The campaign moves on

Today the High Court handed down its judgement on the judicial review we brought against the Secretary of State for Health and Social Care and NHS England on their introduction of Accountable Care Organisations (ACOs). We had originally brought our claim on four grounds - two on the lack of proper consultation, one on the legality of the idea itself, and one on grounds of lack of clarity and transparency. We withdrew our claim on the consultation grounds when our opponents conceded that they would not proceed without a full national consultation, so this success was in the bag.

Unfortunately, the Court has found against us on the law on the other two grounds.

On legality - whilst making clear that he was not deciding on the merits of ACOs, and acknowledging that we raised "perfectly good and sensible questions…..about the ACO policy and the limitations of the terms and conditions in the draft ACO Contract" - Mr Justice Green decided that the ACO policy is lawful because the Health and Social Care Act 2012 gives very broad discretion to Clinical Commissioning Groups when commissioning services.

And on clarity and transparency – whilst resoundingly rejecting the government's argument that the principle did not apply "in relation to what by common accord is intended to amount to radical and transformational changes in the way in which health and social care is delivered" - he decided that the principle was not **yet** engaged.

There is more about the judgment below.

We have decided not to appeal against this decision for several reasons.

Apart from the extra costs involved, our opponents have already been forced to change their plans. In order to win the case, they had to argue that ACO contracts were just like other provider contracts, and not the fundamental change to the governance of the NHS that we know they intended. [If you take the time to read the judgment (link) you will see that the judge recounts in detail how their position changed as they began to appreciate the power of our claim. The commissioning functions of CCGs were to be - illegally - delegated to ACOs - but instead are now reinforced, and if the government wishes to continue on the original path to creating ACOs, primary legislation will be needed and CCGs will have to retain sufficient staff and resources. The Health and Social Care Select Committee has called for legislation, and the Prime Minister included the possibility of new legislation for the NHS in her speech a couple of weeks ago. In addition, the promised consultation will have to be lawfully conducted, and any eventual ACO contract - in Dudley, Manchester or wherever – will have to be lawfully entered into. 999 Call for the NHS are still engaged in legal action, seeking leave to appeal the decision in their judicial review, but for us, the campaign moves out of the courtroom – at least for now – and continues in the local and political arenas, and on to the consultation.

We are extremely grateful to the thousands of people who have allowed us to bring this challenge. Thank you again from the bottom of our hearts for all your encouragement and

financial support. We do not believe that this has been wasted, and we hope you agree. We deeply regret the judgment and we imagine you will share our disappointment. But we hope its effect will be to strengthen resolve to hold the government to account during the consultation, and raise public awareness of the issues at stake if contracts for billions of pounds of public money lasting ten or more years are awarded to new bodies not established by statute, which could be partly or wholly private companies, and which could outsource all their services if they wished.

Colin Hutchinson, Allyson Pollock, Sue Richards, Graham Winyard

Background

Accountable Care Organisations (ACOs) were the flagship in NHS England's Five Year Forward View for the NHS when our campaign began last autumn. ACOs were put forward as a way to "effectively end the purchaser-provider split" and to "dissolve the boundary between health and social care". Draft model ACO contracts were published "….in a form ready for use", despite very limited public engagement. The Secretary of State was intending to lay regulations before Parliament, without any requirement for Parliamentary scrutiny, that would allow 6-10 ACOs to be up and running in April 2018.

Soon after the start of our campaign, NHS England rapidly accepted that proper consultation on their policy and the ACO contract would have to take place before any ACOs could be established. The Secretary of State also put on hold the proposed regulatory changes, pending the outcome of that consultation. The challenge forced a policy retreat to the position that ACOs would simply be providers of care services, with all the commissioning functions remaining with the CCGs.

We asked the Court to decide whether the issue of an ACO contract would put a Clinical Commissioning Group (CCG) in the position of unlawfully delegating many of its statutory functions in complex contracts, worth many billions of pounds and lasting ten or more years, to new bodies that have not been established by statute and which could be partly or wholly private companies and which could outsource all of their services if they wished.

Mr Justice Green made it very clear that he has not expressed a view on whether the ACO policy is a good thing or not. A judicial review can only decide whether a policy is lawful or not. In this case, the Court has decided that the NHS Act 2006, as amended by the Health and Social Care Act 2012, grants a very wide discretion to CCGs in performing their role and would allow a CCG to award an ACO contract. Whether it is in the public interest for them to do so is not an issue for the Court.

Throughout their defence, NHS England emphasised that the role of CCGs remains - in assessing the needs of its population, drawing up and putting out to tender these hugely complex contracts, with the associated quality terms; monitoring the delivery of the contracts and varying them with changing needs and priorities; approval of sub-contracts; maintaining the obligations of the CCG if service reconfiguration or hospital closures are envisaged; and picking up the pieces if the contract fails to deliver, or the ACO walks away from the contract. We do not see that this is compatible with "ending the purchaser-provider split" which was their expressed intention in planning to introduce ACOs. It would not allow CCGs to be radically slimmed down and calls into question the wisdom of introducing an additional, less publicly accountable, and more costly, tier of management into the NHS, drawing even more money away from front-line services.

We also challenged the Government that it was failing in its common law duties of clarity and transparency by not providing a consistent account of its policy intentions. At the outset of our action, the Government had intended to allow ACO contracts to be awarded before any public consultation. Mr Justice Green observed that since "the defendants retreated to the position of the pre-consultation phase", those duties can be addressed through the consultation process, which he expects to be "informed by the arguments and evidence that have emerged in this case".

He accepted that we have raised "….many other perfectly good and sensible questions….. about the ACO policy and the limitations of the terms and conditions in the draft ACO Contract. These can, and properly should, be raised in the course of the consultation." He made it clear how he expects that consultation to be carried out. One of our priorities is now to prepare for the consultation and to raise public awareness of the issues at stake.

We are disappointed that the Court has reached these conclusions, but this judgment makes it clear that, if we do not want our NHS to be run through a complex and inflexible web of commercial contracts and subcontracts, the existing law needs to be changed. In this context, we welcome the commitment of Jonathan Ashworth, Shadow Secretary of State for Health, to draw up more detailed Labour legislation, based on the NHS Reinstatement Bill, in preparation for the first Queen's Speech of the next Labour Government.

We also remember our co-claimant, the late Professor Stephen Hawking, who supported our arguments with the strength of his reputation. We deeply regret that we have not won the legal argument, but we have come a very long way since the campaign started. Many of the issues that concerned us are now out in the open and this policy, which we believe carries grave risks to the continued provision of a universal, comprehensive, publicly-funded and publicly accountable health system, has not yet been implemented.

We all dedicate ourselves to continuing the fight to reinstate a health service that is publicly funded, publicly provided, publicly accountable and available to all on the basis of clinical need not ability to pay. Happy birthday NHS.