

## Whitehall Street Care Home for residents with profound learning difficulties and complex needs and regular essential specialist respite provision for thirty five families<sup>1</sup>

Proposed closure - Haringey Council decision made on 19 July 2011

Legal Framework - discussion points for Scrutiny Committee meeting on Monday 15 August 2011

### Duty to Consult

We understand that a consultation was carried out in December 2010 and approximately four meetings were held around residents' dinner time. Attendees were not necessarily reflective of all those affected. It is not clear whether the consultation document was circulated widely enough or put in a format to which those affected could respond in a meaningful way. The information contained therein appears to have been insufficient in quality and quantity to allow those who did reply to challenge the assertions underpinning the decision, nor to properly analyse whether the business case for closure was properly made out, or to assess whether alternatives would actually materialise or be suitable for the residents and those in need of respite. Finally, although those who responded were overwhelmingly against closure, the decision makers went ahead and approved the decision to shut down the home. It remains to be seen whether they conscientiously took into account the responses. It is hoped that the Scrutiny Committee will give this, and the issues raised below, due consideration as is their role as part of a democratically elected local government.

Normal public law principles as regards consultation were summarised as follows in the key case of *R v London Borough of Brent ex parte Gunning* (1985) 84 LGR 168 by Mr Justice Hodgson:

*“Consultation must be at a time when proposals are still at a formative stage....The proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. ...adequate time must be given for consideration and response .... the product of the consultation must be conscientiously taken into account in finalising .... any proposals.”*

In such a case as this, given the potential impact on so many vulnerable disabled people with highly complex needs, their carers and families and staff, one would have expected a lawful consultation process to have taken place whilst plans were at a formative stage. Sufficient information should also have been provided to enable the consultees to make a meaningful targeted response. The Council should have posed the right questions to enable the exercise of any discretionary powers and gather adequate information to make a sound decision.

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<sup>1</sup> <http://www.bbc.co.uk/news/uk-england-london-14353541?print=true>  
[http://www.haringeyindependent.co.uk/news/9170713.Lib\\_Dems\\_refer\\_care\\_home\\_closure\\_to\\_scrutiny\\_panel/](http://www.haringeyindependent.co.uk/news/9170713.Lib_Dems_refer_care_home_closure_to_scrutiny_panel/)  
<http://www.guardian.co.uk/society/2011/jul/18/residential-care-homes-closure>  
<http://www.bestcarehome.co.uk/services/view/100-whitehall-street> (CQC 2009 - Good rating)

Finally, the results of the consultation must be conscientiously taken into account when finalising any proposals. If any of these criteria are not followed, a decision made on the basis of the flawed consultation process could potentially be open to challenge by way of a judicial review in the High Court.

We hope that in the Council's response it will either provide sufficient evidence that the criteria above have been complied with or set about putting in place a lawful consultation process before the Cabinet proceeds with any irrevocable plans to shut down the care home.

### **Consultation with the NHS**

It is unclear whether the Council has conducted a lawful consultation with the local NHS who may well be affected in light of the proposed closure and adverse impact this may well have on the residents and their carers, who may require additional healthcare services or hospital admission potentially. Please provide evidence of any consultation and minutes of meetings with the local NHS organisations affected.

### **Failure to conduct lawful community care assessments?**

Before considering closing Whitehall Street care home, under section 47 of the NHS and Community Care Act 1990 and section 2(1) of the Chronically Sick and Disabled Persons Act 1970, the Council should have carried out a lawful community care assessment of residents' needs to inform its decision. This should also include robust multidisciplinary risk assessments regarding the impact of a move.

The assessment should follow both Haringey Council's own policy on assessments and the Department of Health's 'Putting People First' Guidance on Eligibility Criteria for Adult Social Care (April 2010), which dictates annual care reviews as a minimum requirement. If lawful community care assessments have not been carried out then the decision-making process thus far will have been carried out without the benefit of this crucial information.

The process thus far appears to have been mainly focussed on how to make savings from the social care budget rather than how to continue to meet residents' needs and minimise the risk posed to them by such a turbulent change of home. Overall, these risks may increase the costs and will have to be factored into the business case.

### **Have Whitehall Street carers' needs received adequate consideration?**

Under the Carers and Disabled Children Act 2000, carers aged 16 or over who provide a regular and substantial amount of care for someone aged 18 or over have the right to an assessment of their needs as a carer. Under the Carers (Equal Opportunities) Act 2004 local authorities must ensure that all carers know that they are entitled to an assessment of their needs, and to consider a carer's outside interests - work, study or leisure - when carrying out an assessment.

Respite should be considered as part of these assessments especially given that the availability of adequate quality respite for those with complex needs and profound learning disabilities will impact hugely on the sustainability of the caring role and their health. What long-term sustainable respite alternatives to Whitehall Street

exist? What assessments have been done to ensure they will actually meet existing needs and increasing demand in the future as carers age?

### Failure to factor in closure of local alternative respite provision?

In order to make a lawful, rational decision, the Council should have specifically factored into its decision-making the parallel closure of Edwards Drive respite facility, which provides ten beds for those with profound learning disabilities - five for those with severe psychiatric problems and five for those with severe physical problems.

### Has the Council complied with its Positive Equality Duties under the Equality Act?

In a service reconfiguration of this magnitude, it is especially important for the Council to comply with its positive equality duties under s 149 Equality Act 2010.

This duty applies to all aspects of the functions of public bodies, including decisions on individual cases (see *R (JL) v Islington LBC* and, most recently, *Pieretti v Enfield* [2010] EWCA Civ 1104), but it is most frequently considered by the courts in relation to general decisions of public bodies. The proposed closure of Whitehall Street would certainly engage the duty. What this should actually entail is detailed below.

The duty on public bodies under s 149 is to 'have due regard' to a range of specified 'needs' when carrying out their functions. The duty is a continuing one - *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141.

Section 149(1) requires a public authority, in the exercise of its functions, to have due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it. Disability, age and race are relevant protected characteristics in this case. This obligation is further explained in section 149(3) and (4) as follows:

*“(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—*

*(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;*

*(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;*

*(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.*

*(4)The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities. [..]*

(6) *Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act..”*

The following key principles which have emerged from recent case law are relevant here:

- the amount of regard needed depends on likely impact and the requirement for due regard to the specific equality duties is all the higher where severely disabled people are concerned - *R (on the application of Hajrula) v London Councils* [2011] EWHC 448 (Admin) (clearly, the potential impact on Whitehall Street residents with profound and multiple disabilities at risk of losing their home and familial environment and their aged carers is severe. In this economic climate it seems optimistic to consider that the voluntary and community sector or private care home market will step into the breach);
- the duty must be performed with vigour and with an open mind when the relevant decision is being taken - *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) [92];
- ‘due’ regard, as opposed to a duty merely to ‘have regard’, requires ‘specific regard, by way of conscious approach, to the statutory criteria’ - *R (Sanders) v Harlow District Council* [2009] EWHC 559 (Admin) and see Birmingham decisions above;
- the test of whether a decision maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking;
- there should normally be some form of ‘audit trail’ or documentation to show that the duty was given due consideration at the appropriate time; *R (JL) v Islington* [2009] EWHC 458 (Admin) at [121]; and
- Active steps are required to be taken to promote equality of opportunity when relevant decisions are made; *R(E) v Governing Body of the Jews Free School* [2008] ELR 445 at [213] (in the context of the equivalent provision in the Race Relations Act 1976).

What this means in practice is that in proposing to close the care home, the Council should be able to demonstrate that it has had specific regard to the needs in s. 149 Equality Act 2010. Thus far, we have seen no evidence whatsoever that the Council has had specific regard to the needs set out above. We would be grateful for the Council’s response on this point and a copy of the Council’s equality scheme and any impact assessment carried out (and supporting documentation) in relation to the proposed changes.

### **Did the Council ask the right questions before deciding to close Whitehall St?**

If the Council has failed to adequate factor in the issues raised by Ms Hessel, Vulnerable Groups Officer, and Mencap amongst others, the Council will have failed to gather sufficient information to reach an adequate decision on any adverse impact and properly understand it.

Although the positive equality duties do not require a particular outcome, there can be no lawful exercise of discretion to proceed with a policy notwithstanding an adverse impact if the decision maker does not properly understand “the problem, its degree and extent”: see *R(Lunt) v Liverpool City Council* [2009] EWHC 2356 (Admin) at [43] and [44]. The focus is on the “seriousness of the detriment to the disadvantaged group”: see *R (E) v JFS* [2009] UKSC 15 at [100]. A failure to gather

adequate information to that end will breach the duty to ensure that conclusions of fact are supported by adequate material of probative value: see *Secretary of State v Tameside MBC* [1977] AC 1014, *Reid v Secretary of State for Scotland* [1999] 2 AC 512 at 541 and *R v Inner London Crown Court, ex p. Provis* [2000] COD 481. A failure to understand the information that has been gathered will be an error of fundamental fact: see *E v Secretary of State* [2004] QB 1044, [2004] EWCA Civ 49 at 61.

### Human Rights Act 1998

Under the Human Rights Act, every decision or action which the Council takes must comply with most of the articles of the European Convention of Human Rights ('ECHR'). Of particular relevance to this case are Article 8 ECHR, discussed below, and potentially Article 3 (freedom from inhumane treatment) (this issue may need to be investigated in due course). Section 6 of the Act makes clear that compliance means not only not interfering with those rights in most circumstances but also taking positive steps to ensure that people can effectively enjoy these rights.

Now that the Council has proposed to close the home, it would potentially be in breach of the Human Rights Act if, before reaching a final decision, it failed to conduct an assessment of the residents' and potentially the carers' needs, or the potential risk to the residents of having to move home, or ensuring that a suitable alternative home is actually available within a reasonable distance of families.

Article 8 says that:

- (1) *Everyone has the right to respect for his private and family life, his home and his correspondence.*
- (2) *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Given that the residents have been living at the home continuously for several years, the right to respect for 'home' is engaged. This must be taken into account in the decision making, as must relationships built up with other residents at the home.

Although Article 8 is a 'qualified right', interference with the right is only lawful if it is done in pursuance of a legitimate aim and it is actually necessary and lawful. Although Article 8(2) allows interference for economic reasons, any interference with the right also has to be proportionate to the objective being pursued. In assessing whether the Council has struck a fair balance between the competing interests of the individual and the community as a whole (or budgetary pressures in this case), the court may assess not only the substantive merits of the decision but also the decision-making process to ensure that due weight has been accorded to the interests of the individual - see *Hatton v United Kingdom* [2003] 37 EHRR 611.

In this context the fair balance between the competing interests will not be struck if:

- the decision is procedurally unfair;
- fails adequately to take into account the views of those affected;

- involves unjustified discrimination;
- fails to give due weight to competing considerations;
- involves inadequate investigation; or
- because it is in breach of an undertaking given by a public authority that is sufficient to give rise to a substantive legitimate expectation that they will be treated in a particular way.

We would be grateful if the Council could explain how it considers that it has met its obligations under the Human Rights Act as set out above.

<http://www.guardian.co.uk/society/2011/jul/18/residential-care-homes-closure>

## Care home closures will create an uncertain future for many Parents and relatives reveal fears for their children should one London centre close its doors.

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Amelia Gentleman - guardian.co.uk, Monday 18 July 2011 21.00 BST All photographs by [Kayte Brimacombe](#)

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Some time tomorrow evening, councillors in Haringey will decide whether to close a number of residential homes, as part of its efforts to make cuts of £41m over the next year, and £84m by 2015. On the list of centres likely to shut is Whitehall Street, a home for adults with learning disabilities and a respite centre, where disabled people can come for a short break, to give their carers a rest.

Many of the residents have been living here for more than a decade. Most are now entering middle age; they have formed friendships and strong relationships have grown between staff, residents and their families.

For the parents, many of whom are growing elderly, the prospect of trying to find new homes for their children presents a huge worry. In April, campaigners requested that David Cameron intervene to stop the closures, but most are now resigned to the centre closing within the next six months.



Betty Sillery  
and her son John. Photograph: Kayte Brimacombe

**Betty Sillery, 87, lives with her son John Sillery, 52, who was born prematurely, is blind and has severe learning difficulties. Recently, when she has been too ill to care for him, he has stayed at Whitehall Street.**

"He is all right there, as long as he doesn't hear my voice, because then he cries quite a lot. Because he's blind, it's much harder for him to fit in with people; he is quite vulnerable. But the staff there are very, very kind.



"He didn't speak until he was 12, he just made funny noises. It took him quite a while to put sentences together; now you can never stop him talking. The paediatrician said when he was three years old that he was of dull mind, and that he would never make a college education. I laid into him – how can you tell at the age of three years? If that paediatrician was alive now, he would be amazed.

"When they are young, they get all the support in the world, but once they become adult they become written off. There aren't many centres that can cope with him, because of his blindness.

"I would have loved him to end up in Whitehall Street. He knows everybody there. For the moment, I feel while I can I've just got to look after John. They have meetings once in a while to decide what to do with him, and they have decided that he would be best living with another family. He did that once for eight months, but it didn't work out, so I brought him home again.

"His father used to live in a dream land; he always thought he would wake up and John would be OK. He died 11 years ago. We haven't got anybody else.

"I talk to John a lot about what will happen later. I say to him: 'John, you know I'm not going to last for ever. You may have to go to Whitehall Street.' He says: 'I know, Mum.' I don't know what he'll do if it closes. What's going to happen to all those people who live there?"



Pat Wright and daughter Joanne. Photograph: Kayte Brimacombe

**Joanne Wright, 41, has lived in Whitehall Street for five years, since her mother Pat, who's in her 70s, became too unwell to care for her full-time at home. Her condition has never been clearly diagnosed, but Pat thinks she has autism and severe learning difficulties. Joanne visits her mother every other weekend.**

"I thought I could die happy knowing that she was being looked after in a stable place. Now I don't know where she will go if Whitehall Street closes. It took her an awfully long time to settle in. If something upsets her she goes off her food and for a whole month she didn't eat anything.



"I never thought these last years would be like this; I always thought she would end up with me. But now I don't know what will happen to her if anything happens to me. Where will she go? I worry what if something happens to me before she is settled somewhere. That's my main concern. They haven't said anything about what will happen when it closes. It is stressful. There aren't any other places like this in Haringey. If she has to move further away, how is she going to be able to visit me?"

"People like Joanne don't take kindly to change; they find it very upsetting. She isn't a lot of trouble, but she couldn't cope on her own. She needs 24-hour care. She needs to be dressed, undressed, she needs help going to the toilet. She couldn't bath herself, wash her hair. If she is unsettled or unhappy, she will do a lot of screaming and shouting.

"We'd like her to end up in the same place as some of the other residents so there are friendly faces. She can't have a conversation with you, but she listens and she is taking it all in. At the back of her mind, she knows something is going on.

"It may be selfish, but I wonder why aren't they closing the libraries or the play centres? Instead, they're closing services for the ones who need them the most, the ones that can't get up to fight for themselves. I am shocked at David Cameron. He had a child who needed help; he must surely have some understanding as to what is needed."



Anna

Wakeford and her daughter Oriel. Photograph: Kayte Brimacombe

**Anna Wakeford, 66, lives with her daughter, Oriel, 39, who has Angelman syndrome, a rare genetic condition that comes with physical disabilities and severe learning difficulties. Oriel has regular short stays in Whitehall Street.**

"Oriel's needs are fairly severe. She is non-verbal (although she does understand quite a lot); she can't walk for a long time; she is at the age of a two- or three-year-old. I have to get up every night to change her wet sheets, which I am happy to do, but sometimes I need a break. It's good to know that there's somewhere she can go if something goes wrong.

"The long-stay people really regard the staff as their families, and if the centre was closed they would be transferred to homes with different staff. I think the council wants them to go into supported living arrangements, which means that agency staff would look after them. There wouldn't be any consistency. The staff at Whitehall Street are very consistent and they are highly trained. The fact that these people have been in their jobs for such a long time fills us with confidence. As parents, we feel safe with our children there. As carers, it's really important to know that sometimes we can have a break. Without this respite period, I wouldn't be able to see my family who live a long way away. Oriel finds it very difficult to travel, and it's no break for me if she's there.

"I try not to think of the future too much. I think we may be offered respite care with a family. I tried this for a while, but no one was prepared to take on my daughter. There is this ridiculous idea about offering outward-bound holidays. I don't think that Oriel would enjoy it; it would really distress her. The trend is to have carers to come and take them out for activities. For some people, especially the more able, that works. For others, the more needy, it wouldn't work.

"I feel very upset because I don't think the council will be able to provide such a good resource again. From past experience I know when they close somewhere down, we have to wait a very long time before they make other arrangements. They think they are going to save a lot of money. I'm not sure they will."



Zehra Boyaci and her sons, Ibrahim and Seyhan. Photograph: Kayte Brimacombe

**Zehra Boyaci, 51, has a son, Ibrahim, 26, who has severe autism and goes to Whitehall Street for a week every month. Her older son, Seyhan, 30, who is severely mentally and physically disabled, goes to another centre for a few days every six weeks. The rest of the time they live at home with her and their younger brother, who is 13 years old.**

"I am really devastated. Ibrahim loves going to Whitehall Street; it's like a second home for him. They get him involved in things and they're able to take him out a lot, which I'm not able to do because I have my other boy in a wheelchair. They really understand his needs and they get on with him. They're very nice, caring people. They

could lose their jobs as well. I think they're closing both respite centres. I have to do everything for Seyhan, and Ibrahim can't be left alone. He doesn't understand danger; he's too friendly. He can speak, but you have to really listen to him to understand, and he repeats himself a lot. He can't go out on his own anywhere. He hits himself every now and again, so I have to be very careful.

"If there's nowhere for them to go, they will have to stay at home, which will make life very difficult for them and for me. There is nowhere else they can go, apart from the day centres, and there's been some talk about them closing too; they're already letting off a lot of staff. When the older boys are away at respite, I can visit my mum, who lives in south-east London and spend time with my 13-year-old because the rest of the time, I've got the older boys indoors, and don't have time to be with him; he's missing out.

"If there's nowhere for them to go, what are they going to do with these people? There are going to be more vulnerable people on the streets."



Yvonne Heath and niece Jane Sanders. Photograph: Kayte Brimacombe

**Yvonne Heath, 74, has been helping care for her niece, Jane Sanders, 46, all her life. Jane's mother died when she was 13, and she moved in to Whitehall Street 18 years ago. For decades, Yvonne has been taking Jane, who has Down's syndrome, out to the cinema at the weekend, or on other trips around town; she is the only member of her family who visits her regularly.**

"I feel that there is other expenditure in the borough that they could lose before they close these homes. I know why they are doing it — closing them could save a lot of money in one go. But I do feel it is unfair. They are the weakest people in the borough, or society.

"Jane is really settled in Whitehall Street. They are very, very caring. I've never heard them raise their voice to anyone. There's no plan as to what will happen to them next. There's been some talk about putting the residents into fostering arrangements, where they go and live with a family. I am not happy about that. I'm sure that these people would be properly vetted, but she would be more secure in the kind of unit where she

is now. She's in a communal place now, in a family unit. They paint her nails, they play lots of games, they watch the same television shows. The fostering arrangement feels very vague. Fostering small children and babies is very rewarding; fostering Jane might not be very rewarding. She is hard work, and she's getting older. If any routine changes, she becomes very difficult, uncooperative, throws things.

"Her father is still her next of kin, but he's in a home now. I'm not formally responsible for her, I'm just a caring aunt, but because I'm the only member of the family who has regular contact with her I feel responsible. It is a huge worry. I think about it every day. I've heard awful stories of what happens to elderly people whose homes are moved – they often don't last long.

"Jane needs supervision 24/7. Her mother taught her how to read and write, and she can bathe herself with supervision, but she couldn't go on a bus on her own. If she was moved out of the borough, I don't know how often I'd be able to see her. I'm not well – I have lung problems, and arthritis – so we only meet once a month now."