HEALTH AND WELLBEING SCRUTINY COMMITTEE **30 JANUARY 2024**

CHANGES TO HEALTH SCRUTINY ARRANGEMENTS

REPORT OF THE SCRUTINY AND MEMBERS' SUPPORT COORDINATOR

1. Purpose of the Report

1.1 The report provides an overview of changes that are being made to health scrutiny in England through legislation and guidance issued by Department for Health and Social Care on 9 January 2024.

1.2 These changes will take effect from 31 January 2024.

2. Background

2.1 Health overview and scrutiny committees (HOSCs) gained the power to scrutinise local health services further to the Health and Social Care Act 2001, with powers commencing in 2003. Health scrutiny is a fundamental way by which democratically elected local councillors are able to voice the views of their constituents and hold relevant NHS bodies and relevant health service providers to account.

2.2 Health overview and scrutiny committees continue to play a vital role as the body responsible for scrutinising health services for their local area. They retain legal duties to review and scrutinise matters relating to the planning, provision and operation of the health service in the area. The operation of the referral power has stayed broadly the same since then. The relevant legislation can be found in the National Health Service Act 2006, which is the main repository for the statutory provisions relating to the governance and organisation of the NHS in England.

3. Changes to Health Scrutiny

3.1 The changes are predominantly related to the reconfiguration of local health services and will come into effect from 31 January 2024. What this means fundamentally is that health scrutiny committees will no longer be able to formally refer matters to the Secretary of State for Health that relate to substantial variations of local health services, as this power is removed.

3.2 This will be replaced by the Secretary of State having a much broader power to intervene in local services. It should be noted that health scrutiny committees and local Healthwatch organisations will 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.

3.3 The Secretary of State's powers to "call in" proposals will be used as a last resort and will only be considered when all local methods and avenues for resolution have been exhausted. Where any proposal is "called in", the Secretary of State will consult stakeholders, including local authorities, in considering how the intervention

power should be used. Where a notice is issued by the Secretary of State using their power of intervention, the relevant body must comply with that notice.

3.4 It should be noted that other aspects of health scrutiny remain unchanged in that the power still remains to require representatives of NHS bodies to attend formal meetings, get information from NHS bodies and require NHS bodies to have regard to scrutiny's recommendations. Health scrutiny committees' status as statutory consultees on reconfigurations also remains in place, with health and care providers required to engage as they do currently.

4. What does this mean in reality?

4.1 The new system will operate in the following way:

i. The NHS provider will need to consider if the proposed service reconfiguration is notifiable (in other words would this trigger a local authority consultation). The notification should be made to Department of Health and Social Care (DHSC) via a form created specifically for this purpose. The notification given to DHSC should consider the relevant HOSC's on a proposal when deciding when to notify and should make it clear to the Secretary of State of the HOSC's view of whether this reconfiguration is notifiable.

ii. The reconfiguration will be managed at a local level in the usual way, as DHSC's guidance notes that "local organisations are best placed to manage challenges related to NHS reconfiguration". This may involve the establishment of a statutory Joint Overview and Scrutiny Committee (JOSC), similar to the one created for the Path to Excellence reconfiguration proposals and will also involve the usual liaison and dialogue between relevant provider(s) and the HOSC/JOSC.

iii. It is at this point that anyone locally (including a HOSC) may make a request to the Secretary of State that the proposal be "called in". However, the guidance envisages that a proposal will be called in only under "exceptional" circumstances. The criteria used to determine this is as follows:

- Attempts have been made to resolve any concerns through the local NHS commissioning body, or through raising concerns with the local authority/HOSC, and;
- NHS commissioning bodies and local authorities/HOSCs have taken steps to resolve issues themselves, and;
- There are concerns with the process that has been followed by the commissioning body or the provider (e.g., options appraisal, the consultation process), and/or;
- A decision has been made (i.e., a Decision-Making Business Case has been approved) and there are concerns that a proposal is not in the best interests of the health service in the area.

It should also be noted that Ministers may also consider whether the proposal is considered to be "substantial", and the regional or national significance of a reconfiguration, and the impact of service quality, safety and effectiveness.

The criteria outlined are very similar are similar to, but not identical, the current criteria for a referral by a HOSC to the Secretary of State.

iv. When a call-in request is received that shall be considered and appropriate evidence collated to support the Secretary of State's decision-making. This is a process that will be co-ordinated between DHSC and the Independent Reconfiguration Panel (IRP). A range of people may be contacted to provide further information, including the relevant HOSC. The guidance also points out that this process is separate to a substantive review that would take place should a decision to call in be made.

v. Should the Secretary of State decide to call in a proposal they will issue a Direction Letter to the NHS commissioning body, at which point the call-in becomes "live". The Direction Letter will set out the steps that the NHS commissioner is permitted to take next (which may or may not include continuing with a consultation). The requester will be informed as well. Other interested parties such as the HOSC would be copied in "if it is considered helpful to the stakeholder to have sight of the information included". It is worth noting that it is explicitly stated that the NHS commissioning body should themselves share information on the call-in with the HOSC at this stage.

vi. The Secretary of State may formally seek advice from the IRP at this point.

vii. The Secretary of State will also give interested parties the opportunity to make formal representations at this stage. This can be expected to involve the relevant HOSC, the guidance does indicate that where there are multiple HOSCs involved and there are no established joint arrangements, a single HOSC will take the lead on making representations.

viii. The Secretary of State will make a decision within six months. A number of decisions can be taken, up to and including that the proposal should not be taken forward. Decisions will be notified and published, and commissioners will have to act on them. Decisions are stated to be "final" although, similar to other administrative actions, will remain subject to judicial review.

5. Powers and Duties for Health Scrutiny

5.1 It is important to note that existing arrangements for health scrutiny, in a broader sense, will continue. This means that upper tier and unitary authorities in England still have the power to:

- review and scrutinise matters relating to the planning, provision and operation of the health service in the area. This may well include scrutinising the finances of local health services.
- require information to be provided by certain NHS bodies about the planning, provision and operation of health services that is reasonably needed to carry out health scrutiny.
- require employees including non-executive directors of certain NHS bodies to attend scrutiny meetings to answer questions.

- make reports and recommendations to certain NHS bodies and expect a response within 28 days.
- where practicable, set up joint health scrutiny committees with other local authorities and delegate health scrutiny functions to an overview and scrutiny committee of another local authority.

6. Conclusion

6.1 As of 31 January 2024 the health scrutiny power of referral for substantial variations in service is to be removed, meaning that the health scrutiny committee will no longer be able to formally refer such matters to the Secretary of State.

6.2 This will be replaced by broader power for the Secretary of State to intervene in reconfigurations of local health services. Although health scrutiny committees should be formally consulted on how the Secretary of State uses this power of "call-in" and is only used as a last resort after all local methods of resolution have been exhausted.

6.3 Where any proposal is "called in" by the Secretary of State they will consult stakeholders including local authorities, in determining how any intervention power should be used. Any intervention decision from the Secretary of State must be fully complied with by the relevant body.

6.4 Other aspects of health scrutiny remain unchanged including HOSC's status as a statutory consultee on substantial variations, with health and care providers required to engage with scrutiny committees as they currently do. It will remain important to engage early with commissioners where there is the potential for reconfigurations of health services. As well as continuing to work collaboratively, observing the principles set out by the Department of Health and Social Care in relation to best practice for ways of working between HOSCs, ICBs, ICPs and other local system partners to ensure the benefits of scrutiny are realised.

7. Background Papers

The Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013
https://www.legislation.gov.uk/uksi/2024/16/contents/made

Statutory guidance: "Local Authority Health Scrutiny: Guidance to support local authorities and their partners to deliver effective health scrutiny" (DHSC, 2024).
https://www.gov.uk/government/publications/advice-to-local-authorities-on-scrutinising-health-services/local-authority-health-scrutiny

Statutory guidance: "Reconfiguring NHS services – ministerial intervention powers" (DHSC, 2024).
https://www.gov.uk/government/publications/reconfiguring-nhs-services-ministerial-intervention-powers/reconfiguring-nhs-services-ministerial-intervention-powers

Guidance: "Health overview and scrutiny committee principles" (DHSC, 2022). This is guidance issued following the passage of the 2022 Act, and which remains in force:
Health overview and scrutiny committee principles - GOV.UK (www.gov.uk)

Health scrutiny and the new reconfiguration arrangements: a further guide for scrutiny practitioners: Centre for Governance and Public Scrutiny

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