Herefordshire Council

MEETING:	**OVERVIEW AND SCRUTINY COMMITTEE**
DATE:	**28 AUGUST 2012**
TITLE OF REPORT:	**CONSULTATION ON LOCAL AUTHORITY HEALTH SCRUTINY**
REPORT BY:	**HEAD OF GOVERNANCE**

CLASSIFICATION: Open

Wards Affected

County-wide

Purpose

To consider a response to a consultation on Local Authority Health Scrutiny.

Recommendation(s)

THAT:

(a) the response to the consultation set out in the report be approved, subject to any comments the Committee wishes to make; and

(b) the Head of Governance be authorised to finalise the response after further consultation with the Chairman and Vice-Chairman of the Committee.

Key Points Summary

- The Department of Health has issued a consultation paper on arrangements for local authority health scrutiny. The consultation runs until 7 September 2012.

- The consultation relates to the power to refer proposals for "substantial variations" or "substantial developments" to NHS Services to the Secretary of State.

- Under the current system, NHS bodies must consult the relevant Health Overview and Scrutiny Committee (HOSC) on any proposals for "a substantial variation" in the provision of the health service or "a substantial development" of the health service. A HOSC can refer proposals to the Secretary of State if they do not feel that they have been adequately consulted by the NHS body proposing the service change, and/or do not believe that the changes being proposed are in the interests of the local health service.

- The consultation paper notes that since the health scrutiny provisions were implemented in 2003, NHS organisations, health services and local authorities have changed substantially. The Government considers that the current arrangements for health scrutiny need to be updated to ensure the scrutiny provisions reflect the new structure and are appropriate to the new system.

- The proposals for service reconfiguration and referral are broken down into four main areas: requiring local authorities to publish a timescale for making a decision on whether a proposal will be referred; requiring local authorities to take account of financial considerations when considering a referral; introducing a new intermediate referral stage for referral to the NHS Commissioning Board for some service reconfigurations; requiring the full council of a local authority to discharge the function of making a referral.
- A draft response to the questions contained in the consultation document is set out in the report.

Alternative Options

1 There are a several possible alternative responses. The Committee could also decline to submit a response at all.

Reasons for Recommendations

2 The report provides an opportunity for the Committee to consider and respond to the Department of Health's consultation on local authority health scrutiny.

Introduction and Background

3 The Department of Health has issued a consultation paper on arrangements for local authority health scrutiny. The consultation runs until 7 September 2012. The consultation relates to the power to refer proposals for "substantial variations" or "substantial developments" to NHS Services to the Secretary of State.

4 Under the current system, NHS bodies must consult the relevant Health Overview and Scrutiny Committee (HOSC) on any proposals for "a substantial variation" in the provision of the health service or "a substantial development" of the health service. A HOSC or a joint HOSC can refer proposals to the Secretary of State if they: do not feel that they have been adequately consulted by the NHS body proposing the service change, and/or do not believe that the changes being proposed are in the interests of the local health service.

5 The consultation paper notes that since the health scrutiny provisions were implemented in 2003, NHS organisations, health services and local authorities have changed substantially. The Health and Social Care Act 2012 Act will bring about further structural reforms with the introduction of the NHS Commissioning Board, Clinical Commissioning Groups (CCGs), health and wellbeing boards and Healthwatch. The Government considers that the current arrangements for health scrutiny need to be updated to ensure the scrutiny provisions reflect the new structure and are appropriate to the new system.

6 The proposals for service reconfiguration and referral are broken down into four main areas:

a. requiring local authorities to publish a timescale for making a decision on whether a proposal will be referred;

b. requiring local authorities to take account of financial considerations when considering a referral;

c. introducing a new intermediate referral stage for referral to the NHS Commissioning Board for some service reconfigurations;

d. requiring the full council of a local authority to discharge the function of making a referral.

7 The consultation paper indicates that it proposes to preserve the health scrutiny provisions in the current Regulations 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 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;

c. 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;

d. require NHS bodies to respond within a fixed timescale to the HOSC's reports or recommendations;

e. require NHS bodies to consult health scrutiny on proposals for substantial developments or variations to the local health service;

8 The Health and Social Care Act 2012 Act has, however, made changes to the regulation-making powers in the 2006 Act around health scrutiny. In future, regulations will:

a. confer health scrutiny functions on the local authority itself, rather than on an overview and scrutiny committee specifically. This will give local authorities greater flexibility and freedom over the way they exercise these functions in future, in line with the localism agenda. Local authorities will no longer be obliged to have an overview and scrutiny committee through which to discharge their health scrutiny functions, but will be able to discharge these functions in different ways through suitable alternative arrangements, including through overview and scrutiny committees. It will be for the full council of each local authority to determine which arrangement is adopted;

b. extend the scope of health scrutiny to "relevant NHS bodies" and "relevant health service providers". This includes the NHS Commissioning Board, CCGs and providers of NHS and public health services commissioned by the NHS Commissioning Board, CCGs and the local authority, including independent sector providers.

9 A copy of the consultation document has been circulated separately to Members of the Committee.

10 A draft response to the questions set out in the consultation document is set out in the report below.

11 The Government has indicated that it will publish is response to the consultation exercise in the Autumn. Regulations and statutory guidance will then follow.

Key Considerations

12 The main elements of the consultation document are summarised below. Members are asked to refer to the consultation document for the full detail. The questions included in the consultation document are set out together with a draft response for discussion.

Timescales

Under the 2002 Regulations, a HOSC can decide to refer a reconfiguration proposal at any point during the planning or development of that proposal. The Government has had feedback from both the NHS and local authorities that the absence of clear locally agreed timetables can lead to considerable uncertainty. Some have expressed a view that timescales should be specified in regulation. The Government believes that imposing fixed timescales in this way would be of limited value.

The Government proposes that the NHS commissioner or provider must publish the date by which it believes it will be in a position to take a decision on a proposal, and notify the local authority accordingly. Local authorities must then notify the NHS commissioner or provider of the date by which they intend to make a decision as to whether to refer the proposal.

If the timescales subsequently need to change – for example, where additional complexity emerges as part of the planning process – then it would be for the NHS body proposing the change to notify the local authority of revised dates as may be necessary, and for the local authority to notify the NHS organisation of any consequential change in the date by which it will decide whether to refer the proposal. The regulations will provide that the NHS commissioner or provider should provide a definitive decision point against which the local authority can commence any decisions on referral.

Questions in the Consultation Document

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.

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

Draft Response

It would be helpful if regulations placed a requirement on the NHS and local authorities to publish clear timescales as proposed in the consultation document. This would provide greater clarity to organisations and the public and help to manage the process.

Indicative timescales are not necessary. As the consultation document recognises, each reconfiguration scheme is different and it is therefore right to allow local flexibility. It could be argued that indicative timescales would inject more discipline into the process, but if they are indicative they would not be binding and could prove an unnecessary and unhelpful distraction potentially creating a bone of contention where none need exist.

Financial Sustainability of Services

(This is a complete extract from the consultation document)

"55 *Under present regulations, an HOSC can make a referral if it considers the proposal would not be in the best interest of the local health service. The regulations do not define what constitutes 'best interest' but evidence from previous referrals indicates that local authorities interpret this in terms of the perceived quality and accessibility of services that will be made available to patients, users and the public under the new proposals.*

56. The Government protected the NHS in the Spending Review settlement with health spending rising in real terms. However, this does not mean that the NHS is exempt

from delivering efficiency improvements - it will need to play its part alongside the rest of the public services. Delivery of these efficiencies will be essential if the NHS is to deliver improved health outcomes while continuing to meet rapidly rising demands.

57. *As local authorities and the NHS will increasingly work together to identify opportunities to improve services, we believe it is right that health scrutiny be asked to consider whether proposals will be financially sustainable, as part of its deliberations on whether to support or refer a proposed service change.*

58. *It would not be right for a local authority to refer a reconfiguration proposal to the Secretary of State without considering whether the proposal is both clinically and Financially sustainable, within the existing resources available locally. We believe health scrutiny would be improved in it was specifically asked to look at the opportunities the change offered to save money for use elsewhere in improving health services.*

59. *We therefore propose that in considering whether a proposal is in the best interests of the local health service, the local authority has to have regard to financial and resource considerations. Local authorities will need support and information to make this assessment and the regulations will enable them to require relevant information be provided by NHS bodies and relevant service providers. We will address this further in guidance.*

60. *Where local authorities are not assured that plans are in the interests of the local health services, and believe that alternative proposals should be considered that are viable within the same financial envelope as available to local commissioners, they should offer alternatives to the NHS. They should also indicate how they have undertaken this engagement to support any subsequent referral. This will be set out in guidance rather than in regulations."*

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

Draft Response

A decision to request a referral should have regard to relevant financial and resource considerations. These would be two factors that would normally be taken into account in considering proposals for change and alternative options.

However, whilst recognising that there are financial pressures, financial and resource considerations are only some of the factors that need to be considered. They are part of the picture alongside, for example, matters identified in the Government Guidance of 2003 such as accessibility of services, the impact of the proposal on the wider community, and the patients affected.

It is unreasonable to require the local authority to offer alternative costed proposals.

Referral to the NHS Commissioning Board

The Government is seeking views on the role of the NHS Commissioning Board (NHSCB) in the resolution of any disputes between the proposer of change and the local authority where service reconfiguration proposals are commissioned by CCGs, particularly where the local authority is considering a referral to the Secretary of State.

One option in the consultation paper is to introduce a formal intermediate referral stage, where

local authorities make an initial referral application to the NHS Commissioning Board. (If the local authority was not content with the response from the NHS Commissioning Board, it would continue to have the option to refer the proposal to the Secretary of State for a decision)

The other option is for the NHS Commissioning Board to play a more informal role, helping CCGs (and through them, providers) and the local authority to maintain an on-going and constructive dialogue.

The Government does not have a preference between the formal and informal methods set out above.

The consultation paper notes that "Government believes the formal option holds most true to the spirit of a more autonomous clinical commissioning system, strengthening independence from Ministers, and putting further emphasis on local dispute resolution. However, it is aware through testing this option with NHS and local authority groups that it is not without complexities. It may be difficult for the NHS Commissioning Board to both support CCGs with the early development of reconfiguration proposals (where CCGs request this support) and also to be able to act sufficiently independently if asked at a later date by a local authority to review those same plans. Furthermore, this additional stage could lengthen the decision making timetable for service change, which could delay higher quality services to patients coming on stream."

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?

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

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?

Draft Response

It is difficult to see what benefit a first referral stage to the NHSCB would bring. It is likely that the NHSCB would have been heavily involved in developing service proposals. There would appear to be ample scope for the local authority to work formally and informally with the NHSCB without introducing a formal, time consuming referral stage.

Full council agreement for referrals

Under existing regulations, it is for the HOSC to determine whether to make a referral to the Secretary of State for Health.

The Government believes that given the enhanced leadership role for local authorities in health and social care, the referral function should be exercised only by the full council.

It notes that it is potentially undesirable for one part of the council (the health and wellbeing board) to play a part in providing the over-arching strategic framework for the commissioning of health and social care services and then for another part of the council to have a power to refer to the Secretary of State.

The Government believes that the additional assurance provided by full Council agreement to a referral would help encourage local resolution, and further support closer working and integration across the NHS and local government.

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.

Draft Response

This should be a matter for local discretion. The authority can provide a mechanism to resolve any potential conflict between the role of the Health and Wellbeing Board and its scrutiny function if it considers it necessary.

Full Council is not necessarily the best forum for considering a "full suite of evidence to support any referral recommendation".

The timetable of meetings for Council is agreed at the start of the municipal year and is comparatively inflexible. The need to seek Council's approval to a referral could build unnecessary delay into the consideration of reconfigurations. Additional Council meetings would incur unnecessary additional costs to the authority.

Joint Overview and Scrutiny

The current regulations enable the formation of joint scrutiny arrangements where a local NHS body consults more than one HOSC, but do not require them to be formed, although there is a Direction form the Secretary of State that this should happen. The Government proposes to include in the regulations that a joint HOSC **must** be appointed when an NHS body consults more than one HOSC and that body alone will have the right to exercise health scrutiny powers in relation to that proposal.

An individual authority would still be able separately to refer a proposal considered by a joint HOSC to the Secretary of State, with the backing of their full council.

The discretion to form a joint scrutiny arrangement for other purposes would remain.

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?

Draft Response

This County's experience of a Regional consultation exercise demonstrated the practical difficulties associated with the establishment of a Joint OSC.

The formation of Joint OSC's should be a matter for local discretion. If the authorities affected wish to work together, all well and good, and guidance may well usefully encourage this approach. However, if there is an unwillingness to work together from the outset it is unlikely that the process will work smoothly and effectively.

A joint arrangement, particularly operating over a wide geographical area, can lead to a loss of local accountability and be detrimental to the public's ability to participate in consideration of proposals affecting vital services.

It is essential that if Regulations do include the requirement that Joint OSCs **must** be established that the right of individual local authorities to refer proposals to the Secretary of State for review is preserved.

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

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?

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?

Draft Response

No response to these questions is proposed.

Community Impact

13 The potential changes do not have a significant community impact.

Equality and Human Rights

14 The Department of Health's equality analysis states that the evidence it is aware of shows no direct impact on particular equality groups

Financial Implications

15 If additional full Council meetings had to be called additional costs would be incurred. These can, however, be managed within the Council's overall budget.

Legal Implications

16 The Council may need to revise its procedures to comply with the Regulations when made.

Risk Management

17 There are no particular risks identified.

Consultees

18 Relevant officers have been consulted.

Appendices

- None

Background Papers

- None identified.