Open and accountable public services?

The White Paper's aim of commissioning almost all public services from a range of providers implies 'government by contract' on a large scale. Tony Prosser, CMPO researcher and University of Bristol professor of public law, outlines the many potential legal difficulties that lie ahead.

The White Paper 'sets out a comprehensive policy framework across public services'. This big claim includes commissioning services from a range of diverse providers, in what will become the default approach in all areas where it is feasible. The range of eligible services is enormous: only national security and the judiciary, characterised as natural monopolies of state provision, will be excluded in principle.

The legal instrument for this apparent revolution will be the use of contract, and thus the proposals build on earlier experiences of contracting out services and competitive tendering. But on a large scale this may create difficulties, especially in relation to accountability, where traditional means are not well suited to government by contract.

The White Paper is remarkably thin on detail about mechanisms of accountability in a system of 'open public services'

The White Paper points to increased accountability in the future, for example, through 'mutually reinforcing choice, voice and transparency mechanisms'. But it lacks detailed discussion of what these arrangements might actually look like. Some examples will make clearer the danger of accountability gaps.

Transparency and accountability

It is now universally accepted that transparency in government is an essential prerequisite for accountability. Indeed, access to reliable information is especially important where public services are provided on a basis of choice, both by commissioning bodies and by individual users.

The White Paper lays great stress on the importance of the publication of data about user satisfaction and performance of public services; indeed, a new statutory right to data is envisaged. Similarly, access will be provided to public sector contract and procurement data, and publication of government contracts through the 'contracts finder' website will be developed further.

But past experience suggests that these sorts of data will often be difficult to digest and partial. Although standard formats for data provision are mentioned, such data, however useful, remain essentially under the control of government, which can decide on the format and what is to be released.

By contrast, the White Paper is almost totally silent on the difficulties that might be caused by government by contract for the individual right of access to information under the Freedom of Information Act 2000. It is highly unlikely that the Act will be extended to cover all the private providers, so access to information would depend on whether the terms of the contract with the provider require it. This is already a controversial issue in the NHS, and the White Paper nowhere makes a commitment to such continued access, except in the particular case of academies.

Human rights, judicial review and ombudsmen

A second issue is the application of the Human Rights Act to private providers. Although the Act has proved controversial in some quarters, key rights that it makes enforceable (relating, for example, to the right to a private life) are of considerable potential importance in challenging poor quality social care and other services.

The Act applies to 'public authorities', and in a major decision relating to a Southern Cross care home in Birmingham, the House of Lords held that this did not include the provision of social care contracted out to a private provider by a local authority, although the Act would apply where the authority provided the care itself. In this particular situation of private provision of social care under contract with a local authority, the Act has now been made applicable by statute. But serious problems remain about its use to challenge decisions by other types of private provider.

A related issue is that judicial review – the standard procedure for challenging unlawful decisions by public bodies for abuse of power – has in the past been difficult to use in relation to decisions by private providers. The current position is that judicial review will be available where there is some 'public law element' distinguishing the situation from an ordinary contract. But it has proved difficult to define this with any precision and it certainly does not imply that all

government contracting can be challenged by judicial review. Once more, the White Paper does not deal with this potentially important issue.

The legal rights of users and commissioning bodies to choose providers will not themselves provide accountability without institutional support

The White Paper does discuss the role of public sector ombudsmen, whom it sees as an important source of redress for individuals where choice is not available. Indeed, it is suggested that failure to provide a choice to which an individual has a right will by definition amount to maladministration, which an ombudsman will be able to investigate.

Currently, the parliamentary ombudsman, who investigates complaints of maladministration against central government, is precluded from investigating actions taken in matters relating to contractual or other commercial transactions. This exclusion has been widely criticised and is highly anomalous, particularly as the health service ombudsman (the parliamentary ombudsman wearing a different hat), though subject to a similar exclusion, is able to investigate health services provided under contract by the private sector and matters arising from contracts between health authorities. The equivalent restriction on local government ombudsmen was abolished in 2007.

The White Paper promises a review of how the ombudsmen can play a greater role in supporting the ability of individuals to exercise choice in specific services, and it is hoped that this issue will be clarified. The review will also provide an opportunity to re-examine other constraints on the powers of the parliamentary ombudsman, notably the 'MP filter' preventing her from receiving complaints directly from members of the public.

Fairness in commissioning

Turning from the position of individual service users, the question also arises of how to secure fairness in the commissioning process. The major means of regulating contracting by public authorities has been the role of the European Union's public procurement rules in opening up contracting to scrutiny and requiring fair procedures as between different bidders. But these rules have some major limitations.

First, the detailed rules on the procurement process do not apply to a number of important public services, including education, health and social services, where only more limited requirements apply. These include transparency, non-discrimination and advertising of the opportunity to bid.

Second, the rules are essentially about supporting a competitive process between different bidders for a contract, and do not incorporate other goals. Indeed, there is currently considerable controversy about the extent to which social goals are compatible with the full application of the EU rules.

One issue of considerable importance is the role of social enterprises in bidding for contracts. The White Paper points to the provision of a 'right to provide' for public sector workers who want to form mutuals or co-operatives. In a competitive market this does not, of course, mean a right to be given a contract but merely to bid for it.

The potential pitfalls were vividly illustrated recently in the case of Central Surrey Health, a non-profit body already holding an NHS contract, which had been praised by the government as a flagship social enterprise. The organisation was beaten as preferred bidder for a five-year contract by a company 75% owned by Virgin, largely because of the latter's easier access to financial backing.

The White Paper envisages a right to appeal to an independent body where a provider feels unfairly excluded from the bidding process. But in a competitive market this would not permit the positive promotion of social enterprises as a means of service provision.

Left to individual providers, the means of achieving accountability for public services are likely to be patchy and incoherent

Conclusions

It could be objected that concentration on these institutional means of accountability reflects an old-fashioned view redolent of the 'old, centralised approach to public service delivery' criticised in the White Paper. Instead, a wide range of less formal mechanisms could be developed, based on assisting choice in the marketplace both by individual consumers and by commissioning bodies.

But the White Paper is remarkably thin on detail of such mechanisms, and there is a danger that, if they are left to individual service providers, the means of achieving accountability for services will be patchy and incoherent. Worst of all would be to assume that formal legal rights to choose providers, either by commissioning bodies or by individual service users, will themselves provide accountability without the need for institutional support.

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