

Evidence submission: Health and Care Public Bill Committee

Further to oral evidence provided to the Committee on 9 September 2021

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About Centre for Governance and Scrutiny

CfGS is a charity which exists to promote better governance and scrutiny, both in policy and in practice. We support local government, the public, corporate and voluntary sectors in ensuring transparency, accountability and greater involvement in their governance processes.

CfGS has carried out substantial work since its establishment in 2003 to support local authorities in the transaction of their duties relating to health overview and scrutiny.

1. The importance of health scrutiny, and accountability in the system

Effective accountability is central to the new health and care system established by the Bill. As it stands much of this accountability is:

- Upwards, to the Secretary of State, through the various powers available to him to intervene in and direct local services;
- Sideways, as a range of partners in the health and care system work together in partnership, in a system designed to support collective responsibility and accountability.

What is missing in the system is the way it seeks to support and build on the need for robust external accountability.

In the new system this external accountability will continue to be provided by CQC (at national level), Local Healthwatch, and local health scrutiny committees. Of these, we consider health scrutiny committees play a pivotal role – they are led by democratically elected councillors, empowered with particular responsibilities around holding to account partners across the health and care system. They have a broad remit in local government legislation, to look at anything affecting the area or the area’s inhabitants. Health scrutiny committees are excellently placed to oversee plans for integration, to investigate clinical outcomes in less high profile services, and to act as a focus for public debate in more high profile ones.

Our proposals

CfGS is supporting proposed amendments being put forward by NHS Confederation, NHS Providers and the Local Government Association in respect of the Secretary of State’s intervention powers. CfGS also strongly recommends the tabling in due course of Regulations to cover some of these issues in more detail, and therefore suggests that amendments to the Bill include provision for Regulations on the exercise of powers under s38, and Schedule 6 more generally.

2. The power of referral

At the moment health scrutiny committees make use of a power of referral to the Secretary of State (the Bill proposes the removal of that power). When a local NHS body proposes a substantial variation in local health services (and consults on that change) a relevant health scrutiny committee can evaluate that consultation.

If it considers the consultation to be inadequate, or if it considers the proposed change not to be in the interests of the local area, it can refer the matter to the Secretary of State. This triggers a process by which the SoS instructs the Independent Reconfiguration Panel to review the decision. The Independent Reconfiguration Panel produced useful research on the outcome of referrals in 2020, which highlighted how they can enhance the ability of NHS bodies to consult effectively. Referral has acted as a useful halfway house – a system for formal intervention that stops short of the invocation of judicial review.

This power is rarely used; it is nonetheless the lynchpin of the health scrutiny system. It sits alongside the long-standing “duty to consult” held by NHS bodies.

This is because the power that it provides to local scrutiny committees concentrates minds – it brings senior partners to the table and ensures that the voice of independent, locally-elected scrutineers is heard. Without it, scrutiny would retain a range of other powers, but would find it tougher to be listened to.

CfGS considers that minor changes to the Bill can be made which retain a formal role for health scrutiny while also ensuring that the Secretary of State enjoys enhanced powers of intervention and direction. These changes would involve:

- An amendment to the Bill, requiring that the Secretary of State consult with the relevant health scrutiny committee when proposing to use his powers of intervention and direction.
- The laying of Regulations, which would set out in more detail the way in which health scrutiny committees would share information with the Secretary of State. In particular, we think that such Regulations should also include arrangements for the proactive “escalation” of matters of concern to the Secretary of State, which could inform the Secretary of State’s thinking.

Action in this way would secure several main outcomes:

- It would anchor intervention and direction activity in a locally-led understanding of clinical needs and outcomes;
- It would provide an ongoing statutory framework within which local scrutiny committees (and, should Regulations be so drafted, other local accountability partners) would support the Secretary of State in exercising their rights and duties;
- It makes it less likely that ICBs and ICPs will see their principal accountability as lying with the Secretary of State alone. Although the proposed powers for health scrutiny committees do ultimately feed back to the Secretary of State, this local involvement shifts the focus of accountability down to “place” level (where “place” and “system” level are not otherwise coterminous);
- It would make the exercise of those rights (under s38 / Schedule 6) less likely to be subject to legal challenge, because an evidence base provided by scrutiny to support these decisions – in a manner specified in Regulations – would limit the possibility that an intervention exercised by the Secretary of State would be considered by the courts to be disproportionate or irrational.
- An amendment to the Bill, requiring that the Secretary of State consult with the relevant health scrutiny committee when proposing to use his powers of intervention and direction.

The current plan – that these and other issues should be dealt with through statutory guidance – is not something we consider adequate.

2. The challenge of joint working at system level

The Bill will give powers to ICBs, and ICPs, to design and direct decision-making and service provision in the health and care system. The integration that this will deliver brings many benefits – to efficiency, effective partnership working, and in the management of a more systematic approach on matters such as service change.

As we noted in our oral evidence there are however caveats. The creation of larger geographic units raises challenges around remoteness – that decision-makers at system level will not have sufficient regard to the wide range of different local needs.

Ideally, partners at system level would set a framework for action in which only necessary decisions are made at that level – with the system co-ordinating, and providing guidance, on the making of decisions closer to where people are. This would be a more distributed health and care system – one where commissioners and decision-makers are embedded in local communities, and empowered to make decisions in the interests of those communities, balanced against the interests of the system as a whole.

However, a combination of the Secretary of State’s powers and the tendency in large institutions to adopt “command and control” approaches raises real risks that more decision-making (and more decision-making than is appropriate) would happen at system level.

This raises challenges for effective locally-led accountability. No formal, external scrutiny for the NHS exists at system level. Partners in the system operate a kind of internal accountability framework through the ICP, but having a direct stake in decisions makes real, independent accountability difficult to come by.

Our expectation is that – as now – big decisions at system level will also need to be scrutinised by local health scrutiny functions. Indeed the Bill explicitly provides for ICBs to be subject to health scrutiny’s rights and powers.

This raises the prospect that councils will see a need to establish standing joint committees to hold ICBs (and ICPs) to account. As things stand, arrangements to establish joint committees of this nature already exist and there is a history of such “JHOSCs” (joint health overview and scrutiny committees). In the past they have been established for time-limited purposes, to look at specific changes and variations in services – usually to satisfy scrutiny’s statutory obligations around major change.

However, they can be cumbersome, can suffer from variable engagement from certain councils, and are often resource intensive.

Setting up standing committees of this nature across England would be challenging, and resource intensive, within the existing legal framework.

CfGS considers that the Regulations mentioned above would also:

- Provide a more systematic and straightforward way for groups of councils to convene JHOSCs where necessary;
- Make specific provision for agreement on how JHOSCs will be resourced.

Appendix: possible Regulations

We should stress that the below are presented as possible Regulations, and that they are so presented to replace (and to simplify) existing Regulations made in 2013. Whatever course of action Government chooses to take some amendment to these existing Regulations will be necessary.

Explanatory note

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 reasonably 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.

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 ICB 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.

“resourcing” means the commitment of financial and human resources to support the effective transaction of scrutiny arrangements.

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 Board;

(b) an Integrated Care Partnership;

(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 ICP 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 ICB.

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.

2 (13)

Integrated Care Board constitutions shall be drafted to have regard to the scrutiny arrangements of relevant authorities wholly or partly within their area.

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. Support to the powers of 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.

This section also includes detail of the way in which the Secretary of State would be expected to consult a relevant overview and scrutiny committee in advance of exercising their powers in s38 / Schedule 6

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 guidance 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)

In complying with his responsibility in s4(2)(c) of Schedule 6 of the Act to consult relevant overview and scrutiny committees [a reference to the amendment proposed by the NHS Confederation and other bodies], the Secretary of State must

- (a) have regard to the scrutiny arrangements of those authorities;

(b) provide a deadline within which a response will be considered, which provides sufficient opportunity for relevant committees to draft a response, convene a meeting to consider and approve that response, and submit that response to the Secretary of State;

(c) when a response or responses have been received from relevant scrutiny committees, have regard to that response or responses in using his powers in that section.

(d) notify the relevant scrutiny committee(s) when he uses his powers in respect of those matters to which the consultation relates, and include in that notification a summary of the relevant intervention or direction.

5 (7)

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 (8)

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.