PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Sixth Delegated Legislation Committee

DRAFT HEALTH CARE SERVICES (PROVIDER SELECTION REGIME) REGULATIONS 2023

Tuesday 28 November 2023

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not later than

Saturday 2 December 2023

The Committee consisted of the following Members:

Chair: † Clive Efford

† Baker, Duncan *(North Norfolk)* (Con)
† Blomfield, Paul *(Sheffield Central)* (Lab)
† Clarke, Sir Simon *(Middlesbrough South and East Cleveland)* (Con)
† Crosbie, Virginia *(Ynys Môn)* (Con)
† Dalton, Ashley *(West Lancashire)* (Lab)
† Duguid, David *(Banff and Buchan)* (Con)
† Edwards, Ruth *(Rushcliffe)* (Con)
Edwards, Sarah *(Tamworth)* (Lab)
† Gill, Preet Kaur *(Birmingham, Edgbaston)* (Lab/Co-op)
† Holloway, Adam *(Gravesham)* (Con)
† Hopkins, Rachel *(Luton South)* (Lab)
† Morrissey, Joy *(Lord Commissioner of His Majesty's Treasury)*
† Randall, Tom *(Gedling)* (Con)
† Rimmer, Ms Marie *(St Helens South and Whiston)* (Lab)
† Stephenson, Andrew *(Minister of State, Department of Health and Social Care)*
† Vickers, Matt *(Stockton South)* (Con)
† Wakeford, Christian *(Bury South)* (Lab)

Chris Watson, *Committee Clerk*

† attended the Committee

The following also attended (Standing Order No. 118(2)):

Greenwood, Margaret *(Wirral West)* (Lab)

Sixth Delegated Legislation Committee

Tuesday 28 November 2023

[Clive Efford *in the Chair*]

Draft Health Care Services (Provider Selection Regime) Regulations 2023

2.30 pm

The Minister of State, Department of Health and Social Care (Andrew Stephenson): I beg to move,

That the Committee has considered the draft Health Care Services (Provider Selection Regime) Regulations 2023.

It is a pleasure to serve under your chairmanship, Mr Efford. I will begin by setting out the policy context for the regulations. The House will know that the challenges we face as a country are changing, and the NHS is changing to address them. We have an ageing population, an increase in people with multiple health conditions, and persistent inequalities in health outcomes. We must respond to those challenges. To do so, we need to provide an empowering framework that allows the NHS to combine the value of competition with collaboration, to best promote the interests of patients. These regulations do that. They will establish a provider selection regime from 1 January 2024.

In 2019, engagement across the NHS identified that use of the current procurement rules presented a bureaucratic barrier to bringing NHS organisations and partners together. The NHS wanted a framework that would allow it to be flexible in different scenarios; that allowed for competition, without defaulting to it; and that supported the increased need for alignment of services, so that we can join up care for patients. The Government developed this legislative framework in the light of those requests. In June 2019, the Health and Social Care Committee agreed that that was the right approach to

"ease the burden procurement rules have placed on the NHS, ensuring commissioners have discretion over when to conduct a procurement process".

As colleagues from across the health system have emphasised, we must seek a balance. We want a system-driven approach to planning services, but recognise the importance of provider diversity for innovation and value. That is why my officials have worked closely with a broad range of colleagues and organisations across the system, including commissioners and providers of health care services, to prepare this statutory instrument. That work included extensive consultation. In 2021, NHS England published a consultation on the detail of the policy behind this instrument. Some 420 responses were received from NHS representative bodies and individuals, and 70% of respondents agreed or strongly agreed with the detailed proposals set out in that consultation. The Department of Health and Social Care published a further consultation in 2022 that aimed to inform the detail of our regulations.

Our voluntary impact assessment shows that in the most likely scenarios, this instrument will deliver a saving to the NHS by reducing bureaucracy. It is difficult to provide a precise figure ahead of the monitoring of any such regime, but Members who have read the impact assessment will be aware that our central estimates suggest that savings of up to around £230 million a year are possible.

Of course, as many Members will know, getting the balance of a framework right, so that it promotes the best culture and behaviour on the ground, is tricky. I am glad, therefore, that our engagement with stakeholders has resulted in an agreement to establish an independently chaired panel for contested decisions made under this regime.

Legislation and guidance are only part of the story of how the new legislation will influence outcomes. That is why my Department is committed to monitoring and evaluating this new regime from its implementation.

To summarise, this instrument reflects engagement and careful balancing to present commissioners with the right options for procurement, so that they can go about finding the most collaborative, value-adding solutions that will work for patients. I commend the regulations to the Committee.

2.34 pm

Preet Kaur Gill (Birmingham, Edgbaston) (Lab/Co-op): It is a pleasure to serve under your chairship, Mr. Efford. I begin by reflecting on the story of these regulations. That goes back to the David Cameron era of reforms that came into force with the Health and Social Care Act 2012. Those flagship Conservative reforms turned the concept of competition into the organising principle in our NHS. They turned competition from one of the ways that the NHS was meant to operate into pretty much the only way to run the NHS. As that Bill went through Parliament, Labour argued that relevant authorities should have the flexibility to award contracts. We warned against excessive private involvement in the NHS and said that the marketisation of the NHS would act as a barrier to integration—which is crucial for our ageing population, who often have multiple conditions—and would ultimately lead to a worse service for patients. We were vindicated.

The NHS that the Government inherited from Labour in 2010 was judged by the Commonwealth Fund as the best and—crucially, when we consider the regulations—one of the most efficient healthcare systems in the world. A decade on, the NHS is in the middle of the worst crisis in its history, with the highest waiting times and lowest patient satisfaction. It has been left without the staff, equipment or modern technology needed to ensure that patients can be treated on time, and it has slid down the international rankings to the middle of the pack. Competition may have been the watchword of the Government's NHS reforms, but in reality, the only competition it meant was a race to the bottom. Even the current Chancellor admitted that the reforms led to ridiculous fragmentation, wasteful bureaucracy and a worse service for patients.

The new provider selection regime is an opportunity to correct a decade-long mistake, and to move the NHS away from competitive retendering by default and towards the emphasis on collaboration and integration that Labour called for all along. I will not go so far as to call this another case of the Government pinching our ideas, given what a long struggle it has been to get to this point, but it is a chance to draw a line under a failed Conservative experiment. That is why I and the Opposition will support the new regime today.

The new regulations are an extension of the Health and Care Act 2022. As the Minister outlined, they are intended to provide relevant authorities with greater flexibility to award contracts, and they set out the key criteria that they must take into account when choosing the process to follow. More people now live with multiple long-term conditions and need support from several different services at the same time, so it is vital that services have the flexibility to work together more effectively and provide joined-up, co-ordinated care that meets their needs.

The Government were previously wedded to outsourcing services to private companies and to the flawed notion that financial competition drives up clinical quality, when in reality it has been a barrier to integration. That undermined the NHS in the years before the pandemic, but then we saw a new scandal emerge and staggering levels of waste and cronyism, represented most potently by the infamous VIP lane for covid contracts. A recent report by Transparency International UK stated that a fifth of covid contracts awarded by the Government contained red flags indicating possible corruption. An analysis by *The New York Times* found that roughly half of the 1,200 contracts it analysed, worth some £17 billion, went to companies run by friends and associates of Conservative party politicians.

I raise that issue because it highlights just how important it is that we get these regulations right. The rampant reliance on outsourcing and the waste and cronyism we have seen under this Government need to come to an end. Labour is clear that every penny of the public's money should be spent wisely. That does not mean endless financial competition, and certainly not any more opaque backroom deals. We recognise that the independent sector has a role to play in the NHS if a service cannot be provided by a public body, because the capability or capacity is not there. Labour will always put patients first, which is why in the short term we will use spare capacity in the independent sector to treat NHS patients and bring waiting lists down as we reform and strengthen NHS-delivered services and capacity for the future.

I turn to the specifics of the regulations. I welcome the increased emphasis on provider quality and patient outcomes in the new provider selection regime. It is right that providers will be evaluated not only on their capacity to deliver services, but on their track record of achieving positive results for patients. That change should foster a culture of continuous improvement among healthcare providers. Does the Minister agree that authorities should engage with service users to accurately assess and develop services to meet their communities' needs? Will he say why no such stipulation is included in the regulations?

The emphasis on quality and outcomes, and the inclusion of transparent performance metrics and patient feedback, are also welcome. Transparency is key to avoiding the cronyism that we saw during the pandemic. Will the Minister address the concern raised by the NHS Support Federation and others that prior notice of how commissioners plan to award a contract is reduced under the new regulations? Only in the most suitable provider process and the competitive process will the public know of the commissioner's intentions to begin the decision-making process, meaning that many decisions will take place with no notice to the public. Does that not risk disempowering patients?

The Opposition also support the recognition of the value of providing continuity of care, allowing commissioners to prioritise providers providing good quality care over time instead of having to resort to competitive retendering by default. I know that that flexibility will be welcomed by commissioners right across the NHS, which is reflected in the 70% support among respondents to the consultation. Does the Minister agree that with this flexibility must come greater accountability, and that quality data will be critical to that?

My hon. Friend the Member for Ilford North (Wes Streeting) recently set out Labour's plans to make sure that people can see how their local providers are performing and the progress being made towards our targets to empower patients and put their experience at the centre of the service. Does the Minister not agree that the NHS should be accountable to the many, not just the well-informed few, and that this is a critical aspect of the culture shift we need to drive innovation and continuous improvement?

The aspect of the new regulations with perhaps the greatest potential is the flexibility to innovate that they provide to commissioners. Last week, I had the pleasure of meeting Professor Sam Everington, the former chair of the Tower Hamlets clinical commissioning group and a GP at the Bromley by Bow Centre, which has been doing groundbreaking work with its multidisciplinary team providing community-based care. Professor Everington told me, for example, how one local doctor, sick of seeing young boys turning up on his operating table with stab wounds, set up a charity to follow up those admissions and help those boys to prevent further knife crime. They reduced repeat hospital admissions from 30% to 1%.

These partnerships are game-changing, but they do not happen enough and they have not been consistently incentivised by the current model. Can the Minister say how the new regulations will encourage integrated care systems to consider a diversity of providers, including voluntary and community sector organisations, to play a role in delivering innovative health and care services? Where is the Government strategy to ensure that, where innovation is working at a local level, the right incentives and resources are there to ensure that it is adopted elsewhere, bringing the best of the NHS to the rest of the NHS?

Can the Minister explain why it has taken so long to bring these regulations forward? The Health and Care Act received Royal Assent 19 months ago. In the meantime, these regulations have suffered several disruptive delays, leaving commissioners and providers alike in limbo, creating uncertainty and undoubtedly increasing costs for the taxpayer. What support are the DHSC and NHSE providing to commissioners in integrated care boards, trusts and other relevant authorities to ensure that these regulations are implemented quickly and smoothly? Can the Minister say how his Department will ensure that the regulations are monitored and reviewed, especially so that commissioners are supported in knowing which procurement process to follow, and when? Does he know what progress NHSE has made to establish the independent oversight panel to resolve complaints on choice and procurement issues? That will be critical to managing disputes and reducing the cost to the taxpayer from cases going to judicial review.

[Preet Kaur Gill]

I note that a job advert for the role of chair of the provider selection regime review panel has just closed. Part of their role will be to recruit and review panel members and to establish and maintain its process. Can the Minister confirm that this will be ready for when the regulations come into force? Can he assure me that there will be no risk of corporate capture of this panel leading to conflict of interest?

The Opposition support the new provider selection regime as a break from the failed reforms of the last decade. As more people are living with multiple long-term conditions and need support from several different services at the same time, it is vital that services have the flexibility to work together and provide joined-up, co-ordinated care. If implemented successfully, we hope that the new regime will simplify health procurement, saving time and money. I look forward to the Minister's response.

2.43 pm

Adam Holloway (Gravesham) (Con): While the shadow Minister makes some genuinely very interesting points, the idea that there were lots of Conservative donors making huge amounts of money through contracts at times such as the covid crisis cannot keep going unchallenged. One of the examples that is often held up is a constituent and close friend of mine, Samir Jassal. I think he gave £2,000 to my campaign in 2010, and served as a councillor in the Painters Ash ward. His partnership got many millions of pounds-worth of personal protective equipment contracts. It is utterly preposterous to think that my right hon. Friend the Member for West Suffolk (Matt Hancock) rang up a bloke who once gave money to my campaign and was a councillor in Painters Ash, going, "Oi, mate. You gave a bit of cash to Adam Holloway a few years ago. Would you like a 10 million quid contract?" It is preposterous.

There are proper examples of waste—I am not disputing that at all—but the other thing I will point out is that this was a time when the entire world was screaming out for the same bits of kit. We had factories in China and people from every country on Earth, basically, trying to get rid of pallet loads of it. These supposed covid profiteers were actually entrepreneurs who did something that neither I nor the civil service could have done. The fact that lots of them happened to have met people in the Conservative party is perhaps a tribute to the fact that those in the Tory party are more likely to know the entrepreneurs and wealth generators of this country than my friends in the Opposition.

2.45 pm

Margaret Greenwood (Wirral West) (Lab): I shall move on directly with my remarks, I think. Although I am not a member of this Committee, I have a long-standing interest in this area, and I am grateful for the opportunity to raise some of my concerns about the regulations. I would be grateful if the Minister could respond to my questions.

On direct award process C, it would seem that in the event that a contract is currently held by a private sector organisation, there may be very little chance of the service being brought back into the public sector. That may include situations where, while the service may be being delivered to an adequate standard, the fact that it is being done by a private company is drawing expertise in related areas away from the NHS. That may have an adverse impact on other related NHS services and particularly on our ability to deliver comprehensive services.

The Government say that they are not privatising the NHS, but the World Health Organisation defines privatisation as

"a process in which non-government actors become increasingly involved in the financing and/or provision of health care services".

That has happened and is happening.

It is not clear from the regulations that the most suitable provider process could not lead to a situation where the contract for a service that is currently provided by an NHS provider is given to a private company. I would be grateful if the Minister gave a clear assurance that the most suitable provider process will not lead to the replacement of NHS providers by private or other independent sector organisations when their contracts are up for renewal. If he cannot give that assurance, the regulations are surely a matter of serious concern for NHS staff and their unions, and indeed, in relation to the very future of the NHS as a universal and comprehensive public service.

The most suitable provider process involves the awarding of a contract to providers because the relevant authority can identify the most suitable provider. I am concerned that the "most suitable provider" is a very wide and poorly defined notion. The term "suitable" is subjective and could be very much determined by which criteria the relevant authority chooses to give priority to. Given that ICBs are being required to make average efficiency savings of 5.8% this year, it is not difficult to imagine that a relevant authority may feel the need to prioritise the criterion of value above all else, and value is to do with the cost of what it is getting.

It is feasible that that may lead to a reduction in the quality of services provided over time and to a greater number of private sector organisations being awarded contracts, since they can cut costs by paying staff rates below those set out under "Agenda for Change". With reference to the key criteria that relevant authorities must take into account when awarding contracts, will the Minister set out clearly that they do not expect them to select the criteria of value as the top priority and that all the other criteria must be considered as at least equal to it?

Although there is room in the process for providers that are aggrieved that they have not been given a contract to make written representations to the relevant authority, what opportunity will be given to the public and Members of this House to raise concerns on behalf of their constituents about decisions to award or not award a contract to a particular provider?

On the issue of data, the Royal College of Nursing has pointed out that some independent sector providers are not subject to the same requirements for data collection, reporting or publication as NHS providers. It states that procurement processes should be mindful of that and not make decisions that are likely to weaken access to provider reporting or opportunities for scrutiny. How does the statutory instrument address that?

The Royal College of Nursing also highlighted an area of concern in previous procurement regimes: that service contracts can be awarded to providers that have

no expertise in delivering the type of healthcare provision for which they seek a contract. The RCN argued that procurement decision-making processes should include safeguards to ensure that providers can demonstrate sufficient expertise in delivering the required services and in managing clinical risk, and that concerns can be raised and independent scrutiny provided. Is the Minister satisfied that safeguards are in place to ensure that providers that are given contracts will have expertise in delivering the type of healthcare provision that the contract is for?

The regulations would not be necessary had the Conservative Government not introduced, back in 1991, the purchaser-provider split in the NHS, thus moving away from a publicly run and publicly owned national health service to an NHS that sits within a health marketplace, with all the additional costs, bureaucracy and inefficiencies to which that gives rise.

The regulations do not make the NHS the preferred provider. The Government have failed to deliver on that. They could have supported the very sensible amendment tabled by my hon. Friend the Member for Leeds East (Richard Burgon) during the passage of the Health and Care Act, which would have provided for a presumption in favour of contracts being awarded to NHS trusts and NHS foundation trusts, and made provision for meaningful public consultation where integrated care boards propose to award any contract for those services to any body other than an NHS trust or NHS foundation trust. That is the spirit that the draft regulations should embody but sadly do not.

Without the NHS as the preferred provider, I am concerned that existing levels of privatisation will be locked in and that privatisation may increase. I hope that, as a result of the regulations, the award of contracts will promote and strengthen the position of the NHS, so that we can continue to enjoy the expertise of professionals who are able and employed to deliver a comprehensive and universal national health service. I ask the Minister for his assurances on the points that I have raised.

2.50 pm

Andrew Stephenson: I thank hon. Members for their contributions and I will try to address as many of the points as possible in the time allowed.

I thank the shadow Minister, the hon. Member for Birmingham, Edgbaston, for her support for the regulations. She talked about greater accountability and transparency, which are vital to the process. We feel that they are ingrained in the regulations, but if there is anything more that we can do to ensure that that is the outcome of the process, we are keen to work with her on that.

I have been assured by my officials that good progress is being made in putting together the independent panel, but I am keen to see it in place in good time for the commencement of the regulations. The shadow Minister asked about service user involvement in the procurement process. As she may know, commissioners must follow NHSE guidance on people and communities, which guides how commissioners must involve patients and the public in commissioning healthcare services. That advice is available online if Members want to see more details.

We probably disagree about some of the controversy around the procurement of PPE during the covid pandemic. Let me be clear that the draft regulations apply only to the arrangement of healthcare services that are delivered to patients. That does not include the procurement of goods or other services, which will continue to be procured under the wider rules in the Procurement Act 2023 from October next year.

At the same time, let me reassure hon. Members that every effort was made to quality-assure the products that the Government procured during the pandemic. Estimates of demand relied on a reasonable worst-case scenario in a very fast-moving situation, and of course the reasonable worst-case scenario was that we would need to purchase significant amounts of PPE. Despite the enormous challenge, we conducted due diligence on more than 19,000 companies, and only around 2,600 companies made it through that initial process. All offers, regardless of the route through which they were identified, underwent rigorous assessment, and, importantly, the source of the offer did not affect the way that the offer was treated. To protect patients and staff, the Government spent £12 billion on PPE for the covid response, which was a time when we needed to act fast to protect the public. Of that, only 3%, or £673 million-worth, was not fit for use.

Moving forward, we have established a contract dissolution team to maximise the value obtained from PPE contracts. The team is reviewing contracts that did not perform, either wholly or in part, to find ways to allow the PPE to be used, replaced or refunded. Our current trajectory should see the Department recovering significant amounts of money.

I turn to the contribution of the hon. Member for Wirral West and her concern about the so-called privatisation of the NHS. I recognise that that issue comes up in debates time and again. To discuss the point properly, we must recognise that the independent sector includes a broad range of organisations, all of which have an important role to play in the day-to-day delivery of NHS services. It includes the work of charities, social enterprises and cutting-edge independent diagnostic centres, each of which has its own role to play in the NHS to ensure that patients receive the best possible care—I was pleased that the shadow Minister acknowledged that.

Margaret Greenwood: I thank the Minister for making that point. He is talking about charities, but he must recognise that where a private provider is delivering NHS services, the money has to go to shareholders. That money could be spent on patient care. He can talk about charities, but that is not what I am talking about, as he knows. He is probably going to get on to this now, but can he give a clear assurance that the most suitable provider process will not lead to the replacement of NHS providers by private or other independent sector organisations when the contracts come up for renewal?

Andrew Stephenson: The most suitable provider process is designed with the NHS to give the right level of flexibility for the NHS. Commissioners can choose how to balance the key criteria, so value is used alongside the other criteria set out in the process. I know the hon. Lady has come to many debates over the years and said that the Government are privatising the NHS. In 2013-14,

[Andrew Stephenson]

6.1% of total health spending was spent on the purchase of healthcare from the independent sector. In 2021-22, the figure was 5.9%, so the idea that we are privatising the NHS is just nonsense. I want to ensure that that is on the record.

Adam Holloway: To me, this is complete nonsense. It is absolutely ridiculous to say that if a private provider does something, the profits go to shareholders and are not reinvested in the NHS. The hon. Member for Wirral West is basically saying that the means of production should be entirely in the hands of the state. What about when we buy tanks? Do we say that we should make the tanks ourselves and not let evil BAE Systems shareholders take the profits? It is preposterous.

Andrew Stephenson: My hon. Friend put that eloquently and made a very good point.

The shadow Minister, the hon. Member for Birmingham, Edgbaston, mentioned one of her recent visits, so I want to put on the record one of my recent visits. Just last week, I visited University College London Hospitals NHS Foundation Trust, which opened a Macmillan Cancer Centre in 2012. It is a diagnostic centre that treats a wide range of cancer and non-cancer conditions, and it is integrated with the Macmillan support and information service for patients and their carers and families. To me, that is integration in action, which is what we are looking at today. The statutory instrument recognises the important role that all providers play by treating none of them differently, irrespective of whether they are a statutory NHS body, an independent social enterprise or a charity. Indeed, the Committee knows that the NHS already relies on a diversity of providers, because what is most important is doing what is right by patients.

I hope I have provided sufficient answers to the questions raised by hon. Members today. The regulations are necessary to enable the transformation that the NHS needs to deliver better joined-up services, and I commend them to the Committee.

Question put and agreed to.

2.58 pm

Committee rose.