

## Olovus briefing: Urgent temporary service changes – NHS in England

### Summary

Responding to unforeseen events can mean NHS provider organisations need to make urgent changes to services in circumstances that don't allow for public involvement or consulting the local authority. That is allowable if the organisation is genuinely satisfied the welfare of patients or staff is at risk. In these cases, organisations should:

- be mindful of their legal duties and their own governance processes,
- keep contemporaneous notes of the factors they consider in making their decisions,
- communicate the changes to affected people,
- brief their commissioning organisation immediately,
- share information with the local authorities in the affected areas about the changes and explain why you're not consulting them under the health scrutiny regulations, and
- make arrangements to reinstate services once the issue causing the need for urgent change has been resolved.

### Service change duties

Service change is “any change to the provision of NHS services which involves a shift in the way frontline health services are delivered, usually involving a change to the range of services available and/or the geographical location from which services are delivered.”<sup>1</sup> NHS bodies in England have legal duties to involve patients, carers, and other local people in developing and considering proposals for changes to services (from the patient point of view) and decisions about services.

When local authorities in the affected area consider the proposed changes to services to be ‘substantial’, NHS bodies have a duty to consult those local authorities usually via Health Overview Scrutiny Committees (HOSCs). In these cases, public consultation is normally part of the approach to discharging the duty to involve patients and the public. Where a substantial change proposal is initiated by a provider, the commissioner of the services must consult the local authority on the provider's behalf.

### Urgent temporary service changes

Urgent changes can be made without consulting the local authority, if the NHS body is genuinely satisfied a decision “has to be taken without allowing time for consultation (with the local authority) because of a risk to safety or welfare of patients or staff.”<sup>2</sup>

In these situations, the NHS body must immediately notify the local authority of the changes and the reason for this<sup>3</sup>. Timely and transparent communication between NHS commissioners and providers is critical.

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<sup>1</sup> [Planning, assuring and delivering service change for patients](#), 2018

<sup>2</sup> [2013 Health Scrutiny regulations 23\[2\]](#)

<sup>3</sup> 2013 Health Scrutiny Regulations 23[3]

The duties to involve patients can be discharged by providing information, by involving in other ways, or through consultation. Where this type of urgent decision needs to be taken, it would be appropriate to communicate that decision by providing information directly to the patients affected and more widely as needed. NHS bodies should record and monitor reaction and response to providing the information and act on it appropriately.

Urgent change should be made in tandem with a plan to reinstate affected services. If the urgent temporary change endures, or becomes the basis of a longer-term service change proposal, NHS bodies should involve patients and local people in developing the proposals, keep an open dialogue with affected local authorities, and follow normal service change processes.

NHS England and its partners have set out a protocol for partnership working in these circumstances<sup>4</sup> which sets out the roles, actions and expectations for NHS commissioners, local authorities, NHS providers, Care Quality Commission and NHS England.

### What is urgent?

The regulations are clear that there must be an imminent risk to the safety or welfare of patients or staff. The Independent Reconfiguration Panel has noted that it is not acceptable for NHS bodies to delay telling a local authority about fragile service situations that might lead to such a risk occurring until it is so urgent that an imminent risk exists<sup>5</sup>. The Panel has stated its view that a service change lasting longer than ten months “exceeds what can reasonably be considered to constitute a temporary measure.”<sup>6</sup>

In March 2021, the High Court considered a Judicial Review claim from local campaigners about a Trust’s decision to close an Accident and Emergency department and some other services at a district hospital as part of its approach to “step up” non COVID-19 urgent services in April 2020<sup>7</sup>. The judge did not accept the trust’s argument that it was effectively “too busy with other things” to comply with its public involvement and consultation duty<sup>8</sup> when it had time to. The judge went so far as to say that if the trust had to breach a statutory duty then it should not be section 242, given its importance. Effectively, the judge thought the trust could have involved people, and should have done so earlier.

### Guidance

NHS England service change guidance acknowledges that changes to services might need to be made in circumstances that don’t allow for public involvement or consultation with the local authority. The guidance notes that “when a decision is proposed to make a temporary change permanent, the full process set out in *Planning, assuring and delivering service change for patients* (NHS England 2018) must be followed.”

*Working in partnership with people and communities* statutory guidance (NHS England 2022) tell us that “it will only be reasonable to justify carrying out a limited (or no) public involvement exercise on grounds of urgency when the lack of time was genuinely caused by an urgent situation or where there is a genuine risk to the health, safety or welfare of patients or staff”. The guidance explicitly

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<sup>4</sup> [Joint Working Protocol: When a hospital, services or facility closes at short notice](#), 2018

<sup>5</sup> [Initial assessment of Grantham referral](#), Independent Reconfiguration Panel 2017

<sup>6</sup> [Horton General Hospital, Banbury advice](#), Independent Reconfiguration Panel 2018

<sup>7</sup> Dawson v United Lincolnshire Hospitals NHS Trust [2021] EWHC 928 (Admin)

<sup>8</sup> [NHS Act 2006 \(as amended\), section 242](#)

notes that this does not allow commissioners or providers to leave involvement until the last second so as to create an urgent situation.

The guidance notes that legal duties apply to changes introduced during the COVID-19 pandemic should they be made permanent.

Systems are encouraged to maintain an open dialogue with their local authority partners including Integrated Care Partnership members, HOSCs, and others on services it considers “at risk” in order to help anticipate the consequences of urgent changes on patients and to make sure health inequalities are not made worse.

**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.