

Responsibility for Preventative Public Health Services: National Aids Trust v NHS England – Court of Appeal

Purpose

For information.

Summary

This paper updates Board Members on the court action between the LGA, National AIDs Trust and NHS England being fought out in the Court of Appeal over who pays the bill for a service to block Human Immunodeficiency Virus (HIV) infection.

The High Court ruled that NHS England has the power to commission Pre-Exposure Prophylaxis, which has been described as a “game-changer” in the fight against HIV/Aids.

NHS England is appealing on the grounds that local authorities have the legal responsibility to arrange services to “prevent” the spread of HIV, while its own responsibilities are limited to treating those already assumed to be infected.

Recommendation

Members are asked to note the report.

Action

Officers to action as appropriate.

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Background

1. On 2 August, the National Aids Trust (NAT), relying heavily on arguments formulated by the LGA, successfully challenged in the High Court, NHS England's decision that it did not have the legal powers to commission the HIV treatment called Pre-Exposure Prophylaxis, also known as PrEP.
2. Pre-Exposure Prophylaxis (PrEP) is a way for people who don't have HIV but who are at very high risk of getting it to prevent HIV infection by taking a pill every day. The pill contains two medicines that are also used to treat HIV. If you take PrEP and are exposed to HIV through sex or injection drug use, these medicines can work to keep the virus from taking hold in your body.
3. PrEP is a powerful HIV prevention tool and can be combined with condoms and other prevention methods to provide even greater protection than when used alone. But people who use PrEP must commit to taking the drug every day and seeing their health care provider for follow-up every 3 months
4. Mr. Justice Green ruled in his [judgment](#) that NHS England (NHSE) has the power to commission PrEP. Disappointingly NHS England immediately announced it would appeal the decision.
5. Having previously accepted that it had the power to commission PrEP, NHSE argued the onus falls on councils to fund PrEP, as local authorities are responsible for sexual health services following the transfer of public health responsibilities in 2013. The LGA branded this as a "selective and untenable" reading of the relevant legislation.
6. Along with the LGA and NAT, the Association of Directors of Public Health, London Councils, British Association for Sexual Health and HIV, British HIV Association, and the Terence Higgins Trust, each made strong representations in response to NHS England's decision.
7. NHS England's appeal was heard on Thursday 15 September 2016. NHSE's case mainly focused on the literal interpretation of the carve out in the National Health Services Act 2006 and the Health and Social Care Act 2012, pertaining to the powers and duty of NHS England to commission treatments in relation to HIV positive persons only.
8. LGA agreed with NATS and also highlighted that prevention does not automatically equate to public health services and that this treatment amongst many falls into the comprehensive health service remit of NHS England. The LGA's case is that the NHS Act does not introduce two sets of mutually exclusive functions with prevention/public health on the one hand and the treatment of illness on the other and in fact NHS England and local authorities amongst various bodies have overlapping functions. Particular examples given of other treatments provided to healthy persons for the purpose of prevention in full or in some part by NHS England included statins and the contraceptive pill.

9. The Department of Health, an Interested Party to the appeal, were represented at this hearing, unlike at the High Court. They lodged written representations on the proper interpretation of Section 2 of National Health Service Act 2006, but made no verbal representations on their behalf due to time constraints on the day. They argued that the wording, structure and statutory context of Section 2 confirm that the power is to be given a “broad and generous interpretation”.
10. Lord Justice Longmore, Lord Justice Underhill and Lady Justice King presided and requested further documentation on the commissioning of contraception and the relevant parts of the Health and Social Care Act 2012 to be provided by NHS England. Their main lines of questioning focused on the definition of commissioning in this context, the definitions of public health and prevention, the apparent inconsistency with NHS England commissioning PEP but not PrEP, the risk of variable provision if only Local Authorities are able to commission PrEP, the purpose and intentionality of the 2006 Act and the legality of using a later regulation to construe the meaning of original legislation.
11. At the time of writing, the judgement in the Appeal Court was pending.

Implications for local authorities

12. The LGA has consistently maintained that the commissioning guidance is clear. Responsibility for anti-retroviral drugs, including PrEP, lies with NHSE and to place the responsibility solely on local authorities would create a new and unfunded burden to the tune of £15-20 million a year.
13. It is important to note that the implications of this case go beyond sexual health services. NHSE funds a number of other preventative measures, including contraception, diabetes prevention, statins and PEPSE (Post exposure prophylaxis for HIV).
14. By successfully challenging NHS England's interpretation of the law, the LGA believes this will provide clarity around the roles of councils and the NHS for prevention services. The LGA's position is that Parliament's intention was that local authorities, NHSE and the Secretary of State have joint responsibility for ensuring they can deliver an integrated sexual health system, but NHSE rejected that argument.
15. The LGA also emphasised to the court that implementing PrEP would have saved the NHS significant costs of having to provide much costlier treatment further down the line.
16. This case, if not challenged, has the potential for councils to be liable for other expensive NHS prevention drugs and services and runs counter to the spirit of joined up commissioning in the delivery of public health services.

Financial Implications

17. Over 80% of upper tier local authorities contributed to a fund to challenge the action in the Court of Appeal. In the event that the LGA and the NAT lose the appeal, the LGA will be liable for some of the costs incurred by NHSE.