

louise.irvine@runbox.com

Dr Faruk Majid, Chair of Lewisham CCG
Mr Martin Wilkinson, Managing Director, Lewisham CCG

25 August 2019

Dear Dr Majid and Mr Wilkinson,

Thank you for your response to our enquiry about public consultation on CCG merger in which you give as your reason for not carrying out a public consultation s14Z2 of the NHS Act 2006 because it applies “in relation to any health services which are commissioned by the CCG, as opposed to proposals for an organisational change such as a merger”.

However we believe that s14Z2 is not the relevant legislation in the case of CCGs seeking to merge, and that the relevant legislation does require there to be public consultation for proposed CCG mergers.

The relevant legislation is contained in the 2006 NHS Act, as amended by the 2012 Health and Social Care Act, which legislated for the creation of CCGs, and the Regulations (Statutory Instruments) that govern how these laws are put into effect.

The Act says that merger of CCGs entails the dissolution of the pre-existing CCGs and the formation of a new CCG. The Regulations say that if a CCG is applying to the Board (NHS England) for dissolution then the Board has to take into account *the extent to which the CCG has sought the views of individuals who receive health services pursuant to arrangements made by the CCG in the exercise of its functions*. This means the views of the general population served by the CCG must be sought, and that would require public consultation.

Furthermore even if it were to be argued that the CCGs were not dissolving but were in fact changing to cover a different area and different membership then that would be considered a change in constitution and there are regulations requiring public consultation for a variation in constitution.

Here is the link to the NHS Act: <http://www.legislation.gov.uk/ukpga/2006/41>

The Act states that CCG mergers entail the dissolution of the pre-existing CCGs and the establishment of a new CCG.

Here is the relevant section, 14G:

“14G Mergers

*(1) Two or more clinical commissioning groups may apply to the Board for—
(a) those groups to be dissolved, and*

(b) another clinical commissioning group to be established under this section.”

Please note the word “and”. It is clear that applications for CCG mergers require the existing CCGs to be dissolved AND another CCG to be established.

The section of the Act governing Dissolution of CCGs is as follows:

“14H Dissolution

(1) A clinical commissioning group may apply to the Board for the group to be dissolved.

(2) Regulations may make provision—

(a) as to the circumstances in which the Board must or may grant, or must or may refuse, applications under this section;

(b) as to factors which the Board must or may take into account in determining whether to grant such applications;

(c) as to the procedure for the making and determination of such applications.”

Please note 14H (2b) which refers to Regulations that may make provision “as to factors which the Board must or may take into account in determining whether to grant such applications”

In addition, and in case it were to be argued that CCG merger does not entail CCG dissolution, but rather a change to the CCG constitution to vary the area or list of members, then this section of the Act would apply:

“14E Applications for variation of constitution

(1) A clinical commissioning group may apply to the Board to vary its constitution (including doing so by varying its area or its list of members).

(2) If the Board grants the application, the constitution of the clinical commissioning group has effect subject to the variation.

(3) Regulations may make provision—

(a) as to the circumstances in which the Board must or may grant, or must or may refuse, applications under this section;

(b) as to factors which the Board must or may take into account in determining whether to grant such applications;

(c) as to the procedure for the making and determination of such applications.”

Please note 14E(2b) which refers to regulations that may make provision as to “factors which the Board must or may take into account in determining whether to grant such applications.”

The relevant Regulations are the National Health Service (Clinical Commissioning Groups) Regulations 2012, and came into force immediately after the commencement of section 25 of the Health and Social Care Act 2012.

Here is the link:

http://www.legislation.gov.uk/uksi/2012/1631/pdfs/uksi_20121631_en.pdf

Regulation 7, which covers factors relating to the granting of applications for establishment or merger of CCGs, is similar to section 14G of the NHS Act 2006 in referring to the merger of CCGs as entailing the dissolution of two or more CCGs for the establishment of another one.

“Regulation 7. Factors relating to the granting of applications for establishment or merger of CCGs

(1) This regulation applies in relation to—

(a) an application under section 14B of the 2006 Act for the establishment of a CCG, and

(b) an application under section 14G of the 2006 Act for the dissolution of two or more CCGs and for the establishment of another one. “

Regulation 9(2) and (3) and Schedule 2(f) and Schedule 3(e) of the Regulations state the factors that the Board (NHS England) must take into account when determining whether to grant an application to vary the constitution of a CCG or to dissolve a CCG. Please note the word “must” is used, not “may”.

The relevant parts of the Regulations are quoted below:

Variation of CCG constitution and dissolution of CCG: factors etc.

9.—(1) This regulation applies if a CCG applies to the Board—

. (a) under section 14E of the 2006 Act, to vary its constitution, or

. (b) under section 14H of the 2006 Act, for the group to be dissolved.

(2) Schedule 2 sets out factors which the Board must take into account when determining whether to grant an application under section 14E.

(3) Schedule 3 sets out factors which the Board must take into account when determining whether to grant an application under section 14H.

Schedule 2 Factors relating to applications to vary CCG constitution

2(f) The extent to which the CCG has sought the views of individuals to whom any relevant health services are being or may be provided, what those views are, and how the CCG has taken them into account.

“Relevant health services” means any services which are provided as part of the health service pursuant to arrangements made by the CCG in the exercise of its functions.

Schedule 3 Factors relating to applications for CCG dissolution

NOTE FROM HACKNEY KEEP OUR NHS PUBLIC

*3(e) The extent to which the CCG to be dissolved has sought the views of individuals to whom any relevant health services are being or may be provided, what those views are, and how the CCG has taken them into account.
“Relevant health services” means any services which are provided as part of the health service pursuant to arrangements made by the CCG in the exercise of its functions.*

In summary, according to legislation, CCG merger entails the dissolution of CCGs and/or variation of the CCG constitution. Applications to merge CCGs are therefore governed by regulations about applications to dissolve a CCG or change its constitution. Such applications require the Board (NHS England) to take into account the extent to which the CCG has sought the views of individuals to whom any relevant health services are being provided. Relevant health services means any services provided pursuant to arrangements made by the CCG.

That means the people whose views must be sought are the population receiving health services arranged by the CCG i.e. the general population of the area. That would require a public consultation and not just an “engagement” with selected stakeholders, which is all that is currently taking place.

Interestingly, the NHS England guidance on implementing mergers (paragraphs 28-44 that you cited in your letter), does not, in our view, accurately reflect the law and regulations as it only refers to engaging with Healthwatch and undefined “stakeholders”, and makes no mention of seeking the views of the whole CCG population, which we would argue is what the regulations require.

We believe that we have legal grounds to support our argument that the merger of the six CCGs in South East London requires public consultation and will be sending a version of this letter to the chairs of the six CCGs and to NHS England, as well as to the Joint Overview and Scrutiny Committees and our MPs.

We will be asking the six CCGs to agree to full public consultation before submitting their application for merger to NHS England.

We are doing this because we see the issue of CCG merger as of utmost importance in terms of NHS democratic accountability and should therefore be properly consulted on by all those affected, i.e. the general population covered by each CCG.

Yours sincerely,

Dr Louise Irvine, Chair of Save Lewisham Hospital Campaign
louise.irvine@runbox.com