

## **Briefing note for Health, Adult Social Care, Communities and Citizenship Scrutiny Sub-Committee**

**4 September 2013**

### **Outcome of the legal challenge to the decisions of the Trust Special Administrator for the South London Healthcare NHS Trust and the Secretary of State for Health in respect of Lewisham Hospital**

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#### 1. Background

In July 2012 the Secretary of State for Health, exercising his powers under Chapter 5A National Health Service Act 2006, appointed Matthew Kershaw as “Trust Special Administrator” (“TSA”) for the South London Healthcare NHS Trust (“SLHT”).

The TSA was appointed by the Secretary of State under the “Unsustainable Providers Regime” to deal with failing NHS organisations. SHLT was described as the “most financially challenged” NHS Trust in the country, with a deficit of £65 million per annum.

The TSA’s task was, in effect, to run the Trust (the Trust chair and board of directors having been suspended) and then make recommendations to the Secretary of State as to what actions were needed in relation to the Trust.

The TSA published his report in January 2013. He recommended the dissolution of SLHT and the transfer of the management and delivery of NHS services to other organisations. In the view of the TSA, this also entailed a reconfiguration of NHS services in the wider south east London area, beyond the area served by SLHT. In particular:

- A reduction of the number of A&E departments in the area from five to four, necessitating the replacement of the A&E department at University Hospital Lewisham (“UHL”) with a non-admitting urgent care centre.
- A reduction of the number of obstetrician-led maternity units in the area from five to four, necessitating the downgrade of the maternity unit at UHL to a stand-alone midwife-led birthing centre.

UHL is part of the Lewisham Healthcare NHS Trust, a separate entity to SLHT that was not subject to the TSA arrangements put in place in 2012.

On receiving the TSA’s report and recommendations, the Secretary of State for Health asked NHS Medical Director Sir Bruce Keogh to review the recommendations with regard to whether there had been sufficient clinical input into the development of the recommendations; whether they were underpinned by clear clinical evidence; and whether a strong case had been made that the recommendations would lead to improved patient care. While

Sir Bruce accepted that while there was sufficient clinical input and a clear evidence base, he made a different recommendation with regard to the downgrading of the UHL A&E department, recommending instead that UHL retain a smaller A&E service, with 24/7 senior emergency medical cover. The rationale for retaining A&E at UHL was that it would help reduce increased demand on other hospitals. An additional £37 million investment to expand services at other hospitals was also recommended.

The Secretary of State published his decision accepting the TSA's recommendations, subject to Sir Bruce Keogh's comments, on 31 January 2013. He announced that SLHT would be dissolved by 1 October 2013.

## 2. The Secretary of State and TSA's powers

The power of the Secretary of State to appoint a TSA is contained in the National Health Service Act 2006 ("the Act"). The power is exceptional by nature, intended to deal with Trusts which are unsustainable on financial or clinical performance grounds. In a Written Statement to Parliament in July 2012, the Secretary of State explained that:

*"The [TSA's] Regime is not a day-to-day performance management tool for the NHS or a back-door approach to reconfiguration. The purpose is to deliver a rapid and robust process when the widest range of other solutions to improve and maintain sustainability have been tried. Implemented and not delivered the results required"*

The Act also grants the Secretary of State the power to direct NHS bodies with regard to the exercise of any functions – a more general power enabling the Secretary of State to require a reconfiguration of NHS services, including the dissolution of an NHS body and redistribution of Trust property and liabilities to other NHS bodies. This power is however subject to more rigorous scrutiny and consultation requirements than the TSA regime. In particular, any proposals for the reconfiguration of the health service would need to be mindful of:

- The requirement to consult a Local Authority on any substantial development or variation in the health service in the LA's area (Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013). The 2013 Regulations exempt a TSA from the duty to consult a LA.
- The principles set out in the NHS London Reconfiguration Guide (2011)
- The four "reconfiguration tests" set out by Sir David Nicholson, Chief Executive of NHS England, in May 2010, namely that:
  - Support from GP Commissioners will be essential;
  - Arrangements for public and patient engagement should be strengthened;

- The need for greater clarity about the clinical evidence underpinning the proposals; and
- Proposals should take into account the need to develop and support patient choice.

### 3. Legal challenge

The proposals concerning UHL provoked a significant outcry and protest. A Save Lewisham Hospital campaign was formed. Both the Campaign and Lewisham Council issued separate applications in the High Court for a Judicial Review of the TSA recommendations and the decision of the Secretary of State. The applications were heard together by Mr Justice Silber and judgement was handed down on 31 July.

The grounds for challenge put forward by the Campaign and Lewisham Council were that the Secretary of State and the TSA had no powers to make the recommendations and decisions that they did in respect of UHL (i.e. they had acted *ultra vires*); alternatively that the Secretary of State was wrong in finding that his tests for reconfiguring health services in south east London were met.

#### *The vires argument*

The *vires* argument centred on whether the TSA and the Secretary of State had the power to make recommendations and take decisions in relation to an NHS organisation which did not form part of SLHT. The wording of the Act suggested that the TSA and the Secretary of State's powers could only be exercised "in relation to the Trust" to which the TSA had been appointed.

The Secretary of State's case was that the words "in relation to the Trust" had to be interpreted more widely when considering the Act as a whole and that it was not Parliament's intention to give the words the narrow meaning put forward by the Applicants. The Court rejected this view, and held that as a matter of interpretation the words "in relation to the Trust" had to be specific to the Trust over which the TSA had been appointed.

#### *Other arguments*

Although the *vires* argument was sufficient on its own to defeat the TSA's recommendations and the Secretary of State's decision, the Court went on to consider other issues raised by the parties. Though largely academic, these are arguments that may fall to be considered on appeal.

The Applicants also succeeded in persuading the Court that the TSA's recommendations did not meet the four "reconfiguration tests" outlined above. The Court accepted that they did not fall to be considered under the TSA regime, but analysed the four tests in the event that its decision on *vires* was wrong. The Court held that the first requirement – namely that the support of GP Commissioners was "essential" to any reconfiguration – meant that the support of *Lewisham* GPs, as the group most affected by the changes to UHL,

had to be obtained. As Lewisham GPs had voiced strong opposition to the changes, the proposals failed this test. The Court held that the other three tests had been satisfied.

The Secretary of State sought to argue that even if he did not have the powers under the TSA regime to make the decision that he did, he could still rely on his other powers to direct NHS organisations as to the exercise of their functions, and he would have reached the same decision if he followed this route. The Court rejected this claim.

#### 4. Conclusion and next steps

As such, the recommendations of the TSA and the final decision of the Secretary of State, but only to the extent that they related to UHL, were quashed.

The Department of Health has announced that it intends to appeal against the decision to the Court of Appeal.

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