Note about the Healthcare (International Arrangements) Bill 2018, introduced 26.10.2018

Some concern has been expressed about the Government's new Healthcare (International Arrangements) Bill 2018. This Note is designed to provide a brief explanation of the Bill and to consider whether we should be worried about it.

Executive summary

» The Bill is designed to cover arrangements for reciprocal healthcare (a) in the case of No Deal and (b) for those not covered by any Deal that is made.
» If the Withdrawal Agreement (WA) is ratified in its present form, the present EU system of reciprocal healthcare will be guaranteed for UK citizens in the EU covered by the WA. This Bill does not affect that.
» The Bill is of relevance for UK citizens who will not be covered by the WA.
» The introduction of the Bill is not itself sinister: there are perfectly good legal reasons why the Government had to introduce legislation of some sort to provide for reciprocal healthcare after Brexit.
» Nor is it necessarily sinister that the Bill avoids all detail and simply empowers Ministers to promote secondary legislation which will then set out the detail: it was impossible for the Government to go into more detail at this stage as it does not yet know the outcome of the Brexit negotiations, so it does not know what gaps need to be filled.
» In short it could turn out badly or well: it is simply too soon to say.
» That said, we should not be complacent but must keep an eye on government announcements and the Parliamentary debates, and intervene if we think that Citizens' Rights are being compromised.

Why have a Bill at all?

Since the Bill of Rights 1689 the executive has required the authority of Parliament to spend taxpayers' money. Participation in the present EU system of reciprocal healthcare involves spending taxpayers' money and is covered by statute. The EU (Withdrawal Agreement) Bill authorises all expenditure covered by the WA, both in the transition period and beyond. However, there is no statutory authority for expenditure which is not covered by the WA (eg EHIC for UK citizens residing in the UK) or for any reciprocal healthcare expenditure if there is No Deal. So some legislation is legally necessary and the introduction of such legislation is not of itself sinister but sensible.

But the Bill is very vague

The Bill is indeed very vague. It is of the sort much beloved by this government – ie it largely enables Ministers to legislate by statutory instruments, which in turn receive much less Parliamentary scrutiny than an Act of Parliament. In this particular case that is not necessarily sinister for the following reasons:

- As **British in Europe** has been pointing out for the last year and a half, it is not possible for the UK to replace the EU reciprocal healthcare system *unilaterally*. Reciprocity requires agreement between at least two countries that one country will provide healthcare and another will pay for it. The Bill empowers the government to make reciprocal healthcare agreements and gives considerable flexibility to do so. The new powers could be used after Brexit to (a) replicate current arrangements with the EU; (b) make new arrangements with the EU; or (c) make new bilateral reciprocal arrangements with individual countries. The Explanatory Notes set out EU countries where current reciprocal arrangements are most used. This could indicate the target countries for any first new bilateral agreements, if this proves necessary.
- As it is not yet known whether there will be a Deal, it is not known whether the draft WA healthcare

provisions will come into effect. The agreements which need to be made if it does are quite different to those which need to be made if it does not. It is therefore not yet possible to state *what agreements* should be made.

- Moreover, it takes two to tango. Until such agreements are made, at least in principle, it is not possible to know what their terms will be. It is therefore not yet possible to state *what terms* such agreements should contain (it would be possible in theory to provide for minimum terms, but what if the other party(ies) did not agree?).
- In this particular situation, then, there is nothing sinister in the failure of the Bill to be more specific.

What is to be done?

This does not mean that we should all sit back and relax. Governments have disappointed and failed to keep their promises too often in recent years for that to be a good idea, and the Brexit experience simply confirms that. Rather, the open-ended nature of the legislation means that we need to keep a close watch on government announcements, on any agreements that they are proposing to make, and on the regulations when they are drafted.

Some specific concerns

- The Bill is accompanied by the usual Explanatory Notes. Whilst pointing out that it is impossible to estimate exactly the expenditure which this Bill will occasion, since the agreements which will be covered are not yet known, the Notes estimate that if there is a Deal, the cost of maintaining the present system would remain unchanged at £630m. So no reduction in cost is anticipated, "if the UK continues to participate in the current EU arrangements". The "if" might be a cause for concern, but this is because the Bill is looking at reciprocal arrangements for all UK citizens for the future and the EU will have to agree to continue current arrangements in the context of the future UK-EU agreement. This does not however affect in any way what has already been agreed for British in Europe in the context of the WA. If the WA is ratified, then the UK will be committed by Treaty to continuing the present arrangements for those covered by it.
- Clause 5(4) of the Bill provides that Regulations may amend, repeal or revoke retained EU law. Strictly this would give authority for Regulations to change the application of the EU scheme in the UK but, once again, were the UK to do so in breach of the WA, it would be in breach of a Treaty and would be subject to correction by the European Court of Justice for 8 years from 31.12.20 and subject to whatever governance mechanism is in place long-term to keep each side to its bargain.
- Finally, the provisions authorising the sharing of data appear to be too wide. Clause 4(1) provides that "an authorised person may process personal data held by the person in connection with any of the person's functions where *that person considers it necessary* for the purposes of implementing" etc the Act. The words in italics are a very wide formulation for the exercise of a function like this, designed to make a challenge in court almost impossible. Among others defined as "an authorised person" is "a provider of healthcare". So the authority extends to commercial organisations as well as public authorities. Moreover it is left to bodies such as the NHS to define for themselves the level of staff who should have this degree of authority. A concern then which is perhaps peripheral to the major concerns of British nationals in the EU, which are more to do with whether they will get any treatment at all and if so on what terms; nevertheless an issue to keep an eye on.

November 13th 2018