

Campaigners win permission to appeal – leaving NHS England’s consultation making bogus claims on legal status

On 5th July, the High Court handed down its [judgement](#) on the judicial review brought by the JR4NHS claimants against the Secretary of State for Health & Social Care and NHS England on their introduction of Accountable Care Organisations (ACOs).

Almost a month later, on 2nd August, Mr Justice Green announced his decision on who should pay the costs of the case. His decision was a vindication for the four claimants, and the now deceased Professor Hawking. Usually, the loser has to pay the winner’s costs, but on this occasion he ordered the government and NHS England to pay JR4NHS costs up to 18th January 2018.

This was because NHS England had “changed their minds about full nationwide consultation and the use of the ACO model by early adopters,” and also because “in some measure there was a degree of confusion caused by the use by the Secretary of State of misleading language to describe the process of appointment of ACOs ...”.

The judge also found that the JR4NHS claimants had “succeeded on certain subsidiary points of law arising under the outstanding substantive grounds,” and “acted in the public interest in bringing the claim.” They had “identified some serious and important issues which will need to be considered during the course of the consultation, the substance of which will have been improved by the airing and ventilation of the Claimant’s concerns and criticisms”.

A previous challenge to ACOs on different legal grounds, by campaign group 999 Call for the NHS, had been rejected by the High Court in April: but in this case the group and their solicitors at Leigh Day and barristers at Landmark Chambers found the ruling so flawed that they immediately applied for permission to appeal.

Nonetheless just one day after the JR4NHS costs decision effectively going against them, and without waiting for the court’s ruling on whether an appeal would be permitted on the 999 challenge, NHS England chose the height of the summer holiday period to launched a 12-week consultation on contracting arrangements for Integrated Care Providers (ICPs), ‘formerly known as’ accountable care organisations (ACOs).

In doing so NHS England claimed (prematurely, and we now know inaccurately) that “The High Court has now decided the two judicial reviews in NHS England’s favour.”

Two weeks into that tokenistic 12-week consultation, on August 17, the Court of Appeal issued an [order](#) granting another campaign group, 999 Call for the NHS, permission to appeal the ruling against their Judicial Review of the proposed payment mechanism in NHS England’s Accountable Care Organisation contract.

Their case rests on the fact that the Accountable Care Organisation Contract (now rebranded by NHS England as the Integrated Care Provider contract) proposes that healthcare providers are not paid

per treatment, but by a 'Whole Population Annual Payment', which is a set amount for the provision of named services during a defined period.

This, 999 Call for the NHS argues, unlawfully shifts the risk of there being an underestimate of patient numbers from the commissioner to the provider, and endangers service standards.

The Appeal, which 999 hope will be by the end of the year, will consider all seven grounds laid out in the campaign group's application – with capped costs. They need to raise additional funding and are issuing a further crowdfunding [initiative](#).

999 shares common ground with Health Campaigns Together in highlighting the impossibility of achieving any real "integration" in an NHS that remains trapped in competitive market system that has been put in place by successive governments and the 2012 Health & Social Care Act.

Like HCT they also call for legislation to abolish the purchaser/provider split and contracting, put social care on the same footing as the NHS as a fully publicly funded and provided service that is free at the point of use; and remove the market and non-NHS bodies from the NHS. Although they have chosen not to engage with Health Campaigns Together, and instead set out to build a separate network, many campaigners will wish them well on their legal challenge.

In the meantime NHS England's minimalistic and premature ['consultation'](#) is promoting a model that could yet be ruled unlawful. It is claiming a legal standing that has yet to be established.

It seems more than likely that NHSE will proceed with the consultation regardless of the legal questions that remain unresolved; but responses to that consultation need to draw attention to this fact.

Health Campaigns Together was the first campaigning alliance to flag up the dangers of [Sustainability & Transformation Plans](#) early in 2016. Since then we have been consistent critics of ["Accountable Care Organisations"](#) and each of the rebranded versions that have since been promoted. We will continue to fight on all fronts possible against the latest NHS England plans.

Our aim is to prevent flawed plans being adopted and long-term contracts being signed that will undermine our NHS and the hopes of achieving a genuine integration of health and social care as public services, publicly provided free at point of use – and publicly accountable.