

Dear Clerk

Further to my email of 22 February I have now seen a recent letter that Earl Howe has sent to his colleagues in the House of Lords. The letter states that the Section 75 Regulations "enshrine the principle that it is Commissioners who are best placed to determine requirements for improving services and to decide which provider or providers are best able to deliver those requirements." What the letter does not state is that in making these decisions, Commissioners must abide by all of the Regulations and any failure to do so will be investigated and remedied by Monitor. It was because of our concern over this ambiguity and potential conflict that we attached importance to Earl Howe's commitment in the House of Lords when he said, "This will be made absolutely clear through secondary legislation and supporting guidance as a result of this Bill".

I have just seen a legal opinion obtained by 38 Degrees that if the Regulations are passed unamended they would break the promises made by Ministers last year.

It has been suggested that an amendment along the following lines to Section 14 of the Health and Social Care Act 2012 would help clarify the situation.

"Each Clinical Commissioning Group may arrange for the provision of such services or facilities as it considers appropriate for the health service that relate to securing improvement in (a) the physical and mental health of the persons for whom it has responsibility, or (b) the prevention, diagnosis and treatment of illness in those persons."

This wording could be incorporated into Regulation 2, which should then state that the remainder of the Regulations applicable to CCGs would only apply when a CCG decides that it is appropriate to consider tendering a service or facility to more than one provider. This amendment would make it absolutely clear that CCGs will be free to commission services in the way they consider best, without having to rely on obscure wording in the current Regulations. Obscure wording that we do not know how it will be interpreted by Monitor.

I hope it is within the terms of reference of your Committee to both recommend the present Regulation be withdrawn and suggest alternative wording for any new Regulation.

Yours sincerely

DAVID OWEN