

DERBYSHIRE COUNTY COUNCIL

CABINET

4 September 2012

Report of the Director of Legal Services

**HEALTH SCRUTINY LEGISLATION CONSULTATION RESPONSE
(Leadership and Culture)**

1. Purpose of the Report

To approve the Council's response to the Department of Health's Local Authority Health Scrutiny Proposals for consultation.

2. Information and Analysis

The Department for Health, on behalf of the Government, have produced a consultation paper on changes to the regulations that currently govern the referral process of the Health Scrutiny function. The Government intends Health Scrutiny to be strengthened and streamlined through its changes and bring it in line with the enhanced role local government has following the introduction of the Health and Social Care Act 2012 and the Localism Act 2012.

Within Derbyshire County Council, the Health Scrutiny function is currently the responsibility of the Improvement and Scrutiny Committee-People, and has historically been attributed to a scrutiny committee that also considers social care issues.

The report attached at Appendix 1a provides a summary of the consultation paper and draft responses to the consultation questions are attached at Appendix 1b. The deadline for responses to the consultation is 7 September 2012.

3. Considerations (to be specified individually where appropriate)

In preparing this report the relevance of the following factors has been considered: financial, human relations, legal and human rights, prevention of crime and disorder, equality and diversity, environmental, health, property and transport considerations.

4. Key Decision

No

5. Call-in

Is it required that call-in be waived in respect of the decisions proposed in the report? No

6. Background Papers

6.1 Local Authority Health Scrutiny: Proposals for Consultation, Department for Health, London 2012

7. OFFICER'S RECOMMENDATION

7.1 That Cabinet approves the response to the Department for Health's Consultation on proposals to change the regulations governing Local Authority Health Scrutiny.

John McElvaney
Director of Legal Services

LOCAL AUTHORITY HEALTH SCRUTINY: PROPOSALS FOR CONSULTATION SUMMARY PAPER

1. Introduction

The Department for Health, on behalf of the Government, have produced a consultation paper on changes to the regulations that currently govern the referral process of the Health Scrutiny function. The Government intends Health Scrutiny to be strengthened and streamlined through its changes and bring it in line with the enhanced role local government has following the introduction of the Health and Social Care Act 2012 and the Localism Act 2012.

2. Background

Changes already agreed

There have already been some changes to the health scrutiny function which were suggested in *Liberating the NHS: Legislative Framework and Next Steps* and included in the Health and Social Care Act 2012, these were:

- Placing health scrutiny function onto the local authority, rather than a specific committee, for it to determine how best to deliver the function (therefore allowing for any changes an authority may make with respect to its executive arrangements as enabled through the Localism Act 2012);
- Extending the scope of health scrutiny to cover 'relevant NHS bodies' and 'relevant service providers' – thereby encompassing the NHS Commissioning Board, Clinical Commissioning Groups and providers of health and public health services and independent sector providers.

What remains the same?

The Government have acknowledged that the existing regulations have worked well and are therefore proposing to preserve some provisions from the existing scrutiny regulations which:

- enable health scrutiny functions to review and scrutinise any matter relating to the planning, provision and operation of health services in the local authority's area;
- require NHS bodies to provide information to and attend (through officers) before meetings of the committee to answer questions necessary for the discharge of health scrutiny functions;

- enable health scrutiny functions to make reports and recommendations to local NHS bodies and to the local authority on any health matters that they scrutinise;
- require NHS bodies to respond within a fixed timescale to the Health Overview and Scrutiny Committee's (HOSC) reports or recommendations;
- require NHS bodies to consult health scrutiny on proposals for substantial developments or variations to the local health service.

There are two further provisions made in the Health Act 2009 that will be preserved which:

- provide a restricted 30-working day consultation period in relation to an NHS trust or NHS foundation trust being found unsustainable under the terms of Unsustainable Providers regime;
- exempt consultation with a HOSC on a Trust Special Administrator's report where a trust is found to be insolvent.

The Government have also confirmed that they do not wish to try and define what a 'substantial variation' to service is and that it is best left to a local agreement.

So what is being consulted on?

The focus of the consultation is on the provisions relating to the referral powers of a health scrutiny committee. The Government have stated in their consultation document that service reconfigurations should be locally-led, clinically driven, decisions made in best interest of patients. Reconfigurations should demonstrate robust evidence against the Secretary of State's four key tests for change. Effective patient and public engagement should also be at the heart of any successful reconfiguration.

The Government have made four proposals for which they are seeking comments as well as clarification on the regulations for Joint Health Scrutiny Committees.

The four key areas are:

1. Publishing of a timescale for decision making on whether to refer.
This means that an NHS body must publish the date when it expects a decision on a proposal will be made; likewise the Local Authority will have to publish a date when it will determine whether or not it will make a referral.
2. Requiring local authorities to take account of financial considerations when considering a referral.

Health Scrutiny should be asked to consider whether proposals will be financially sustainable in addition to other grounds for change such as clinical effectiveness. If proposals are not considered appropriate an alternative financial arrangement should be proposed by the local authority (though the health scrutiny function).

3. Introducing a new intermediate stage for referral to the NHS Commissioning Board for some service reconfigurations

Two options have been put forward. The first option is a formal referral to the local NHS Commissioning Board for local resolution prior to a Secretary of State referral. Second option is for informal dialogue whereby the local NHS Commissioning Board acts as a mediator between the proposer and the health scrutiny function.

4. Requiring Full Council of a Local Authority to discharge the function of making a referral.

The proposal is for the full Council of a local authority to have the final say, and ability to debate, as to whether a referral is made to the Secretary of State as it enhances local democratic legitimacy of health service changes.

There is also a proposal to incorporate the arrangements made in the 2003 Directions to Local Authorities (Overview and Scrutiny Committees, Health Scrutiny Functions). These enable an NHS body consulting on a proposal which covers more than one HOSC area to request a Joint HOSC. The Local Authorities approached must then form a Joint HOSC and provide a joint response – but still retain their right to refer on an independent basis. The Government want to include this direction within the full regulations.

Consultation Questions and Draft Responses

Q1. Do you consider that it would be helpful for regulations to place a requirement on the NHS and local authorities to publish clear timescales? Please give reasons.

Yes, placing a requirement on both the NHS and local authority would demonstrate a level of transparency in decision making that would allow interested parties, e.g. patients and service users, to know how long a proposal will take to be decided and whether or not a referral will be undertaken.

Q2. Would you welcome indicative timescales being provided in guidance? What would be the likely benefits and disadvantage of this?

Indicative timescales at a national level should not be included within the regulations. Whilst this would provide some consistency across the health scrutiny functions nationally the emphasis throughout the consultation document has been on service change being locally led and for NHS bodies and local authorities to work together at a local level. Imposing timescales would not be helpful, particularly when service reconfigurations should be treated on a case by case basis at the local level. No two service change proposals are the same in one area let alone nationally. Any agreement on timescales should be reached by the proposing NHS body and the local authority through its health scrutiny function. Furthermore, should the Government require, through the outcome of this consultation, the full council of a local authority to debate and agree any referral it would mean that any published timescales from the local authority would have to take account of the full council meetings timetable, which would add a level of bureaucracy not currently evident in health scrutiny.

Q3. Do you consider it appropriate that financial considerations should form part of local authority referrals? Please give reasons for your view.

Yes, it is wholly appropriate given the current economic situation and efficiency drive within all public services for financial considerations to be taken into account in any referral from a local authority. Derbyshire County Council's Improvement and Scrutiny Committee-People, which incorporates the health scrutiny function, already requires NHS bodies to provide financial information with any proposals to change a service.

It would, therefore, be extremely beneficial for NHS bodies to be mandated to provide this information as part of a wider range of information on service changes to help the health scrutiny function of a local authority consider whether or not the proposals really are in the best interests of the health service. It also allows for a wider understanding of the financial issues facing NHS services.

Q4. Given the new system landscape and the proposed role of the NHS Commissioning Board, do you consider it helpful that there should be a first referral stage to the NHS Commissioning Board?

The current system for referral does need some tightening up and perhaps a requirement should be placed on local authorities, through these regulations, to demonstrate that all avenues of local resolution have been explored before a referral can be made to the Secretary of State.

Q5. Would there be any additional benefits and drawbacks of establishing this intermediate referral?

The benefit of an intermediate referral would be for both parties to meet with an 'independent' party to consider an issue and provide advice/guidance that may prevent a formal referral from taking place. The drawback of an intermediate referral stage would be the point at which it takes place. i.e. it is not clear in the proposed regulations whether it would be during the timescales set for making a decision or at the end of this timescale. If it is the latter then this has the potential to delay any final decision on whether or not a referral should take place beyond the initial date that a Health Scrutiny Committee may have set. This would ultimately delay any change to a service taking place more than at present.

Q6. In what other ways might the referral process be made to more accurately reflect the autonomy in the new commissioning system and emphasise the local resolution of disputes?

To emphasise the local resolution of disputes each local authority health scrutiny function should be required to have a protocol of working with its local NHS Commissioners outlining each other's roles and responsibilities in considering any substantial variations and include a commitment to local resolution. This approach has been in effect in Derbyshire since Health Scrutiny was introduced in 2001 and has worked very well as no referrals have been made to the Secretary of

State for Health, despite some very emotive changes that have been considered over the past decade.

Q7. Do you consider it would be helpful for referrals to have to be made by the full council? Please give reasons for your view.

It would not be helpful for full council to make the decision on whether or not a referral is made. Whilst the consultation suggests it allows for a full debate on the issues by all Councillors, it is effectively undermining the role of the health scrutiny function as an independent non-political arena to discuss issues in an open and transparent way. By making full council debate and decide on a referral all NHS service changes will become political in nature – rather than driven on the principles of improving services for the patients/public.

If this proposal were to go ahead the role and independence of scrutiny, not just health scrutiny, would be brought into question. The purpose of overview and scrutiny is to act independently of the decision making processes within the local authority and look at the decisions being made in the area to see if they are in the interest of its inhabitants – no other element of scrutiny is required to report to full council for its approval, so it would be welcomed if the health scrutiny referral decisions remain solely with the health scrutiny function of a local authority.

Q8. Do you agree that the formation of joint overview and scrutiny arrangements should be incorporated into regulations for substantial service developments or variations where more than one local authority is consulted? If not, why not?

Yes, the arrangements for formation of joint overview and scrutiny committees should be incorporated into the regulations. The ability for individual authorities to retain their power of referral is important though and it is pleasing to see that this has been incorporated into the proposals.

Q9. Are there additional equalities issues with these proposals that we have not identified? Will any groups be at a disadvantage?

There are no issues that the Council can identify.

Q10. For each of the proposals, can you provide any additional reasons that support the proposed approach or reasons that support the current position? Have you suggestions for an alternative approach, with reasons?

No.

Q11. What other issues relevant to the proposals we have set out should we be considering as part of this consultation? Is there anything that should be included that isn't?

None.