HEALTH AND SOCIAL CARE ACT **Martin McKee**

England's healthcare now lies in the hands of lawyers

The government's revised regulations on competition have removed much of the initial clarity of the 2011 health act

The Health and Social Care Bill that the government sprung on an unsuspecting electorate in January 2011 attracted much criticism but had the advantage of clarity of purpose. It envisaged a competitive market in which healthcare would be purchased from any willing provider, regardless of its experience.

Faced with widespread criticism that the bill could lead to privatisation, fragmentation, and administrative costs, the government paused to engage in a "listening exercise." Many words were changed in the revised bill; any "willing" provider became any "qualified" provider, albeit unspecified. A widespread view was that the revisions had created confusion, not clarity. Critics said that the bill's basic goal of privatisation remained and predicted that this would become apparent when the government published the regulations needed to implement it.

In February 2013, a few weeks before the act was due to come into force, the regulations on competition were laid before parliament.[1 2] The critics were right. All services must be open to competition. The new clinical commissioning groups could not pick and choose.

The few remaining supporters of the bill had believed the assurances made by ministers seeking support from Liberal Democrat politicians to get the bill passed. When speaking of private provision, ministers invariably referred to small charities providing niche services and not large corporations without previous involvement in healthcare. The ministers accused their critics of scaremongering, offering reassurances that the bill didn't really mean what it said. The former health secretary Andrew Lansley said that it was "absolutely not the case" that commissioners would be forced to put services out to tender. The health minister Simon Burns said that it was not the government's intention to "impose compulsory competitive tendering requirements on commissioners, or for Monitor [the competition regulator] to have powers to impose such requirements." In the House of Lords, Earl Howe emphasised that there would be "no legal obligation to create new markets."

The publication of the regulations largely escaped media attention, conveniently distracted by the Mid Staffordshire affair. But a petition by the campaigning group 38 Degrees attracted over 350 000 signatures, 1000 health professionals wrote to the *Daily Telegraph*, and the Liberal Democrat MP Andrew George called for the regulations to be withdrawn.

The government resorted to a tried and tested formula: pause and listen. Ministers portrayed themselves as victims of careless parliamentary drafting, reporting surprise at what had been written, which suggested that they had laid the regulations before parliament without having first read them. This evoked memories of the shock expressed by Captain Renault in *Casablanca* on "discovering" gambling taking place in Rick's bar. Then the ministers claimed that the regulations were much the same as what had been put in place by the last Labour government, provoking the question of why a 300 page act had been needed. Yet the regulations were crystal clear and entirely consistent with the act. The inconsistency was between the ministers' reassurances and both the act and the regulations.

So how do the new regulations differ? There is a nod to integration, although not as one of the three objectives that commissioners must pursue (securing needs, improving quality, and promoting efficiency), only as one way in which they might do so. A paragraph clarifying the extremely limited circumstances in which commissioners could offer a contract without competition has been deleted. The section prohibiting anticompetitive behaviour now has an exception for when integration or cooperation can be shown to be in the interests of patients, although without guidance as to how this would be established. Finally, Monitor is prevented from ordering a commissioner to open up a service to competition. Many will be reassured that the original regulations were an innocent mistake now corrected.

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Or maybe not. The revisions have removed much of the initial clarity and, in several places, are ambiguous. In one place anticompetitive behaviour is forbidden unless it is in "the interests of" service users—in another unless it is "necessary" to achieve intended outcomes for them. These are not the same. Commissioners must achieve "best value," which is unspecified and, as the tendering for the west coast rail franchise showed, a challenge to define. There is no requirement to consider existing providers' stability, and, arguably, this is forbidden. Commissioning is on behalf of users, not the population, excluding those whose needs are not already met.

So where now? For the government's changes to achieve their fundamental goal it was never necessary for all care to be privatised, only those bits from which large corporations could make adequate profits. However, the contradictions within the regulations and with the act create a magnet for competition lawyers, including some of the peers who supported the act. The result is that the future of healthcare in England lies in the hands not of politicians and professionals but of competition lawyers. Clinical commissioning groups may no longer fear Monitor but will think twice before invoking the wrath of one of the large corporations now moving into healthcare. With legal and contracting teams many times larger than those available to the commissioners, it is they who will be the ultimate arbiters of the shape of healthcare.

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HEALTH AND SOCIAL CARE ACT **Jacky Davis, Ian Banks, David Wrigley, Clive Peedell, and others**

Act now against new NHS competition regulations

An open letter to the BMA and the Academy of Medical Royal Colleges calls on them to make a joint public statement of opposition to the amended section 75 regulations

On 1 April the government is due to enact enabling legislation to the Health and Social Care Act, which will in effect require clinical commissioning groups to enter into competitive tendering for all NHS services. This contradicts clear promises made in the letter that former health secretary Andrew Lansley sent to clinical commissioning groups on 16 February 2012, which stated "it is a fundamental principle of the Bill that you as commissioners should decide when and how competition should be used to serve your patients' interests."[1]

The original section 75 proposals were withdrawn after widespread protests. Amended regulations were tabled, but there is widespread consensus (including counsel's opinion) that these do not change the underlying thrust. The amended regulations state that commissioners are not required to advertise if "satisfied" that the services can be provided by a single provider only. However, there remains the strong possibility that a decision not to tender will be challenged by a dissatisfied commercial provider, threatening to involve the clinical commissioning group in lengthy and expensive litigation. The only way a commissioning group can prove that services can be provided by a single provider only is to go to tender. Groups are therefore likely to practise "defensive tendering"—that is, tendering to protect themselves from risk of litigation from private providers. This would waste public money, and "wasteful" tendering could itself breach regulation 2 (for inefficiency).

Forcing clinical commissioning groups to practise competitive tendering will not only break government promises made about the autonomy of these groups, but it will also lead to inevitable acceleration of the privatisation of the NHS, which is already under way. While the government has repeatedly insisted that it will not privatise the NHS, what is happening now meets all criteria for the definition, including the criteria of the World Health Organization.[2] It is part of a wave of healthcare system privatisation forced on European Union countries by Washington's requirement for legal harmonisation with US laws before the EU-US treaty that David Cameron will sign in June 2013. The rhetoric of these reforms is "the best interest of the patients," but the reality is a raid on public service budgets and an attempt to open the door to co-payments and the expansion of private health insurance.

In its response to the Future Forum report[3] the government specifically undertook to rule out privatisation of the NHS. Health minister Simon Burns promised in a letter,[4] "We will never 'privatise' the NHS, will never pursue competition as an end in itself, and frontline staff (will have) the ability to take control of the services they can offer." Deputy Prime Minister Nick Clegg promised, "Yes to reform of the NHS—but no to the privatisation of the NHS." The content of the section 75 regulations shows these statements were not and cannot be true. They are a classic set of privatisation regulations. Many countries have already been caught in the trap set by these regulations and are seeing healthcare costs climb and outcomes deteriorate—let us not follow them into an avoidable healthcare disaster.

Broken promises? Former health secretary Andrew Lansley (left) and health minister Simon Burns

> **It is not too late to change the direction of travel that the government is pursuing against the wishes of the profession and the public, and which these regulations will cement in place**

Promises made to the profession and the public are now seen to mean nothing and full opposition to these regulations is the only possible response. Doctors are trusted by patients and the public and thus we have a duty to speak out when acts of vandalism are perpetrated on the health service we all work in and on which our patients and families rely.

We are appealing to the elected leaders of the medical profession to stand up and be counted at this last hour. Once again the future of the NHS is in your hands. We call upon the BMA and the Academy of Medical Royal Colleges to make a joint public statement of opposition to the amended section 75 regulations. It is not too late to change the direction of travel that the government is pursuing against the wishes of the profession and the public, and which these regulations will cement in place. Please act now.

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