

Ten tips to help save the NHS from privatisation

Caroline Molloy explains how to fight health service privatisation at a local level, based on her own experience in a Gloucestershire campaign that successfully reversed a decision to transfer eight local hospitals out of the NHS.

1. Understand the legal situation

As we found, even after the Health & Social Care Act 2012, **health services DON'T HAVE TO be tendered** (ie forcing NHS providers to compete with bids from private providers). Decisions about who provides local health services, are generally made not by central government, but by the local commissioners (budget holders) – currently the PCT (Primary Care Trusts), with CCGs (Clinical Commissioning Groups) taking over in April 2013 (and already meeting in shadow form).

Of course there is pressure on commissioners from government to exercise this choice through competitive tendering of services, but much of this is policy, not law – so local commissioners can exercise their **discretion** as to whether they follow it (though they may be very reluctant to admit this!). Indeed, Lansley gave CCGs written promises in letters in February 2012^{1,2}, saying “I know many of you have read that you will be forced to fragment services, or put services out to tender. That is absolutely not the case....you as commissioners, not the Secretary or state and not regulators, should decide when and how competition should be used to serve your patients interests.”.

Will CCGs hold the government to these promises? Whilst the PCTs / CCGs do have to make ‘commissioning’ decisions (the ‘internal market’), there is **no clause in the Act that requires this to be done through tendering** (or indeed through AQP, see below). And EU Procurement Law doesn’t apply, if an arrangement is simply made with another NHS Trust to provide services. Such arrangements have been made, for example, in the case of many community services (district hospitals, health visitors, etc), and is what ultimately happened in Gloucestershire – even after the Act, and reversing a previous decision to outsource. The legality of not tendering was also confirmed in a letter from Simon Burns MP, Health Minister, in May 2012, where he states if services are transferred to an NHS Trust, there is ‘no case for tendering’ and ‘an administrative transfer should not raise the risk of credible challenge under procurement law’³.

As well as tendering, another **key avenue** for privatisation is the policy of AQP (**‘Any Qualified Provider’**), where private companies are pre-selected

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to be on a shopping list, and doctors are encouraged to refer patients to this list, for an increasing number of services. AQP is even worse than tendering. If it takes off, our health services will be broken into tiny pieces, meaning hassle for patients and little control or oversight by doctors or anyone else. The rump of the NHS that is left (dealing with the difficult cases the private sector doesn't want) will struggle to survive.

Essentially, CCGs have 5 choices in commissioning (buying) health services: (i) AQP, (ii) competitive tendering, (iii) 'single tender actions', (iv) extending an existing contract or arrangement with an NHS provider, or (v) coming to a new arrangement with an existing or new NHS Trust, without tendering. Of these, the first two will be likely to lead to privatisation. The third and fourth options are mentioned in the government guidance to CCGs⁴, though this guidance also makes clear there will be heavy pressure only to use them in 'exceptional' cases, also not for 'innovative' services – so campaigners may have to make these arguments.

Only the fifth option – the one we got in Gloucestershire – guarantees the private sector will be kept out of NHS services. It is not mentioned in the guidance to CCGs, but our solicitors have confirmed it is perfectly legal, reasonable, and in line with the political promises that were made.

So the question will be, how can campaigners ensure the CCGs keep NHS services out of the hands of the private sector? The rest of this guide suggests ways to do this.

2. Understand the political situation

Although the Act creates various shadowy bodies who may put increasing pressure on CCGs to tender out services, campaigners can use the government's promises of putting patient 'choice', patients and clinical values first, to argue for the local choice to stay in the public sector. The government does not want to be seen to be breaking its word and overruling local clinicians and communities, and has shown it is prepared to make exceptions where this will be expressed strongly enough. This is where media campaigns, online and street petitions, surveys, lobbies, demonstrations, 'no private provider' requests (see Keep Our NHS Public, resources, page 7) and letter-writing campaigns all have a part to play, as well as legal challenges.

The campaign against the Bill (now Act) presented what plans could mean for the NHS, but this campaigning required some simplification, which has perhaps resulted in confusion, even despair. No doubt there are plans afoot even now, to put compulsory tendering on a stronger statutory footing than it currently is. But the danger is that if we don't shout about, and use, the wriggle room that the (muddled) Act presents to local campaigners, we could lose these chances.

3. Focus on a local issue

Focus on a local issue (whilst making the link with the national picture) so that people feel there is a chance of influencing things, and **follow the money**. CCGs hold the budgets and make local decisions about services so they are an obvious focus for campaigning. Supposedly the CCGs are made up of doctors and represent doctors in their areas, but most GPs have had very little involvement – some may be willing to speak out. One way of encouraging CCGs to stand up for the NHS in face of government

pressure, is to get them to make commitments to fairness and publicly owned health services in their constitutions (which are being settled now but are also open to revision). 38 Degrees have come up with one suggested form of wording, and other groups – including the British Medical Association – have endorsed a stronger form of words⁵.

Why not also ask the CCG to include a commitment in their constitution that they will not decide to offer any services to the private sector without first both properly considering NHS options, and fully consulting the public and staff? Our lawyers have confirmed this would be perfectly legal and reasonable.

Moving away from the commissioning side, you can often boost a campaign by looking at the providers, too. Privatisation weakens NHS providers by cherry picking what's profitable (often with unfairly advantageous contracts) until what is left in the NHS isn't sustainable. PFI and Foundation Trusts (both 'market reforms') have saddled the NHS with expenses, debts, and fragmentation. Where the NHS is struggling and making cuts as a result of all this, such problems are then used as an argument for more privatisation! Look out for talk of 'efficiency savings' and 'reconfiguration' – in other words, cuts and hospital/bed closures.

Don't be fooled by claims that 'there is no money' – if government can find billions to bail out the banks, why can't it keep NHS hospitals afloat, and even write off PFI debts? Where 'integration' or 'innovation' are presented as solutions, be aware that it is politically easier to privatise a 'new' or 'innovative' service, than an existing one. Meanwhile, private sector providers make huge profits, pay very little tax⁶, and are not averse to using their money to try and influence politicians and decision makers (politicians and CCG members have to declare their financial and business interests, which can sometimes yield interesting results if you dig around!^{7,8})

4. Do your research

Do your research to find out where privatisation is threatened, both by talking to people locally (especially staff/unions), and using the resources at the end of this article. At least half the battle is to find out what they are planning, before the contracts are signed. Look at PCT/CCG board papers and minutes which should be online. Look out for harmless sounding language like 'innovation', 'integration', 'partnership', 'transforming', 'modernising', 'choice', 'diversity of providers', 'outcome-focused', 'contestability', and 'co-production' – all often used as code for privatisation. Follow up references to sub-committees (eg Audit committees), 'expert advice' and 'closed sessions' where vital information is often buried – these minutes and reports should be public too.

Publicly challenge commissioners on any assertions that their plans will make services 'more inclusive / sustainable / better' – ask them what evidence they are basing this on. If their evidence is missing or unconvincing, publicise that they have 'failed to demonstrate how services will be protected'. Ask why NHS options aren't being considered properly. If they say they have 'no alternative' but to open things up to the private sector, or that they 'can't' give you commitments to public ownership, ask why not – what legal obstacle (ie a specific clause or regulation) they are referring to.

Make Freedom of Information requests for papers, letters and reports (including asking for any 3rd party / consultants reports they may have commissioned in relation

to provision of the service) if necessary. FOI requests may be refused on grounds of 'commercial confidentiality' but you can, and should, appeal on grounds of public interest. Check Supply2health.nhs.uk to see what services in your area may be being prepared for privatisation. (We found that even if commissioners advertise for 'expressions of interest' or 'pre-qualification questionnaires', this is a pre-tendering stage, and does not commit them to actual tendering).

5. Explain what privatisation means for patients

The other half of the battle is to explain to both decision makers and the public, **why tendering & privatisation is bad**, focusing on the **impact on patients & frontline services (be as local as possible)**. Because this is happening so fast & so secretly, you may need to speculate what the likely impact is, drawing on experiences from elsewhere of how markets damage healthcare. Speak to others that have had similar battles, and also look to recent examples like dentistry, Independent Treatment Centres, PFI, the NHS IT debacle, and of course the notorious American system.

We argued that privatisation would mean fragmentation, loss of access to specialist equipment / NHS expertise & funds, loss of assets (with hospital buildings transferring over to a new company, 'PropCo'), loss of accountability, additional VAT costs (private companies can't reclaim VAT, unlike the NHS), and additional admin costs (in the US system, \$1 in every \$3 is spent on admin, tendering itself is hugely expensive, & every major NHS reorganisation in the last 30 years has resulted in a doubling of admin costs).

Ultimately the only way private companies can make shareholder profits from healthcare is by cutting services and/or staff, and/or charging patients (something the Health & Social Care Act makes easier). Privatisation wastes money – and remember the NHS is already facing £20-40 billion of cuts. Privatisation is part of the problem, not part of the solution, to cuts – it is politically easier for private companies to inflict cuts, than accountable public servants.

If you have information (for example from the unions) on impacts on staff⁹, use it to make links with the impact on patients – less well-trained or demoralised staff, loss of public sector ethos, etc. Most people respect the views of health workers and recognise they are best placed to understand the complexities of the changes. In Gloucestershire the fact that 91% of staff opposed privatisation was definitely influential with the public. Could the union conduct its own ballot of staff views, if senior managers haven't consulted them on changes?

6. Build a local network

Build a local network to share information and tasks – hold public meetings and events, and always collect contact details. Publicise your events and network through posters, leafleting (with calls to action) and street petitioning (have a stall or banner to attract attention), through social media, and local press and radio. Cultivate friendly journalists with regular, locally focused press releases & photo opportunities about every action you undertake, & persuade reluctant editors of local interest through sustained letter writing campaigns focusing on personal experience. Seek out existing local groups – ask Keep Our NHS Public if there is a local group (and if not, set one up or affiliate an existing group).

Other organisations concerned about the NHS which may already have a local presence include 38 degrees, UK Uncut, the National Pensioners Convention, disability campaigners, and (as in our case) an active local Anti-Cuts group. There are also a wide range of groups focused on specific health & disability issues, friends of hospital groups, and so on, that may or may not be willing to get involved in campaigning.

Seek out **health workers**, especially **union** reps and branch officials. If possible hold joint meetings and training. All TUC-affiliated unions (Unite, Unison, GMB) oppose privatisation, and in practice, most professional organisations (eg Royal College of Nurses, British Medical Association) often do too. So they are important allies. Be aware that the health workers are under many attacks, from pensions and pay freezes to staff cuts, that unions' ability to take lawful action is constrained, and that whilst they can draw on national support, they are only really as strong as their local organisation. So encourage people to join, and get active within, unions.

Privatisation can be a great issue to organise around, and build union links with the local community. The local Trades Council¹⁰ (if there is one active) can also help spread the message to other local union members. Unemployed, student and retired people can also be union members.

7. Include but don't rely on politicians

By all means include **politicians** in your network, meet with them, and, if you want, share platforms at meetings with both political supporters and opponents (perhaps organised by a 3rd party). They have access to information, publicity, and networks. Having them on side will put pressure on local decision makers (MPs can put pressure on the Department of Health on your behalf too, if necessary).

Remember, though, that politicians aren't necessarily experts, and they obviously have both an electoral agenda and a party line, which sometimes turns people off. They often make vague statements that they 'support the NHS' – ask them if they will publicly commit that they support public ownership of the NHS, or at least, whether they support their electorate's right to decide whether the area's services stay in the NHS, (something it's hard for them to be seen refusing!) and push them to sign up to a short public **pledge** to this effect. We used this tactic to effectively put pressure on our local Tory MPs^{11,12,13}. Ownership is key – don't accept fudges on this!

8. Don't be fooled by 'third-sector solutions'

Don't be fooled by **social enterprise / mutual / co-operative / charitable / third sector** 'solutions'. These are often presented as more 'inclusive', 'liberating' staff and widening 'ownership'. But in the NHS, they have mostly been forced onto unwilling staff, are opposed by health unions¹⁴, and have the effect of narrowing ownership of something that previously belonged to all of us.

The commonest forms of social enterprise are also, legally, private companies, so have all the disadvantages of privatisation listed above, including opening services up to EU Procurement Law. They have an additional disadvantage in that, cut adrift from the NHS, they are too small to effectively compete with the private sector – as in Surrey, where one of the first large ex-NHS social enterprises, much praised by David Cameron, was

outbid by Virgin Health in November 2011¹⁵. The third sector has an important role in advocacy and providing services the state never has – but the government's strategy is to cut charities funding and encourage them to be co-opted into the 'big society', ie taking over public services.

Francis Maude MP made this 'backdoor privatisation' strategy clear. Leaked minutes of a meeting he had with the CBI shortly after the last election reported the minister saying that 'wholesale outsourcing to the private sector' would be politically 'unpalatable', so mutuals, co-ops, charities and the 3rd sector would often be used as vehicles for backdoor privatisation instead¹⁶, as would joint ventures or 'partnerships' between public and 3rd sector or private providers (for an illustration of this latest line of attack, see¹⁷).

9. Understand insider and outsider strategies

One response to the Act is to try and get NHS supporters onto watchdog bodies like HealthWatch (replacing LINKs), the new Health & Wellbeing Boards, council Scrutiny committees, and Foundation Trust boards of governors. Of these, HealthWatch has little power but the Health & Wellbeing Boards (which include councillors) are currently writing strategies which will have some influence over CCGs. Campaigners can also use formal and informal links that they have (sympathetic managers, senior clinicians, board & committee members, politicians) to try find out about, and improve decisions – for example, asking searching questions about outsourcing plans before they are in the public domain, either publicly or more privately and discreetly.

These 'insider' approaches have value. However, campaigners should be wary of diverting too much energy into these routes (committees can suck energy from the best of us!). The system now in place is incredibly undemocratic, so working within it is always going to be limited. Any information that committee and board members have is only useful if it is shared with campaigners, and lone individuals may find themselves under considerable pressures.

'Outsider' strategies use the media as much as possible, and include tactics from public meetings, demonstrations, petitions and lobbies, to legal, industrial and even direct action. Such tactics are often better able to target power where it is really being exercised, and to mobilise our most powerful weapon – public opinion.

10. Be aware of what the law can – and cannot – do

It can be used to stop the wrong thing happening – at least temporarily, and sometimes even at the eleventh hour (as in our case) – but not to make the right thing happen. For that, you also need a political campaign that mobilises public opinion and puts pressure on local decision makers, politicians, and even on private providers.

Talk as soon as possible to solicitors specialising in public law (we used Leigh Day, who were excellent) if you think you may have a case (if they agree, they will help you understand what evidence you need to gather). The Judicial Review system (where you think the government or a public body like the NHS has broken the law) focuses on the process, not the outcome, of decisions. Has the decision-making process been flawed? We used procurement law (which rules out services being quietly handed over

to a third sector body), but other cases are more likely to hinge on a failure to carry out consultation, equalities assessments, or to properly consider NHS options - before offering services up for tender.

A judicial review can be taken by anyone, but can be expensive (up to £50,000) unless it is taken by an individual who is eligible for legal aid, and who uses the services in question. Campaigners can provide support. People who are on minimum income related benefits, including some pensioners, are the mostly likely to be eligible for legal aid. Even so, in such cases, the community will be required to raise funds – in our case, we raised £7,000 through a public appeal – though if you win, you'll get this money back. An initial consultation with lawyers (if they are interested) is always free.

Regarding **consultation** requirements – the law requires 'consultation or engagement' where there is 'service change'. You may be told that 'change of provider does not equal service change' (and so they don't have to consult – this is what happened when Suffolk hospitals were taken over by Serco). In fact the law is quite open on this point – in other words, it's up to you to argue that a change of provider will impact on services, and that therefore there should be a consultation, at a formative stage in decision making (which you can then try and strengthen, influence & publicise).

In fact the law says change of provider may – or may not – constitute a change of service – in other words, it's up to you to argue that it will impact on services, and that therefore there should be a consultation (which you can then try and strengthen, influence & publicise). The law here is not as strong as it should be – so if you can't use the law, you'll need to work harder to find shocking examples to shame commissioners into stopping, or at least slowing down and consulting (whilst you build your campaign).

And finally... don't give up!

Public opinion is strongly on the side of keeping the NHS public – fewer than 1 in 5 people want more competition in the NHS¹⁸. It is the 2nd most efficient health care system in the developed world, for all its imperfections. There is barely a jot of evidence that privatisation would improve services or save money – and much evidence it would, and does, damage services and waste money in both the short and long term. Those who push privatisation are fighting a battle based not on evidence, but on an ideological commitment to a very different, and much more selfish kind of society – one where profits come before patients. Their main weapons are secrecy and confusion, and the line, "There is no alternative". But there is, as we have found.

"The NHS will exist as long as there are folk left with the faith to fight for it."

Nye Bevan, creator of the NHS

Recommended resources

- False Economy – www.falseeconomy.org.uk – Why cuts are the wrong cure
- Keep Our NHS Public – www.keepournhspublic.com – an excellent first port of call to see if they know what is happening in your area. It costs £10 (waged) / £5 (unwaged) to join. The website has a huge amount of resources though it isn't that easy to navigate (KONP do a great job on a shoestring, and could do with donations!). KONP also provide campaign materials & postcards (for a small charge) which allow patients to register individually that they don't want to be referred to a private provider.
- 38 degrees – www.38degrees.org.uk – their CCG guidance is easy to use though I would advise strengthening the wording, which is quite cautious, to be more in line with the BMA-endorsed version – see page 9, note 4.
- Supply2health.nhs.uk – where upcoming NHS contracts are advertised – sometimes at quite an early (pre-tendering) stage.
- “In Place of Fear”, Nye Bevan, 2008 Edition – available from good bookshops and free if you join the Nye Bevan Society www.nyebevan.org.uk
- Sicko (film), Michael Moore, 2007 – we put on a screening as part of our campaign fund-raising
- www.whatdotheyknow.com – you can make Freedom of Information requests direct to public authorities, or (very simply) by using this site – and you can browse other users requests.
- Campaign for Freedom of Information – publish a short guide which is well worth reading before submitting requests www.cfoi.org.uk/pdf/foi_guide.pdf
- Register of interests of MPs – www.publications.parliament.uk/pa/cm/cmregmem.htm
- Health Emergency – www.healthemergency.org.uk – a wealth of advice and experience from John Lister, who has been campaigning against NHS privatisation since the 80s.
- “The Plot Against the NHS”, Colin Leys, 2011 – readable & compulsive introduction to how we got to this point. This more recent article by the author convincingly warns where we might go next, if we don't fight back www.redpepper.org.uk/the-end-of-the-nhs-as-we-know-it
- Unison has produced an up to date guide to trying to use the new structures to block NHS privatisation – www.falseeconomy.org.uk/blog/unison-guide-how-campaigners-can-use-nhs-structures-to-block-privatisation
- National Pensioners Convention – <http://npcuk.org> – contact them to find your local group
- UK Uncut – www.ukuncut.org.uk – contact them to find your local group
- www.twitter.com – for some ideas of who to follow, see twitter.com/carolinejmolloy/nhs/members
- NHS Vault – excellent critique of health policy developments – www.nhsvault.blogspot.co.uk
- A Better NHS – another very thoughtful site, written by a Hackney GP – www.abetternhs.wordpress.com
- NHS Consultants Association – www.nhsca.org.uk – a campaigning association of hospital doctors, led by Clive Peedell, who has set up the NHS Action Party to stand candidates at the next general election
- The Green Benches – www.eoin-clarke.blogspot.co.uk – this site works to publicise where NHS privatisation is happening or threatened
- NHS Supporters Federation campaign guide – www.nhscampaign.org/campaign-activity/campaign-tools/new_campaign_guide/fed_campaign_guide.html – quite out of date now, but lots of detailed tips on the practicalities of campaigning.
- National Coalition for Independent Action – www.independentaction.net – speaking out strongly against the way the ‘third sector’ is being co-opted into the big society
- Socialist Health Association – www.sochealth.co.uk – if you are a Labour party member it's worth looking at this organisation.
- Find legislation here www.legislation.gov.uk (for health acts etc)
- Friends of the Earth has produced helpful guidance on taking Judicial Reviews – www.foe.co.uk/resource/guides/5_1_judicial_review.pdf

Notes

- 1 www.pulsetoday.co.uk/gps-force-ministers-into-u-turn-over-any-qualified-provider/13507827.article
- 2 www.falseeconomy.org.uk/files/lansley-ccg.pdf
- 3 www.whatdotheyknow.com/request/113046/response/286241/attach/html/10/701443%20Geoffrey%20Clifton%20Brown.pdf.html
- 4 www.commissioningboard.nhs.uk/files/2012/09/procure-brief-2.pdf
- 5 web.bma.org.uk/nrezine.nsf/wd/RTHS-8TPCEW?OpenDocument&C=28+April+2012
- 6 www.corporatewatch.org/?lid=4251
- 7 socialinvestigations.blogspot.co.uk/2012/02/nhs-privatisation-compilation-of.html
- 8 cheltenham-gloucesteragaincuts.org/2012/05/04/two-gloucestershire-tory-mps-accepted-donations-from-controversial-super-rich-private-health-investor/
- 9 keepglosnhspublic.posterous.com/what-happens-if-nhs-staff-transfer-to-a-priv
- 10 www.tuc.org.uk/union/index.cfm?mins=54&minors=53&majorsubjectID=14
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