

OXFORDSHIRE JOINT HEALTH OVERVIEW & SCRUTINY COMMITTEE – 2 FEBRUARY 2017

Report by Director of Law & Governance

Summary

- HOSC has a duty to work with health bodies to determine whether any changes proposed to health services amount to a substantial variation.
- HOSC has been seeking to reach agreement with the CCG as to whether the CCG's decision to not retender the contract for the provision of health services at Deer Park Medical Centre (DPMC) is a substantial variation.
- Litigation has commenced against the CCG by a patient from DPMC.
- For the reasons set out below, it is recommended that further attempts at reaching agreement be deferred pending the outcome of that litigation.

Background

1. Although an earlier indication was given by officers – in the response to an FOI request – that any actions that resulted in the closure of DPMC would not amount to a substantial variation, no formal consideration had been undertaken by the Committee as to whether indeed such a closure would amount to a substantial variation. An informal meeting of Committee members was held on 12 December 2016 with the CCG to discuss a completed substantial change toolkit assessment for the closure of DPMC. At this meeting it was decided that the matter be considered at a public meeting on 2 February 2017.

The Litigation

2. On 5 December 2016 the CCG received a letter before claim by a patient at the Deer Park Medical Centre (DPMC). This was alleging that the determination by the CCG, resulting in the cessation of services at DPMC, was unlawful. Judicial review proceedings were issued on 12 December 2016, being the last day within the three month period when, by law, proceedings have to be issued, if you take the decision made by the CCG as 13 September 2016 – which is disputed.
3. Solicitors for the CCG responded on 12 December 2016 setting out their reasons why they considered the actions of the CCG were lawful.
4. The solicitors for the Claimant gave detailed grounds of their claim on 22 December 2016, including a request for interim relief (i.e. an injunction to prevent the closure of DPMC) and to extend the contract currently in place with Virgin Care.

5. Detailed grounds have been submitted by the CCG just recently on 20 January 2017.
6. Oxfordshire County Council and West Oxfordshire District Council are interested parties to the claim. Oxfordshire County Council has responded to the claim indicating that it does not wish to participate in the proceedings, but indicated that the Joint Health Overview & Scrutiny Committee may wish to provide clarification on any matters.
7. The detailed grounds of 22 December 2016 from the Claimants say, in summary, that the decision to reprocure was made in August but there was no consultation or engagement prior to that decision which they say the CCG are required by law to undertake.
8. They also say that the CCG should/could have rethought their specification based on the needs of the patients rather than simply close the whole practice – and these issues should have been consulted upon. Therefore, they maintain, the CCG's decision was unlawful.
9. They also maintain that an Equality Impact Assessment was not properly undertaken and thereby the CCG have failed to comply with their duties under the Equality Act 2010.
10. The CCG's basic position in their correspondence is that the contract was coming to an end in November 2016, they endeavoured to reprocure services but could not do that successfully for the price on offer. There was no interest from other providers and it was considered that a second procurement was not going to produce any other result. They have therefore embarked on a process of dispersing patients and extending the current contract with Virgin Care until March 2017, but no further.
11. The suggestion that they could have undertaken a consultation has been dismissed by the CCG because, they say, the procurement process demonstrated that there was no alternative to stopping provision and therefore what would be the point of consultation? They go on to say that they have, however, undertaken an engagement process in the light of the failed procurement including involving lay representatives/Healthwatch in the procurement process.
12. This basic position has been reiterated in the CCG's detailed grounds.
13. The Courts have considered the application for interim relief and refused this, together with the Claimant's request to expedite matters.

Implications for HOSC

14. As indicated above, the duty on HOSC is to, where possible, seek agreement with health bodies as to whether any proposed changes amount to a substantial variation.

15. The position adopted by the CCG in the litigation is that they do not consider their decision to not retender for services at DPMC to be a substantial variation.
16. The decision as to whether something is a substantial variation is the CCG's to take. Where there is disagreement then HOSC have a reserve power to refer matters to the Secretary of State where appropriate and after attempts have been made to seek a local resolution.
17. There are a number of reasons why the further consideration of whether the CCG's decision to not re-tender amounts to a substantial variation would be inadvisable at this stage.
18. One aspect of the legal challenge is that the CCG has failed to comply with its obligations to consult, including a failure to consult with the Joint Health Overview and Scrutiny Committee.
19. In many respects the issues of consultation with the public and HOSC are bound up. The CCG have maintained a view that they were keen to continue with services at DPMC, but the commercial realities made that impossible and that they have engaged a number of public bodies in the procurement exercise. As to HOSC they have maintained that the failure to re-tender is not a substantial variation and as such they do not need to consult HOSC. It is the question of substantial variation that HOSC is considering.
20. If the Court determines that there has been a failure on the part of the CCG to comply with its statutory duties to consult then either the question of whether there is a substantial variation will be a matter for the Court; or, (more likely) the CCG will need to reconsider how it approaches the consultation and HOSC would be better placed to scrutinise any revised consultation arrangements in the light of the Court's clarification.

Recommendation

In the light of the above it is recommended that it would be more advisable for HOSC to await the outcome of the litigation before giving further consideration to the question of whether the CCG's actions in regard to DPMC amount to a substantial variation.

Nick Graham
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