

Section 75-77 briefing: regulations on procurement, patient choice and competition, March 2013

Overview

The BMA remains strongly opposed to the overall direction of policy for the NHS in England, as enshrined in legislation by the Health and Social Care Act 2012 (the Act). We believe that competition risks fragmentation of services, creates unnecessary transaction costs and increases scope for legal challenge, making it harder for the NHS to deliver high-quality, cost-effective care to patients.

During the legislative stages of the Act, we raised serious concerns about the Government's plans to increase competition in the NHS. Our lobbying helped to limit some of the most damaging aspects of the proposed legislation, including changes to proposals requiring Monitor to promote competition - and the corresponding change of its main duty to one of protecting and promoting the interests of people who use health services by promoting services which are economic, efficient and effective. We were also instrumental in the removal of clauses that would have allowed providers to compete for contracts on price, highlighting the decline in quality associated with price competition. Further clauses in the Act ensure that Monitor cannot act with the intention of causing variation in the proportion of NHS health care services that are delivered by public or private sector providers.

NHS (Procurement, Patient Choice and Competition) Regulations 2013

The Act came into force on 27 March 2012. Since then, we have maintained our opposition to increased competition and the development of the market in the NHS, whilst also working to mitigate further the worst aspects of the new system. To this end, in October 2012, we submitted a detailed response to a Department of Health (DH) consultation on requirements for commissioners to adhere to good procurement practice and protect patient choice. This consultation set out draft regulations for the NHS Commissioning Board and clinical commissioning groups (CCGs) under Sections 75-77 of the Act, on procurement, patient choice, anti-competitive behaviour and managing conflicts of interest.

The regulations are made under Sections 75-77 of the Act, and state that commissioners must adhere to good practice in relation to procurement and must not engage in anti-competitive behaviour which is against the interests of people who use health services. These sections confer the power to make regulations concerning Monitor's ability to investigate and tackle anti-competitive behaviour by the NHS Commissioning Board and CCGs, with the authority to direct commissioners to address breaches of the rules.

A number of key concerns that we raised to tighten up the draft regulations were taken on board by the DH in its response to the consultation. These included strengthening requirements around conflicts of interest and amending a proposed 'indispensability' test in order to give commissioners more flexibility to restrict

competition where they can show it is necessary to achieve benefits for patients. Our response reiterated that local commissioners are best placed to take the lead in deciding where and how to extend patient choice and that regulations must not act as a barrier to this. We also signed a submission from the staff side of the Staff Passport Group (a sub-group of the Social Partnership Forum), along with UNISON, the Royal College of Nursing, Managers in Partnership, the Chartered Society of Physiotherapy and Unite, which set out the unions' joint opposition to the Act and its direction of travel as well as specific points on the regulations.

In developing the final regulations, the DH undertook a programme of engagement to inform stakeholders about the draft regulations and to gather views. There was engagement with the NHS trade unions during the consultative period through DH attendance at the Staff Passport Group and a special workshop on the regulations.

Areas for urgent clarification in the regulations

The regulations made under Sections 75 add detail on how Monitor will carry out its functions under the Act. In particular, the detail on how it will operate in practice, providing the necessary clarity on what will be expected of commissioners, and how Monitor will carry out its functions. We expect that Monitor's forthcoming guidance for commissioners on procurement and competition will add further vital detail. We would ask that this key piece of guidance is issued as soon as possible, to provide clarity on what will be expected of commissioners and how Monitor will discharge its functions in this area.

During the passage of the Act, the Government stated on a number of occasions that commissioners would have the freedom to decide which services they would tender, and that regulations would not impose compulsory competitive tendering requirements on commissioners. Given growing confusion over the impact of competition elements of the Act in practice, we are seeking clear and definitive assurances from Ministers on the following points:

- The DH has stated that commissioners must decide where it is appropriate to use competition to improve services. A specific example given by the DH is that commissioners might legitimately seek to restrict competition where it would be in patients' best overall interests, for example, where it is necessary to make sure that individual providers achieve minimum volumes of surgical procedures to ensure patient safety. We would like clarification that this is still the intention and that this is what is intended by the regulations, which state that the sole grounds on which there may be considered to be only one capable provider are 'technical reasons' or reasons of extreme urgency outside the control of the commissioner (5(2)).
- We would like further explanation of which circumstances are included in the scope of these 'technical reasons'. Without this, it is difficult to be clear of the potential impact of the regulations on the ability of commissioners to decide whether it is appropriate to use competition.

- The regulations state that commissioners should consider integration, competition and patient choice when deciding how to improve the quality and efficiency of services. We would like assurance that commissioners will be able to prioritise integration over competition and choice, without leaving themselves open to challenge from Monitor, in accordance with their duty under Section 14Z1 of the Act.

With a significant raft of NHS changes due to take place in April, it is clearly in everyone's interest to ensure that commissioners are equipped as best as possible. It is vital that we gain greater clarity on these key areas in order for there to be a full and shared understanding amongst all those involved in implementation of the Act of their roles and responsibilities. It is also necessary to have an absolute reassurance that CCGs really will be allowed to make the best decisions about the use of competition in providing high quality services for their local populations.