PARLIAMENTARY BRIEFING – 21 FEBRUARY 2013

Privatising the NHS through the back door

- Last week the Government published new regulations (SI257) under Section 75 of the Health & Social Care Act 2012[1]
- Assurances were given by ministers during the passage of the Bill through Parliament that it did not mean the privatisation of the NHS, that local people would have the final say in who provided their NHS.
- The regulations just published break these promises by creating requirements for virtually all commissioning done by the National Commissioning Board (NCB) and Clinical Commissioning Groups (CCGs) to be carried out through competitive markets, which will have the effect of forcing through privatisation regardless of the will of local people. They contain legal powers for Monitor to enforce the privatisation spontaneously or at the request of private companies which lost bids.
- They would also make it impossible to fulfil some of the key thrust of the Francis report recommendations.

What did ministers say then?

- Andrew Lansley MP: "There is absolutely nothing in the Bill that promotes or permits the transfer of NHS activities to the private sector." (13/3/12, Hansard[2])
- Andrew Lansley MP, 12.02.12, letter to Clinical Commissioning Groups: "I know many of you have read that you will be forced to fragment services, or put them out to tender. This is absolutely not the case. It is a fundamental principle of the Bill that you as commissioners, not the Secretary of State and not regulators – should decide when and how competition should be used to serve your patients interests.."
- Simon Burns MP: "...it will be for commissioners to decide which services to tender…to avoid any doubt—it is not the Government's intention that under clause 67 [now 75] that regulations would impose compulsory competitive tendering requirements on commissioners, or for Monitor to have powers to impose such requirements." (12/7/11, Hansard, c442[3])
- Lord Howe: "Clinicians will be free to commission services in the way they consider best. We intend to make it clear that commissioners will have a full range of options and that they will be under no legal obligation to create new markets…." (6/3/12, Hansard[4])

What do the regulations say?

According to David Lock QC, the regulations as a whole have the effect of closing down the current option of an in-house commissioning process, even if local people wish it. This option has been taken in a number of cases, including *since* the passage of the Act[5]. Ministers have confirmed that at the *present* time such arrangements are legal and would not give rise to challenge under EU Procurement law[6].

[1] The National Health Service (Procurement, Patient Choice & Competition) Regulations 2013 http://www.legislation.gov.uk/uksi/2013/257/contents/made
[2] http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120313/debtext/120313-0002.htm
[3] http://www.publications.parliament.uk/pa/cm201011/cmpublic/health/110712/pm/110712s01.htm
[4] http://www.publications.parliament.uk/pa/ld201212/ldhansrd/text/120306-0001.htm
[5] www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=12092%3Anhs-gloucestershire-in-outsourcing-u-turn&catid=174&Itemid=99
[6] www.whatdotheyknow.com/request/113046/response/286241/attach/html/10/701443%20Geoffrey%20Clifton%20Brown.pdf.html

These regulations sweep all existing arrangements between NHS bodies, and just about all commissioning done by the CCGs, into a market framework[7]. - and thus into the remit of EU competition law,. Once this is triggered, private providers gain rights which make halting their encroachment financially – and thus politically – virtually impossible.

Regulation 5 - awarding a contract without competition can, effectively, only[8] be done in an 'emergency', a much narrower restriction than suggested in the parliamentary debate.

Regulation 10 makes whatever Monitor judges to be an "unnecessary" restriction of competition, illegal. It thus effectively closes down the current option of one state body (i.e. the NHS Commissioning Board or a Clinical Commissioning Group) merely making a new arrangement (not contract) with another – i.e. an NHS Trust.

Regulation 12 forces commissioners to use the market to meet waiting time considerations, in contravention of assurances offered to CCGs during the passage of the Act when they were told they would have discretion and could also consider quality issues. This regulation also ignores the summary of the DH's own consultation which highlighted that waiting time considerations should not be used to override quality considerations.

Part 3 Regulations 13-17, covering Monitor's powers

The sweeping (and time unlimited) statutory powers given to Monitor enable it to decide when the CCG has breached regulations (Regulation 14), to end any arrangements the CCG has come to and to impose their own (Regulation 15) – including the criteria governing selection of suppliers, and more fundamentally, the decision about whether to use competitive methods like tendering and AQP at all. Under these regulations Monitor will have sweeping statutory power to enforce (as yet unseen) guidance, whereas the current guidance is not legally binding.

(For further discussion please see http://opendemocracy.net/ournhs/nicola-cutcher-lucy-reynolds/nhs-as-we-know-it-needs-prayer.
For a more detailed analysis of the regulations, please email campaignmanager@keepournhspublic.com)

What can MPs do

- Support moves to ensure these regulations are subject to both committee scrutiny and full debate and vote on the floor of both houses, and vote against them. This would be unusual, but possible.
- These regulations should not proceed – take time to find a better solution to the challenges posed by Francis and the wishes of your constituents.
- Remember that these regulations go much further towards privatising the NHS than ministers implied when the legislation was going through Parliament. Respond to the wishes of your constituents.[9]
- Use your parliamentary skills and experience to the full to save this institution from privatisation.
- This is a last chance to save the NHS we celebrated in the Olympics ceremony. The culture of care has already been damaged by managing the NHS as though it were a market, as the case of Mid Staffordshire Foundation Trust demonstrates, but it can be repaired and be the safety net we have relied on for 65 years.

This parliamentary briefing has been prepared by Keep Our NHS Public www.keepournhspublic.com. **Keep Our NHS Public** is a non party political organisation aiming to retain our NHS as a publicly provided, publicly funded and publicly accountable service.

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[7] Competition law applies to any public sector transaction which is contracted through a market in which profit-making competitors can participate.
[8] The only other exception – where competition is legally or technically impossible – is extremely specific and limited and thus unlikely to be of much use to local commissioners in the vast majority of circumstances.
[9] Polls show that 4 out of 5 voters (across the political spectrum) do not want any more markets in the NHS http://cdn.yougov.com/cumulus_uploads/document/ly9ei68uye/YG-Archives-Pol-ST-results-10-120212.pdf