House of Lords
London
SW1A 0AA

Monday, March 12th, 2012

Dear _____.

I'm writing to you with regards to the coalition government's "Health and Social Care Bill 2011" which proposes massive restructuring of the NHS.

I'm sure, as an active participant in the governance of Great Britain, you will be extremely familiar with the precise content of the Bill and its amendments. What you may not be aware of is what medical professionals, experts and the public think.

I want specifically to bring to your attention the astonishing disconnect between the overwhelming opposition to the Bill exhibited by academics, medical professionals and members of the public; and the stubborn, ill-advised perseverance of David Cameron and Andrew Lansley in pushing the Bill through both houses.

Opposition to this bill exists at every level of society, in both professional and academic institutions, and even strongly within the government itself. It is shocking to many that the Bill has made it this far in its current state. A glance at the list of Royal Colleges of medicine reveals an almost unilateral rejection of the government's proposals on the grounds that they will be damaging and irreversible, and not in the interests of the vast majority of patients or healthcare practitioners in this country. The list of those professional medical organisations in opposition to the Bill includes the Royal Colleges of Physicians, GPs, Paediatrics and Child Health, Radiologists, Nursing, Midwives, and Psychiatrists, as well as many others.

This opposition is somewhat unsurprising, given the content of the Bill. Most understand it to entail the privatisation of the NHS. The breadth and extent of the opposition to the Bill is impossible to miss. What is hard to understand is the government's refusal to acknowledge or listen to this expert opposition. I will provide references to back up each of my claims.[1]

The Conservative-led coalition government has pushed through these "reforms" as part of its political agenda. It has not paid due consideration to the views of the voters, the experts or the practitioners, even when they have been sought. The government is doing this without weighing-up the long-term consequences that these measures will have on the ability of the NHS to function and to continue to treat the most vulnerable members of society. A recent, peer-reviewed analysis published in the British Medical Journal concludes: "The government has been unable to show, as it has argued, that these changes are 'vital'".[2]

If it goes through in its current state, the Bill will have an irreversible and damaging effect on the NHS and the UK's core principles of universal healthcare. The Royal College of GPs has declared that it believes the Bill is "destructive" and "must be withdrawn entirely to ensure the stability of the NHS".[3] They call on political leaders to "stop using the NHS as a political football".

Opposition to the Bill is strong and almost unilateral amongst healthcare providers. The Royal College of Radiologists has "always had grave concerns about many aspects of the Bill"[4] and, when polled, more than 90% of the members of the Royal College of Physicians opposed the Bill.[5] Moreover, three-quarters of surveyed GPs (those the government claim will be "empowered" by the Bill) want it withdrawn.[6] The Royal College of Midwives remain "opposed" to the Bill and believe that it should be "dropped, with immediate effect".[7]

One of the most crucial aspects of the NHS, and one facet which makes Britain a world-leading provider of social healthcare, is its ability to treat the poorest and most vulnerable members of society without consideration of their ability to pay. Through the marketisation of the provision of healthcare, the Bill will threaten this most fundamental principle, leaving at-risk groups at even greater risk. This fact is openly acknowledged by experts. The Royal College of Paediatrics and Child Health has warned that the Bill is a "risk for children and young people".[8] In addition, a report

drawn up by 54 Primary Care Trusts found that the Bill's proposed changes may increase risks to vulnerable children.[9] Furthermore, internal NHS reports have warned that the governments plans run a high risk of reducing levels of safety and patient care.[10]

The British Medical Journal has recently highlighted services that, through the replacement of Primary Care Trusts by Clinical Commissioning Groups, will no longer be automatically secured on behalf of everyone in each geographical area.[11] The list includes the following:

- Accident and emergency services
- Services relating to contraception
- Services in connection with drug and alcohol misuse
- Services provided at walk-in centres
- Medical treatment of pupils
- Any other services that the secretary of state may direct

The British Medical Journal's analysis of the Bill is thorough and shocking. It ought to be read by everyone in government who has the power and responsibility to vote or debate the Bill, so a copy is included.

The dangers of commodifying heath and wellbeing are well-documented. One need only look to America to see the devastating effect this can have: the vast power that health insurance providers have over the political process, and the countless documented cases of these organisations working against the best interests of patients and those in need of help in order to maximise profit.[12, 13] Even in Britain, these fears are shared by many. The Royal College of Psychiatrists note that "there is a danger that, in the new system, services will go to the cheapest provider at the expense of quality".[14] Recently, more than 150 doctors, scientists and surgeons elected to voice their fears that the Bill proposes "marketisation and privatisation" of healthcare.[15] They follow the NHS Consultants' Association, which has been extremely vocal in its opposition to the Bill, also deeming it "privatisation" and "marketisation".[16] Professor Steve Field, head of the NHS "listening exercise" review completely dismisses the Bill as "destabilising" the NHS.[17] He says that the "free market" approach to healthcare "would destroy essential services" in hospitals of all sizes.

The Royal College of Nursing also opposes the Bill, stating that it considers it "a serious threat to the NHS".[18] It has voiced its concerns that the decision-making process in government has not adequately taken into account the views of medical professionals.

At this point the scale of opposition should be clear. It is surely enough for the government to redraw the Bill if, as it claims, it is committed to the NHS and social healthcare. But in fact I have only scratched the surface of the public and professional outrage and the scale of the facts that the government is ignoring. Allow me to continue.

The United Kingdom Faculty for Public Health (FPH) has called on the government to withdraw the Bill "in its entirety, because it would be in the best interests of everyone's health".[19] The FPH has also noted that the Bill "will increase health inequalities" and that there are significant omissions in the Bill in relation to what might protect patients if private providers go bankrupt. They call the Bill an "unaffordable and unnecessary burden".

Returning to the theme of increased risk for vulnerable patients, the highly respected Lancet medical journal has remarked that "the Bill and current amendments fail to safeguard the core principle of universal care", and has pointed out the fact that under the Bill, patients will have to pay for things they currently get for free.[20]

The British Medical Journal has recently published an analysis of the Bill which shows that it will result in the the loss of free healthcare to many, and even gives the secretary of state extreme powers to exclude people from the health service.[21] Even prior to this, when polled by the British Medical Journal, 93% of doctors believed that the Bill should be withdrawn.[22]

The British Medical Association (BMA) "opposes the whole Bill".[23] "Continuing with these radical reforms", it says, "especially in a period of huge financial constraint, is an enormous risk." It believes "the Bill will be irreversibly damaging to the NHS", and represents "an irresponsible waste

of taxpayers' money".[24] It calls the reorganisation "unnecessary" and implores the government to "withdraw the Bill and instead enter into productive dialogue with the BMA".[25]

However, David Cameron has not heeded the warnings given by these organisations (including those he handpicked to attend the emergency summit) and has decided not to engage in meaningful dialogue. Instead he has placated his party, concerned with the growing condemnations, that "fortune favours brave governments".[26] He simply says there's "no going back", despite the fact that the majority of voters oppose him in this matter.[27]

Doctor and journalist Ben Goldacre has pointed out the astonishingly undemocratic way in which David Cameron has conducted his emergency summit — consulting only those organisations which, at the time, had not come out against the Bill, while specifically excluding those (including the Royal College of GPs, the Royal College of Nurses, the British Medical Association, the Faculty of Public Health and the Royal College of Psychiatrists) known to oppose it.[28] Even some of those not vocal in their opposition before the summit have since moved to explicitly oppose the Bill.

It seems clear that the government is simply not interested in listening to those with access to the facts. So committed are they to their ideology-based agenda, they have been caught inventing facts and statistics to add weight to their conclusions. Goldacre (a journalist renowned for exposing phoney statistics) has also pointed out that the government has repeatedly used outdated and misleading statistics in support of the Bill.[29] At best, this demonstrates their lack of appreciation for the role of facts in policy, and at worst their wish to actively obfuscate the truth. In a similar vein, Lansley has repeatedly used falsehoods in his campaign, including distorted claims of falling productivity within the NHS. This has been corrected in articles in the Lancet medical journal — in fact, productivity has risen.[30] But of course, the government has not seen fit to redress their mistakes or reexamine their proposals in light of this. The government is not interested in the facts, but rather in pushing their own political agenda.

Even more sinister possible explanations for the government's refusal to listen to public and expert opinion have emerged. According to an investigation by The Mirror, an astounding 40 peers have been found to have a specific financial interest in the privatisation of the NHS.[31] According to an investigation by the Mail on Sunday, many aspects of the Bill have been heavily influenced (if not outright written) by an international management consultancy firm, which had privileged access to Lansley during the drawing-up of the Bill.[32] This firm, which has used its access to Lansley to "share information" with its corporate clients, stands to make substantial financial gains if this bill passes. These revelations should be regarded as allegations of substantial government corruption from a major British newspaper. They must be investigated and considered further before this bill is enshrined in law.

What I have presented here amounts to just a portion of the public and professional rejection of this bill, which the government nevertheless persists in pushing, apparently deaf to all reason and evidence. You will have noticed that I have not mentioned any party-political comment or opposition, simply the stated views of the public and numerous professional and expert bodies. There are of course countless more damning statements from medical professionals individually opposed to the Bill, and from members of parliament, both inside and outside the coalition.

It is clear that opposition to this bill is not an issue of politics, but an issue of fact-based policy, commitment to equality, and protection of this country's greatest institution.

Whether or not you broadly agree with the aims of the Bill, it is inescapable that the government have conducted themselves with shocking disregard for both democratic consensus and expert opinion. Whether or not this bill passes in some form eventually, in its current form it represents an insult to the British democratic process and to this country's commitment to universal healthcare.

I urge you to consider these facts when the Bill comes before the second chamber.

Yours faithfully,

Cai Wingfield (Ph.D. student)

1 I believe strongly in fact-based policy and the proper consultation of experts. I consider it to be a keystone of the democratic process, but something that in this case the Government has utterly failed in.

[2] http://www.allysonpollock.co.uk/administrator/components/com_article/attach/2012-03-08/BMJ_2012_Pollock_HealthSocialCareBill.pdf

3 http://www.rcgp.org.uk/news/press_releases_and_statements/response_to_lord_crisp.aspx

4 http://www.rcr.ac.uk/docs/newsroom/pdf/RCR_bill_withdrawal_statement_020312.pdf

5 http://www.guardian.co.uk/politics/2012/feb/26/hospital-doctors-oppose-nhs-bill

6 http://www.guardian.co.uk/society/2012/jan/12/gps-health-bill-withdrawn-poll?INTCMP=ILCNETTXT3487

7 http://www.rcm.org.uk/college/about/media-centre/press-releases/midwives-remain-opposed-to-health-bill-17-2-2012/

8 http://www.rcpch.ac.uk/child-health/standards-care/health-policy/health-and-social-care-bill/health-and-social-care-bill

9 http://www.guardian.co.uk/society/2012/mar/04/nhs-health-bill-child-protection-risks

10http://www.guardian.co.uk/politics/2012/feb/14/nhs-health-social-care-bill?INTCMP=ILCNETTXT3487

[11] http://www.allysonpollock.co.uk/administrator/components/com_article/attach/2012-03-08/BMJ_2012_Pollock_HealthSocialCareBill.pdf

12 The inability of market forces to represent externalised costs and benefits is well-known amongst economists, though is often not discussed by proponents of the free market. For example, in the USA, where blood products are a commodity, they suffer from higher rates of scarcity and contamination compared to the UK where blood products (currently) exist only as centralised donations. http://blogs.telegraph.co.uk/finance/tracycorrigan/10010791/Greed_is_useful_but_we_need_to_keep_it_in_its_place_says_Michael_Sandel_in_Reith_lecture/ Opposition to the privatisation and marketisation of healthcare is a point of fact as well as a matter of politics.

13The internet and newspapers are thick with moving and troubling personal anecdotes, one need only look for them. For one example, a friend of mine has written publicly about the concerns she encountered in her dealings with the NHS about the standards of professionalism and training in private parametics. http://thedinglestarry.livejournal.com/14451.html

14 http://www.rcpsych.ac.uk/press/pressreleases2011/healthsocialcarebillresponse.aspx

15 http://www.guardian.co.uk/society/2011/sep/11/doctors-letter-resists-nhs-reform

16 http://www.nhsca.org.uk/docs/newsletters/dec2011.pdf

17 http://www.guardian.co.uk/society/2011/may/13/andrew-lansley-nhs-reforms-unworkable

18 http://www.rcn.org.uk/newsevents/news/article/uk/rcn_moves_to_oppose_health_bill

19 http://www.fph.org.uk/fph_calls_on_government_to_withdraw_health_and_social_care_bill_%27in_best_interests_of_everyone%27s_health%27

20 http://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2812%2960246-3/fulltext

[21] http://www.allysonpollock.co.uk/administrator/components/com_article/attach/2012-03-08/BMJ_2012_Pollock_HealthSocialCareBill.pdf

22 http://www.guardian.co.uk/society/2011/sep/11/doctors-letter-resists-nhs-reform

23 http://www.bma.org.uk/images/nhsreformbriefingbmaopposesbilldec2011_tcm41-210946.pdf

24 http://www.guardian.co.uk/society/2012/mar/01/bma-letter-opposing-nhs-reforms

25 http://www.bmj.com/content/342/bmj.d4050

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27 http://www.guardian.co.uk/politics/2012/feb/20/conservative-support-shrinks-voters-nhs

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30 http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(11)61782-0/fulltext

31 http://www.mirror.co.uk/news/uk-news/nhs-reforms-d-day-40-peers-84917

32 http://www.dailymail.co.uk/news/article-2099940/NHS-health-reforms-Extent-McKinsey--Companys-role-Andrew-Lansleys-proposals.html

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ANALYSIS

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

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

Allyson M Pollock *professor*[1], David Price *senior research fellow*[1], Peter Roderick *public interest lawyer*[2]

[1]Centre for Primary Care and Public Health, Queen Mary, University of London, London E1 4NS, UK; [2]London, NW1 0XG, UK

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

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

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

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

Abolition of area based responsibilities

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

Legal basis for CCGs arranging fewer government funded health services

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

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

Correspondence to A M Pollock a.pollock@qmul.ac.uk

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treating and caring for persons with such infections or diseases

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

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

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

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

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

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

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

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

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

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

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

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

How new charges can apply

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

People may be excluded from health services

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

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

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Public health functions that are subject to new charging powers

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

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

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

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

Conclusion

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

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

Competing interests: All authors have completed the ICMJE uniform disclosure form at www.icmje.org/coi_disclosure.pdf (available on request from the corresponding author) and declare: no support from any organisation for the submitted work; no financial relationships with any organisations that might have an interest in the submitted work in the previous three years; no other relationships or activities that could appear to have influenced the submitted work.

Provenance and peer review: Not commissioned; externally peer reviewed.

1 House of Lords. Health and Social Care Bill 2011. HL Bill 92. www.publications.parliament.uk/pa/bills/lbill/2010-2012/0119/2012119.pdf.
2 House of Commons, National Health Service Act 2006, sections 1 and 3. www.legislation.gov.uk/ukpga/2006/41/contents.
3 Health and Social Care Bill briefing note 12: Earl Howe's response to the Constitution Committee's follow-up report and his letter dated Jan 12, 2012. www.allysonpollock.co.uk/administrator/components/com_article/attach/2012-01-17/Pollock_HouseOfLords_HSCB_Briefing12_HoweLetter_17Jan12.pdf .
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