessments on the Government's health reforms drawn up by PCTs and other NHS organisations. For example, "risk registers" drawn up by the four merged strategic health authorities were published in the press on 14 February 2012.

¹⁰⁰ Earl Howe has made a number of subsequent statements on the issue, for example, in response to questions in the Lords on [18 January](#), and on [1 February 2012](#).

¹⁰¹ <http://www.guardian.co.uk/society/2012/mar/09/nhs-reforms-appeal-risk-register?newsfeed=true>

¹⁰² [HL Deb 12 March 2012 c11](#)

During the House of Lords Third Reading of the Bill on Monday 19 March 2012 Lord Owen proposed an amendment, the purpose of which was to delay considering of Third Reading until the publication of the reasons by the first-tier information tribunal, and the Government's response. This amendment was defeated by a majority of 115 (Contents 213; Not-Contents 328).

There was also Commons Opposition-day debate calling for the release of the risk registers on 22 February 2012. The Opposition motion, "That this House calls on the Government to respect the ruling by the Information Commissioner and to publish the risk register associated with the Health and Social Care Bill in order to ensure that it informs public and parliamentary debate", was defeated with a majority of 53 (Ayes 246, Noes 299) (see [HC Deb 22 February 2012 c981](#)).

At the start of the House of Lords Committee's eleventh sitting on 7 December 2011, Labour spokesperson Baroness Thornton moved a motion to express the House's regret concerning the Government's decision to appeal and stating that "disclosure would aid public understanding and debate on crucial aspects of the Bill"; this motion was disagreed on division (Contents 195; Not-Contents 248).¹⁰³

It is possible for the Government to appeal to an upper-tier tribunal and ultimately the Cabinet could veto any order to release the risk registers.

4 The Liberal Democrat Spring Conference

On Saturday 10 March 2012 the Liberal Democrat Spring Conference voted against debating a motion calling for the withdrawal of the Bill. However, the following day the conference also refused to fully endorse a motion supporting the Third Reading of the Health and Social Care Bill. After a short debate dominated by activists criticising the Bill, the conference voted by 314 votes to 270 in favour of removing a line in the original motion calling on Liberal Democrat Peers to support the Third Reading of the Bill "provided such further amendments are achieved". *The Guardian* reported that "Lib Dems are not officially saying that their MPs and peers should vote against the bill. But this vote shows that they cannot bring themselves to back it either."¹⁰⁴

5 Briefings on earlier stages of parliamentary scrutiny

A [House of Lord's Library note](#) summarises proceedings at the Health and Social Care Bills Report and Third Reading stages in the Commons.

Library Research Paper on the *Health and Social Care Bill* ([RP 11/63](#), 30 August 2011) provides an overview of changes to the Bill following the NHS Future Forum's listening exercise on the Bill during April, May and June 2011 and the re-committal of the Bill to Public Bill Committee.

There are two earlier Library research papers on the Bill: the first, prepared for the Commons Second Reading debate, provides more detail on the Bill, and the background to the Government's proposals for reform ([RP 11/11](#), 27 January 2011); the second paper provides a summary of the Commons Second Reading debate on the Bill, on 31 January 2011, and the changes made during the Public Bill Committee's first consideration of the Bill, between 8 February and 31 March 2011 ([RP 11/31](#), 6 April 2011).

¹⁰³ HL Deb 7 December 2011 c738-41

¹⁰⁴ <http://www.guardian.co.uk/politics/2012/mar/11/nick-clegg-shirley-williams-nhs-health-bill>

Further information about the Bill and the Government's account of its NHS reforms can be found on the [Department of Health website](#).¹⁰⁵

On 1 December 2011 the Government published *Protecting and Promoting Patients' Interests: the role of Sector Regulation*, to provide briefing for Peers as Part 3 of the Bill, which sets out the Government's proposals for sector regulation in the NHS, is debated in the Lords.

¹⁰⁵ See also: <http://healthandcare.dh.gov.uk/context/quickguide/> and http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_132469