

**NATIONAL HEALTH SERVICE ENGLAND
("NHS England")**

**REFERRAL TO TREATMENT
("RTT")**

OPINION

INTRODUCTION

1. I am instructed to advise the Opposition Leadership in the House of Lords. My advice is sought with respect to the statutory requirement for NHS England to ensure that a minimum of 92% of patients awaiting treatment for non-urgent conditions wait no more than 18 weeks for that treatment from the date of their referral.

BACKGROUND

2. In December 2015 the RTT target was missed for the first time since its establishment in April 2012. It has now not been met since February 2016.

3. On 21 July 2016 NHS Improvement and NHS England announced measures to restore financial discipline and help ensure ongoing financial

sustainability for the NHS. These measures included removing financial penalties for more than 50% of hospitals failing to achieve the 92% RTT target.

4. On 31 March 2017 NHS England published “Next Steps in the NHS Five Year Forward View”. This states (Chapter 7: Funding and Efficiency: page 47) “that ... over the next couple of years, elective volumes are likely to expand at a slower rate than implied by a 92% incomplete pathway target”. This position appears to be corroborated by public comments made by the NHS England Chief Executive.

STATUTORY FRAMEWORK

5. Part 1 of the consolidating National Health Service Act 2006, as amended (“the 2006 Act”) is concerned with the promotion and provision of the Health Service in England. Sections 1-1G inclusive relate to the duties of the Secretary of State for Health (“the SoS”). His duties include to promote a comprehensive health service: Section 1(1); to exercise his functions so as to secure that services are provided in accordance with the 2006 Act: Section 1(2); to exercise his functions with a view to securing continuous improvement in the quality of services: Section 1A(1); to act with a view to securing

continuous improvement in the outcomes that are achieved: Section 1A(2) and (3); and to “have regard to” the NHS Constitution: Section 1B.

6. Section 1H(1) in Part 1 of the 2006 Act is concerned with the establishment of a body corporate known as the National Health Service Commissioning Board (“the Board”). The Board is (with an exception that is not material for present purposes) subject to the duty under Section 1(1) concurrently with the SoS: Section 1H(2).

7. The Board has the function of arranging for the provision of services for the purposes of the health service in England in accordance with the 2006 Act: Section 1H(3)(a). The Board must exercise its functions in relation to clinical commissioning groups (“CCGs”) so as to secure that services are provided in accordance with the 2006 Act: Section 1H(3)(b). Each CCG has the function of arranging for the provision of service for the purposes of the health service in England in accordance with the 2006 Act.

8. Part 2 of the 2006 Act relates to NHS Bodies. Chapter A1 of Part 2 is concerned with the Board.

9. Sections 13A and 13B relate to the Mandate of the SoS to the Board. Subsection (1) of Section 13A requires the SoS, before the start of each financial year, to publish, and lay before Parliament, a document to be known as “the Mandate”.

10. Subsections (2) and (3) of Section 13A state what must be specified in the Mandate. By subsection (7) the Board must seek to achieve the objectives specified in the Mandate and comply with any requirements so specified.

11. Subsection (8) of Section 13A imposes consultation duties upon the SoS. Subsection (9) states that requirements included in the Mandate have effect only if Regulations so provide. Regulations do so provide.

12. Part 9 of the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012, S.I. 2012/2996 (“the 2012 Regulations”) relates to Standing Rules with respect to waiting times. Regulation 45 is at the heart of the matter for present purposes. It imposes a duty to meet the maximum waiting times standards.

13. By Regulation 45, a relevant body (the Board and CCGs) must make arrangements to ensure that, at the end of each data collection period, not less

than 92% of the persons falling within paragraph (4) have been waiting to commence appropriate treatment for less than 18 weeks.

14. The right correlative to this duty is re-stated as a right in Section 3a of the NHS Constitution. The NHS Constitution given effect to by Chapter 1 of Part 1 of the Health Act 2009, in particular Section 2(2)(ca), and by Section 3 of the Health and Social Care Act 2012.

15. The NHS Constitution states that patients have “the right” to access certain services commissioned by NHS bodies within maximum waiting times (or for the NIIS to take all reasonable steps to offer a range of suitable alternative providers if this is not possible). The waiting times are stated to be those described in the Handbook to the NHS Constitution.

16. The NHS Constitution and its Handbook were updated in July 2015. The Government then stated that:-

“NHS Constitution now reflects a series of fundamental standards, below which care must never fall.”

17. Part III of the Handbook relates to Section 3a of the NHS Constitution. It includes “the right” to access services within maximum waiting times.

18. The right is stated as including (subject to exceptions) the right to start consultant-led treatment within a maximum of 18 weeks from referral for non-urgent conditions. The source of the right is described as being Part 9 of the 2012 Regulations, as amended from time to time.

19. The 2012 Regulations can indeed be amended. This, however, is subject, importantly, to Parliamentary approval.

20. They have not been amended materially for present purposes. Unless and until they are there is an unqualified duty to meet the 92% target.

21. The NHS Constitution could be amended. It has not been materially for present purposes. This and its Handbook confirm the unqualified duty to meet the target.

22. The National Health Service (Mandate Requirements) Regulations 2017, S.I. 2017/445, coming into force on 10 April 2017, and ceasing to have effect on 31 March 2018 (“the 2017 Regulations”), state that the requirements set out in paragraph 1.6 of the Mandate and paragraph 6.2 of the Annex in the Mandate, published by the SoS on 20 March 2017 and laid before Parliament

on that date, have effect. Paragraph 6.2 sets out overall 2020 goals (including the RTT target), 2017-18 deliverables, and 2017-18 requirements.

23. The 2017-18 Mandate does not, however, include the 92% RTT target in its list of in-year deliverables or requirements. Nor is any form of interim measure specified. It is with respect to the lawfulness of these omissions from the current Mandate that my advice is sought.

24. An additional matter is that it is not apparent that the consultation required by Section 13A(8) of the 2006 Act with specified bodies was carried out before the 2017 Regulations were made. Nor was there public consultation, unlike in the previous year.

ADVICE SOUGHT

25. I am asked five questions. I address them in the order in which they are raised in my Instructions.

FIRST QUESTION

26. I am asked whether NHS England has acted unlawfully in failing to uphold the 92% RTT target since February 2016.

27. My answer is: “Yes”, at any rate for the latter part of the period from February 2016 to the end of March 2017.

28. This is because:-

- (1) The 2012 Regulations require relevant bodies to make arrangements to ensure that the target is achieved;
- (2) The 2006 Act requires the Board to “seek to achieve” the objectives specified in the Mandate;
- (3) The inference from the objective not having been achieved over such an extended period is that the Board did not sufficiently seek to achieve the objective specified in the 2015-16 and 2016-17 Mandates, and/or that the Board and/or some CCGs did not make arrangements to ensure that the target was achieved.

SECOND QUESTION

29. I am asked whether the SoS acted unlawfully in failing to take action requiring NHS England to uphold the 92% RTT target since February 2016.

30. My answer is: "No".

31. This is because:-

- (1) The most relevant duty for present purposes upon the SoS is no less and no more than to "have regard" to the NHS Constitution as a mandatory consideration;
- (2) That does not preclude the SoS from having regard to other considerations, including countervailing considerations;
- (3) What weight to give to various considerations is a matter for the SoS;
- (4) Non-compliance with the NHS Constitution does not necessarily give rise to the inference that no regard was had to it; and
- (5) Other duties upon the SoS are of a very general nature.

THIRD QUESTION

32. I am asked whether the SoS acted unlawfully by failing to include the 92% RTT target in the Mandate to NHS England for 2017-18.

33. My answer is: "Yes".

34. This is because the 2012 Regulations and the NHS Constitution have the effect that this must be included. The annual Mandate cannot lawfully be used to circumvent or undermine by omission the absolute statutory and sub-statutory requirements.

FOURTH QUESTION

35. I am asked whether it is in the public interest for the SoS to publish any legal advice obtained by his Department with regard to any potential breach of Regulation 45 of the 2012 Regulations.

36. My answer is that would be in the public interest and in the interests of transparency, but that is not to say that there may not be a countervailing

interest in terms of confidentiality of legal advice, and the SoS is not likely to be found to be under a legal duty of disclosure under the Freedom of Information Act or otherwise.

FIFTH QUESTION

37. I am asked whether the Government has satisfied its general duty to consult on major policy changes, on the basis of relevant Cabinet Office guidelines.

38. My answer is that it has not. Moreover, another source of a duty to consult would be a procedural legitimate expectation based on its own past practice with respect to the annual Mandate.

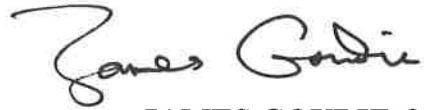
CONCLUSION

39. Both as to procedure and as to substance the Government has acted unlawfully. The 92% RTT target is embedded in and underpinned by legislation. It cannot be set aside without Parliamentary approval. Absent such

approval even being sought, the target was required to be included in the 2017-18 Mandate and to inform NHS practice. The failures in these respects are unlawful.

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A handwritten signature in black ink that reads "James Goudie". The signature is written in a cursive style with a large initial 'J'.

JAMES GOUDIE QC
26 April 2017

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20/04/17