

May 16th 2013

# Lords Set Legal Puzzle for NHS Commissioners

The NHS in England has moved into uncharted territory following the House of Lords' defeat of Labour's attempt to block new regulations on commissioning. NHS Clinical Commissioning Groups will each now have to figure out whether they are legally compelled to open up more contracts to the private sector.

While the Lords' vote on April 24 was a defeat for opponents of NHS privatisation, the debate left local campaigners with some Government-supplied quotes to use against Commissioning Groups who say they must launch competitive tendering. The Health Minister Lord Howe insisted: "These regulations do not confer any obligation on commissioners to create or promote markets."

Labour's opposing argument was that the regulations left Commissioning Groups in danger of legal action from private firms who are denied the chance to bid for contracts. In resisting the regulations, Labour was representing a broad alliance including NHS campaigners, Royal Colleges, the British Medical Association, nurses and unions, and a 350,000-strong petition. Some lords reported receiving large amounts of mail.

Campaigners had particularly hoped to sway some Lib Dem peers away from the Coalition line. In the event none defected and the Government majority was substantial – 254 votes to 146. Labour did not even manage to produce a strong turnout of its own side.

## Challenge to Labour

The Government Coalition used two linked arguments to strong effect concerning a much-complained-about passage in the regulations requiring services to go out to tender unless there is "only one capable provider". Government spokespeople said this wording was the same as in commissioning guidelines introduced when the former Labour government set up a market within the English NHS, and this provision was necessitated by the European Union's competition law.

At the same time, Government supporters took the unusual course of flagging up a loophole in their regulations. Apparently if Commissioning Groups "bundle" services into one contract with a hospital, this could be enough to establish there is "one capable provider" - and keep the corporate lawyers at bay.

The Coalition's claim to be building on the work of the last Labour government was amplified by a speech by Lord Warner, the sole Labour rebel. He boasted that he had been a Labour health minister implementing "the policy of using the independent sector in the 2005 election manifesto of the Labour Party", which referred to "any willing provider". Lord Warner was in no doubt that the new regulations would increase the private sector's role in the NHS, and he supported this.

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Lord Warner's reminder of Labour's groundwork in bringing markets to the NHS could be timely for anti-privatisation campaigners. Now that the current law and regulations have been through Parliament, the next opportunity to reverse them will come at the 2015 General Election. Labour's current health spokespeople can expect to be pressed by NHS campaigners on whether the party would scrap the Government's changes to the health service – no if's or but's .