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Regulations rushed through the backdoor

In the last weeks before the government's new NHS regime comes into effect, ministers have been rushing through regulations to force market competition into healthcare.

The Government's first version of the regulations met such an outcry that it was withdrawn, but a slight redraft quickly followed.

The regulations go to the heart of how the new Clinical Commissioning Groups will go about running local NHS services after taking control on April 1. GPs in the new CCGs had believed that they would be allowed to use their clinical judgment in organising hospital and other medical services; the first version of the regulations put forward on 13 February instead required that all commissioning decisions be put out to competitive tender - giving private companies the chance to undercut established NHS operations.

The second version of the regulations says commissioning groups do not need to put services out to tender if there is 'only one provider capable of delivering the service' – meaning the NHS organisation currently doing the job. But the Keep Our NHS Public campaign says in practice this rewording will keep the armlock on the commissioning groups.

The campaign's co-chairs Wendy Savage and John Lipetz sent a critique of the redraft to the House of Lords committee responsible for checking such regulations. Savage and Lipetz said it would be "extremely difficult" for commissioners to prove there was only "one provider capable" to the extent that they would put themselves beyond fear of intervention by Monitor, the NHS regulator.

"Establishing such a burden of proof would likely be an even more onerous task than that of running a tender exercise, meaning it is highly unlikely that CCGs would attempt it, except in those circumstances where it is clear that the private sector does not want to take over the service." say Savage and Lipetz.

They point out that the regulations give Monitor very broad powers to do anything it likes if it spots "anti-competitive behaviour".

The method that the Government has been using to modify its Health and Social Care Act is termed secondary legislation. Such legislation does not have to be debated on the floor of the House of Commons and therefore usually evades unwanted publicity and opposition.