



OSC T-16
**ASSOCIATION OF
COMMUNITY HEALTH COUNCILS
FOR ENGLAND & WALES**

Overview and Scrutiny Briefing

Local Authority (Overview and Scrutiny Committees Health Scrutiny Functions) Regulations 2002 Statutory Instrument 2002 No. 3048

Introduction

This briefing sets out the background to the Local Authority (Overview and Scrutiny Committees Health Scrutiny Functions) Regulations 2002 of the Health and Social Care Act 2001 and draws attention to weaknesses in the Regulations.

Background

- For the past 28 years Community Health Councils (CHCs) have monitored and scrutinised the work of the local NHS on behalf of local communities including. They have a major role in the arrangements for public consultation in the NHS under Regulation 18 of the Community Health Council Regulations 1996, Section 5 of the NHS and Community Care Act 1990, The Primary Care Trusts (Consultation on Establishment Dissolution and Transfer of Staff) Regulations 1999 and the NHS Trust (Consultation on Establishment and Dissolution) Regulations 1996. CHCs will be abolished on September 1st 2003.
- The Overview and Scrutiny Committees (OSC) of Local Authorities were established on January 1st 2003 and assumed parallel responsibility with CHCs to be consulted over substantial developments or substantial variation in health services in the area of the Local Authority.
- When she was the responsible minister, Hazel Blears MP said: *'a key principle for this government is the right of the public to expect its concerns over major changes to health services to be expressed through a formal statutory process'*.
- ACHCEW supports the new OSC system and believes it will enhance democracy. However, in some ways the OSC system may reduce the direct power of patients and communities to procure appropriate health services, where there is a failure by the local NHS to provide services required to meet the health needs of local communities. This is because OSCs will not have the campaigning and community development profile that has enabled CHCs to influence local NHS policy and health care provision.
- ACHCEW is also concerned that should a local authority decide not to establish a health OSC, residents of that area will be denied access to the legal mechanism that enables OSCs to refer proposals regarding closures and major change of use of NHS facilities to the Independent Reconfiguration Panel.

Key Problems with the Local Authority (Overview and Scrutiny Committees Health Scrutiny Functions) Regulations 2002

Question One: What steps will the Minister take to ensure that all local authorities exercise their right to establish a Health Overview and Scrutiny Committee, so use the powers granted to them to undertake scrutiny of the local NHS?

Question Two: Will the Minister take steps to transfer the right of referral to another body, should a local authority fail to set up a health OSC; thus denying local people the means of referring a case involving objections to a major change of use or variation in service, to the Independent Reconfiguration Panel.

Question Three: What action will the Minister take to prevent a diminution of accountability in the NHS as a result of Section 7 of the Health and Social Care Act, in respect of consultations over substantial variations in NHS services?

Question Four: Will the Minister enforce a duty on Overview and Scrutiny Committees to make reports and recommendations to local NHS bodies regarding scrutiny exercises?

OSC Regulation 3: Lack of enforceable duty to establish a Health OSC

- Regulation 3. – (1) states that: ‘An overview and scrutiny committee **may** make reports and recommendations to local NHS bodies...’ Thus there is no enforceable duty for an overview and scrutiny committee to undertake scrutiny and no right for local communities to demand that the OSC acts in a way that protects their interests in the NHS. CHCs currently have a duty under Regulation 17 of the 1996 CHC Regulations to do so. After the abolition of CHCs it is possible that some areas may be left without any scrutiny at this level at all.

Reports and recommendations

3. – (1) An overview and scrutiny committee may make reports and recommendations to local NHS bodies and to its local authority on any matter reviewed or scrutinised by it pursuant to regulation 2.

Question Five: Does the Minister recognise the problems inherent in excluding the establishment and dissolution of NHS Trusts and PCTs from consultation through the OSCs? Does he acknowledge that this will lead to a loss of rights for patients and the public? Does he accept that the loss of these powers is irrational and because the establishment or dissolution of a PCT (which provides community services as well as being commissioners of services) or NHS Trust is likely to have a major impact on the way that services are provided and access to them?

OSC Regulation 4 (2) – Failure to provide for Overview and Scrutiny arrangements in respect of NHS Trust and PCT mergers and dissolution:

- Regulation 4 (2) excludes the establishment and dissolution of NHS Trusts and PCTs from consultation through the OSCs. The right to be consulted in such matters is currently held by CHCs under the Section 5 of the NHS and Community Care Act 1990, the NHS Trusts (Consultation on Establishment and Dissolution) Regulations 1996 and the Primary Care Trusts (Consultation on Establishment Dissolution and Transfer of Staff) Regulations 1999. The loss of these powers is irrational and onerous because the establishment or dissolution of a PCT (which provides community services as well as being commissioners of services) or an NHS Trust, is almost certainly going to lead to a substantial variations in services. We would argue that in every case, the establishment or dissolution of an NHS Trust or PCT requires consultation with the OSC. We are also concerned that it would be very difficult for an OSC to know, whether the establishment or dissolution of a PCT or NHS Trust would constitute a substantial variation in

service, because it is unlikely to be in a position to have sufficient information on local services to be able to make that judgement. The Government state that it is their intention to amend SI 1996/653 and SI 1999/2337 to reflect changes brought about by the new PPI system and it is implied that changes will enable the OSC to become the statutory consultee – however we would like to have this intention recorded through Ministerial statement in the House.

Consultation of Committees by local NHS bodies

4. – (1) Subject to the following provisions of this regulation, where a local NHS body has under consideration any proposal for a substantial development of the health service in the area of a local authority, or for a substantial variation in the provision of such service, it shall consult the overview and scrutiny committee of that authority.

(2) Paragraph (1) shall not apply with respect to –

(a) any proposal to establish or dissolve an NHS trust or a Primary Care Trust (unless the establishment or dissolution involves a substantial development or variation as referred to in paragraph (1))

Question Six: Why has the Secretary of State failed to place a duty to consult for an appropriate length of time on NHS bodies? Currently, bodies consulted must be given a reasonable time for consultation and this is usually three months. Guidance on this matter is required as NHS bodies wishing to consult may attempt to reduce consultations to one month or less – an unreasonable time to consult communities.

OSC Regulation 4 (4) – Failure to provide a time frame for Overview and Scrutiny Committees undertaking consultations in the NHS:

- Regulation 4 (4) places no time limits on the length of a consultation. Under the present system bodies consulted must be given a reasonable time for consultation. This is usually three months. Guidance on this matter is important because NHS bodies wishing to consult quickly sometimes attempt to reduce consultations to one month or less – an unreasonable amount of time to allow full consultation with local communities. We understand that guidance on the Regulations will emphasize the need to undertake consultation for a sufficiently long period of time to enable consultees to thoroughly consider and respond to proposals. We would like to see the guidance specifically recommend the three month period of consultation advised in the Cabinet Office guidance.

Regulation: 4. – (4) Subject to any direction issued under regulation (10), an overview and scrutiny committee which has been consulted by a local NHS body pursuant to paragraph (1) may make comments on the proposal consulted on by such date as may be specified by the local NHS body.

Overview and Scrutiny System - Background

Section 7 of the Health and Social Care Act 2001 came into force this year and is likely to result in a diminution in accountability for consulting on substantial variations in the NHS as a result of the way that it is drafted. In the current system a CHC is obliged to keep under review the operation of the health service in its district (CHC Regulation 17 (1)) and would therefore at least have to consider the impact of a substantial variation. The health authority is obliged 'to consult a Council on any

proposals which the health authority may have under consideration' for a substantial development in services or a substantial variation of services' (Regulation 18 (1) SI 1996 640), so it would have to consult the CHC. The closure of a facility, even temporarily, is well established by case law (*R. v North & East Devon Health authority ex parte Pow* 1997) as amounting to a substantial variation.

Under the current system, the Secretary of State is required to establish a CHC in each district, which has a duty under certain circumstances to act. If the CHC failed to act when e.g. when a substantial variation of service was being proposed, an aggrieved resident could seek judicial review against the CHC and possibly force them to consider the matter. The CHC could take action against the health authority to enforce its statutory duty to consult them, as has been done successfully on several occasions.

Under the new system the statutory consultee under section 7 of the Health and Social Care Act 2001 (HSC), is to be the local authority OSC established under that section.

- Section 7 (3) states: 'regulations may in relation to an overview and scrutiny committee of an authority to which this section applies, make provision.....

(c) as to matters on which the local NHS bodies must consult the committee..' .

- 'The committee' is specifically the health committee established under Section 21 of the Local Government Act 2000 (LGA) as amended by section 7. The statutory consultee is that committee and no other.
- Local authorities are given the power to establish Overview and Scrutiny Committees on health under section 21 of the Local Government Act 2000 as amended by section 7 of the Health and Social Care Act 2001. They have no duty to do so. If there were no health overview and scrutiny committee locally, it would not be possible to oblige an NHS Trust to undertake a statutory consultation because there would be no body to consult. The duty to consult under section 7 would be a legally unenforceable duty in such circumstances. Even if there were an OSC on health it could not be compelled to demand a consultation or even respond to one which was conducted. There would be no remedy against the Trust because it could not be compelled to consult an organisation, which did not exist.
- Patients' Forums have no right to demand a consultation because they will not be the statutory consultees.
- Section 11 of the HSC Act 2001 which places a duty to consult on NHS bodies, provides no substitute for a statutory duty to consult with a body obliged to respond, because the duties placed on NHS bodies are only to make arrangements to consult and involve, terms not defined in the Act. There are no sanctions on NHS bodies for failure to comply with section 11.
- The power of referral to the Secretary of State and the mechanism of the Independent Reconfiguration Panel (not yet set up but was supposed to start at the same time as the OSCs in January 2003) does not apply to section 11 of the HSC Act 2001.
- If there is not an OSC on health, there will be no power of referral even if some consultation was attempted by the Trust, because no body would exist to exercise the power.

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