



Mayor and Cabinet

Integration with the NHS: approval of participation in NHS South East London Clinical Commissioning Group's Lewisham Borough Based Board

Date: 12 February 2020

Key decision: Yes.

Class: Part 1.

Ward(s) affected: All

Contributors: Executive Director, Community Services, Interim Executive Director, Children and Young People

Outline and recommendations

Outline

The purpose of this report is to consider the Council's approach to, and involvement in, the governance structure and decision making processes for the Lewisham Borough Based Board of the proposed NHS South East London Clinical Commissioning Group and to approve the Council's participation in the Borough Based Board.

Recommendations

Mayor and Cabinet are asked:

1. To note the proposed arrangements for the Council's involvement in the Lewisham Borough Based Board of the proposed NHS South East London Clinical Commissioning Group;
2. To agree to participate in the NHS South East London Clinical Commissioning Group's Borough Based Board on the basis substantially as set out in the Board's draft Terms of Reference (Annex 1), providing that if changes are made to the Terms of Reference the Chief Executive is satisfied that the changes have no negative impact on the Council;
3. To agree to receive further updates on joint work with the proposed NHS South East London Clinical Commissioning Group as required.

Timeline of engagement and decision-making

On 11th December 2019 Mayor and Cabinet agreed in principle to participate in the Lewisham Borough Based Board of the proposed NHS South East London Clinical Commissioning Group.

1. Summary

- 1.1. On 11th December 2019 Mayor and Cabinet agreed in principle that the Council should participate in the Lewisham Borough Based Board of the proposed NHS South East London Clinical Commissioning Group (SELCCG). It is expected that SELCCG will be established on 1st April 2020. SELCCG intends to establish a committee - the Lewisham Borough Based Board - and arrangements in which the Council will have a role. This report provides information about that Board and those arrangements, and recommends to Mayor and Cabinet that the Council should participate.

2. Recommendations

- 2.1. Mayor and Cabinet are asked:
- To note the proposed arrangements for the Council's involvement in the Lewisham Borough Based Board of the proposed NHS South East London Clinical Commissioning Group;
 - To agree to participate in the NHS South East London Clinical Commissioning Group's Borough Based Board on the basis substantially as set out in the Board's draft Terms of Reference (Annex 1), providing that if changes are made to the Terms of Reference the Chief Executive is satisfied that the changes have no negative impact on the Council;
 - To agree to receive further updates on joint work with the proposed NHS South East London Clinical Commissioning Group as required.

3. Policy Context

- 3.1. A detailed breakdown of the policy context was provided in the report considered by Mayor and Cabinet on 12th December 2019, attached as appendix 1. The policy context is set out fully in that report.

4. Background

- 4.1. Lewisham Council and NHS Lewisham Clinical Commissioning Group (Lewisham CCG) have, over the years, worked together in various ways to discuss and deliver improvements in and integration of health and social care services and sought to strengthen the integration of health and social care services, including through local commissioning arrangements. This section sets out the background to the current local arrangements between the Council, Lewisham CCG and other partners. These have been or are intended to be affected by the Government's NHS Long Term Plan, issued in 2019. Section 6 sets out the changes proposed.
- 4.2. In south east London there are currently six CCGs (Bexley, Bromley, Greenwich, Lambeth, Lewisham and Southwark). Since 2017 the approach to commissioning for acute hospital services (e.g. for Lewisham and Greenwich NHS Trust) has been undertaken at this sub-regional level, with formal accountability remaining with the

borough-based Clinical Commissioning Groups.

- 4.3. As part of the delivery of the NHS Long Term Plan, local NHS bodies are expected to work at a sub-regional level with local authority and other partners within the local 'Sustainability and Transformation Partnership' (STP). The name given to the South East London STP was Our Healthier South East London (OHSEL). The purpose of the work of OHSEL is to take local action to improve services and the health and wellbeing of local communities and to develop and implement strategies for the next five years. The local authority partners are Lewisham, Bexley, Bromley, Greenwich, Lambeth and Southwark. Other partners include Acute and Mental Health NHS providers (Lewisham and Greenwich NHS Trust, Kings Healthcare Foundation Trust, Guy's and St Thomas' Foundation Trust, South London and Maudsley Foundation Trust and Oxleas Foundation Trust), the local CCG(s), and primary care providers. This is a collaborative working arrangement between the partners; there is no contract or formal arrangement between the parties and it is not a separate legal entity. On 1st July 2019 OHSEL agreed the development of 6 Primary Care Networks (PCNs) in Lewisham, involving 35 GP practices.
- 4.4 Providers of health and care services within Lewisham have come together to work in partnership around the needs of local patients and to deliver specific enhanced services. This local partnership group of providers is known as Lewisham Health and Care Partners (LHCP) and includes GP practices, the Council (community services, social care, Children and Young People), and other local providers of health and care services¹. Again, there is no formal contractual arrangement regarding this partnership.
- 4.5 LHCP's vision is to achieve a sustainable and accessible health and care system to support people to maintain and improve their physical and mental wellbeing, to live independently and have access to high quality care when they need it, through both local Lewisham and collective South East London action. A key focus of the partnership's work is on the integrated delivery of proactive, co-ordinated and accessible community based care, and establishing effective working across that and secondary provision. Four priorities have been identified as areas where improvements in delivery and outcomes are required: Frailty, Mental Health, Respiratory and Diabetes. Progress reports on the activities of LHCP, along with delivery of the Better Care Fund have been reported to the Health and Wellbeing Board.
- 4.6 The Council and Lewisham CCG participate in local joint commissioning arrangements. These are covered through various existing agreements, including those under section 75 of 2006 Health Act (covering adult mental health and children and young people's services, as well as the mandated Better Care Fund and Improved Better Care Fund). A S75 Management Group is in place with Executive Director representatives from LBL and CCG to oversee the performance of the S75s. Joint commissioning staff work on behalf of the Council and CCG to deliver respective commissioning functions of the CCG and Council for client groups of mental health, learning disabilities, physical disabilities, older adults and children and young people. Increasingly commissioners are working jointly with local providers, including through Lewisham Health and Care Partners (LHCP) where the Council is one of the partners (see further information above).

¹ Lewisham Health and Care Partnership (LHCP) partners are: London Borough of Lewisham (LBL), Lewisham Clinical Commissioning Group (LCCG), Lewisham and Greenwich NHS Trust (L&G), Lewisham Local Medical Committee (LLMC), One Health Lewisham Ltd (OHL), Primary Care Networks (PCN) and South London and Maudsley NHS Foundation Trust (SLAM)

5. NHS South East London Clinical Commissioning Group's Lewisham Borough Based Board

- 5.1. Mayor and Cabinet agreed at their meeting on 11th December 2019 that in principle the Council should participate in the Lewisham Borough Based Board, and that officers should bring back to the Mayor and Cabinet a further report for approval of the governance structure and decision making processes for the Council's participation in that Borough Based Board to include the measures which would be necessary to implement if approved. That is what this report sets out.
- 5.2. The NHS Long Term Plan envisages the creation of a number of sub-regional area-based Clinical Commissioning Groups which will be formed from the merger of the current borough-based Clinical Commissioning Groups. A single CCG will be established for each sub-region.
- 5.3. In September 2019 Lewisham CCG made an application, along with the other CCGs in South East London, to NHS England and Improvement to create a new NHS organisation - 'NHS South East London Clinical Commissioning Group' ('South East London CCG'). That application was made following endorsement by NHS Lewisham CCG's Governing Body at their Public Meeting on 12 September 2019 and subsequently agreement by NHS Lewisham CCG's GP membership on 17 September 2019. The NHS intends that South East London CCG will operate across the six boroughs from 1 April 2020; the existing borough-based Clinical Commissioning Groups will cease to exist.
- 5.4. In considering the establishment of that new CCG, the NHS has engaged with a wide range of stakeholders, including the Local Authority (Officers, Lead Cabinet Member and via Healthier Communities Select Committee). The proposal seeks the restructure of NHS commissioning organisations and will not make any changes to services that residents receive. It is intended that these will be further strengthened as part of the development of the place based system which is referred to below.
- 5.5. Lewisham CCG remains in place until midnight on 31st March 2020; at that point Lewisham CCG will cease to exist (in accordance with provisions in section 14G of the National Health Service Act 2006). Lewisham CCG staff and property will transfer automatically to the new South East London CCG (under section 14I of the National Health Service Act 2006). 'Property' includes contracts and arrangements in which the Council has an interest such as existing section 75 agreements (covering services for adult mental health, services for children and young people, the Better Care Fund and Improved Better Care Fund) and existing joint commissioning staff secondments.
- 5.6. The NHS is making preparations for the merger and the creation of South East London CCG. A draft Constitution has been developed and agreed locally. It was submitted, along with the merger application documents, to NHS England and Improvement and is subject to their further comment. Much of the content is in line with the arrangements under which Lewisham Clinical Commissioning Group currently operates. There are differences including in relation to certain governance arrangements relating to the Council, as set out below.
- 5.7. The draft Constitution of South East London CCG says that most decision making by the CCG will be delegated by the members to the Governing Body (membership is made up of General Practices). The Membership's role includes confirming that the annual commissioning plan is consistent with the CCG and Borough commissioning intentions, and by providing representatives to sit on the Borough Based Boards.
- 5.8. The draft Constitution also covers matters including arrangements for the CCG's Governing Body; arrangements for committees and sub-committees of the CCG and of the Governing Body; standing orders; Schemes of Reservation and Delegation and financial instructions; arrangements for conflict of interest and so on.

- 5.9. The Constitution also includes:
- 5.9.1. Terms of Reference for certain Committees established by the Governing Body (Audit, Remuneration, Primary Care Commissioning).
 - 5.9.2. Establishment of other Committees by the Governing Body (Borough Based Boards, Integrated Governance and Performance Committee, Commissioning Strategy Committee). Their Terms of Reference are to be decided by members of the Governing Body, and are to be included in the Governance Handbook. Further information about the Lewisham Borough Based Board is provided below.
 - 5.9.3. Provision for committees (apart from the Remuneration Committee) to include persons other than members or employees of SEL CCG.
 - 5.9.4. Provision for South East London CCG to enter into 'Collaborative Commissioning Arrangements', whether formal or informal, with '*partner organisations in order to assist with meeting ... statutory duties, particularly those relating to integration*'.
 - 5.9.5. Provision for making 'Joint Commissioning Arrangements with Local Authority Partners' '*to reduce health and social inequalities and to promote greater integration of health and social care*' such as joint commissioning under section 75 of the 2006 Act.

Local input, and the Lewisham Borough Based Board

- 5.10. As part of merger preparations, one of the priorities which the CCG is addressing is how to establish local arrangements and input. The arrangements for this within the Constitution include the arrangements below:
 - 5.10.1. Each of the six Borough Based Directors (to be called 'Director of Integrated Care and Commissioning' in Lewisham, to be jointly funded by the Council and the CCG) are to be members of the South East London CCG Governing Body. On 22 January 2020, Lewisham Council agreed the creation of a new Council post of Director of Integrated Care and Commissioning, subject to Mayor and Cabinet agreeing to participate in the Borough Based Board. If that agreement is given, the post would be jointly funded by the Council and South East London CCG.
 - 5.10.2. There will be a formal committee of South East London CCG – a 'Borough Based Board' - for each borough within the South East London CCG area. These will report directly to the Governing Body and will be '*prime committees of the Governing Body that bring together the CCG and each Local Authority with delegated responsibility for the commissioning of local services, as part of the overall commissioning plans of the merged CCG*'. As a committee of the Governing Body, the Lewisham Board would hold delegated responsibility on behalf of the CCG's Governing Body.
- 5.11. The NHS's intention is that the Boards will address the on-going strategic management and commissioning of those NHS functions and services which are best determined at a local level. It is for each Local Authority to determine its level of participation in these committees and the detail of how each Board would operate in respect of Local Authority business.
- 5.12. Draft Terms of Reference for the Lewisham Borough Based Board have been proposed. These are provided at Annex 1. This paper seeks the comments of Mayor and Cabinet on those Terms of Reference, and approval to the Council's participation in the Lewisham Borough Based Board substantially on the basis of those Terms of Reference. If the NHS makes any changes to those Terms of Reference, it is intended that the Chief Executive will consider those and approve participation on those amended terms if the changes have no negative impact on the Council.
- 5.13. It is proposed that the members of the Borough Based Board for Lewisham will include the Council's Executive Director of Community Services, Executive Director of Children and Young People's Services and Director of Public Health. They will all be in attendance on a non-voting basis. Decision-making is reserved to the CCG members

of the Board. Work will be done to make sure that there is no liability, whether for the Council corporately or for those officers, because of that participation.

- 5.14. In summary, the Terms of Reference for the Lewisham Borough Based Board set out the role of that Board for governance and oversight of the NHS delegated local functions, budgets and services, including the matters set out below. Note that the delegated responsibility only covers NHS services and issues; there is no delegated power or responsibility for Council services and decision making will remain restricted to matters which are entirely sovereign to the NHS.
- 5.15. The draft Terms of Reference set out that the NHS local functions, budgets and services for which responsibility is delegated to the Borough Based Board are:
 - 5.15.1. Commissioning of NHS local services, as part of the overall commissioning plans of the South East London CCG:
 - Some elements of primary care commissioning
 - Community services commissioning
 - Client group commissioning (such as learning disabilities, physical disabilities, mental health, children and young people and maternity services)
 - Medicines Optimisation related to community based care
 - Continuing Healthcare.
 - 5.15.2. Production of an annual delivery plan for the areas of delegated responsibility and funding, to be agreed with the South East London CCG Governing Body. The Borough Based Board will manage and have effective oversight of delivery of the annual plan, the associated budget and performance for the areas in scope, ensuring that best value and optimal outcomes are delivered in these areas, and for escalating to the South East London Governing Body if material risks to the delivery of plans are identified.
- 5.16. Other NHS matters for decision at the Borough Based Board will be set out in a Schedule of matters delegated to officers, including the Lewisham Director of Integrated Care and Commissioning. Those delegations will include responsibility for the management of delegated NHS local budgets and accountability for ensuring budgets are delivered on plan.
- 5.17. Council (and therefore non-NHS) matters will also be considered. It is proposed that the discussions at the Borough Based Board meetings will cover Council matters, although not as part of the formal Board machinery. In that context, the Borough Based Board would be used as a forum for discussion of matters of local common interest between NHS and the Council and for input, advice and recommendations between Council and NHS colleagues. This would not involve decision making on Council matters. Those discussions would however inform decision making by the Council on Council issues (including decisions by Mayor and Cabinet and by Council officers). The parties will document their joint understanding of the arrangements under which those discussions will operate so that the Council's legal obligations (including regarding decision making) are delivered. That document will be approved by the Chief Executive.

6. Financial implications

- 6.1. This report describes the proposed integrated commissioning model in Lewisham via a Borough Based Board. The Council contribution towards the new structure will be from base budget and from Better Care Fund.
- 6.2. The new arrangements are expected to secure improvements to commissioning for both health and social care although it is too early to quantify these.

7. Legal implications

- 7.1. The decisions sought by this report have to be made within the current legal framework which underpins the integration of health and social care services, and thus between local authorities and the NHS. One of the barriers which has impeded progress to date on the integration of social care and health is legislative. The NHS Long Term Plan recognises this factor, but perhaps unsurprisingly, contains a particular emphasis on the law relating to health commissioning. In this respect the requirements in the Health and Social Care Act 2012 on Clinical Commissioning Groups to tender services with potential intervention by the Competition and Markets Authority remain on the statute book, and the duty on health commissioners and providers to collaborate awaits full expression in legislation. The national strategy proposals for Borough based partnerships and Integrated Care Strategies appear to be in part a “workaround” in an attempt to ameliorate the negative impact of hard commissioner/contractor splits without any statutory assistance to do so. While there are proposals for legislative change, these are not in place and would not necessarily address all the issues from the perspective of local authorities.
- 7.2. Since Mayor and Cabinet considered the earlier report on 11th December 2019 further information has been obtained about the governance arrangements as set out in this report, including the arrangements for decision making by the Borough Based Board. It is clear from the Terms of Reference of the Borough Based Board that the Board will not take Council decisions.
- 7.3. Paragraph 5.17 above sets out that the discussions at the Borough Based Board meetings will cover Council matters, although not as part of the formal Board machinery; in relation to those matters the Borough Based Board would be used as a forum for discussion of matters of local common interest. That paragraph notes that further work is to be done to document the Council and South East London CCG’s joint understanding of the arrangements under which those discussions will operate. This will ensure that the Council’s legal obligations (including regarding decision making) are delivered. That document will be approved by the Chief Executive.
- 7.4. The effect will be that Council decisions about integrated health and social care (such as about joint working arrangements with the NHS, decisions regarding section 75 arrangements, placing of contracts regarding provision of services, and staffing arrangements) are made in accordance with Council legal and Constitutional requirements. The key features set out below will apply.

Council decisions

- 7.5. The basic rule is that only the Council (whether at full Council, through a Council committee or the Mayor, or as appropriate as delegated) may make decisions which are for it to make. The Council cannot delegate its decision making to an outside body. Neither may it subjugate its decision making to the decisions of another body. It cannot fetter its discretion in this way.

Mayoral decisions

- 7.6. By law, the full Council sets the Council’s budget, proposals for which are made by the Mayor. Once the budget is fixed, unless a decision is specifically prohibited to him by law, all decisions are for the Mayor to make so long as they are consistent with the Council’s budget and policy framework. There are regulations which set out what is and what is not a Mayoral decision, but decisions about social care and public health are for the Mayor (except to the extent that they fall to the Health and Wellbeing Board by regulation).

Mayoral delegation

- 7.7. The Mayor may delegate decision making but he may only do so in accordance with

the law. He may delegate to the Executive (in Lewisham called the Mayor and Cabinet), a sub group of his Cabinet, an individual cabinet member, an area committee (which we do not have in Lewisham), a joint committee, or to an officer. He could not delegate anything to the Borough Based Board, and it is not intended that any such delegation should happen.

The scope of Executive Directors' delegation

- 7.8. In Lewisham, powers are delegated to the Executive Directors in accordance with the Mayoral Scheme of Delegation. There are a number of reserved decisions which are for members to make, for example as below. It is always possible for the Mayor to amend this scheme of delegation:
- 7.8.1. decisions relating to the provision, commissioning or purchasing of services which in the opinion of the Executive Director would lead to major change in service delivery;
 - 7.8.2. decisions relating to the joint commissioning of services with health bodies or other external bodies which would have financial implications for the Council in excess of £500,000;
 - 7.8.3. Award of contracts above the European threshold including under the Light Touch Regime.
- 7.9. There are other exemptions. Decisions not reserved to members are for officers to make. Executive Directors establish their own Schemes of Delegation; however, they could not delegate anything to the Borough Based Board.

The process for Mayoral decision making

- 7.10. This is largely prescribed in law. Many provisions apply irrespective of who makes the decision, so even if very much larger powers were granted to EDs sitting on the Borough Based Board, it would make no difference.
- 7.11. The law provides that some Mayoral decisions are to be “key decisions” (regardless of whether the decision is made by Mayor and Cabinet, or by an officer). The legal definition of a key decision is one which would be likely to have a significant effect in two or more wards, or is in excess of a financial threshold set by the Council. The Council has set a general threshold of £500,000. Where a decision relates to a contract award, this threshold is £200,000. There is also a number of specific instances where a decision would be key (for example granting interest in land over £500,000). Whoever makes a key decision, there is a legal requirement that it must be included in the Forward Plan (normally for 28 days) before the decision is made.
- 7.12. Also there is a legal requirement that once a decision has been made but before it has been implemented there must be an opportunity for “call in” by overview and scrutiny members. “Call in” is the right of overview and scrutiny members to ask the decision maker to reconsider. This function is exercised by the Overview and Scrutiny Business Panel. Where this happens, the decision is not effective until the decision maker has reconsidered. This process cannot be subverted except in cases of real urgency.
- 7.13. It would not be possible, nor is it intended, that the Borough Based Board to be established by South East London CCG should operate as some sort of committee that binds the Council. Council/Mayoral delegations to Council officers sitting on that Board would not allow decisions to be made by the Board. The Board could not have Council budgets delegated to it in the absence of permissive legislation. Such legislation exists for S 75 arrangements under which pooled budgets may be established, but not otherwise. Decisions about those matters would have to be taken in accordance with the legal process and the Council’s own statutory duties.

Equalities issues

- 7.14. The Council has a public sector equality duty (the equality duty or the duty - The Equality Act 2010, or the Act). It covers the following protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. In summary, the Council must, in the exercise of its functions, have due regard to the need to:
- 7.14.1. eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
 - 7.14.2. advance equality of opportunity between people who share a protected characteristic and those who do not.
 - 7.14.3. foster good relations between people who share a protected characteristic and those who do not.
- 7.15. It is not an absolute requirement to eliminate unlawful discrimination, harassment, victimisation or other prohibited conduct, or to promote equality of opportunity or foster good relations between persons who share a protected characteristic and those who do not. It is a duty to have due regard to the need to achieve the goals listed above. The weight to be attached to the duty will be dependent on the nature of the decision and the circumstances in which it is made. This is a matter for the decision maker, bearing in mind the issues of relevance and proportionality. The decision maker must understand the impact or likely impact of the decision on those with protected characteristics who are potentially affected by the decision. The extent of the duty will necessarily vary from case to case and due regard is such regard as is appropriate in all the circumstances.
- 7.16. The Equality and Human Rights Commission (EHRC) has issued Technical Guidance on the Public Sector Equality Duty and statutory guidance. The Council must have regard to the statutory code in so far as it relates to the duty. The Technical Guidance also covers what public authorities should do to meet the duty. This includes steps that are legally required, as well as recommended actions. The guidance does not have statutory force but nonetheless regard should be had to it, as failure to do so without compelling reason would be of evidential value. The statutory code and the technical guidance can be found on the EHRC website.
- 7.17. The EHRC has issued five guides for public authorities in England giving advice on the equality duty. 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.

8. Equalities implications

- 8.1. There are no equalities implications arising from this report as no services will be changed as a result of the changes outlined. However, it is expected that the creation of the Borough Based Board will bring decision making between the Council and NHS closer together and therefore allow for more focused work taking inequalities, particularly health inequalities, in the borough.

9. Climate change and environmental implications

- 9.1. There are no direct climate change and environmental implications arising from this report.

10. Crime and disorder implications

- 10.1. There are no direct crime and disorder implications arising from this report.

11. Health and wellbeing implications

- 11.1. As highlighted above it is expected that the creation of the Borough Based Board will bring decision making between the Council and NHS closer together and therefore allow for more focused work taking inequalities, particularly health inequalities, in the borough.

12. Social Value implications

- 12.1. N/A

13. Background papers

- 13.1. Mayor and Cabinet paper - Update on Integration with NHS and the creation of a Borough Based Board – 11 December 2019

14. Glossary

Term	Definition
CCG	Clinical Commissioning Group. NHS body with responsibility for the organisation and purchase of medical services within a particular area.
SELCCG	South East London Clinical Commissioning Group

15. Report author and contact

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