Amend in haste, repent at leisure - NHS section 75 saga continues

Caroline Molloy [1] 11 March 2013

The government today released its amended regulations on NHS procurement after considerable outrage from campaigners and parliamentarians over what appeared clear breaches of agreements. But is the government still going ahead with compulsory NHS competition?

This afternoon, the government published revised regulations under Section 75 of the Health & Social Care Act 2012. The government has hastily re-written these regulations, the first draft of which would have forced commissioners to open just about every part of the NHS up to private sector competition. Howls of protest from grassroots [2] groups [3], healthcare professionals [4], all the [5] Royal [6] Colleges [7], all [8] the [9] unions [10], and even those few parts of the NHS previously supportive [11] of the Act, were taken up publicly by the Labour front bench [12], and (we are told [13]) privately by the Lib Dem leadership.

Having been caught [14] red-handed [15], trying to sneak in drastic changes and broken promises through the back door, does the rewrite do enough? Will these new regulations ensure that, as promised, GPs ‘as commissioners – not the Secretary of State or regulators – should decide when and how competition should be used’ [16]? And that ‘there is nothing in the [Health & Social Care] Bill that promotes or permits the transfer of NHS activities to the private [17] sector’? Or do they still take power away from local people and draw huge parts of NHS provision into an unnecessary quagmire of competition law for the first time?

It remains to be seen. Lib Dems should be very wary of boxing themselves in by rushing to hail these new regulations as enough of an improvement. A cosmetic re-write, that seeks merely to better disguise the true privatising aim of these regulations, was widely expected, as Earl Howe opined that all was needed was to ‘improve the drafting’ and ‘clarify’ them, to avoid ‘confusion’.

Lawyers will be looking very closely at these regulations over the coming few days, but it is surely inappropriately hasty to bring them into force on 1 April - ie, before any parliamentary scrutiny and vote can take place. Last week Norman Lamb assured campaigners that he shared their concerns, and was ‘determined to ensure there is complete transparency in this process’. Shirley Williams hinted at this weekend’s party conference, that Lib Dem ministers had not even seen the first regulations before publication. Surely, in these circumstances, transparency is best served by simply revoking the regulations so that the coalition can take time to consult and consider what if regulations, if any, may be needed - particularly in the light of the recent Francis recommendations.

In the mean-time, the Clinical Commissioning Groups are capable of getting on with making decisions that respond to the needs of local people, as promised. Currently, commissioners can decide what is best for patients, from a wide range of options, including (for example) an in-house arrangement between NHS bodies. The government confirmed [18] such an arrangement was entirely legal a few months ago, but it would be outlawed [19] under the first draft regulations. This is a crucial point and no new regulations should be accepted without addressing it.

The excessively tight exceptions for tendering appear – on face value- to have been loosened very slightly, but it is little help if some exemptions are allowed, but only – as Earl Howe has suggested [20] - in unprofitable areas (like A&E) that the private sector probably doesn’t want anyway. His
soothing words in themselves do nothing to stop the private sector picking off everything that really brings in the government money – all the ‘routine’ operations, home visits, and outpatient appointments – damaging what’s left of the NHS quite possibly beyond repair.

In any event, the problem with these regulations was never about just one clause. Sweeping pro-competition clauses like section 10(2) seem, on first glance, little changed, along with extensive provisions to enforce other forms of competition, like Any Qualified Provider. And Monitor will be the sole legislator, judge and jury, of what is supposedly in ‘patients best interests’, within a legal framework that appears still to unnecessarily extend competition law in several ways. Its sidekick, the Competition and Co-operation Panel (headed by a private healthcare mogul) would also gain statutory powers.

Thanks are due to Andy Burnham and Lord Phil Hunt, who quickly got behind campaigners and cross-party backbenchers who sounded the alarm.  It was good to hear Burnham talking in outraged terms of ‘back door privatisation’.  But it was worrying to see the news report this, rather prematurely, as a U-turn. Vigilance, and indeed political will, must not be sapped by arcane parliamentary procedures or Tory spin. The NHS should be in Labour’s – and indeed the Liberals – blood. To protect the NHS against Tories who have admitted they intend to dismantle it in one term, and are prepared to lie to do so, will involve an Opposition strategy more sophisticated than ‘blaming the Lib Dems’.  The public – four out of five of whom don’t want any more markets in the NHS – deserve better. No-one voted for NHS privatisation, it’s not in the coalition agreement, it won’t save money, it won’t provide better results, and if it happens, it will be possibly the biggest failure of democracy in living memory.

(You can see the revised legislation here.)

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