

Possible legislative provisions on scrutiny in the health Bill

Contact: Ed Hammond, ed.hammond@cfgs.org.uk / 07764 684 182

Contents

1. Introduction and context
2. The purpose of health scrutiny
3. Explanatory note
4. Detailed legislative provisions

1. Introduction

This paper sets out an approach in legislation by which the powers of the Secretary of State, and those of health scrutiny, can be effectively aligned.

It should be read in conjunction with our February 2021 position paper on the health White Paper.

2. The purpose of health scrutiny

Health scrutiny is about providing vital accountability on matters central to the health and care of local people. Health scrutiny sits as part of a complex accountability and governance framework incorporating Health and Wellbeing Boards, local Healthwatch and other partners. Its legitimacy, credibility and power derives from:

- The fact that it is led by elected members, whose perspective derived from their being local politicians brings a plurality of voices into health and care policymaking;
- Its focus on outcomes for local people – through gathering evidence on service change and carrying out its work in public, informed by the interests and needs of local people;
- Its ability to take a cross-cutting, system-wide view. Scrutiny has a general power to look at anything affecting the area or the area's inhabitants, which permits a broad view knitting together health issues with wider matters of public policy.

Of these elements the focus on outcomes is most important. The redesign of processes and systems for accountability and governance in health must be seen in this light. Processes and systems all operate in service of the need to deliver these outcomes, through a responsive health and care system which is acutely aware – through the support of scrutiny and other partners – of the needs of local people.

3. Explanatory note

The below is an attempt to ensure that health scrutiny continues to play a part in the health and care landscape on passage of the Bill.

The below is drafted to secure the following objectives:

- To retain the duty to consult as a strong and meaningful part of the accountability landscape. The duty to consult local people is a central obligation for NHS bodies wishing to substantially vary the services they provide, and health scrutiny provides important oversight of the way that NHS bodies comply with this duty;
- To provide a clear escalation mechanism for matters of concern relevant to the system as a robust, locally-led replacement for the power of referral to the Secretary of State, and the role of the IRP. This involves replacement of the power of referral with a power for scrutiny to request action on a broader range of issues including the duty to consult, requiring that the SoS respond to such requests, and giving health scrutiny a more general power to pass information to the SoS from time to time;
- To provide local discretion as to the nature and scope of health scrutiny's role. The proposals introduce the concept of "scrutiny arrangements", which can be determined by an authority to set its expectations around engagement with health and care bodies. Arrangements are deliberately not tied to the need to establish a specific "health scrutiny community", recognising that councils may choose to adopt a range of formal and informal approaches to carry out their work. The presence of these arrangements will increase transparency and predictability while allowing for local determination on the right model or models of scrutiny to adopt. These are not negotiated documents but councils will be expected to consult on them. Where councils fail to adopt arrangements within a reasonable timeframe provision exists for the SoS to require councils to operate a bare bones model which would be set out in guidance, without prejudice to the ability of councils, in due course, to amend and augment those arrangements. This would be an arrangement taken on a blanket basis rather than requiring the SoS to individually assess the adequacy of all council scrutiny arrangements;
- To provide for more joint scrutiny arrangements which are less-resource intensive, less bureaucratic, better integrated to health scrutiny at "place" level and more flexible overall. Scrutiny arrangements in the proposed legislation are designed to build in joint arrangements, providing a structure for the operation of such arrangements either ad hoc or ongoing. Councils still have the freedom to determine the best way to transact scrutiny and at what level, and there is no formal requirement for all authorities in an ICS area to conduct health scrutiny in the same way, although a degree of joint working is assumed.

4. Detailed legislative provisions

Health scrutiny by local authorities

1. Interpretation

1 (1)

In this Part:

"the 2000 Act" means the Local Government Act 2000;

“relevant local authority” means any local authority, except that it applies to the council of a district only where the district is comprised of an area for which there is no county council;

“overview and scrutiny committee” means an overview and scrutiny committee of a local authority operating executive arrangements under Part 1A of the 2000 Act, and an overview and scrutiny committee appointed by a local authority under section s9JA of that Act.

“a responsible body” means a relevant NHS body, and a relevant member of an ICS HCP insofar as their functions relate to the implementation of an ICS health and care plan;

“member”,

in relation to a relevant health service provider which is a body corporate, includes a body who is not a member of the body but is a director of it;

in relation to an NHS trust, means a director of the trust;

in relation to an NHS foundation trust, means a director or governor of the trust.

“scrutiny arrangements” means arrangements made under section 2

“relevant functions” means functions under section 2

“relevant information” means information held by a responsible body insofar as it relates to a relevant function, subject to section 6.

1 (2)

For the purposes of the definition of “relevant NHS body” the NHS bodies prescribed in relation to a local authority are:

- (a) an Integrated Care System health service body;
- (b) an Integrated Care System health and care partnership body (ICS HCP);
- (c) an NHS trust or NHS foundation trust which provides services to bodies residing in the area of the authority.

2. Scrutiny arrangements

This section requires councils to establish “scrutiny arrangements”, public material setting out scrutiny’s role and how it will operate, and how it will deliver outcomes for local people. This will be particularly required with respect of joint working, which we expect to become a more common feature of the health landscape than it is now. It will regularise the approach taken to the agreement of health scrutiny arrangements across boundaries, significantly streamlining the establishment and conduct of joint arrangements alongside separate elements of the health scrutiny and oversight landscape.

2 (1)

The functions conferred on a relevant local authority by this section are not to be the responsibility of an executive of the authority under executive arrangements (within the meaning of Part 1A of the Local Government Act 2000).

2 (2)

A relevant local authority may arrange for its functions under this section to be discharged by:

- (a) an overview and scrutiny committee of the authority; and/or
- (b) the overview and scrutiny committee of another authority; and/or
- (b) a joint overview and scrutiny committee of which the authority is a member.

2 (2)

A relevant local authority must make arrangements to carry out:

- (a) scrutiny of the review and scrutiny of matters relating to the planning, provision and operation of health and care services in the area;
- (b) scrutiny of the development of the Joint Strategic Needs Assessment;
- (c) scrutiny of the development of the ICS HCP plan;
- (d) scrutiny of the oversight of consultations carried out by responsible bodies under section 3, including consultations involving more than one authority;
- (e) the issuing of a local request to the Secretary of State under section 5

2 (3)

Arrangements under section 2 (2) must include provisions:

- (a) requiring the attendance of representatives of responsible bodies at meetings of a local authority;
- (b) requiring the provision by responsible bodies of relevant information, subject to section 6;
- (c) requiring a response to recommendations made by the local authority;

(subsections a-c are subject to section 6(4))

(d) where relevant and required, provision for a county council to arrange for one or more of the members of the council of a district comprised in the area of that county to be appointed as:

- (i) a member of an overview and scrutiny committee of the county council or another local authority, or of a joint committee, for the purposes of relevant functions exercisable by the committee in relation to the county council; or
- (ii) a member of an overview and scrutiny committee of the county council, for the purposes of relevant functions exercisable by the committee in relation to another local authority.

(e) for the management, operations and officer support of any scrutiny committee exercising the functions set out in this section, including provision for the future amendment of the scrutiny arrangements;

(f) setting out the principles of working between the relevant local authority and responsible bodies.

2 (4)

(a) Scrutiny arrangements may include any other provision which complies with this and other legislation and which the local authority considers necessary to transact its function.

(b) In making arrangements under section 2(2), a local authority must have regard to:

(i) the views of responsible bodies;

(ii) the views of a Local Healthwatch organisation;

(iii) the views of other local authorities within, or directly bordering, the area of the relevant ICS.

2 (5)

A relevant local authority must review its scrutiny arrangements, including the impact and outcome of its arrangements, annually.

2 (6)

Two or more local authorities may appoint a joint committee (“a joint overview and scrutiny committee”) of those authorities and arrange for some or all of the scrutiny arrangements of those authorities to be transacted by the joint committee subject to those authorities’ scrutiny arrangements.

2 (7)

Where they relate to joint committees, an authority’s scrutiny arrangements may make provision for:

(a) the establishment of a joint overview and scrutiny committee or committees to carry out some or all of the functions set out in section 2(2);

(b) the nomination of a “lead authority” for some or all of the functions set out in section 2(2), further to section 2(2)(b);

(c) consultation by responsible bodies with a joint overview and scrutiny committee or committees, or with a lead authority.

2 (8)

The provisions of sections 9FA(1) to (12) of the 2000 Act apply to a joint overview and scrutiny committee as they apply to an overview and scrutiny committee within the meaning of section 9F of that Act, but subject to the modification that subsection (5) applies as though the words “Subject to any provision made by or under paragraphs 6 to 8 of Schedule A1 and to section 20(6) of the Police and Justice Act 2006” were omitted.

2 (9)

The sections in this Part shall apply to a joint overview and scrutiny committee as if it were a committee of each of the local authorities which appointed it.

2 (10)

Where scrutiny arrangements under section 2(10) are exercisable by a joint overview and scrutiny committee by virtue of those scrutiny arrangements, the local authority may discharge that function only in compliance with those arrangements.

2 (11)

Scrutiny arrangements established under this section, and established under section 7, may be amended by an authority, authorities or joint committee to which they relate subject to section 2(4).

2 (12)

Scrutiny arrangements established under this section, and established under section 7, shall make provision for the resourcing of those arrangements.

3. Consultations by responsible bodies

This section amends previous rules on the “duty to consult”, simplifying them and providing for more local freedom as to how scrutiny will engage with this exercise in dialogue with system partners.

3 (1)

Subject to a local authority’s scrutiny arrangements, where a responsible body (“R”) has under consideration any proposal for a substantial development of the health service in the area of a local authority or authorities, or for a substantial variation in the provision of such service, R must consult the authority or authorities.

3 (2)

In carrying out a consultation under this section, a responsible body must comply with the authority’s scrutiny arrangements under section 2(2)(d).

3 (3)

Subsections (1) and (2) do not apply to any proposals on which R is satisfied that a decision has to be taken without allowing time for consultation because of a risk to safety or welfare of patients or staff.

3 (4)

In a case such as is referred to in subsection (3), R must notify the authority immediately of the decision taken and the reason why no consultation has taken place.

3 (5)

Where a responsible body consults more than one local authority further to this section, that consultation should be carried out in accordance with the agreed scrutiny arrangements for the functions specified in section 2(2)(d).

4. Exemptions from the duty to consult

4 (1)

Section 3 does not apply to

- (a) any proposal to establish or dissolve an NHS trust (unless the establishment or dissolution involves a substantial development or variation as referred to in section 3; or
- (b) any proposals contained in—
 - (i) a trust special administrator's report or draft report under section 65F or 65I of the 2006 Act; or
 - (ii) recommendations by a health special administrator on the action which should be taken in relation to a company subject to a health special administration order under section 128 of the 2012 Act.

5. Local requests to the Secretary of State

This section provides for a proportionate mechanism for escalation of concerns on health and care matters generally. It seeks to support the SoS in his role of oversight and accountability. It imposes a general duty on the SoS to have regard to any escalated matter but beyond an acknowledgment of concerns and notification of action, does not trigger any specific intervention. This is in line with the legislative intent of providing maximum discretion to the SoS on the use of his powers.

5 (1)

A local authority may report to the Secretary of State in writing where:

- (a) It considers that any scrutiny arrangements in section 2(3) have not been complied with by a responsible body, or;
- (b) It has concerns relating to the planning, provision and operation of health and care services in the area, and;
- (c) It has made or proposes to make recommendations to the responsible body on any of these matters, and;
- (d) it believes that recommendations made to the responsible body will not be accepted and implemented or that any relevant urgency procedures for this are not practical.

5 (2)

A local authority may further report to the Secretary of State to provide information to support the Secretary of State to transact his duties under this Act.

5 (3)

The Secretary of State may issue Regulations concerning the form and content of any report made under section 5(1).

5 (4)

The Secretary of State must have regard to any report made by a local authority under section 5(1).

5 (5)

The Secretary of State must

(a) respond to any report submitted under section 5(1) setting out any action which he proposes to take.

(b) notify the local authority or authorities concerned when this action has been taken.

5 (6)

Section 101 of the 1972 Act does not apply in relation to the discharge by a local authority of its functions under this section.

5 (7)

The following provisions of section 101 of the 1972 Act do not apply with respect to the discharge by a local authority of its relevant functions—

(a) subsection (1)(a) (arrangements for discharge of functions by local authorities), in so far as it relates to an officer of the authority;

(b) subsection (5) (discharge of functions by two or more local authorities jointly);

(c) subsection (13) (extended meaning of “local authority”), except in so far as it relates to the Common Council of the City of London.

6. Provision of relevant information

This provides an update and simplification on existing provisions around information, tying requests to the scrutiny arrangements.

6 (1)

Where a local authority’s scrutiny arrangements require any member or employee of a responsible body to attend before the authority to answer such questions as appear to the authority to be necessary for discharging its functions, it is the duty of any such member or employee to comply with any such requirement.

6 (2)

Where a local authority’s scrutiny arrangements require the provision of information held by a responsible body, nothing in this Part requires any body to provide information at or to an overview and scrutiny committee, either orally or in writing:

(a) to the extent that the answer requires the provision of information of a type specified in Schedule 17 of the 2006 Act, subject to section 100A(4) of the Local Government Act 1972;

(b) if that body would be entitled to refuse to answer in, or for the purposes of, proceedings in a court in England and Wales.

6 (3)

A local authority or that authority's scrutiny arrangements may not require a member or employee of a responsible body to attend before it to answer questions in relation to—

(a) a trust special administrator's report or draft report under sections 65F or 65I of the 2006 Act;

(b) a health special administration order under section 128 of the 2012 Act, or recommendations by a health special administrator on the action which should be taken in relation to a company subject to such an order.

6(4)

Scrutiny arrangements made under section 2 which relate to the provision of information, attendance at meetings and responses to recommendations must include:

(a) reasonable timescales;

(b) explanation of circumstances where there is a presence of urgency and where different timescales may apply.

7. Directions and guidance by the Secretary of State: scrutiny arrangements

This provides a "floor" for all councils of basic scrutiny arrangements set out in guidance should local action to agree such arrangements not occur. It ensures that all areas will be considered to be operating scrutiny arrangements which comply with the Act, therefore providing certainty to system partners and a foundation on which scrutiny arrangements, individual and joint, might be built.

7 (1)

The Secretary of State may issue guidance setting out model scrutiny arrangements, and ways of working.

7 (2)

The agreement of scrutiny arrangements by a local authority must be accompanied by a declaration by that authority's Monitoring Officer that those arrangements comply with the requirements of section 2 and that in their preparation the authority has had regard to any guidance issued by the Secretary of State.

7 (3)

The Secretary of State may direct a local authority or local authorities, or a joint committee of those authorities, to adopt the model scrutiny arrangements set out in guidance if such

arrangements have not been adopted, and if that adoption has not been accompanied by a declaration issued under section 7 (2), by 1 May 2022 .

7 (4)

Nothing in this section should be taken as removing from an authority, authorities or joint committee so directed the responsibilities to amend and review scrutiny arrangements set out in section 2.