

Olovus briefing: Consulting local authorities on service change – NHS in England

Summary

NHS bodies in England must consult local authorities when they have under consideration any proposal for a substantial development of the health service in the area of a local authority, or for a substantial variation in the provision of such service. The regulations do not define what constitutes a substantial development or variation.

The process of consulting local authorities is usually conducted through a Health Overview and Scrutiny Committee. This process is separate to a formal public consultation on the same matters. The process of consulting a local authority starts a long time before a formal public consultation and ends several weeks after it. The requirements that need to be considered in a change programme governance timetable. If a local authority is not satisfied with certain elements of the process or outcome, it may refer the decision of the NHS bodies to the Secretary of State for review.

Background

Legislation gives unitary authorities and upper tier local authorities the function of scrutinising local health service provision and changes to that provision. Each local authority can choose how it fulfils that function. It is common for the entire function and associated powers to be delegated to a health scrutiny panel. That approach is not universal. Some local authorities reserve the entire function for full council. Others choose to delegate all the functions. Some retain the power to refer a matter to the secretary of state for cabinet or full council.

The primary aim of health scrutiny is to act as a lever to improve the health of local people, ensuring their needs are considered as an integral part of the commissioning, delivery and development of health services.

It helps to be clear there are two separate processes of consultation which can be confused:

1. Consultation with patients and the public, (is largely driven by the duty to involve set out in sections 242, 13Q, and 14Z2 of the NHS Act 2006 as amended by the Health and Social Care Act 2012); and
2. Consultation with the local authorities through the joint health scrutiny committee (as required by *The Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013*)

The health scrutiny regulations

The regulations (Reg. 23[1]) require that where a responsible person has under consideration any proposal for a substantial development of the health service in the area of a local authority, or for a substantial variation in the provision of such service, they must consult that authority.

The responsible person must give the local authority and publish two dates:

- The date on which the responsible body intends to make a decision on the proposals; and
- The date by which the responsible body needs a response to the proposals from the local authority.

Where a provider under consideration any proposal for a substantial development of the health service in the area of a local authority, or for a substantial variation in the provision of such service, the commissioner of those services must lead the consultation with the local authority (Reg. 23[12])

NHS bodies should be aware the regulations give local authorities powers to require NHS commissioners including NHS England and providers including contracted private and voluntary sector organisations to provide information and send representatives to attend meetings and answer questions.

Local authorities have the power to make reports and recommendations. If a response to consultation includes recommendations, NHS bodies have 28 days to respond formally where a response is requested. If the NHS body disagrees with the recommendation, it must notify the local authority and the parties must take all reasonable steps to try to reach agreement on the matter.

Local authorities have the power to refer decisions of NHS bodies to the Secretary of State for Health and Social Care for review, if:

- It is not satisfied with that adequate time or information has been made available for it to respond;
- It considers that the proposal would not be in the interests of the health service in its area;
- It has *not* been consulted, and it is not satisfied that the reasons given for not carrying out consultation are adequate.

If the local authority does not respond to the proposals or responds without making recommendations, it must tell the consulting organisation if it intends to refer the matter to the Secretary of State and the date by which it intends to make the referral, or the date by which it will make a decision on whether to refer the matter.

Where an NHS body has under consideration a proposal or proposals would affect more than one local authority area, s30 of the regulations requires the relevant local authorities to form a joint scrutiny panel known as a mandatory joint scrutiny panel. Local authorities may delegate health scrutiny functions to a joint health scrutiny panel whenever it suits them. This is known as a discretionary scrutiny panel.

Practical steps

The process of raising a local authority's awareness of an issue that might result in proposals for substantial development or variation of services should start many months ahead of any formal exercise to consult that authority under the scrutiny regulations. Ideally NHS commissioners should involve the authority, most likely through its properly delegated Health Overview and Scrutiny Committee, in discussing and scoping the challenges or opportunities and developing proposals for potential changes.

A formal notification letter from the responsible officer to the local authority is useful to discharge the Reg. 23 responsibilities.

The notification letter might usefully include:

- That it's a Reg. 23 notification
- An outline of the proposals,
- The date on which the consultor intends to make a decision (Reg. 23 requirement)
- The date on which the consultor expect to provide the local authority with the output report of the public consultation (guidance); and
- The date by which the consultor needs the local authority to respond to the proposals (Reg. 23 requirement), that date will be substantially after the consultation closing date.

The requirement to publish the two dates can be met by publishing this letter. There is no requirement on notice other than the general expectation that it should be reasonable. There are advantages to leaving the formal notification until the timetable is agreed and firm, because the regulations require that changes to the published dates be formally notified and published.

A briefing to the scrutiny committee can usefully include:

- A succinct description of the background of the challenge or opportunity being explored,
- A clear definition of the services being reviewed or discussed,
- A clear definition of the area of population that stands to be affected,
- A draft timetable for briefing the panel and reporting to them after the public consultation, so they can respond to the proposals with the benefit of the consultation output report.

It is useful to note that it is for inadequacy in the consultation with them (not the public) that they may refer to the secretary of state, so the panel's agreement to the plan helps mitigate that risk.

The guidance recognises the value of the local authority having the benefit of the output of public consultation before it responds to the proposals, so its response can be informed by patient and public opinion. In practice it is useful to share the date by which the consultation analysis report will be available and work with the local authority to agree a workable date after that, which allows for at least one formal attendance afterwards to assist the local authority publicly with its deliberation and sufficient time to for it to consider and draft its formal response to the proposals under the regulations.

Both parties have a duty to seek to reach agreement on the proposals. It is only in the event that it proves impossible to reach agreement that, as a last resort, the local authority may refer the matter to the Secretary of State for review.

Guidance

The detail of the requirements for NHS bodies and local authorities are in *The Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013*) and explained Local Authority Health Scrutiny, Guidance to support Local Authorities and their partners to deliver effective health scrutiny (Department of Health, 2014). There are several assessments from the Independent Reconfiguration Panel that reference and reinforce the rules.

Note to readers

These notes are intended only to give an overview of complex requirements as general information. Every situation is different. Please seek specific professional advice to inform the action you take on the issues raised in your circumstances. © Olovus