Adults Wellbeing and Health Overview and Scrutiny Committee

1 October 2012

Department of Health Consultation – Local Authority Health Scrutiny

Report of Lorraine O'Donnell, Assistant Chief Executive

Purpose of the Report

1. This report details the Council's response to the Department of Health consultation paper on local authority health scrutiny (see Appendix 2).

Background

2. The Committee considered a report at its special meeting held on 13 August 2012 highlighting proposals to update local accountability put forward as part of a Department of Health consultation launched on 12 July 2012 on regulations governing local authority health scrutiny under the auspices of the Health and Social Care Act 2012.

Department of Health consultation – "Local Authority Health Scrutiny"

3. Members will recall that the consultation invited comments around:-

   (a) proposals for publication of timescales regarding proposed changes to health services as well as the local authority's proposed timescales on examining such proposals and the potential to challenge such proposals by way of referral to the Secretary of State for Health;

   (b) proposals that regulations would make the provision that local authorities would need to have regard to financial and resource considerations when deciding whether a proposal is in the best interests of the local health service;

   (c) proposals to introduce a new power of referral to the NHS Commissioning Board as an intermediate step, either formally or informally;

   (d) proposals to require referrals to be made by full Council rather than the Health OSC as currently happens;

   (e) proposals relating to the establishment of Joint ealth Overview and Scrutiny Committees where changes to health services may impact on two or more local authorities.

Proposed response to Consultation

4. Following consideration of the proposals and to reflect comments made by members at the meeting held on 13 August 2012, a corporate response to the consultation paper was drafted and agreed with the Chair of the Adults

Wellbeing and Health Overview and Scrutiny Committee to allow a response to be made by the deadline of 7Th September 2012. A copy of the response is attached to this report (see appendix 2).

Recommendations

5. It is recommended that the Adults Wellbeing and Health Overview and Scrutiny Committee receive this report and endorse the corporate response to the consultation appended hereto.

Background papers

Department of Health consultation paper – Local Authority Health Scrutiny

Report of Assistant Chief Executive - Department of Health consultation paper - Local Authority Health Scrutiny – Special Adults Wellbeing and Health Overview and Scrutiny Committee held on 13 August 2012

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Appendix 1: Implications

Finance - None

Staffing - None

Risk - None

Equality and Diversity / Public Sector Equality Duty - None

Accommodation - None

Crime and Disorder - None

Human Rights - None

Consultation – The deadline for responding to the consultation is 7 September 2012

Procurement - None

Disability Issues - None

Legal Implications – The proposed response to the consultation has been shared with the Council's Head of Legal and Democratic Services.

APPENDIX 2

Department of Health consultation – "Local Authority Health Scrutiny"

Response by Durham County Council
August 2012

General Comments

We have addressed your questions in turn below, although there are a number of comments we would like to submit that do not neatly fit into any of the question areas below.

Firstly, we would like to comment on the proposals to assign the Health Scrutiny power to the local authority, as opposed to Overview & Scrutiny specifically. We believe that by having the role as the named scrutiny committee, responsible for Health Scrutiny, it has developed a certain level of experience, expertise and respect in the local health and social care economy. It is able to call upon past experience and the accumulated knowledge when considering a new topic. We can see no logical reason for the power to be instead granted to the wider local authority. In addition to that, we can not see a realistic alternative for local authorities to carry out health scrutiny, other than how they do now, with non-executive councillors in a committee type environment. Any system which saw Executive Councillors becoming directly involved with the performing of Health Scrutiny would raise the very real prospect of a conflict of interest.

The second point we would like to make is that the Department of Health seems to be under the impression that the bulk of Health Scrutiny's work is in responding to service reconfigurations and, therefore, being somewhat reactive. It is noted that the entire consultation document on the proposals centres on such reconfiguration debates. Durham County Councils Adult Well-being and Health Scrutiny committee, (like most local authorities) has developed a high profile role in proactively considering and investigating topics that it sees as important, rather similar to a Parliamentary Select Committee. It does not plan its entire business around the issues that the local NHS raises with it. We suggest that the Department of Health make more reference to this in its documents on the topic.

Consultation Questions

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:-

We note that under existing regulations the HOSC can decide to refer a reconfiguration proposal to the Secretary of State at any point during the planning or development of that proposal; in practice this is generally done when the NHS has finished its consultation and decided on its preferred option. When HOSCs have referred earlier in this process, the Independent Reconfiguration Panel has usually

advised that the NHS and HOSC should maintain an ongoing dialogue while options are developed.

The Scrutiny process (and indeed decision making processes) will often have to be tailored to the particular issue under consideration, taking into account the weight of evidence to support the decision/recommendation. It is quite appropriate at times to consider secondary evidence and further consultation/information. We believe the issue of publishing timescales potential could place constraints on the effectiveness of scrutiny process to this end. Indeed it could equally hamper the reconsideration of proposals by commissioners and providers in efforts to ensure quality, safety and financial sustainability.

Our experience has demonstrated that agreement and ongoing dialogue between the commissioners and overview and scrutiny in relation to the timescale associated with a consultation and a decision making schedule is essential. Local discussion between both parties to agree the timescale for the issue in hand is fundamental and is very much in line with the advice from IRP. We are not convinced publishing timescales for referral purposes is helpful.

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

Please see above

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

We note that regulations would make the provision that local authorities would need to have regard to financial and resource considerations when deciding whether a proposal is in the best interests of the local health service. Local authorities will need support and information to make this assessment and the regulations will enable them to require relevant information to be provided by NHS bodies and providers. Furthermore, we note that where local authorities are not assured that plans are in the best 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.

In the current economic climate with significant constraints on resource availability we believe the principle of financial considerations as part of a referral seems the right thing to do.

However, we believe it is inappropriate for a scrutiny committee to become experts in terms of financial planning offering an alternative business case for consideration. The value that overview and scrutiny brings is the community leadership and lay perspective. The critical friend and challenge role must remain and should take into account (as we do currently) business case options for any proposed changes. We believe strongly that it is entirely up to commissioners and providers to assure overview and scrutiny that there is a sound business case and that these are financially sustainable proposals. The accountability chain here could become extremely confused were scrutiny to provide assurance and or offer alternative financial proposals in this respect.

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?

We note that the government is not proposing to remove the ultimate right to refer to the SoS, however it is considering whether to introduce an intermediate referral stage in which the initial referral is made to the NHSCB (except for services commissioned directly by the NHSCB). The Board would be required to take action, such as working with local commissioners to try to address the local authority's concerns, and would have to respond to the local authority with any action it intended to take. If the local authority still wished to pursue a referral, it would identify how the Board's actions did not address its concerns.

We believe there is probably some merit in this but there are issues with regard to potential conflicts of interest with NHSCB themselves in a commissioner role commissioning for example offender health programmes or specialised services. However, we do think in an intermediary phase perhaps some sort of mediation might be usefully exercised by the NHS Commissioning Board.

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

See above

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?

Comments needed.

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.

We note that currently HOSCs make the decision to refer to the SoS. The consultation paper indicates that referral signals a breakdown in dialogue between local authorities and the NHS and should be regarded as the last resort with all discussion exhausted; the decision should be open to debate. Given the enhanced leadership role for local authorities in health and social care the government believes that it is right that the full council should support any decision to refer a proposed service change, and that the council should not be able to delegate this to a committee. It is likely to be undesirable for one part of the council – the health and wellbeing board – to be working with the NHS on a joint strategic framework while another part – the HOSC – has the power of referral.

We do not support the proposal that Full Council should be required to make a referral.

Overview and scrutiny by its nature is about capturing the evidence and focussed on outcomes that will lead to policy development, policy review or service improvement. The scrutiny process itself is an educative process with members developing a better understanding of the issues and constraints; reflecting on the consultation to hear

what local people have to say about the issue in hand. Full Council will reach and agree resolutions without going into the detail that overview and scrutiny can offer.

That said we believe that Overview and Scrutiny Committees should be provided with clear criteria for referral, some of which could involve a series of tests to be answered. As the local authority (as proposed) is given the power to confer its scrutiny responsibility to a "method of choice" (we believe that our existing arrangements are the best fit for health scrutiny delivery) the responsibility for referral should be allocated accordingly. What we mean by this is that if Durham County Council confers the function to the Adult Well-being and Health Overview and Scrutiny committee, the committee should also have responsibility for referral. Clearly as part of the process of referral the committee will share its evidence/case for referral with the Health and Wellbeing Board, Cabinet and Council.

We agree that referral should be the last resort. With the executive and scrutiny split, scrutiny holds the executive to account and in our opinion as a last resort will "call-in" a decision of the executive. A last resort because we invest in pre decision scrutiny so that scrutiny members are aware of the proposals as early as is possible. We are not convinced by government's suggestion that "…..it is likely to be undesirable for one part of the council – the health and wellbeing board – to be working with the NHS on a joint strategic framework while another part – the HOSC – has the power of referral……". Why not? Overview and Scrutiny is about independent, constructive challenge providing community voice for our communities.

Notwithstanding this, within Durham County Council in order to ensure that the expertise of relevant Cabinet portfolio holders can be utilised, both formally via the AWH OSC and informally, a number of methods of engagement have been developed including:-

(a) Cabinet Portfolio holders for Adults Services and Safer and Healthier Communities are invited to AWH OSC to share their experience and knowledge on NHS/Public Health/Social Care services and to contribute to the Committee's evidence gathering process;

(b) Regular Executive/Non-Executive meetings to allow a two way exchange of information between Cabinet members and Overview and Scrutiny regarding the AWH OSC Work Programme, the Forward Plan of Key decisions and NHS partner issues;

(c) 6 monthly meetings held between the Chairs of NHS Partner organisations, Cabinet Portfolio holders for Adults Services and Safer and Healthier Communities, the Chair and Vice Chair of the AWH OSC and Health Scrutiny officers to allow a more informed discussion to take place between the Council and NHS partners regarding Health issues and the impacts upon social care services;

(d) Findings of all Scrutiny review activity including that related to health matters are reported through to the County Durham Partnership's (LSP) thematic sub groups as appropriate. This partnership working is being developed to include the newly established Shadow Health and Wellbeing Board and the Clinical Commissioning Groups.

We note that the consultation document refers to the fact that by ensuring Full Council has a role to play in deciding upon a proposal being referred:

"will also bring health oversight and scrutiny functions in line with other local authority scrutiny functions, which also require the agreement of full council"[1].

We are not aware of any instances where Overview and Scrutiny Committees seek determination or agreement of reports/recommendations by Full Council other than in receiving its Annual Report. We would welcome any examples of such practices that the Department of Health could provide.

Rather, we would suggest that by following agreed lines of enquiry and engaging with relevant partners/bodies i.e HWB/CCG NHS providers as well as patients and local communities, the Health OSC will build a robust evidence base upon which the case for referral can by justified..

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?

Yes.

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

As part of the scrutiny process an area of challenge focuses upon the need for an equality impact assessment of proposals under consideration or out to consultation so that the needs of communities with protected characteristics are taken into account.

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?

No further comments.

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?

The proactive role that health overview and scrutiny has taken in contributing to policy development, policy review and service improvement.

[1] Para 72, page 19.