

# Arrangements to discuss possible changes in health care: proposed South West London protocol

## Introduction

Change in health services is unavoidable and necessary. In broad terms, three levels of change may be identified:

- Minor changes that are undertaken as part of routine management in order to address identified problems or bring about service improvements. For such very minor changes, it is unlikely that any specific consultation or engagement process will be required;
- Changes that go beyond routine management but are still relatively minor in nature. For such changes, engagement with service users and other stakeholders may be necessary, but a formal consultation process is unlikely to be required;
- Changes involving a substantial reconfiguration of services, on which there should be formal consultation in accordance with the relevant health scrutiny regulations.

The purpose of this protocol is to

- help local agencies share information early in the process before formal consultation might be triggered
- assist local agencies in agreeing into which category a proposal falls,
- set out the process to be followed in undertaking a formal consultation, including management of joint scrutiny where a proposed change affects residents from more than one borough.

It does not, however, provide a detailed set of instructions to be followed in all cases, and its value is dependent on the exercise of common sense and the readiness of all parties to agree a proportionate approach.

The following quotation is taken from the DH publication - "Local Authority Health Scrutiny, guidance to support Local Authorities and their partners to deliver effective health scrutiny" June 2014 and provides the guiding theme to this protocol : seeking to provide a framework and associated processes which can support high quality early engagement prior to, and moving where required, into the formal consultation phase.

“ The duty on relevant NHS bodies and health service providers to consult health scrutiny bodies on substantial reconfiguration proposals should be seen in the context of NHS duties to involve and consult the public. Focusing solely on consultation with health scrutiny bodies will not be sufficient to meet the NHS’s public involvement and consultation duties as these are separate. The NHS should therefore ensure that there is meaningful and on-going engagement with service users in developing the case for change and in planning and developing proposals. There should be engagement with the local community from an early stage on the options that are developed. ....If informally involved and consulted at an early enough stage, health scrutiny bodies in collaboration with local Healthwatch, may be able to advise on how patients and the public can be effectively engaged and listened to. If this has happened, health scrutiny bodies are less likely to raise objections when

consulted.”

## **Preparing the ground**

For this protocol to be effective, it must be underpinned by good ongoing communication between those responsible for commissioning and providing health care and the bodies responsible for scrutinising and commenting on health services on behalf of patients and the public. Providers and commissioners should share plans and proposals with officers of Healthwatches and local authority scrutiny bodies at an early stage in their development, so that informal discussions on likely consultation requirements can take place before a proposal for change is fully formulated. Where such informal information sharing is undertaken in confidence, this must be respected by the Healthwatch or local authority scrutiny body.

Where a proposal for change goes beyond routine management, engagement with service users and other stakeholders will be required. This engagement process should commence at an early stage, potentially before the proposed change has been fully formulated or endorsed, and the results of such early engagement may help to inform the decision on whether there is a need for formal consultation. Guidance on good practice in engagement is presented in [Transforming Participation in Health and Care](#) (NHS England, September 2013).

## **Determining the need for formal consultation**

The Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013 set out specific requirements for formal consultation with local authorities over substantial developments or variations of health services although there are three specific exclusions from the requirement for consultation on substantial change:

- Where the relevant NHS body or commissioner is satisfied that the change needs to be made urgently in the interests of patient or staff safety or welfare. In these circumstances, the local authority must be notified as soon as possible of the change and why consultation was not undertaken;
- Proposals for dissolution or changes to the constitution of NHS Trusts or CCGs (unless these also involve substantial changes to health services);
- Proposals in a report from a trust special administrator (put in place by the Secretary of State where a trust is in financial difficulties, as these will be dealt with under separate consultation arrangements.

The term ‘substantial’ is not defined in the regulations or the subsequent (2014) health scrutiny guidance. Most service changes implemented by the NHS will fall short of this threshold but, in planning changes, consideration should be given as to whether they might have an impact on the accessibility or acceptability of the service, either to service users as a whole or to particular population groups.

The variety of circumstances that may apply is such that there is little value in attempting to define thresholds that will determine whether or not a variation is or is not to be regarded as substantial. However, the following observations may be made:

- a) that if the responsible NHS body declines to undertake consultation on a change that the local authority considers substantial, the local authority is entitled to refer the matter to the Secretary of State on the grounds of inadequate consultation; and
- b) legal challenges to NHS bodies over inadequate consultation have been upheld.

To avoid the risk of such challenges, it is prudent for the responsible NHS body to carefully consider the views of the local authority before deciding whether public consultation is required.

The 2014 guidance commends the development of protocols between local authority scrutiny bodies and their NHS counterparts to assist in deciding whether a change should be considered as 'substantial'. Where such protocols exist, they generally refer to the four factors presented in the 2003 Health Scrutiny Guidance as 'to be taken into account' in determining if a change is substantial:

- a) **changes in accessibility of services**, for example withdrawal or significant reduction of a service at a particular site. Communities attach considerable importance to the local provision of services, and local accessibility can be a key factor in improving population health, especially for disadvantaged and minority groups. At the same time, development in medical practice and in the effective organisation of health care services may call for reorganisation including relocation of services. Thus there should be discussion of any proposal which involves the withdrawal of in-patient, day patient or diagnostic facilities for one or more speciality from the same location;
- b) **impact of proposal on the wider community** and other services, including economic impact, transport, regeneration;
- c) **patients affected**. Changes may affect the whole population (such as changes to accident and emergency), or a small group (patients accessing a specialised service). If change affects a small group it may still be regarded as substantial, particularly if patients need to continue accessing that service for many years (for example, renal services);
- d) **methods of service delivery**. Modernisation of provision usually involves changed methods of service delivery, and such changes can normally be considered as routine management interventions. However, changed methods might contribute to a service change being viewed as substantial. Relocation of a service or replacing face to face interactions with a wholly online service may be seen as substantial by patients.

It will assist discussion on the need for consultation if the responsible NHS body presents the likely impact of the proposed change in these terms, and the local authority also uses them in presenting its rationale for whether a change should be considered substantial.

The stage at which public consultation should take place is when specific proposals for change have been developed. Broader plans setting out overall ambitions and intended direction of change should be subject to wide engagement and informal consultation, but they will generally lack the detail that local authorities are looking for in this formal consultation process.

A decision on whether a change should be treated as 'substantial' need not necessarily be taken when it is first proposed, and the need for consideration of whether or not a change is substantial, and for the formal consultation processes associated with a substantial change, should be considered in drawing up a timetable.

In deciding whether it considers a change 'substantial', the views of actual service users and the local population will be very significant for the local authority scrutiny body. Prior and informal engagement with those likely to be affected by a change is thus likely to be very helpful to the local authority in its deliberations. Without such prior engagement, the scrutiny body will necessarily adopt a precautionary approach, regarding the change as substantial unless there is strong evidence to the contrary.

Individual changes in services are often part of a wider process. Where interdependent changes are proposed, it will usually be best for these to be addressed in a single consultation, with consideration of whether the change is substantial being applied to the overall package rather than to each individual change. An example might be a phased move of multiple services across a Trust's estate. In this case, the consideration would be as to whether the overall reconfiguration package represented a substantial change, rather than whether this was the case for each individual move.

### **Collating the information**

Even where a consultation is over a change initiated by a service provider, the consultation would normally be undertaken by the responsible commissioner (although they may delegate most of the work to the provider).

When a responsible NHS body has in mind a proposed service change that goes beyond business as usual and might reasonably be considered a substantial change, it will complete the 'Trigger Template' attached as Appendix One, which is designed to bring together the information that local authority scrutiny bodies will require in deciding whether or not formal consultation is required.

In preparing this information sheet, it may be helpful for the commissioner and provider to meet and discuss the issue with the health scrutiny officer and Healthwatch co-ordinator for the borough most directly affected, although this is not a required part of the process.

This information sheet will be shared with the lead officers responsible for health scrutiny in each of the boroughs from which patients are drawn.

### **Reaching a decision**

If the NHS body itself believes that the change is substantial and formal consultation is required, then formal consultation procedures will be implemented and no decision is required from the local authorities.

Where the NHS body is uncertain or believes that formal consultation is not necessary, its final decision will need to be informed by the views of the relevant local authorities. Within two weeks of receiving the information sheet, and following consultation as necessary with the elected member responsible, each scrutiny officer will indicate which of the following represents the views of the local authority scrutiny body:

- a) The change is definitely substantial and formal consultation is required;
- b) The change is not substantial and formal consultation is not required;
- c) The issue is marginal and would need to be referred to the full scrutiny committee for a decision;
- d) Further information is required before the local authority can reach a decision.

The response will be supported by an assessment of the proposal in relation to the four decision-making criteria set out above.

The majority of hospital-based acute services in South West London, especially those provided by St George's, serve patients from more than one borough. Each borough is entitled to consider whether a proposal represents a substantial change for its residents, and no borough has the power to impose its view on other boroughs.

Where all boroughs are agreed that the change is substantial (or just one borough is affected and it considers the change substantial), then the NHS body will be expected to give due weight to this in deciding whether to move to formal consultation.

Where all boroughs are agreed that the change is not substantial (or just one borough is affected and it considers the change is not substantial), then formal consultation is not required and the NHS body will be expected to undertake an appropriate level of informal consultation and engagement on the proposal, in accordance with the guidelines on good practice in consultation.

Where at least one borough considers that the issue is marginal, or that further information is required before it can make a decision, the NHS body should seek to provide any further information that is required to enable that authority to reach a conclusion.

As each borough will consider the matter independently, it is possible that different boroughs will reach different conclusions as to whether or not a change is substantial. This carries with it the risk of perverse results, where the borough with the highest number of patients believes that a change is not substantial, but one with a smaller number of patients concludes that it is.

Where there is a disagreement between boroughs, it will be the responsibility of the scrutiny officers from the relevant boroughs to arrange for discussion between elected members from their boroughs (which could be face to face, by telephone or by e-mail) with the aim of agreeing a common position. If further information is required to enable the local authorities to reach a consensus, the NHS body should endeavour to provide this. If a consensus is reached on the need for formal consultation, the NHS body will be expected to take account of this in reaching its decision.

Where a common position cannot be agreed by the local authorities, they will advise the responsible NHS body of this. In deciding whether or not to undertake formal consultation, the responsible NHS body will be expected to take account of the views of the local authorities, including the reasons advanced by any authority considering that a change is substantial,

Should the responsible NHS body decide not to undertake formal consultation, but at least one of the local authorities considers that the proposed change is substantial, this entails a risk that the local authority will refer the matter to the Secretary of State on the grounds of inadequate consultation. The risks of referral will be greatly increased if there is a consensus amongst the local authorities that formal consultation is required.

The 2014 Health Scrutiny guidance emphasises that every effort should be made to seek local resolution before a referral is made to the Secretary of State. Accordingly:

- The NHS body will provide the local authorities with an explanation as to why it considers that formal consultation is not required and what informal engagement processes have been and will be undertaken;

- Before making a referral to the Secretary of State, the local authority will consider the explanation provided by the NHS body and will also consider whether a compromise (for example, enhancements to the informal engagement process) might adequately address its concerns;
- In the event that a compromise appears possible, a meeting will be held as soon as possible between the relevant local authority and the responsible NHS body to explore this and seek an agreement;
- Where the relevant local authority does not accept the reasons given by the responsible NHS body for not undertaking formal consultation and no compromise can be agreed, it will be the responsibility of the local authority scrutiny body to reach a decision on whether to refer the matter to the Secretary of State as soon as practically possible.

## **Managing the consultation**

Where there is consultation on a proposal for substantial change in health services affecting more than one borough, the options for fulfilling the scrutiny role on this consultation may either be undertaken through a joint committee or through one borough taking the lead, with others delegating their scrutiny powers to the lead borough. The local authorities in South West London have established a standing Joint Health Overview and Scrutiny Committee with the power to establish sub-committees constituted so as to respond to consultations affecting more than one borough, meaning that joint scrutiny arrangements on substantial changes can be put in place relatively quickly.

The decision as to whether joint scrutiny arrangements or delegation of responsibilities to a lead authority is more appropriate is one that will need to be agreed between the affected boroughs in each case. In general, where multiple boroughs have reached the conclusion that the change is significant for their residents, then joint scrutiny arrangements are likely to be most relevant. Where only one borough considers the change substantial or the change clearly affects the residents of one borough far more than any other borough, lead scrutiny arrangements are likely to be preferable. However, as no authority can be required to delegate its scrutiny powers to another authority, joint scrutiny arrangements will be required if there is not unanimous agreement on the delegation of powers to a lead authority.

## TRIGGER TEMPLATE

NHS Trust or body & lead officer contacts:	Commissioners e.g. CCG, NHS England, or partnership. Please name all that are relevant , explain the respective responsibilities and provide officer contacts:

Trigger	Please comment as applicable
<b>1. Reasons for the change &amp; scale of change</b>	
What change is being proposed?	
Why is this being proposed?	
What is the scale of the change? Please provide a simple budget indicating the size of the current investment in the service, and any anticipated changes to the amount being spent.	
How are you planning to consult on this? (please briefly describe what stakeholders you will be engaging with and how) . If you have already carried out consultation please specify what you have done.	
<b>2. Are changes proposed to the accessibility to services?</b>	
	<b>Briefly describe:</b>
Changes in opening times for a service	
Withdrawal of in-patient, out-patient, day patient or diagnostic facilities for one or more speciality from the same location	
Relocating an existing service	
Changing methods of accessing a service such as the appointment system etc.	
Impact on health inequalities across all the nine protected characteristics - reduced or improved access to all sections of the community e.g. older people; people with learning difficulties/physical and sensory disabilities/mental health needs; black and	

ethnic minority communities; lone parents. Has an Equality Impact Statement been done?	
<b>3. What patients will be affected?</b>	<b>Briefly describe: (please provide numerical data)</b>
Changes that affect a local or the whole population, or a particular area in the borough.	
Changes that affect a group of patients accessing a specialised service	
Changes that affect particular communities or groups	
<b>4. Are changes proposed to the methods of service delivery?</b>	<b>Briefly describe:</b>
Moving a service into a community setting rather than being hospital based or vice versa	
Delivering care using new technology	
Reorganising services at a strategic level	
Is this subject to a procurement exercise that could lead to commissioning outside of the NHS?	
<b>5. What impact is foreseeable on the wider community?</b>	<b>Briefly describe:</b>
Impact on other services (e.g. children's / adult social care)	
What is the potential impact on the financial sustainability of other providers and the wider health and social care system?	
<b>6. What are the planned timetables &amp; timescales and how far has the proposal progressed?</b>	<b>Briefly describe:</b>
What is the planned timetable for the decision making	
What stage is the proposal at?	
What is the planned timescale for the change(s)	
<b>7. Substantial variation/development</b>	<b>Briefly explain:</b>
Do you consider the change a substantial variation / development?	



Have you contacted any other local authority OSCs about this proposal?	
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