

Legal analysis of the Health & Social Care Bill

Background:

In June 2011, 38 Degrees members donated to fund independent legal advice on the implications of the government's proposals to change the NHS. 38 Degrees engaged Harrison Grant solicitors and the specialist barristers Stephen Cragg and Rebecca Haynes to give their legal opinions on two aspects of the Health and Social Care Bill: The removal of the Duty of the Secretary of State for Health to provide or secure provision of NHS services and the question of the impact of competition law on the NHS.

This document summarises some key findings. The full legal opinions and executive summaries are available at <http://www.38degrees.org.uk/nhs-legal>

1. Removing the Secretary of State's Duty to Provide

What our lawyers have identified within the Health and Social Care Bill:

The bill will remove the duty of the Secretary of State to provide or secure the provision of health services which has been a common and critical feature of all previous NHS legislation since 1948. This is the means by which the Government can ensure the NHS delivers what the public want or expect. Furthermore a "hands-off clause" will severely curtail the SoS's ability to influence the delivery of NHS care to ensure everyone receives the best healthcare possible.

What our lawyers say this could mean:

Postcode lottery

The power to choose what health services are closed or improved in a local area will be passed on to local unaccountable bodies with little scope for the government to intervene. The bill will mean patients can no longer expect the government to ensure a consistent level of healthcare regardless of where they live. This could mean far worse problems with a postcode lottery in the NHS, and far less scope for the government to intervene to fix them.

Loss of Accountability – The Government washes its hand of the NHS

Removing the Secretary of State's legal duty to provide or secure provision of the NHS, and introducing a hands-off clause, significantly reduces democratic accountability for the NHS. The responsibility for securing the provision of healthcare services will, lie with unelected commissioning consortia who will be only accountable to another unelected national quango. The bill will make it impossible for the Secretary of State or Parliament to direct that certain services are available and difficult for the Secretary of State to step in if these groups deliver poor healthcare to the local community. Currently the NHS is consistently a top issue at most General Elections – these changes would shift responsibility to unelected officials.

Loss of local accountability

– Local representatives and health watchdogs lose their rights to appeal

Because the Government is removing any power the Secretary of State has to ensure the NHS delivers an appropriate service, appeals from locally elected council bodies and health watchdogs will no longer be decided by the Secretary of State but – if any rights of appeal survive – by a national quango.

2. Opening the NHS up to competition law

What our lawyers have identified within the Health and Social Care Bill:

The Bill contains a number of measures which will not only increase competition within the NHS at the expense of collaboration and integration, but will bring the NHS even further into the ambit of UK and EU competition law as if it were a utility like gas or telecoms, including:

- giving Monitor's the duty the elimination of so-called "anti-competitive" behaviour
- removing the limit on the NHS hospitals also offering private healthcare
- handing significant new procurement responsibilities to the new Clinical Commissioning Groups.
- permitting the new commissioning groups to outsource commissioning work to private companies
- writing detailed rules on competition into the law and making Monitor enforce them
- forcing commissioning groups to make choice and competition a higher priority than almost anything else – so commissioning groups will have to prioritise competition over making sure that fair and equal access for all patients.

What our lawyers say this could mean:

Exposing the NHS to UK and EU Competition Law

Taken together, these changes increase the likelihood of NHS services being found by the courts to fall within the scope of UK and EU competition law. The likelihood of this is further increased by other government NHS policies, particularly the significant extension of the right of Any Qualified Provider to be given a contract to deliver health services.

Costly and complex procurement procedures

The new commissioning groups will be subject to EU procurement rules as they commission local health services. This is likely to be a costly, and our counsel warns that it appears the government have not planned for this significant cost. Furthermore it is not clear that the commissioning groups have the necessary procurement expertise to avoid legal action from disgruntled private healthcare providers. This could mean that the NHS ends up spending a lot of time and money fighting legal action instead of investing in patient care.

Fertile ground for private health companies (and their lawyers)

Companies that bid unsuccessfully for NHS contracts will be able to challenge commissioning decisions in the courts. Private health providers have far more expertise and legal capacity than either public bodies or the charities, and so are likely to be best placed to exploit these laws. Litigation could be time consuming and costly for commissioning bodies.

Open our NHS to private companies. Privatisation by stealth?

These new plans means nothing can stop :

- private companies profiting from spending multi-million pound health budgets and recommending to local unelected boards what health services aren't available in local areas
- private companies poaching services in a way which undermines the ability of the NHS to deliver essential services like Intensive Treatment Unit, A&E, Emergency cover, teaching, training and research.
- the NHS's role in provision of services being eroded

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