

Absent voices compromise the effectiveness of nursing home regulation: a critique of regulatory reform in the UK nursing home industry

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Abstract

Over the last decade there has been consistent pressure for the healthcare services in the UK to become more accountable to users. Now over half the healthcare beds in England are in the privatised nursing home sector, and regulation of the sector is under reform. Yet requirements for user accountability have not been reflected in these reforms. In other sectors, consumer involvement in regulatory agencies and processes is seen as important to the success of the regulatory enterprise. But in the care sector neither users nor their representatives have been given legal rights of involvement in the National Care Standards Commission or in regulatory processes. This paper argues that failure to involve users not only places the regulation enterprise at risk of capture by the industry, but will also weaken the legitimacy of the new Commission.

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User accountability and the private sector concordat

In the UK, long-term care and more recently intermediate care has been transferred from to NHS hospitals to private nursing homes. Since the early 1970s, the number of NHS beds has declined from around 400 000 in 1974 to 190 000 in 2000. At the same time the nursing home industry has grown dramatically, both in capacity from 28 000 in England in 1983 to 196 000 in 1999 and in its importance to the UK healthcare system. With over half the healthcare beds in England now in this sector, private nursing homes are central to the UK government's strategy to address the crisis in acute beds. In effect, a large part of the UK healthcare sector has been privatised. In a publicly funded healthcare system, this raises complex problems of how to ensure that private providers are held to account for the quality of care provided. A legal framework of regulations enforced by a regulatory agency is the main mechanism for achieving the accountability of private agencies to government. But an increasing important argument within health policy is the need for healthcare systems to be directly accountable to users (Hutton 2000, Harrison & Mort 1998, Hunter &

Harrison 1997). This dimension of accountability has never been one of the key strengths of the NHS. In fact, its lack has been one of the most enduring criticisms of the service. However, there is now a clear intent in *the NHS plan* to address this by increasing user involvement in decision making. But how can this aim be realised for the UK healthcare system as a whole when a significant proportion of care is provided by the private sector?

Regulation of the private healthcare sector is now under reform with new legislation in England and Wales – the Care Standards Act 2000, new standards (Department of Health 2001) and a new central enforcement agency, the National Care Standards Commission. We argue that in other sectors, empowerment of users through enhanced individual rights and involvement in regulatory decision making is considered to be a major part of modern regulatory technique. By contrast, in the new regulatory arrangements for the care home sector, little thought appears to have been given to accountability to users. As a consequence of the failure to ensure that users have legal rights to be involved in regulatory decision making, regulation of this sector is very vulnerable to capture by the nursing home

industry. Through the private sector concordat and industry representation on the government's Regulatory Impact Unit, the industry already has the ear of government. If this is not balanced by the voices of users or their representatives then the regulatory enterprise will be jeopardised.

The new regulatory framework for the nursing home industry

The Care Standards Act 2000 gives the new National Care Standards Commission (NCSC) regulatory jurisdiction over the wide spectrum of care services: independent hospitals and clinics, care homes, childcare facilities, nursing agencies, fostering and adoption agencies and domiciliary care agencies. The Act uses the same legal form, 'command and control' regulation for all these different types of organisations, irrespective of their differing functions. In this type of regulation, an agency, in this case the government, sets the rules or standards and then monitors compliance with these rules. One of the main weaknesses of 'command and control' regulation is the risk of capture of the regulators by the industry (Sunstein 1990, Baldwin & Cave 1999). In other words, regulators pressurised by the industry become paralysed and are unable or unwilling to enforce standards. The main strategy advocated to avoid capture is to balance the industry's interests with the involvement of public interest groups (Ayres & Braithwaite 1992). The resultant increase in transparency of regulatory processes encourages regulators to act in the public interest. Clearly, this is not just a matter of regulatory technique but an important policy for increasing the accountability of both regulator and the industry to users.

Involving home residents and their representatives in regulation

In the case of nursing homes, public interest groups could include either the residents themselves or, given their general frailty, their representatives such as relatives groups or voluntary organisations. Such groups can be involved in regulation in a number of different ways.

Users and the making of regulatory rules

Users or their representatives could be consulted about the standards used. The drafting of the national standards for care homes for the elderly, *Fit for the Future* was a collaborative effort involving many different voluntary agencies (Department of Health 1999). But these standards are not legally enforceable, instead they are

guidance, to be taken into account as evidence in proceedings and appeals. The statutory instruments or secondary legislation is legally enforceable. The framing of this secondary legislation has been closed process with little or no involvement of voluntary sector (Centre of Policy on Aging, personal communication). However there are indications that this process is vulnerable to lobbying by the industry. For instance, the government has already indicated that it will not enforce one of the standards fiercely advocated by the voluntary sector and resisted by industry, the requirement for larger room sizes until 2007 (National Care Standards Commission 2000). Similarly, the government has indicated it does not intend to impose strict staffing ratios. This is against the recommendations of the voluntary groups who formulated *Fit for the Future* and against all the evidence that staffing is the most important factor in ensuring the quality of care (Kerrison and Pollock 2001b).

A voice in the National Care Standards Commission?

In the Department of Trade and Industry (DTI) White Paper *Modern Markets: Confidence Consumers*, the government states that 'the consumer voice must be heard in government and consumer representation must be effective' (Department of Trade and Industry 1999). In line with this policy, involving users in the regulatory agency has become a major plank in regulatory policy in other sectors. The Financial & Markets Act 2000 and the Utilities Act 2000 require that the relevant regulatory agencies, the Financial Services Authority and OFGEM, consult users about their general policies. Consequently, these regulatory authorities have been required to set up a consumer panel and users councils (Department of Trade and Industry 1998, Financial Services Authority 2000). The National Care Standards Commission could have been similarly required to consult users or their representatives about the use of its powers, but the Care Standards Act placed no such requirements on the Commission. Maybe the Commission will choose to involve users but, unlike the other sectors, there is no legal requirement for them to do so and no legal rules safeguarding the procedures for user involvement.

Enhancing individual rights

The enhancement of individual resident rights provides a third way of redressing the balance between the industry and public interest. Individual rights appear to have slipped into the regulatory agenda for nursing homes more as a response to a changing legal environment (Oliver 1997) than by any conscious

process. The incorporation of the European Convention on Human Rights into domestic law as the Human Rights Act 1998 is symbolic of this new legal environment. The new NCSC is required to enforce this Act, but although the effects are difficult to predict it could significantly improve the residents' rights in two areas. First, no government has seen fit to grant security of tenure to care home residents, a right of tenants since the early nineteenth century. Protection against arbitrary eviction may now be provided by Article 8 of the European Convention, right to respect for private and family life, his or her home and correspondence. Secondly, Article 6, right to fair and public hearing by independent and impartial tribunal, may mean that for the first time home residents will be represented at the Registered Homes Tribunal. This Tribunal hears appeals from home owners against decisions of the regulatory authority. Hitherto home residents or their representatives have played no part in the proceedings. The registration authority has been required to represent both its own interests and those of home residents.

Residents as consumers

Consumer rights legislation for private sector goods and services is also in the process of being strengthened (Department of Trade & Industry 1999). And there are good reasons to classify care home residents as consumers rather than residents. Around one in three residents pay all their own fees and about half of home residents are funded by the local authority and therefore means tested (Laing and Buisson 2000). As consumers, home residents have the same legal rights as those purchasing other services, but because of frailty or illness they face considerable difficulty in enforcement. One of the main purposes of introducing a regulator to this sector is to enforce the consumer and human rights of those who are too frail to enforce their own rights. The Office of Fair Trading (OFT) performs this enforcement role for consumer protection legislation for the private goods and services. In 1997, the Office initiated research into older people as consumers in care homes as part of a project to assist vulnerable consumers (Office of Fair Trading 1998a). The OFT found that fewer than one in five residents were aware of being a signatory to a contract. Moreover, many contracts the OFT examined broke regulations on unfair terms. Standards for care home contracts were incorporated into *Fit for the future*, but as this is not legally enforceable, it offers little protection. Instead the Care Commission, working closely with the Office of Fair Trading, must increase public awareness of unfair contracts.

Holding providers to account through complaints procedures

Another way of ensuring that an industry recognises consumer rights is to set up robust complaint procedures. Complaints mechanisms enable consumers to enforce their rights without recourse to law. In the retail, utilities and financial services sectors, the government has insisted on mechanisms which ensure that when a complaint is valid, the customer has easy access to redress and can be financially compensated (Office of Fair Trading 1998b, Department of Trade & Industry 1999, Financial Service Authority 2000). In these sectors, the enforcement of individual rights is seen as an important regulatory tool and the relevant Acts provide the regulators with the required powers. But this is not the case in the care home sector, for the Care Standards Act contains no such provisions. The Commission is not provided with any powers to ensure that users are financially compensated or have other redress as the result of valid complaint. The Commission will be required to investigate and provide the public with access to information about valid complaints against a home. But it will only be able to apply other sanctions if there is evidence to prove a breach of the statutory instruments or legal standards (Kerrison and Pollock 2001a). For instance, the home may not fulfil its contract to provide specific services to residents, but there would be little the Commission could do unless this suggested a serious breach of regulatory rules or other legislation. The value of a complaint as a mechanism ensuring that a home fulfils its obligations to the resident is lost. In other jurisdictions, such as in the USA or Australia, where individual rights are seen as of importance to regulation, the state funds third parties such as advocacy or dedicated ombudsman schemes to assist residents in pursuing claims against homes. For example, in Australia there is provision for such schemes under the Aged Care Act 1997 and in the US, the Administration on Aging administers the Long-term Care Ombudsman scheme under the Older Americans Act. In the UK there is no central funding for resident advocacy schemes and little attempt to develop these.

Availability of public information about quality of care

In the US, there have been attempts for 20 years to enforce ever more stringent regulations, with little improvement recorded in the level of regulatory deficiencies (Harrington & Carrillo 1999, Harrington *et al.* 2000, Harrington 2001). The federal government is now taking a different approach. Information about the

outcomes of nursing home care and regulatory deficiencies for each of the 18 000 nursing homes in the US can now be accessed via the world wide web (see www.medicare.gov/nhcompare/home.asp). With the data used extensively by advocacy groups, potential users can make an informed choice and poor providers are shamed. In other commercial sectors in the UK and in education and NHS, comparable information about the performance of providers is seen as being of utmost importance (OFT 1998b, DTI 1999, Financial Service Authority 2000) as a mechanism for holding providers to account. In contrast, the lack of centrally collected information about outcomes of nursing home care or about the compliance of individual nursing homes (Miller & Darton 2000) is a severe impediment to public debate.

Lack of user involvement compromises the effectiveness regulation

The National Care Standards Commission has not been provided with many of the powers which are now commonplace among other regulators. Instead, public enquiries in the industry, for example, the Long Care inquiry (Buckinghamshire County Council 1998), have identified listening to residents as central to identifying poor care and abuse. Arguments about the involvement of users in regulation have therefore centred around the importance of inspectors obtaining information from residents when assessing compliance, rather than users inclusion in a more radical modern agenda.

Some compensation may be provided by the innovative use of the Human Rights Act and consumer legislation but current conditions are not conducive to rigorous enforcement of any regulations. Attempts by local and central government to hold down fees has meant a squeeze on the profitability. The industry has low economic resilience (Laing and Buisson 2000). Coupled with competition for scarce resources, such as trained nursing staff, there is danger that organisations will misbehave or at the very least cut corners (Vaughan 1983, Haines 1997, Royal Commission on Long-term Care 1999). Reluctance to drive already marginal providers out of business may constrain inspectors from acting forcefully to deter homes from poor practices (Kagan 1994). The inspectorate is also under-resourced with each inspector, on average, responsible for the 21 homes and nearly 700 beds (Kerrison and Pollock 2001b, Department of Health 2000). Taken together, these factors would suggest that stringent enforcement is unlikely. In such situations, the involvement of users or their representatives can stiffen the regulators' stance by monitoring violations and pressuring the agency for action (Kagan 1994). In order for this be effective, Ayres

& Braithwaite (1992) advocate giving public interest groups rights of access to all the information available to the regulator, the right to participation in negotiation between the home and the regulator and the same standing to sue or prosecute under statutes as the regulator.

It may be the intent to address the issue of public involvement through the secondary legislation, but little in the primary legislation suggests that this has been thought through. In fact, the enforcement powers given to the NCSC would have been very familiar to local authorities who first regulated nursing homes in 1927. There is little evidence of the modern stance of consumer voice and empowerment now adopted for the regulation of other sectors in the UK. Through the recently announced private sector concordat, the industry will have the ear of the government and the regulator untempered by much right of involvement of users. Capture is thus a very real danger.

The lack of emphasis on user involvement or user rights means that the private healthcare sector is being treated very differently from other consumer sectors. The reasons for this might be economic. Increased user rights may result in significant increased costs for the industry, costs which are likely to be passed on to local authorities and the NHS through higher charges. Alternatively, the explanation may be cultural. Until recently patients or users of public services such as the NHS were seen as supplicants with no rights of involvement in decision making processes at local level (Hutton 2000) and few rights to complain (Kerrison and Pollock 2001a). It requires a considerable shift of view to recognise the importance of procedural rights for user involvement in regulatory processes.

In the nursing homes industry there is always high risk of public scandal (Braithwaite 1993, Braithwaite 2001). When scandal erupts, the legitimacy of the regulator is called into question. With little public involvement either in the Commission or regulatory processes, yet an explicit concordat with the private sector, the government is treading a danger path. Public confidence in the regulator is likely to evaporate. Questions will be asked about whether the regulator does really act in the public interest. Predicting the future may be unwise, but it would seem likely that the new National Care Standards Commission will soon cast an envious eye toward the powers of others regulators and return to government for further reforms.

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