



*Serving You*

## **Health and Adult Social Care Overview and Scrutiny Committee**

**16 January 2025**

### **Kent and Medway Joint NHS Overview and Scrutiny Committee Terms of Reference**

Report from: Bhupinder Gill, Assistant Director, Legal and Governance

Author: Teri Reynolds, Principal Democratic Services Officer

#### Summary

This paper provides an overview of the changes to health scrutiny and its implications for joint health scrutiny, specifically the Kent and Medway Joint NHS Overview and Scrutiny Committee (JHOSC) and provides some suggested terms of reference.

#### 1. Recommendations

1.1. The Committee is asked to consider the options available, as set out at sections 6.3 and 6.4 of the report and recommend that the terms of reference, as set out at Appendix 1, be revised to reflect the preferred option and forwarded to full Council for approval.

#### 2. Budget and policy framework

2.1. The terms of reference of both this Committee and the Joint Health Overview and Scrutiny Committee (JHOSC) are set out in Part 5 (overview and scrutiny rules) of Chapter 4 of the Council's constitution.

2.2. Updating the terms of reference set out in the constitution is a matter for full Council and this Committee is therefore requested to make a recommendation to full Council on what action to take forward.

#### 3. Background

3.1. NHS bodies must consult their local health scrutiny committee(s) when they are considering a proposal to change health services in the area. HOSCs are required to determine if the proposed changes represent a substantial variation of service for their residents (there is no statutory definition of a 'substantial variation').

- 3.2. Prior to 31 January 2024, Local Authorities had the power to refer substantial variations to the Secretary of State, who could only intervene once a valid referral had been received and been accepted. The Health and Care Act 2022 removed this referral power from Local Authorities and gave the Secretary of State a new power of intervention in the operation of local health and care services – this is known as a ‘call-in’.
- 3.3. Health Scrutiny’s status as a statutory consultee on reconfigurations remains in place, with NHS bodies required to engage as they did in the past. HOSCs also still need to decide if a proposal represents a significant variation of service.
- 3.4. These changes have previously been explained in greater detail in [the work programme report](#) that was presented to this Committee on 14 March 2024.

#### 4. Call-in requests

- 4.1. Under the Health and Care Act 2022, any interested party can *request* the Secretary of State call-in a proposed variation to local health services. The decision to issue a call-in rests with the Secretary of State. The guidance states that the purpose of intervention is to unblock local problems and disagreements, which suggests that use of the call-in power to intervene would, in most cases, be following a call-in request from an interested party.
- 4.2. The Secretary of State can intervene in a proposal at any point during a reconfiguration process, and once called-in, they have the power to make a final decision.
- 4.3. There are no timing requirements for when call-in requests should be submitted - as long as a proposal for reconfiguration exists, a request may be made at any point during that process. However, local attempts to resolve the issue must have been exhausted before this happens.

#### 5. Joint health scrutiny

- 5.1. Under both the old and new regulations, when a responsible body consults more than one local authority on a substantial variation or development, those authorities are required to form a joint scrutiny committee and scrutiny of the proposed change passes to that committee. This does not prevent the home health scrutiny committee from informally scrutinising the proposals, though consideration must be given to the impact on NHS resources to do this.
- 5.2. In order to expedite the scrutiny of substantial variations of service impacting on both Medway and Kent, there is a standing joint committee (JHOSC) and its terms of reference as found in the Council’s Constitution are set out in Appendix 1. In light of the changes to the regulations, paragraph 3 of the Terms of Reference, as highlighted in the appendix, needs to be updated with reference to the referral power removed.
- 5.3. In addition to amending the powers of health scrutiny bodies, the guidance takes the opportunity to reaffirm the benefits of having in place a

Memorandum of Understanding (MoU) between health scrutiny bodies and their NHS counterparts that clarifies the role of health scrutiny and sets out how the parties will reach a view as to whether or not a proposal constitutes a “substantial variation”. At the moment, no such MoU exists between Medway Council, Kent County Council and the ICB (NHS Kent and Medway). The development of such a document sits outside the amendments to the Terms of Reference covered by this report, but is something the Committee will be asked to explore further as part of its development work. The development of an MoU has also been informally discussed with the ICB who were supportive.

## 6. Options

6.1. The following paragraphs set out the changes that are required to the JHOSC Terms of Reference along with the options available and their respective advantages and disadvantages.

### 6.2. Responding to an NHS proposal for substantial change

6.2.1. [Regulation 30 of the 2013 regulations](#) explains that where a joint overview and scrutiny committee has been appointed to scrutinise a substantial variation, only that committee may respond to the consultation and require attendance and information from the relevant NHS bodies. The guidance expands to say best practice would be for all affected scrutiny committees to be consulted before a joint committee response is made.

6.2.2. Therefore, there are no changes required to the Terms of Reference.

### 6.3. Requesting a call-in

6.3.1. Leading on from section 2 of the report, Medway Council and Kent County Council must decide who will be responsible for submitting call-in requests of jointly scrutinised proposals to the Secretary of State.

6.3.2. Under this Committee’s terms of reference, it has the authority to submit a call-in request. The Committee needs to discuss if this is a power they wish to delegate to the JHOSC or not. This will only apply to proposals that have been subject to scrutiny by the JHOSC.

### 6.3.3. Table 1: Who will be responsible for submitting call in requests to the Secretary of State

Option	Outline	Advantages	Disadvantages
A	No delegation – The JHOSC conducts the scrutiny of the proposal but each individual local authority health	This would mirror the previous system whereby the power to make a referral to the Secretary of State was not delegated to the JHOSC.	The home authorities may not have been involved in scrutiny of the proposal, and rely primarily on the

	scrutiny committee retains the function of submitting call in requests.		recommendation of the joint committee.
B	Delegation - The JHOSC has delegated powers to request a call in without reference to the HOSC.	<p>The process would be streamlined.</p> <p>A decision will be made by those that have scrutinised the proposals.</p> <p>Should the JHOSC decide not to request a call-in, the option would still be open to the home authority (as any interested party can submit a request under the new regulations).</p> <p>The SoS may give greater weight to requests coming from the Committee which had carried out the scrutiny review (i.e., the JHOSC)</p>	Member involvement from the home authorities is potentially diminished. This could be reduced if the call in request first has to go through the local health scrutiny committee before being submitted.

#### 6.4. Procedure following the call-in of a decision

6.4.1. Before making a decision on a called in reconfiguration proposal, the Secretary of State must provide the local authority (among others) the opportunity to make representations in relation to the proposal. The guidance strongly encourages a collaborative approach to representations where multiple authorities have been involved, recommending a lead organisation is appointed for the purposes of representation.

6.4.2. Medway Council and Kent County Council must decide who will make representations to the Secretary of State for a called in reconfiguration that was subject to joint scrutiny.

#### 6.4.3. Table 2: Who will make representations to the Secretary of State for a called in reconfiguration

Option	Outline	Advantages	Disadvantages
A	Each local authority reserves the right to make	This allows for the involvement of a wider group of elected members.	HASC and HOSC would not have scrutinised the issue in detail.

	separate representations.	It allows for the option of a lead organisation to make a representation for both.	Members would not have been involved over a period of time.  Where both Councils make representations, these may conflict and potentially reduce the impact/influence.
B	The JHOSC has delegated powers to respond to the Secretary of State with representations.	As the JHOSC would have been involved in scrutinising the issue in detail, it would arguably be best placed to make representations.  Representations coming from a JHOSC comprising two local authorities might have more weight.  Mitigation of the risks associated with potentially having two authorities submit conflicting representations.	Member involvement from the home authorities is potentially diminished without a clear route for their comments to be included in any representations.

## 7. Risk management

7.1. 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	Risk rating
Clarity of responsibilities	Without agreeing to update the terms of reference of the Joint HOSC, there will be no clarity	Update the terms of reference of the Joint HOSC to clarify the position around requesting and responding to call-ins.	BIII

For risk rating, please refer to the following table:

Likelihood	Impact:
A Very likely	I Catastrophic
B Likely	II Major
C Unlikely	III Moderate
D Rare	IV Minor

## 8. Consultation

- 8.1. Both Medway Council and Kent County Council need to mutually agree the revised terms of reference. The Kent Health Overview and Scrutiny Committee considered a similar report at its meeting on 17 December 2024 where it indicated its preference for Option B at both paragraph 6.3.3 and at paragraph 6.4.3. Dependent on the outcome of this Committee's consideration, the updated terms of reference will be progressed through both Council's governance frameworks.

## 9. Financial implications

- 9.1. There are no direct financial implications arising from this report.

## 10. Legal implications

- 10.1. The Health and Care Act 2022 gave the Secretary of State a new power of intervention in the operation of local health and care services and now have a broad power to intervene in local services.
- 10.2. The Secretary of State's powers to "call in" proposals will only be used as a last resort, and only when they consider that local methods for resolution have been exhausted.
- 10.3. Where a proposal is "called in", the Secretary of State will consult stakeholders, including local authorities, in considering how the intervention power should be used. The power of the Secretary of State to take decisions under this power includes—
- (a) the power to decide whether a proposal should, or should not, proceed, or should proceed in a modified form;
  - (b) the power to decide particular results to be achieved by the NHS commissioning body in taking decisions in relation to the proposal;
  - (c) the power to decide procedural or other steps that should, or should not, be taken in relation to the proposal;
  - (d) the power to retake any decision previously taken by the NHS commissioning body.
- 10.4. Other aspects of health scrutiny remain unchanged – the power to require representatives of NHS bodies to attend formal meetings, the power to get information from NHS bodies and the power to require NHS bodies to have regard to scrutiny's recommendations.
- 10.5. Health Scrutiny's status as statutory consultees on reconfigurations also remains in place, with health and care providers required to engage as they do currently.

- 10.6. Health Overview and Scrutiny Committees (HOSCs) (alongside Local Healthwatch) also have the right to be formally consulted on how the Secretary of State uses their powers to “call in” proposals to make reconfigurations to local health services.
- 10.7. By updating the terms of reference of the Joint HOSC it ensures it stays relevant with the updates in legislation around health scrutiny.

### Lead officer contact

Teri Reynolds, Principal Democratic Services Officer  
Email: [teri.reynolds@medway.gov.uk](mailto:teri.reynolds@medway.gov.uk) Phone: (01634) 332104

### Appendices

Appendix 1 – current Joint HOSC Terms of Reference

### Background papers

There are none.