

HEALTH AND ADULT SOCIAL CARE OVERVIEW AND SCRUTINY COMMITTEE

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HEALTH SCRUTINY – CHANGES TO LEGISLATION

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Summary

This report sets out changes to the legislation relating to health scrutiny and recommends a way forward where there is a degree of local choice about health scrutiny arrangements.

1. Budget and Policy Framework

- 1.1 The Health and Social Care Act 2001 provides a power for Overview and Scrutiny Committees of County and Unitary Councils to scrutinise health services. In Medway scrutiny of health falls within the terms of reference of the Health and Adult Social Care Overview and Scrutiny Committee and the Children and Young People Overview and Scrutiny Committee.

2. Background

- 2.1 In July 2012 the Department of Health published a consultation paper setting out how the Government intended to change the regulations on local authority health scrutiny. This was reported to the Health and Adult Social Care Overview and Scrutiny Committee on 21 August 2012 and the Committee agreed to send a Medway response to the consultation.
- 2.2 Changes to the arrangements for local authority scrutiny of health come into effect on 1 April 2013 under the Health and Social Care Act 2012 and the Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013. The Secretary of State is expected to issue new guidance to support local authorities and relevant NHS bodies and health service providers in complying with the new regulations.

3. New legislative framework

- 3.1 An overview of the main provisions in the regulations is attached at Appendix A. In summary the legislation preserves the provisions which:

- a) 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
- b) require relevant NHS bodies and health service providers to provide information to and attend before meetings of the Committee to answer questions necessary for the discharge of health scrutiny functions
- c) enable health scrutiny functions to make reports and recommendations to relevant NHS bodies and local health providers and to the local authority on any health matters that they scrutinise
- d) require relevant NHS bodies and health service providers to respond within a fixed timescale to reports or recommendations from the local authority
- e) require relevant NHS bodies and health service providers to consult local authorities on proposals for substantial developments or variations to the local health service.

- 3.2 One of the principal changes to health scrutiny arrangements, under section 190 of the Health and Social Care Act 2012, is to confer health scrutiny functions on the local authority itself rather than on designated Overview and Scrutiny Committees specifically. The Department of Health says this will give local authorities more flexibility over the way they exercise these functions in future. There will no longer be an obligation to have an Overview and Scrutiny Committee to discharge the function of health scrutiny. Suitable alternative arrangements could be established, including through an Overview and Scrutiny Committee or a Committee set up under sections 101 or 102 of the Local Government Act 1972. The Council has to determine which arrangement to adopt. In practice it is possible that more Councils will move towards joining up the scrutiny of health and social care; a model of scrutiny adopted by Medway some years ago.
- 3.3 The 2012 Act also extends the scope of health scrutiny to "relevant NHS bodies" and "relevant health service providers". Relevant NHS bodies are the NHS Commissioning Board, any Clinical Commissioning Group arranging the provision of service to residents of Medway or an NHS Trust or NHS Foundation Trust, which provides services to the residents of Medway. A relevant health service provider is a body or person, other than an NHS Trust or NHS Foundation Trust, which provides any "relevant services" to people residing in Medway, including public health.
- 3.4 The regulations now require clear timescales to be published by the proposer of any substantial NHS service change, and in response, the local authority, is required to publish clear timescales for their decision-making. There is flexibility to amend these timescales and guidance is expected to include advice on indicative timescales. The duty to consult does not apply where the responsible person is satisfied that a decision has to be taken without consulting because of a risk to safety or welfare of patients or staff.
- 3.5 The power of referral to the Secretary of State is now a function of Full Council but may be delegated to a Health Overview and Scrutiny Committee. Further guidance is likely to encourage local authorities to consider setting in place additional safeguards to ensure the Council is fully sighted on how the powers for which it is accountable are being exercised, eg requiring Health

Overview and Scrutiny Committees to notify full Council of an intention to refer a matter to the Secretary of State before the referral is made.

- 3.6 There will be a continuing requirement for the formation of Joint Scrutiny arrangements where a proposed change involves consultation with more than one local authority. Advice is expected about the formation of joint scrutiny arrangements in relation to nationally or regionally commissioned services.
- 3.7 The facility for an individual local authority to refer a matter to the Secretary of State will be preserved in cases where consultation has taken place via Joint Scrutiny arrangements.
- 3.8 The right of referral on substantial changes or variations proposed by a NHS Foundation Trust will now be to the Secretary of State rather than Monitor
- 3.9 Public health services commissioned by the local authority and the NHS Commissioning Board will be subject to overview and scrutiny as well as providers of public health services.
- 3.10 The local Healthwatch will be able to refer matters of concern to health scrutiny for consideration
- 3.11 Whilst guidance to assist local authorities in discharging the requirements of these new regulations is still awaited the Government has signalled that:
 - guidance will be explicit about the need for health overview and scrutiny to have regard to the financial sustainability of local health services when looking at proposed change – affordability should be part of the wider assessment of any proposed service reconfiguration
 - local authorities will be expected to provide very clear evidence-based justification for any referral to the Secretary of State
 - local authorities will need to set out clearly why they are referring a matter to the Secretary of State in cases where the change is supported by the Health and Wellbeing Board (HWB)
 - the NHS Commissioning Board will be asked to fulfil a supportive role, facilitating engagement and local agreement but there will be no requirement for referral there before referral to the Secretary of State. Further detail of this support may be provided as part of the NHS Commissioning Board Operating Model.
 - effective relationships between the HWB, Healthwatch and Health Scrutiny will be essential to ensure high quality and effective services are commissioned and delivered
 - the Health and Wellbeing Board will be subject to overview and scrutiny. Health scrutiny will be able to make recommendations to the Council or the Cabinet on matters arising from scrutiny of the HWB.

- further guidance will be provided on the issues to be taken into account when considering whether a change is substantial but it is unlikely a clear definition will be provided

4. Next steps

- 4.1 The Council will be notified of the changes required to health scrutiny arrangements at its meeting on 25 April 2013.
- 4.2 It should be noted that Medway already has a protocol agreed with local NHS Trusts and the Strategic Health Authority (SHA) covering arrangements for NHS consultation with our Overview and Scrutiny Committees on proposals for substantial developments or variations to the local health service. The first of a series of meetings between Overview and Scrutiny Committee Members and NHS colleagues (including a representative from the Medway Clinical Commissioning Group) took place on 6 July 2012 to refresh this protocol and review future health scrutiny arrangements; the aim being to reach agreement on how Overview and Scrutiny Committees and the NHS can work together better collectively to ensure consultation with the Overview and Scrutiny Committees is carried out in a timely and effective manner. Those at the meeting agreed it will be important to ensure a local protocol is realistic and workable for the NHS. In addition Councillors had expressed a wish to ensure the CCG is actively engaged in discussions on how to take this forward for the future.
- 4.3 The start of work locally to refresh our day- to- day working arrangements for health scrutiny is timely and will enable the arrangements to be dovetailed with the new regulations on health scrutiny and the operation of Health and Wellbeing Boards. Members have agreed to delay continuation of this work in light of the recommendation in the report of the independent inquiry into care provided at Mid Staffordshire NHS Foundation Trust (the Francis Inquiry) that further guidance is required from Government to promote the coordination and cooperation between Local Healthwatch, Health and Wellbeing Boards and local government scrutiny committees. It will be important to reflect any forthcoming guidance on this in Medway's work to revise existing protocols.
- 4.4 Further Member development on scrutiny of partners and in particular scrutiny of health generally (and children's health in particular) is being planned for later in 2013
- 4.5 With specific reference to the new legislation and associated regulations on health scrutiny the Council has some local flexibility in three specific areas and the recommended way forward is set out below:
 - 4.5.1 There is choice about whether to continue to delegate the discharge of the function of health scrutiny to the HASC Overview and Scrutiny Committee, the CYP Overview and Scrutiny Committee and the Joint HOSC with KCC, thereby continuing current arrangements or to adopt an alternative model. This would presumably involve the full Council exercising the function itself or delegating to another Committee. No change is recommended as the current arrangements are well established and work well. **(Note:** KCC will also be considering options under the new regime and may take a different view in

which case the arrangements for the Joint KCC/Medway HOSC may need further discussion).

- 4.5.2 There is also choice about whether the power of referral of contested service reconfigurations to the Secretary of State should be reserved to full Council itself or delegated to one or more Overview and Scrutiny Committees. As set out in paragraph 3.5 above, if the latter option is chosen, the Department of Health suggests consideration should be given to imposing a requirement on the relevant Overview and Scrutiny Committee(s) to notify the full Council of any intention to refer a matter to the Secretary of State before that referral is made to give the Council an opportunity to debate the matter. This sounds sensible except in cases where there is a time factor and the delay involved in waiting for a full Council meeting may be against the interests of patients, service users and their families/carers. Assuming the Council decides to delegate the power of health scrutiny to Overview and Scrutiny Committees, it is recommended that the right of referral should also be delegated to the relevant Overview and Scrutiny Committee where the detailed work on any proposed service reconfiguration will take place, with a requirement to notify full Council of the decision to make a referral before that referral is made. The only exception to this would be where, in the view of the Chief Executive, the delay involved in meeting the requirement to report to full Council would not be in the interests of patients, service users and their families and carers, in which case the referral may proceed with a report to the next full Council meeting for information.
- 4.5.3 Healthwatch will come into existence on 1 April 2013 to replace Local Involvement Networks. This Committee and the CYP Overview and Scrutiny Committee each currently have one seat for a LINK representative. To make sure the views of the public and people who use services continue to be represented at Overview and Scrutiny Committee meetings it is recommended that the Medway Healthwatch should be invited to nominate representatives to fill these positions. The Council will be recommended to agree that there should not be dual membership by Councillors and Healthwatch of the HWB and Overview and Scrutiny Committees for the first year of the Board to enable further guidance on working relationships to be considered and the potential for conflicts of interest to be evaluated.

5. Risk management

- 5.1 Risk management is an integral part of good governance. The Council has a responsibility to identify and manage threats and risks to achieve its strategic objectives and enhance the value of services it provides to the community.

Risk	Description	Action to avoid or mitigate risk
New arrangements dilute effectiveness of health scrutiny	The Council has an option to move away from the discharge if the function of health scrutiny via Overview and Scrutiny Committees. There is a risk that different arrangements may dilute the impact and effectiveness of health scrutiny. The current arrangements allow a level of expertise around health scrutiny to be built up by a smaller group of Councillors.	Any new arrangements should be subject to review 6-12 months after implementation

6. Financial and legal implications

- 6.1 New provisions for health scrutiny are contained in the Health and Social Care Act 2012 and the Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013. Further guidance from the Secretary of State is expected. Health scrutiny is now a non-executive function vested in full Council. The function may either be exercised by the Council itself or delegated to a Committee of the Council.
- 6.2 The scope of health scrutiny is being extended to include a wider range of NHS providers, which represents a potential increase in the workload of the relevant Overview and Scrutiny Committees. This will be kept under review in the context of staffing support required and the cost of member level scrutiny activity. Democratic Services holds a budget of £ 5,210 to meet any costs associated with member level scrutiny activity. For example, payment of expenses to expert witnesses, transport for visits, public engagement etc

7. Recommendations

- 7.1 To note the changes to health scrutiny arrangements under the Health and Social Care Act 2012 and the Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013
- 7.2 To agree to recommend the Council at its meeting on 25 April 2013 to:
- a) continue to discharge the function of health scrutiny via the Health and Adult Social Care and Children and Young People's Overview and Scrutiny Committees and
 - b) delegate the right of referral of contested service reconfigurations to the Secretary of State to the relevant Overview and Scrutiny Committee where the detailed work on any proposed service reconfiguration will take place, with a requirement to notify full Council of the decision to make a referral before that referral is made. (The only exception to this being where, in the view of the Chief Executive, the delay involved in meeting the requirement to notify full Council would not be in the interests of patients, service users and their families and carers, in which

case the referral may proceed with a report to full Council meeting for information).

- c) agree that the membership of the Health and Adult Social Care Overview and Scrutiny Committee and the Children and Young Peoples Overview and Scrutiny Committee should each include a representative of Healthwatch to ensure that the views of the public and people who use services continue to be represented at Overview and Scrutiny Committee meetings (noting that the Healthwatch representative should not also be a member of the Health and Wellbeing Board).

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Background papers

Report to the Health and Adult Social Care (HASC) Overview and Scrutiny Committee on 21 August 2012

Response to Department of Health consultation paper on the future of health scrutiny as agreed by HASC Overview and Scrutiny Committee – 21 August 201

**Local Authority (Public Health, Health and Wellbeing Boards
and Health Scrutiny Regulations 2013 (SI 2013 No.218) –
provisions relating to Overview and Scrutiny**

<p>Review and Scrutiny</p>	<p>A power to review and scrutinise any matter relating to the planning, provision and operation of health services in the area is now vested in the Council rather than on Overview and Scrutiny Committees directly. The Council has the option of setting up an Overview and Scrutiny Committee or another Committee or arrangement to discharge this function.</p> <p>In carrying out review and scrutiny the Council must invite interested parties to comment and must take into account any relevant available relevant information, including relevant information provided by Healthwatch.</p> <p>Healthwatch will be able to make referrals to Overview and Scrutiny.</p>
<p>Reports and recommendations</p>	<p>The Council or a Committee/Sub Committee set up to undertake health scrutiny may make recommendations to relevant NHS bodies and health service providers who are under an obligation to respond within 28 days of the request.</p> <p>Recommendations can also be made to the local authority by any Joint Committee, Committee or Sub Committee set up to undertake health scrutiny.</p>
<p>Consultation by relevant NHS bodies and health service providers</p>	<p>The Council (or the relevant Committee) must be consulted (usually by the commissioning body) on any proposal for a substantial development of the health service in the area of the local authority or on any proposal for a substantial variation in the provision of a health service. The local authority may make comments on the proposal.</p> <p>The consulting body must notify Overview and Scrutiny of the date when it is proposed to make a decision on whether to proceed with the proposal and the date by which Overview and Scrutiny</p>

	<p>should provide comments. These dates must be published and notification given if they are varied. The requirement to consult does not apply in cases where the consequential delay in taking the decision would pose a risk to the safety or welfare of patients or staff. In these circumstances the local authority must be notified of the decision taken and the reason why no consultation has taken place.</p> <p>Where a proposed service reconfiguration is contested and the local authority has made a recommendation to the consulting body both parties must take steps to try and reach agreement.</p> <p>The local authority (or an Overview and Scrutiny Committee set up to discharge the function of health scrutiny) may refer a contested service reconfiguration to the Secretary of State where it is not satisfied that consultation has been adequate in relation to content or time allowed or where it considers the proposal would not be in the interests of the health service in its area. Generally this can only happen, in cases where the Council has made a recommendation to the NHS Commissioner or Service Provider, after efforts have been made locally to reach agreement.</p>
Decisions and directions by the Secretary of State	Where a referral is made to the Secretary of State he/she may make a decision on the proposal or give directions to the NHS Commissioning Board. The Board may, in turn, give directions to the relevant clinical commissioning group in relation to the proposal. This process may generate a requirement for the NHS body or health service provider to undertake further consultation with the local authority, to be determine the matter in a certain way or to take, or not to take any other steps in relation to the matter.
Information to be provider by relevant NHS bodies or health service providers	Subject to some exceptions, information about the planning provision and operation of health services in the area must be supplied to the local authority as the authority may reasonably require in order to discharge its relevant functions.

	Supply of information to a Joint Overview and Scrutiny Committee will satisfy requirement where services are provided to residents across several local authority areas.
Obtaining Information and explanations	Members or employees of relevant NHS bodies and health service providers must comply with requests by local authorities to attend before them to answer questions which the local authority considers necessary for discharging their health scrutiny functions.
Discharge of health scrutiny functions	<p>The Council may arrange for the discharge of its health scrutiny functions by an Overview and Scrutiny Committee or another Committee of the Council. A decision to refer a contested service reconfiguration to the Secretary of State may only be taken by the Council or an Overview and Scrutiny Committee to which this power has been delegated (and not by a Committee set up under Sections 101 or 102 of the Local Government Act 1972).</p> <p>Joint Overview and Scrutiny Committees may be established by two or more Councils and local authorities are required to do this in certain circumstances. For example where a relevant NHS body or relevant health service provider consults more than one local authority on a proposed substantial development or variation to a health service.</p>