

JOINT MEETING OF MAYOR AND CABINET, HEALTHIER COMMUNITIES SELECT COMMITTEE AND OVERVIEW AND SCRUTINY BUSINESS PANEL

Report Title	Response to the consultation on the Trust Special Administrator's draft report		
Key Decision	Yes		Item No.
Ward	All		
Contributors	Chief Executive, Executive Director for Community Services		
Class	Open	Date: 10 December 2012	

Reason for urgency

The Mayor, Healthier Communities Select Committee and the Overview and Scrutiny Business Panel are asked to consider this item even though a copy of the agenda including a copy of this item has not been open to inspection by the public for a period of five days before the meeting.

The reason for urgency is that the timetable for the Council to respond to the Trust Special Administrator is very demanding and the Council has sought external advice to inform its response. Given the tight consultation timetable, it was not possible for that advice to be considered and for the Council's response to be drafted in time to comply with the usual access to information requirements.

As the Council's response must be delivered to the Trust Special Administrator by 13 December 2012, it is not possible to delay consideration of it to enable compliance with section 100B Local Government Act 1972. The Mayor and the Chairs of the Healthier Communities Select Committee and the Council's Overview and Scrutiny Business Panel are asked to agree that, because of these special circumstances, the matter be considered as one of urgency in accordance with Section 100B (4) (B) Local Government Act 1972.

1. Purpose

1.1 This report sets out a draft of the Council's response to '*Securing Sustainable NHS Services*' – *Consultation on the Trust Special Administrator's draft report for South London Healthcare NHS Trust and the NHS in south east London*'. The paper seeks comments on the response from the Healthier Communities Select Committee and from the Overview and Scrutiny Business Panel, and approval from the Mayor for the collective response to be submitted to the Trust Special Administrator.

2. Recommendations

2.1 It is recommended that the Mayor:

- a) notes the views of the Council on this issue, as expressed at the meeting of 28 November 2012; and
- b) agrees the response at Appendix A.

2.2 It is recommended that Healthier Communities Select Committee:

- c) notes the decision of Mayor and Cabinet of 10 December 2012;
- d) notes the views of the Council on this issue, as expressed at the meeting of 28 November 2012; and
- e) agrees the response outlined at Appendix A.

2.3 It is recommended that the Overview and Scrutiny Business Panel:

- f) notes the decision of Mayor and Cabinet of 10 December 2012;
- g) notes the views of the Council on this issue, as expressed at the meeting of 28 November 2012;
- i) notes the views of Healthier Communities Select Committee of 10 December 2012; and
- j) agrees the response outlined at Appendix A.

3. Policy context

3.1 The Council is committed to improving the health and wellbeing of citizens in Lewisham. In *Shaping our future – Lewisham's Sustainable Community Strategy*, one of the priority objectives that all partners will work towards is that the borough and communities within the borough should be '*Healthy, active and enjoyable – where people can actively participate in maintaining and improving their health and wellbeing*'.

3.2 The Council's Corporate Strategy also identifies specific priorities related to the health and wellbeing of its citizens, specifically *Caring for adults and older people* and *Active, healthy citizens*. In responding to the Trust Special Administrator's consultation and facilitating others to do so, the Council is also meeting its commitment to deliver *Community leadership and empowerment*.

4. Background

4.1 Lewisham hospital is a key part of the fabric of public service provision in Lewisham. Its long history in the borough stretches back well before the creation of the welfare state to the emergence of poor law provisions in south east London.

4.2 Following the formation of the National Health Service in 1948, the hospital continued to expand with new buildings opened in the 1950s and 1960s. In 1991 the Sydenham Children's Hospital closed and

moved to Lewisham Hospital. In 1996 the Women's and Children's Wing was opened at Lewisham by Princess Alexandra. In 1997 Hither Green Hospital closed, and the Elderly Care service was transferred to Lewisham Hospital. In 2007 the new Riverside Building opened, providing modern elective and health care services and, most recently, the Accident & Emergency suite was refurbished.

- 4.3 Over the past decade Lewisham Hospital has established itself as a highly effective general district hospital, in both clinical and financial terms, with an annual turnover of some £240m serving a local population of some 300,000 people.
- 4.4 In 2010, the hospital was commissioned to provide community health services. This has allowed for the vertical integration of acute and community services and has provided stronger links to Lewisham Council's services and other primary care services. Its links within the health economy of south east London are positive and strong and the nature of its work with Lewisham Council's adult social care system is highly effective. It has played a key role in contributing to Lewisham's achievement of an "outstanding" rating for children's safeguarding.

5. South London Healthcare NHS Trust, the establishment of the Unsustainable Provider Regime and the appointment of the Trust Special Administrator

- 5.1 The previous Labour Government made provision in law for NHS intervention in the case of hospital failures: the so-called "unsustainable provider regime" (UPR) that relies upon a Trust Administrator being appointed, who is then afforded governance and management powers over the failing hospital so that rectifying measures can be developed and adopted swiftly to prevent resource losses from the NHS.
- 5.2 In 2009 three failing hospitals in outer south east London - Princess Royal (Bromley), Queen Elizabeth (Woolwich) and Queen Mary's (Sidcup) - were merged into one Trust (the South London Healthcare Trust, SLHT). This merger has not been successful, as the operating deficit of the combined hospital has continued to climb such that, by 2012, it was losing the NHS over £60m of resources each year and is forecast to have a cumulative deficit of £207m by April 2013.
- 5.3 According to the TSA, the SLHT "struggles to meet a number of (clinical) standards consistently and the sustainability of these improvements is not clear." According to the TSA, the "root causes of the challenges are complex, site-specific and both internal and external to the Trust" such that any solution will require broader changes to the local health system.
- 5.4 Since its establishment SLHT has accumulated deficits of £153m - which will have risen to £207m by the fiscal year end. Of the 266

hospital trusts in England, 30 reported a deficit and of these, SLHT's was the largest (at nearly 15 per cent of its income).

- 5.5 On 12 July 2012, the then Secretary of State for Health, Andrew Lansley, announced that South London Healthcare Trust (SLHT) was to be put into the regime for unsustainable NHS providers after it ran into serious financial difficulties.
- 5.6 Matthew Kershaw, an experienced NHS Foundation Trust Chief Executive, who had been appointed as the Department of Health's national director for provider delivery, was appointed as Trust Special Administrator (TSA), with effect from 16 July 2012.
- 5.7 Mr Kershaw's brief was to assume full control of the trust, replacing the functions of the trust's board and assuming the role of the accountable officer. He was also made responsible for developing recommendations to secure a sustainable future for services provided by the Trust for the Secretary of State to consider. However, once appointed, it became clear that he had adopted a wider scope than simply sorting out the finances of SLHT and extended this to include a review of healthcare provision across south east London.
- 5.8 The legal timeframe for the UPR at South London Healthcare Trust is:
 - an initial 75-working-day phase (up to 29 October) developing recommendations and drafting a report;
 - a 30-working-day public consultation period (from 2 November to 13 December) on that report and its recommendations; followed by
 - a 15-day period to finalise the report of recommendations for the Secretary of State for Health. The final report therefore needs to be submitted to the Secretary of State by 8 January 2013.

The Secretary of State then has 20 working days to consider the report and make a decision on the way services will be delivered in the future. The decision will be made by 4 February 2013.

- 5.9 The TSA conducted an intensive process of clinical meetings and stakeholder deliberations from August through to October in an attempt to arrive at his conclusion as to a way forward.

6. The TSA's draft report and recommendations

- 6.1 On 29 October 2012, the TSA published the draft report '*Securing Sustainable NHS services*'¹ in which he set out six recommendations:
 - Improve the operational efficiency of the hospitals that make up SLHT.

¹ Full report available online at <http://www.tsa.nhs.uk/sites/default/files/TSA-DRAFT-REPORT-WEB3.pdf>

- Queen Mary's Hospital Sidcup should be developed into Bexley Health Campus.
- Surplus and under-utilised premises should be disposed of across the Trust.
- The Department of Health should provide additional funds to cover the excess costs of the PFI building at Queen Elizabeth Hospital and Princess Royal University Hospital.
- There should be a transformation in the way services are provided in south east London, with changes recommended in relation to community-based care and emergency, maternity and elective services..
- SLHT should be dissolved and other organisations should take over the management and delivery of the NHS services which it currently provides.

6.2 The full draft report of the TSA has been circulated to all members of the Council in hard copy. Additional hard copies will be available at the meeting. The report is also available on-line at <http://www.tsa.nhs.uk/sites/default/files/TSA-DRAFT-REPORT-WEB3.pdf>

6.3 The specific impact of the TSA's draft recommendations on Lewisham include:

- Emergency care would no longer be provided at University Hospital Lewisham. It would continue to provide 'non-admitting urgent care'.
- Lewisham would have either reduced critical care or no critical care for women who require hospital admission during pregnancy or an obstetric-led delivery.
- Lewisham would develop as a centre of excellence for non-complex elective surgery, serving the whole of south east London.
- Lewisham Healthcare Trust would join with Queen Elizabeth Hospital Woolwich to create a new Healthcare Trust.
- The proposed changes would mean that while some of the buildings at University Hospital Lewisham site would continue to be required, the major part of the estate would be surplus to requirements and would need to be sold.

7. Consultation on the draft report and the development of London Borough of Lewisham's response

7.1 Public consultation on the draft report opened on 2 November 2012 and will close on 13 December 2012.

7.2 The TSA published a consultation document summarising the draft recommendations and setting out specific questions on which he is seeking people's views. In addition the TSA is holding a series of public consultation meetings.

- 7.3 The Council sought independent expert opinion on the draft report of the TSA to provide a qualified and expert perspective. Alongside, analysis has been undertaken by officers on the likely impact of the proposed changes on Council services.
- 7.4 Accordingly, the Council engaged Frontline Consulting with a brief to establish whether:
- the problem had been framed correctly;
 - the assumptions used in developing the options were reasonable;
 - an appropriate range of options had been considered;
 - the preferred option had been fairly chosen;
 - the preferred option could be delivered.

The Frontline report is attached at Appendix B.

- 7.5 Drawing upon the Frontline report, and building on it with particular emphasis on the likely impact of the proposals on the provision of local authority services, the Council has developed its response to the TSA draft report. A copy of the response is included as Appendix A.
- 7.6 The response includes reference to:
- The impact of the proposals on Lewisham's residents
 - The impact on Council services, in particular Adult Social Care services and Children's Services
 - Concerns regarding the assumptions on which the TSA's draft recommendations are based, in particular the options appraisal, financial modelling and proposals for the Lewisham site.

8. Legal implications

Powers

- 8.1 The legal implications associated with the powers of the TSA and the Secretary of State in relation to South London Healthcare Trust and Lewisham Healthcare Trust are set out in the proposed response to the TSA at section 8. Members' attention is drawn to those implications.

Call in and urgency

- 8.2 The decision that Mayor is being asked to make is a key decision under the Council's constitution. The Council's Overview and Scrutiny Business Panel would normally have the right to ask the Mayor to reconsider a decision made, but not implemented, under the Council's constitution ("call in") in accordance with Part IV Rule E18. However, there is provision for decisions which are urgent not to be subject to the usual procedure.

- 8.3 Rule E19 at Part IV provides that there shall be no requirement for call in where the decision being taken is urgent. A decision will be urgent where the delay to be caused by the call in process would seriously prejudice the interests of the Council or of the public. The Chair of the Council or, in his absence, the Vice Chair, must agree in writing that the decision proposed is reasonable in all the circumstances, and to its being treated as a matter of urgency. Decisions taken as a matter of urgency under this rule must be reported to the next ordinary meeting of the Council with the reason for urgency.
- 8.4 The Chair of the Council has consented in writing in accordance with Rule D19 to this matter being taken as a matter of urgency.
- 8.5 This item was included in the Council's Notice of Key Decisions published in November 2012, covering meetings scheduled to take place from December 2012 to March 2013, as is required under Part IV G17 of the constitution. However, at the date of publication, it was anticipated that the Mayor and Cabinet meeting would take place on 5 December, which was the date published for the meeting in the Notice. As it proved impossible to hold the joint meeting on that date, the matter has been treated as if it were not included in the Notice. Part IV paragraph G19 of the Council's constitution provides that the decision may nonetheless be taken if the Chair of the Business Panel agrees that the taking of the decision is urgent and cannot reasonably be deferred. The Chair of the Business Panel has so agreed and a notice setting out the reasons why the decision cannot reasonably be deferred has been published on the Council's website.

The role of the Healthier Communities Select Committee

- 8.6 The Healthier Communities Select Committee is a statutory consultee on significant health service reconfigurations proposed by the appropriate commissioning body (PCT now; CCG post-April 2013). As the legal implications in the attached response set out, the TSA's proposals do not fall under that statutory regime. However, the Head of Law advises that it would in any event be within the terms of reference of the Healthier Communities Select Committee to comment on the TSA's proposals.

The role of Overview and Scrutiny Business Panel

- 8.7 This would be the normal forum for considering whether to ask the Mayor to reconsider a decision made but not implemented, but given that the decision is being considered under Part IV Rule E19 of the constitution, the Panel has no formal role. However, the Business Panel is asked for its views in any event, in recognition of its role in relation to call in of executive decisions. This decision would have been subject to call in if the timing of the response to the TSA had not meant that this item had to be treated as an urgent matter.

Equalities legislation

- 8.8 The Equality Act 2010 (the Act) brings together all previous equality legislation in England, Scotland and Wales. The act includes a new public sector equality duty (the duty), replacing the separate duties relating to race, disability and gender equality. The duty came into force on 5 April 2011.
- 8.9 The duty consists of the 'general equality duty' which is the overarching requirement or substance of the duty, and the 'specific duties' which are intended to help performance of the general equality duty.
- 8.10 The duty covers the following nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
- 8.11 In summary, the Council must, in the exercise of its functions, have due regard to the need to:
- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
 - Advance equality of opportunity between people who share a protected characteristic and those who do not
 - Foster good relations between people who share a protected characteristic and those who do not.

These are often referred to as the three aims of the general equality duty, or the statutory needs.

- 8.12 As was the case for the original separate duties, the new duty continues to be a duty to have "due regard" to the statutory needs. The weight to be attached to countervailing factors is a matter for members, bearing in mind the issues of relevance and proportionality. The duty is not an absolute requirement to eliminate unlawful discrimination, advance equality of opportunity or foster good relations.
- 8.13 The Equality and Human Rights Commission (EHRC) has issued five guides for public authorities in England giving advice on the equality duty:
1. The essential guide to the public sector equality duty
 2. Equality objectives and the equality duty
 3. Equality information and the equality duty
 4. Meeting the equality duty in policy and decision-making
 5. Engagement and the equality duty
- 8.14 All the guides have now been revised and are up to date. The essential guide provides an overview of the equality duty requirements including the general equality duty, the specific duties and who they apply to. It covers what public authorities should do to meet the duty, including steps that are legally required, as well as recommended

actions. The other four documents provide more detailed guidance on key areas and advice on good practice. Further information and resources are available at:

<http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/guidance-on-the-equality-duty/>

8.15 The EHRC guidance does not have legal standing, unlike the statutory Code of Practice on the public sector equality duty which was due to be produced by the EHRC under the Act. However, the Government has now stated that no further statutory codes under the Act will be approved. The EHRC has indicated that it will issue the draft code on the duty as a non-statutory code following further review and consultation but, like the guidance, the non-statutory code will not have legal standing.

8.16 Members' attention is drawn to contents of paragraph 9 below.

9. Financial implications

9.1 There are no specific financial implications associated with this report or the development of the Council's response. However, the response itself highlights the Council's serious concerns as to the financial assumptions on which the TSA's draft recommendations are based and makes reference to the possible implications on the Council's budget and services were the draft recommendations to be implemented.

10. Equalities implications

10.1 There are no specific equalities implications associated with this report or the development of the Council's response to the consultation. However, the response itself highlights how the TSA's draft recommendations could negatively affect Lewisham's communities and specifically some of its most vulnerable citizens. The TSA's Health Inequalities Impact Assessment was not available for this meeting.

11. Conclusion

11.1 The response incorporating the views of the Healthier Communities Select Committee and Overview and Scrutiny Business Panel will be submitted to TSA prior to the consultation deadline.

12. Background documents

Draft report – Securing sustainable NHS services – Consultation on the Trust Special Administrator's draft report for South London Healthcare NHS Trust and the NHS in south east London

<http://www.tsa.nhs.uk/sites/default/files/TSA-DRAFT-REPORT-WEB3.pdf>

TSA consultation document

<http://www.tsa.nhs.uk/sites/default/files/documents/TSA-Consultation-web.pdf>

Department of Health press release – South London Healthcare Trust to be put into the regime for unsustainable NHS providers.

<http://mediacentre.dh.gov.uk/2012/07/12/south-london-healthcare-nhs-trust-to-be-put-into-the-regime-for-unsustainable-nhs-providers/>

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