

Joint Health Overview and Scrutiny Committee

“Our Healthier South East London”

Briefing paper summarising the exercise of the health scrutiny function and governance arrangements for the Joint Health Overview and Scrutiny Committee

1 February 2016

1. Introduction

- 1.1. The arrangements for the scrutiny of local health services by local authorities are set out in the **Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013** (“the Regulations”).
- 1.2. The Regulations confer the function of scrutinising local health services onto local authorities. They may discharge this function through their own overview and scrutiny committee (“OSC”), or in some circumstances the OSC of another local authority. The Regulations also provide for the discharge of health scrutiny functions by a joint OSC comprising two or more authorities (see section 3, below).

2. Powers of review and scrutiny

General power

- 2.1. The Regulations empower a local authority to **“review and scrutinise any matter relating to the planning, provision and operation of the health service in its area”**.
- 2.2. When reviewing or scrutinising a particular matter a local authority must invite comments from interested parties and to take into account information from the Local Healthwatch organisation or Local Healthwatch contractor. A local authority may also receive referrals of matters for review and scrutiny by a Local Healthwatch organisation, and in that event it must acknowledge the referral and keep the referrer informed of any action taken. These requirements aside, the procedure for review and scrutiny is a matter for a local authority to decide.
- 2.3. Where a local authority has reviewed and scrutinised a matter, it may make reports and recommendations to **“a responsible person”**.¹ Such reports must follow a format set out in the Regulations. Where a local authority

¹ “Responsible person” refers to both “relevant NHS bodies” (meaning the NHS Commissioning Board, Clinical Commissioning Groups and the NHS trusts) and “relevant health service providers” (meaning health service providers besides NHS trusts undertaking “relevant services”)

arranges for the scrutiny function to be discharged through a joint OSC, the joint OSC may also make reports and recommendations to the appointing local authorities.

Consultation by responsible persons and making a written report to the Secretary of State

- 2.4. When a “responsible person” has under consideration “**any proposal for the substantial development of the health service**” or a “**substantial variation**” of a service, they must consult the local authority to whose area the proposal relates. They must also provide the dates they intend to make the decision and the deadline for comments.

What is a “substantial development or variation”? This term is not defined in the Regulations. Guidance from CfPS² suggests that authorities and NHS bodies should develop local agreements or sets of criteria about what might be regarded as ‘substantial’ in the local context.

- 2.5. The duty does not arise where:

- a “responsible person” is satisfied the decision has to be taken without consultation because of a risk to the safety or welfare of patients or staff.³ In such a case the responsible person must notify the local authority and give reasons.
- There is a proposal to establish or dissolve an NHS Trust or CCG, or to vary the constitution of either, unless this proposal itself amounts to a “substantial development or variation”.
- The proposals arise from a trust special administrator’s report or draft report, or recommendations from a health special administrator in relation to a company subject to a health special administration order.

- 2.6. A local authority is empowered to comment (and make recommendations to the responsible person) on the proposal within the timescale laid down by the responsible person.

- 2.7. If there is a disagreement between a local authority and the “responsible person” in relation to a recommendation made by a local authority, the responsible person must notify the local authority and both must take such

² *Substantial variations and developments of health services: a guide* (CfPS, December 2005)
www.cfps.org.uk/domains/cfps.org.uk/local/media/uploads/33.pdf

³ Guidance issued by the Department of Health gives the example of a decision to close a ward immediately because of a viral outbreak

steps as are reasonably practicable to try to reach an agreement. If the local authority has not made a recommendation, but is considering writing to the Secretary of State (see below), it must notify the “responsible person” if they are exercising this power or the date by which it proposes to exercise this power.

- 2.8. On receiving a consultation, a local authority may make a written report to the Secretary of State if it
 - is not satisfied that the consultation on the proposal has been adequate,
 - is not satisfied that the reasons for the lack of consultation in an urgent case are adequate, or
 - considers that the proposal would not be in the interests of the health service in its area.
- 2.9. A report to the Secretary of State must contain information prescribed by the Regulations, including an explanation of the proposal under consideration and the basis (reasons and evidence as appropriate) of the report.
- 2.10. However, a local authority cannot make a written report in a case where there is a disagreement between the authority and the “responsible person” in relation to a recommendation made by the local authority (see 2.8 above) unless:
 - In a case where recommendations have been made, steps towards reaching an agreement have been taken, but an agreement has not been reached within a reasonable period of time or the responsible person has not taken any steps to reach an agreement within a reasonable period of time; or
 - In a case where the local authority has not made a recommendation, but is considering writing to the Secretary of State, the local authority has notified the responsible person they are exercising this power or the date by which it proposes to exercise this power.
- 2.11. On receiving a report, the Secretary of State may make a decision on any report challenging the adequacy of the consultation, or give directions to the NHS Board (who may in turn give directions to a CCG) in relation to a submission that the proposal would not be in the interests of the health service. “Directions” may include a requirement to consult, determine the matter in a particular way or to take steps (or not take steps) in relation to the matter.

Provision of and obtaining information

- 2.12. To enable a local authority to carry out any of its scrutiny functions, a “responsible person” must provide such information about the planning, provision and operation of health services as may be reasonably required. This does not apply to confidential information or other information whose disclosure is prohibited by law, or to any information in a trust special administrator’s report or recommendations from a health special administrator.
- 2.13. A local authority may require a member or employee of a responsible person to attend before it to answer such questions as appear to it necessary to carry out any of its scrutiny functions.

3. Joint arrangements

- 3.1. The exercise of a local authority’s scrutiny functions as described above is subject to any joint arrangements in place.
- 3.2. A local authority **may** arrange the discharge of any of its scrutiny functions by a joint committee, on such terms and conditions as the authorities involved may consider appropriate.
- 3.3. However, in a case where a “responsible person” consults more than one local authority on a substantial development or variation (see 2.4ff), those local authorities **must** appoint a joint overview and scrutiny committee for the purposes of that consultation. In such a case, only that committee will be able to comment, seek information and question members or employees of the “responsible person”.
- 3.4. The Regulations also enable the Secretary of State to direct a local authority to make arrangements for the discharge of scrutiny function by an overview and scrutiny committee or a joint committee and to comply with these requirements.
- 3.5. However arrangements are made for the joint exercise of scrutiny functions, whether by a joint committee at the discretion of the participating authorities or in discharge of the duty to appoint a joint overview and scrutiny committee to respond to a joint consultation, the Regulations appear to leave open the possibility that the power to make a referral to the Secretary of State (see 2.8ff) can be reserved to individual local authorities. But if the arrangements are made in a way that reserve the power to make a written report to the joint committee, then the local authorities cannot then exercise that power themselves.

3.6. If joint arrangements are in place but the exercise of the power to make a written report is exercisable by individual authorities, it will need to be borne in mind that the Regulations prescribe what a written report has to contain. If a local authority thinks consultation on a proposal for a substantial development has been inadequate or has inadequate reasons, it needs to explain what steps it has taken to try to reach agreement on these matters with the responsible body. An individual authority will in preparing its written report therefore have to give an account of steps taken by the joint committee outside of its own control. Also, in a case where a local authority has had to appoint a joint overview and scrutiny committee, it is only that committee which can comment on the proposal, seek information and question members or employees of the “responsible person”.