

## **Pre-Exposure Prophylaxis (PrEP) - National Aids Trust v NHS England, Local Government Association and Secretary of State for Health**

### **Purpose**

For information and discussion.

### **Summary**

This paper updates Board Members on the Court of Appeal's judgement on the legal action between the LGA, National AIDs Trust and NHS England over who pays the bill for a service to block Human Immunodeficiency Virus (HIV) infection and who has the power to commission PrEP (pre-exposure prophylaxis).

### **Recommendation**

The Community Wellbeing Board is asked to note and comment on the update provided in the report.

### **Action**

Officers to take forward as directed by members.

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## **Pre-Exposure Prophylaxis (PrEP) - National Aids Trust v NHS England, Local Government Association and Secretary of State for Health**

### **Summary**

1. On 10 November 2016, the Court of Appeal handed down the judgment on NHS England's appeal in the case of National Aids Trust v NHS England, Local Government Association and Secretary of State for Health. We can inform you that the appeal was dismissed.
2. The LGA were represented by Jenni Richards QC and Nicola Greaney from Essex Chambers. The LGA understood the importance of this case and potential future implications for other preventative services from the outset.
3. This important judgment from the Court of Appeal finds that the National Health Service Commissioning Board (NHS England) has the power to commission PrEP (pre-exposure prophylaxis).
4. The judicial review challenge was brought by the National Aids Trust (NAT) against NHS England's decision that it did not have power to commission PrEP. The Local Government Association (LGA) was a party to the proceedings before the High Court and the Court of Appeal and argued successfully on behalf of its members that the power to commission PrEP lay with NHS England.
5. The LGA argued that not only was NHS England's legal analysis of its responsibilities wrong but that in practical terms, local authorities did not have the financial resources to pay for PrEP and if local authorities were responsible, there would be fragmented national provision (because some local authorities might commission but others would not). The Court of Appeal upheld the arguments of NAT and the LGA that the responsibility for PrEP commissioning lay with NHS England. The judgment was not about whether NHS England will or should commission PrEP but whether it has the power to do so.

### **Background and NHS England's position**

6. NHS England had initially accepted that the commissioning of PrEP was within its power. However, in March 2016 NHS England changed its mind and published a press release announcing for the first time that local authorities were responsible for HIV prevention services.
7. NHS England contended that the 2006 Act (in section 1H(2)) contained an exception to the general duty imposed on NHS England to deliver a comprehensive health service which excluded the commissioning by NHS England of services provided pursuant to "public health functions" of either the Secretary of State or local authorities. NHS England said that PrEP, being essentially a preventative treatment, would, if commissioned, be a service provided pursuant to "public health functions" which was the remit of local authorities under the 2006 Act and associated regulations.

8. The Appeal Court judges held that: *“the whole thrust of the regulations is that local authorities are not to be responsible for HIV patients but rather that NHS England is to be responsible for them”*.
9. The LGA released the following statement following the Court of Appeal's judgment:
  - 9.1 *Responding to today's ruling by the Court of Appeal on the HIV treatment PrEP, Chairman of the Local Government Association's Community Wellbeing Board, Cllr Izzi Seccombe, said:*
  - 9.2 *"We are pleased that today's ruling by the Court of Appeal confirms our position that NHS England has the power to commission the HIV treatment PrEP.*
  - 9.3 *"We were disappointed that NHS England chose to challenge the High Court decision, at great expense to the taxpayer and at a time when council and health budgets are under huge pressures. We argued that NHS England was wrong in law and that its powers include commissioning for preventative purposes, such as HIV-related drugs.*
  - 9.4 *"During the transition period to the implementation of the NHS and Care Act 2010, NHS England sought to retain commissioning of HIV therapeutics, which the PrEP treatment clearly falls into. We now hope this decision will provide much-needed clarity around the roles of councils and the NHS on prevention services.*
  - 9.5 *"It also demonstrates that both parties have the joint responsibility of ensuring we can deliver an integrated sexual health system as Parliament originally intended. It is time for NHS England to stop delaying and finally determine whether to commission this treatment, which could greatly reduce the risk of HIV infection."*