

The Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013

The new regulations build upon the existing statutory provisions by strengthening the process for consultation and the requirement for making referrals to the Secretary of State. They also provide clarity in relation to the circumstances where joint health scrutiny arrangements are obliged to be formed between 2 or more authorities.

1. General Powers – review and scrutiny

Regulations 21 and 22 make general provisions for local authority health scrutiny functions to:

- review and scrutinise any matter relating to the planning, provision and operation of the health service in its area, and;
- make reports and recommendations on any matter it has reviewed or scrutinised.

These regulations require the local authority to invite interested parties to comment on any matter it has under consideration and take account of information provided, which includes referrals from a local Healthwatch organisation. They also make it a requirement for reports to include:

- an explanation of why the matter was reviewed or scrutinised
- a summary of the evidence considered
- a list of the participants involved in the review or scrutiny
- an explanation of any recommendations on the matter reviewed or scrutinised

The legislation states that if a response to a report is requested from an organisation/body, the organisation/body must respond in writing within 28 days.

2. General Powers – provision of information

Regulations 26 and 27 obliges health service commissioners/providers to provide the local authority with information about the planning, provision and operation of health services in the area and to attend before the authority to answer questions.

The health service commissioner/provider is not required to provide information (either as written evidence or evidence provided by a member or employee) if it:

- relates to a living individual unless the information can be provided without disclosing such information
- cannot be disclosed under law
- relates to a trust special administrator's report
- relates to recommendations by a special administrator.

3. Substantial developments/variations – requirements to consult

Regulation 23 makes requirements for a relevant NHS body or relevant health service commissioner/provider to consult the local authority where it has a proposal for a 'substantial development' or 'substantial variation' of the health service in the local authority area.

For example, in the case where a proposal relates to services which a commissioner (such as the Council, Public Health and NHS England) is responsible for arranging, it is the commissioner which must discharge the responsibilities as set out in the regulations.

The regulations do not define a 'substantial variation or development'. Guidance suggests that the key feature is that it should involve a major impact on the services experienced by patients and/or future patients. Guidance also suggests that in considering whether a proposal is substantial NHS bodies, committees and stakeholders should consider:

1. Are there proposed changes in the accessibility of services?
2. What is the impact on the wider community and other services – e.g. is there an economic impact?
3. How many patients are affected by the proposed change? (If it affects a small group of patients it may still be 'substantial' especially if patients need to continue to access that service for many years)
4. What are the methods of service delivery? E.g. is a particular service moving from an acute hospital setting into a community setting?

Following the new regulations, it is expected that there will be new Department of Health guidance published at the end of May 2013 to reflect the changes.

On consulting the local authority, the responsible commissioner/ provider must:

- provide the proposed date by which it intends to make a final decision as to whether to implement the proposal
- provide the proposed date by which it requires the authority to comment
- publish the dates
- inform the local authority if the dates change

4. Substantial developments/variations – exemptions

Regulation 24 provides clarity on situations where NHS bodies or relevant health service commissioners/ providers are not required to consult. This includes where:

- a decision has been taken because of a risk to safety or welfare of patients and staff - in this case the NHS body must notify the authority of the decision taken and the reason why no consultation has taken place;
- a proposal to establish or dissolve an NHS trust or clinical commissioning group (or to vary their constitutions) has been made;
- there are proposals contained in a special administrator's report or 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

5. Substantial developments/variations - requirements to respond

In response to any NHS consultation, the regulations give powers to local authorities to:

- Make comments and recommendations on the proposals by the date indicated by the NHS body.
- Report to the Secretary of State in writing if it:
 - (a) is not satisfied that the consultation on the proposal has been adequate; or,
 - (b) is not satisfied that reasons for an 'emergency' decision are adequate
 - (c) does not consider the proposal would be in the interests of the health service in its area

Where either a local authority does not use its power to make comments or recommendations to the NHS body or it has used its power but its comments did not include a recommendation, it is obliged to provide an indication to the NHS body of its intention to refer the proposal to the Secretary of State for Health or the date by which it intends to make a decision as to whether to refer the proposal or not.

6. Making comments and recommendations on proposals

The regulations make provisions for the authority to make comments on the proposal consulted on by the date or changed date provided by the NHS commissioner/provider.

In circumstances where the authority has provided comment and made a recommendation on the proposals and the NHS body does not agree with the recommendation, the following actions must occur:

- the NHS body must notify the local authority of the disagreement

- the NHS body and local authority (and provider where appropriate) must work together to reach agreement on the subject of the recommendation

If the steps above have been taken, but agreement has not been reached in relation to the subject of a recommendation within a reasonable period of time, the authority may exercise its power to report to the Secretary of State in writing on the proposal. This is dependent on the authority having complied with its obligations to notify the NHS body of the date by which it either intended to refer or make its decision on referral.

7. Reports to the Secretary of State

Reports to the Secretary of State must include:

- an explanation of the proposal to which the report relates
- the reasons why the authority is referring the issue (in line with the possible options set out)
- If the reason is that the proposal is not in the interests of the health service, a summary of the evidence considered, including any evidence of the effect or potential effect of the proposal on the sustainability or otherwise of the health service in the area of the authority.
- An explanation of any steps the authority has taken to try and reach agreement in relation to the proposal
- Evidence to demonstrate that the authority has complied with the requirements to attempt to reach agreement in relation to the recommendation
- Any explanation of the reasons for making the report
- Any evidence in support of those reasons

8. Action taken by the Secretary of State

Regulation 25 sets out the powers of the Secretary of State in relation to a decision on a proposal where a local authority has reported to the Secretary of State. In this regard, the Secretary of State may:

- Make a decision on the subject matter of the referral if the local authority has referred the matter either because the consultation has been inadequate or the reasons for the 'emergency' decision have been deemed inadequate and give directions to the commissioner (through NHS England) or provider to:
 - consult with the authority in relation to the proposal
 - determine the matter in a particular way
 - take other steps in relation to the matter
- Make a decision on the final proposal if the local authority has referred the matter because it does not consider the proposal would be in the interests of the health service in its area.

9. Joint Committees

Paragraph 30 provides a general power for two or more authorities to appoint a joint committee and arrange for relevant health scrutiny functions to be exercisable by a joint committee.

However, where a substantial development/ variation proposal impacts on more than one local authority, those local authorities **are required to** appoint a joint overview and scrutiny committee for the purposes of the consultation and only that joint overview and scrutiny committee may:

- make comments on the proposal
- require the provision of information
- require an officer/member to attend before it

A joint overview and scrutiny committee may not discharge any functions other than the relevant functions in accordance with the regulation.

10. Miscellaneous

The regulations make general provisions for county councils to co-opt members of district councils onto their overview and scrutiny committees. It also cites previous regulations which are revoked including the Local Authority (Overview and Scrutiny Committees Health Scrutiny Functions) Regulations 2002 (a).