09 January 2024

on the day BRIEFING

NHS Providers

Secretary of state intervention powers in the reconfiguration of NHS services

Overview

Schedule 6 of the Health and Care Act 2022 (the Act) established new powers for the secretary of state for health and social care.

The powers enable the secretary of state to:

1. require NHS commissioning bodies, either NHS England (NHSE) or the relevant integrated care board (ICB), to **notify** them about any 'substantial' service reconfiguration.
2. **'call-in'**, or make final decisions about, such reconfigurations.
3. require commissioning bodies to consider undertaking a service reconfiguration.

Statutory guidance, Reconfiguring NHS services – ministerial intervention powers, which NHS commissioning bodies, trusts and foundation trusts must have regard to, was published today by the Department of Health and Social Care (DHSC) as required by the Act. It states DHSC's intention to **commence the first two powers** listed above on 31 January 2024. The **third power is not yet being commenced**. NHSE is also updating its Planning, assuring and delivering service change for patients guidance to reflect the new powers and will publish this as soon as possible after 31 January.

DHSC's guidance is relevant when there are proposals to change NHS services in a way that impacts on how services are delivered to patients, or the range of health services available. Trusts should note that the obligations are on NHS commissioning bodies, not provider organisations. However providers will be involved in any proposals and decisions around service reconfiguration, and so should be aware of the requirements.

When is a service reconfiguration 'notifiable'?

The DHSC guidance sets out the purpose of making service reconfigurations notifiable to the secretary of state: "to support decision-making in the event of a call-in request". It states that most

reconfigurations will continue to be managed at a local level and that most notifications submitted to DHSC will not require any follow-up, or result in ministerial intervention.

The requirement on NHS commissioning bodies to notify the department from 31 January has been aligned with the existing test for when an NHS reconfiguration would trigger a consultation with a local authority (LA)[1]: "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".

The definition of 'substantial' is not set out in law nor the guidance, and is open to local determination, as has been the decision as to whether a service change should trigger a consultation with the LA. Notification is the responsibility of the commissioning body (and there is a notification form they should complete). The LA's health overview and scrutiny committee (HOSC)'s view about any proposal should be considered when making a decision to notify, and its view about whether this reconfiguration is notifiable should be included on the form. If an NHS organisation is leading the reconfiguration proposal, DHSC expects the NHS commissioning body to notify them.

The duty to notify does not apply to reconfiguration proposals where a consultation with the local authority commenced prior to 31 January 2024.

Transactions (mergers, dissolutions, establishments) are out of scope of the guidance[2] and powers, as are trust special administrator recommendations. However, any reconfiguration proposal linked to or resulting from a transaction should be considered in line with DHSC's guidance.

Temporary reconfigurations are also addressed and are permissible without notifying the secretary of state if, as at present, the NHS commissioning body is satisfied that there is a risk to the safety or welfare of patients that means there is no time for consultation with the HOSC. There is no set length of time for a 'temporary' change to be in place. Ministers expect any such changes not to be irreversible and for there to either be clear plans in place for reverting, or the plans to be developed for permanent service changes which would then go through due process.

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[1] Regulation 23(1)(a) of The Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013

[2] Statutory NHS transactions will continue be carried out in accordance with the relevant statutory processes set out in the NHS Act 2006 and set out in NHSE's Statutory Transactions guidance; any necessary approvals from the secretary of state will be sought via those separate processes.

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The DHSC guidance should be read alongside NHSE's Planning, assuring and delivering service change for patients guidance. This publication, which NHSE will update to reflect the new DHSC guidance, sets out NHSE's tests for service change. These currently include strong public and patient engagement, and a clear, clinical evidence base. NHSE remains responsible for 'assuring' substantial service changes pre-public consultation.

When and how will the 'call-in' powers be used?

Under previous legislation, local HOSCs were specifically able to refer NHS reconfigurations to the secretary of state for a decision, where they had concerns. As of 31 January 2024, instead, 'any interested party' (including HOSCs) may notify the minister of concerns. The secretary of state will then decide whether they wish to use their powers of intervention.

Requests to the secretary of state to consider calling in a proposal may be made by an organisation or individual. All written requests for the minister to consider a review should set out how the concern meets one of two criteria:

- Concern with the process followed by the NHS (e.g. around consultation and option development).
- Concern that a decision made is not in the best interests of the health service in that area.

There is a template for referral but they may also be made by email or letter.

The guidance asserts that call-in powers will 'likely' not be used before commissioners and LAs have taken all reasonable steps to resolve any issues, and those making such a call-in request should have already approached the HOSC or NHS commissioning body to raise their concerns.

The DHSC-sponsored Independent Reconfiguration Panel (IRP) is retained and will be asked to provide ministers with expert advice about reconfigurations 'to support effective and timely decision-making.' The panel's view can be sought informally by any parties to the reconfiguration to support local resolution, by the secretary of state to inform any decision about whether to use the call-in power, and to support their decision making if a reconfiguration is called in.

To call-in a service change, the minister will issue a Direction letter to the NHS commissioning body. From that point, no further steps should be taken to progress the reconfiguration, unless the Direction letter specifies that they can be. The minister has a maximum of six months in which to make their decision.

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Before making a decision, the commissioning body, NHSE (if the commissioner is an ICB), and each affected LA will be able to make representations to the department, as will 'any other person' thought relevant by the secretary of state. Stakeholders are encouraged to take a collaborative approach to making representations. The minister or DHSC may request other information from any of the relevant parties to aid their decision.

The minister will then consider the range of evidence collated, including any representations received, as well as value for money and their legal duties to, for example, reduce health inequalities and seek continuous improvement in the quality of health services. The minister is required to publish any decision and the reasons for that decision, including a summary of any representations received, on gov.uk.

The secretary of state may then direct the commissioner in respect of the service change to go ahead, stop, make changes, achieve particular results, take other procedural steps, or to retake any previously taken decision. The secretary of state's decision is final.

The guidance enables the secretary of state to consider, and intervene in, the same reconfiguration more than once if there has been a change in circumstances that materially affects the original decision.

NHS Providers view

This guidance confirms that issues that would previously have been notifiable to local authorities are now notifiable to the secretary of state: this is therefore a significant centralisation of oversight and accountability regarding reconfiguration. The Act also allows the secretary of state to override NHSE's decision-making when assuring a service change, assuming NHSE's revised planning service change guidance retains the assurance tests set out in the current version.

During the passage of the Health and Social Care Bill 2022, now Act, NHS Providers raised concerns that these provisions opened up the possibility of increased political interference in the health service by drawing significant powers of intervention and direction to the secretary of state. As in our feedback on the Bill, we remain concerned that these intervention powers work against subsidiarity, which is a core principle underpinning system working as set out in the Act, and risks undermining local accountability.

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During the passage of the Bill we were pleased that, working with the King's Fund and NHS Confederation, we successfully persuaded the government that notification should only be required for substantial reconfigurations. We welcome the decision to align the requirement for notification with the existing and locally understood and determined threshold triggering consultation with an LA.

We also secured the commitment that if the secretary of state calls in a reconfiguration, they must make their determination within six months. This prevents the possibility of open-ended delays in implementing service change. However, we note that the secretary of state is able to intervene multiple times in the same reconfiguration, which may create periods of delay in practice and we will need to remain alive to the causes and implications of repeated delays.

We welcome that the guidance is clear that commissioners, NHSE and LA(s) party to the proposals are able to make representations to the minister. However, involved or affected trusts do not have an automatic right to make representations: only if they are considered a 'relevant party' by the minister. Services are delivered by trusts, not ICBs, and as we argued during the passage of the Bill, trusts should have been included as having a right to make representations to the minister. While trusts' perspectives should be included in any ICB representations, it would be preferable to make this explicit, particularly as trusts do not have the same right to make representations.

The requirement on the secretary of state to publish their decision and the rationale should bring into the open deliberations that have previously happened behind the scenes. Ministers seek to, and do, influence NHS service provision by less formal means and this requirement brings welcome transparency to balance the call-in powers. We are also pleased to see that a summary of representations received by interested parties will be published, for full transparency.

The Act did not create a right to appeal a decision made by the secretary of state on any grounds and the guidance is clear that the secretary of state's decision is final. Should parties to service reconfiguration proposals believe the minister has not followed due process they would need to apply to the High Court for permission to seek judicial review. This would be expensive and time consuming, and therefore risks putting off people who have legitimate grounds to appeal.

The guidance asserts that call-in powers will 'likely' not be used before LAs and NHS commissioning bodies have had the chance to resolve issues locally, and it is welcome that requests from third parties for the minister to call in a reconfiguration should only be made after that third party has approached those proposing the reconfiguration first.

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NHS Providers will continue to take a keen interest in the use of these powers by the secretary of state and would welcome any feedback from trusts about their experience.

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