It does matter who provides public services, especially when things go wrong

democraticaudit.com /2011/06/13/it-does-matter-who-provides-public-services-especially-when-things-go-wrong/

By democraticaudit 2011-6-13

Recent coverage of the evidence of mistreatment of patients with learning disabilities at the Winterbourne View residential hospital in Bristol raises an important question. Is the level of democratic accountability for public services the same, regardless of the status of the organisations specifically involved? ***Andrew Blick*** *argues that it does matter who provides our public services – especially when things go wrong.*

The case involves publicly-funded services being delivered by private-sector providers. Such specifics have seemingly not impacted upon expectations about accountability. Politicians, regulators and charities are variously demanding and promising remedy in the same way they would were there no private-sector involvement.

The truth, however, is that there are variations in both the practical and legal accountability of the private and public sectors when involved in the provision of public services. A worrying example of legal discrepancy has repeatedly been noted by the parliamentary Joint Committee on Human Rights (JCHR). As long ago as March 2004 it produced a report stating that:

The Human Rights Act [1998, HRA] makes it unlawful for public authorities in this country to act in breach of the fundamental rights and freedoms set out in the European Convention on Human Rights. It allows those who believe their rights have not been respected by public authorities to seek vindication and redress in the courts of the United Kingdom. This protection was intended to be comprehensive, and the obligation to act compatibly with the Convention was to apply to all those discharging the public functions of the State.

Aneurin Bevan, the Founder of the NHS (Credit: Wikimedia Commons, CC by 2.0)

However, the JCHR noted that:

As a result of the combined effects of a restrictive judicial interpretation of one particular subsection of the Act on the one hand, and the changing nature of private and voluntary sector involvement in public services on the other, a central provision of the Act has been compromised in a way which reduces the protection it was intended to give to people at some of the most vulnerable moments in their lives.
The Committee went on:

a narrow judicial view of the meaning of "public authority" in section 6 of the Human Rights Act means that many private and voluntary sector providers of public services are considered to fall outside the scope of the Act, with no obligation to comply with the rights and freedoms it incorporated into domestic law.

Since this problem was first identified by the JCHR, it has in some senses worsened, with the position in case-law hardening, though there has been limited action to correct it. Through the Health and Social Care Act 2008 the Labour government deemed the provision of publicly funded residential care in private care homes a public function

for the purposes of the HRA (which I presume – not being a lawyer – would cover Winterbourne View). However, the last government did not produce legislation to ensure that all private sector providers performing public functions would be subject to the Act, as advocated by the Committee. Moreover, in its responses to the JCHR the government displayed evidence of a relativist attitude towards human rights, stating, for instance, in October 2009, that it must 'take into account the need to maintain a functioning market for the provision of public services' and provide 'reassurance' to actual or potential service providers. In February 2010, the government noted that:

In any engagement with service providers, the Government will make it clear that companies should not see using a human rights approach as something that may negatively affect their competitiveness, but instead should recognise that there is a strong business case for companies to embed human rights within their practices.

It could be inferred from this statement that human rights require justification through reference to business values, and perhaps that they are some kind of optional extra for private sector companies to consider adding to their core activities. The true position is – or should be – that, in the words of one witness as reported by the JCHR :

the state can never contract out of its human rights obligations. It remains the responsibility of the state to ensure that any private provider continues to operate to standards that meet those obligations.

Given the commitment of the present government to the wider involvement of voluntary and private sector bodies in a wide range of public services, building on an already existing long-term trend, these issue merit close attention. Clearly, government will need to couple this approach with measures to ensure that the human rights of public service users are protected equally, regardless of the particular service provider. Perhaps the swift proposal of a legislative measure to bring about this change would be a practical first activity in which the newly-established commission on a UK bill of rights could engage.

There are, of course, no easy answers. Where public services are provided by private and voluntary sector organisations, it clearly harder for ministers to exercise meaningful oversight. Methods of indirect democratic accountability – through Parliament, to ministers (or through elected local authorities) and on into the executive machinery – are rendered less effective. As such, ministers keen to turn over services to non-public sector bodies might do well to consider whether they will find themselves in future being held responsible for failures which they had little ability to prevent, and may have equally little ability to correct.

Dr Andrew Blick is Lecturer in Politics and Contemporary History at Kings College London. He was formerly Senior Research Fellow in the Centre for Political and Constitutional Studies in ICBH, and Senior Research Fellow at the Democratic Audit, University of Liverpool. He has worked in Parliament and closely with parliamentarians on various occasions. During 1999 he was an administrative assistant at No.10 Downing Street. He has a PhD on the history of special advisers in British government.