healthwatch Rutland

Attachment 1

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26 September 2018

Members of the LLR Joint Health Overview and Scrutiny Committee
Dr. Richard Palin, Chair ELRCCG Governing Body

Dear Councillors and Key Stakeholders:

Re: Special meeting of the Leicestershire, Leicester and Rutland Joint Health Scrutiny Committee 28th September 2018

As members of Healthwatch Rutland (HWR), we have been closely following the developments in the University Hospitals of Leicester NHS Trust (UHL) plans to reconfigure level 3 ICU beds and associated services away from Leicester General Hospital. We outline our major concerns below:

1. **The history of Healthwatch Rutland's concerns about the lack of public consultation over the reconfiguration of the level three intensive care beds and associated services out of Leicester General Hospital**

We understand that it has been said that the issue of public consultation is 'new' in September 2018, but this is not the case. HWR has been concerned about the lack of public consultation for some considerable time. Indeed, following the East Leicestershire and Rutland (ELR) Clinical Commissioning Group's (CCG) consideration on 13th November 2017 of the outline business case proposing removal of level three Intensive Care Unit (ICU) beds and associated services out of Leicester General Hospital 2017, the then Chair of HWR, Jennifer Fenelon, wrote to Dr Richard Palin, chair of ELR CCG. She confirmed the concerns which she had already raised at a meeting on 12th November 2018 and suggests that the speed of her response, some of which is copied below, is indicative that this should be taken very seriously:

> ''I was, therefore, extremely concerned at the suggestion that a combined Scrutiny Committee had "decided" that the ICU at LGH should transfer to Glenfield. Clearly that is not the case as the function of scrutiny is to scrutinise. I enclose the guidance on both the role of Scrutiny and HW in the scrutiny process. Its powers are to refer to the Secretary of State.

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A CCG cannot transfer its decision making responsibility to the Joint Scrutiny Committee as suggested. I have now searched the Joint Scrutiny archives and have found no such discussion. I have, however, found a paper submitted by UHL to Leicester City Scrutiny Committee in March 2017 which was for information and not for a decision. Copy attached.

The UHL team asked ELR CCG today to agree the transfer of the ICU at LGH to GH. The papers did give the impression that a much larger decision was being requested but if, as Paul Traynor, suggests, they were only asking for the decision on ICU itself and not anything else which might prejudice STP consultation there is then a question of what public consultation has been carried out on this.

The legal guidance on consultation is voluminous and was reprised for STPs in September 2016. This included the four Lansley tests. I also find the guidance to CCGs from Mills and Reeve helpful which I also attach. The consultation process needs to be carried out before a decision is made by your body (and the other CCGs)…

Early on D.[1] and I discussed several times whether the emergency temporary closure system should be used to sort out ITU while not prejudicing formal consultation on the closure of LGH. In the end we decided that it was dragging on so long it could no longer be called an *emergency.''*

This letter was also copied at the same time to John Adler, chief executive of UHL who replied on 29th November 2017 and an extract is copied below:

''In February and March 2015, the Trust presented a paper to the Health Overview and Scrutiny Committees of both Leicestershire County and Leicester City Councils. The paper set out the Trust's concerns regarding ICU and sought the committees' approval to enact the plan to reconfigure ICU.

The County Council was satisfied that the plan would improve patient experience and outcomes and, in view of this, agreed that it would not be in the interest of the people of Leicestershire for it to insist upon formal consultation as this would divert resources away from the project team charged with the delivery of these necessary changes, and therefore waived its right to be formally consulted.

The City Council noted the guidance issued to Local Authorities, ('Guidance to Support Local Authorities and their Partners to Deliver Effective Health Scrutiny', published in June 2014), which set out certain proposals on which consultation is not required; specifically, "Where the relevant NHS body or health service commissioner

[1] *Anonymised to protect identity.*

believes that a decision has to be taken without allowing time for consultation because of a risk to safety or welfare of patients or staff – in such cases the NHS body or health service provider must notify the local authority that consultation will not take place and the reason for this".

Both Local Authority Scrutiny Committees supported the proposal to reconfigure ICU….

[W]e can offer no explanation other than this was a missed opportunity and Rutland County Council should certainly have been involved. We will contact their Scrutiny officer and ensure that the Council are able to consider the proposal.''

Dr Palin, on behalf of the East Leicestershire and Rutland CCG replied on the 11th December 2017:

''I note that John Adler, Chief Executive of the University Hospital of Leicester (UHL) has provided you with a detailed response in relation to the process followed by UHL and the reasons public consultation was not conducted in respect of their business case. I also note UHL's commitment to ensuring the Rutland Health Overview and Scrutiny Committee has opportunity to consider the matter and provide an opinion.

As commissioners, we considered the Outline Business Case (OBC) for the proposed move of intensive care services at our Governing Body meeting on 14 November 2017. Our approval of the OBC, along with that of both Leicester City CCG and West Leicestershire CCG, triggers the production of a final business case which will return to CCG Governing Bodies for consideration at a later date before being considered for funding at a national level.

While there was clear reference in UHL's OBC and supporting paper to the reconfiguration vision set out in the draft local Sustainability and Transformation Partnership Plan, it is important to note that the OBC put before our Governing Body regarding intensive care services is a standalone plan, which has been developed in response to concern over the sustainability of the current clinical arrangements. The draft Leicester, Leicestershire and Rutland Sustainability and Transformation Partnership Plan is subject to continued public engagement and a public consultation is expected in the New Year.

I would wish to assure you that NHS East Leicestershire and Rutland Clinical Commissioning Group is committed to fulfilling our statutory duties around public involvement and that we will continue to ensure that where appropriate, local people have opportunity to shape plans, comment on proposals and influence decisions.''

Turning now to 2018, our Healthwatch Rutland representative attended the CCG Governing Body meeting on 10th July 2018 when the Full Business Case for a series of removals from Leicester General Hospital was considered. The representative reminded the CCG of its responsibility, as a commissioner of UHL services, to ensure consultation with the Local Authority and for both UHL, as a provider, and the commissioners to ensure public consultation is carried out. This comment was omitted from the original draft minutes of the meeting but it was agreed that an amendment could be added at the Governing Body meeting on 14th August 2018. Below is an extract of the HWR's representative's email requesting this amendment

> B/18/121 item 3 - the concern I raised was about urology and not neurology. In this discussion in July, I also cited NHS England (2018) *Planning, assuring and delivering service change for patients.* This states:
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> 'Where a proposal for substantial service change is made by the provider rather than the commissioner, the 2013 Regulations require the commissioner to undertake the consultation with the local authority on behalf of the provider. Where there is a duty for the commissioner to consult the local authority under the s.244 Regulations, it will almost invariably be the case that public consultation is also required (p11)…in practice, public consultation requirements for commissioners and providers may be satisfied with one public consultation, but it is for each organisation with a public involvement duty to satisfy themselves that the consultation properly addresses their responsibilities. Therefore both commissioners and providers need to ensure that they have satisfied their statutory duties to involve and consult'
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> My understanding of this is (as I said at the meeting) that this places responsibility on the CCGs for ensuring public consultation is adequate. I remain unconvinced that public consultation has been adequate.
>
> I would like these [comments] to be minuted.

Following the heated debate at the 4th September 2018 HOSC meeting and the accompanying media attention and street protests, HWR attempted again to alert ELR CCG of its responsibilities by an email to the Governing Body on 10th September 2018 in preparation for its meeting on 11th September 2018. The question asked is copied below:

> Healthwatch Rutland would like to know if the CCG are aware that the lack of public consultation about the Full Business Case for the relocation of the Leicester General Hospital Intensive Care Unit has now caused concerns such that it was referred to the LLR Joint HOSC last week for evaluation? At this meeting, many councillors were very concerned and some accused UHL of misleading the

> public and misrepresentation (even though this might have been unintentional). The matter has been put aside for a special meeting with the date yet to be announced. As I said in July, where a provider proposes a substantial change it is the responsibility of the commissioners to make sure due public consultation has taken place - so what actions is the CCG proposing to take? This is particularly relevant for Healthwatch Rutland because, although Leicester city and Leicestershire scrutiny boards were consulted in 2015, Rutland scrutiny was only consulted in April this year. Also, as this move is said by UHL to be the key to unlocking the reconfiguration of 3 to 2 acute hospitals, it seems the proposals might lead to LGH being no longer an acute hospital. It is, though, the nearest acute hospital to Rutland and this side of the county.

A written reply within 7 days was promised but has not been received. The lack of reply was taken up with Tim Sacks, the ELR CCG chief operating officer at HWR's AGM on 19th September 2018 at which our concerns about serious omissions in public consultation were raised. He said he would pass on these concerns.

2. Minutes of the meeting of the Leicestershire, Leicester and Rutland Joint Health Scrutiny Committee 4th September 2018

We draw particular attention to Councillor Cutkelvin's (as the Chair) statement that UHL had misrepresented the views (stated in March 2015) of the Leicester City Council (LCC) Health and Wellbeing Scrutiny Committee when presenting its plans to Rutland County Council in April 2018. This alleged misrepresentation was viewed by councillors, in turn, as the apparent misleading of Rutland County committee.

Councillor Cutkelvin is recorded in the minutes as saying that:

> She believed they [UHL] felt they had fulfilled their duty to consult by going to the various scrutiny meetings, including scrutiny at Leicester City and Leicestershire County Council in 2015 and more recently at Rutland County Council in April 2018. The Chair agreed that the plans for the consolidation of Level 3 ICUs had been in the public domain and that now the funding was available there was a strong argument for wanting to make that investment. However, she expressed disappointment that the report did not address the matter of urgency as fully as she had hoped.
>
> The Chair stated that despite the urgency of the move, the UHL had managed to mitigate the situation with the ICU at the LGH for the last three years and although far from ideal, a public consultation would only require them to continue to manage the situation for a further three months (pp2-3).

We therefore call upon page 17 of the Department of Health's (2014) ''*Local Authority Health Scrutiny. Guidance to support local authorities and their partners to deliver effective health scrutiny'',* which states:

> 3.1.17 Regulation 30 also requires local authorities to appoint joint committees where a relevant NHS body or health service provider consults more than one local authority's health scrutiny function about substantial reconfiguration proposals (referred to below as a mandatory joint health scrutiny committee). In such circumstances, Regulation 30 sets out the following requirements (see section 4 on consultation below for more detail).

- Only the joint committee may respond to the consultation (i.e. rather than each individual local authority responding separately).
- Only the joint committee may exercise the power to require the provision of information by the relevant NHS body or health service provider about the proposal.
- Only the joint committee may exercise the power to require members or employees of the relevant NHS body or health service provider to attend before it to answer questions in connection with the consultation

The Director of Strategy and Communications stated that 'a basic premise was that consultations took place where there were options, but on this issue, it was considered that there were no options'. However, as the Mills and Reeve briefing (2013)[2] notes (see page 9):

> ''If a public body identifies only one serious option to put to the public, it is entirely lawful to consult on implementing that single option. However, you may need to justify why only one option was realistic. Also, you must allow members of the public to suggest alternative options and, if they do so, you must give these options genuine consideration.''

We think that it is clear from both the foregoing that proper public consultation has not been undertaken when compared to these requirements

[2] Mills and Reeve (2013) *Reconfiguring services: when must NHS bodies consult the public? How do they go about it? And how can they protect themselves from legal challenge?* https://www.mills-reeve.com/files/Publication/1c71458e-6a71-4b88-95df-a7a575500263/Presentation/PublicationAttachment/f3a0da0b-1fbd-4081-952d-b51f14505974/Reconfiguring%20services%20briefing_October%202013.pdf

3. University Hospitals of Leicester NHS Trust. Report to the Leicestershire, Leicester and Rutland Joint Health Scrutiny Committee 28th September 2018

UHL states that it meets the 'Gunning Principles' because the time for consultation is at the formative stage and not at this late date. As we have demonstrated, Healthwatch Rutland detailed its concerns in 2017 at the formative stage but these concerns were dismissed by the Chair of the ELR CCG and UHL chief executive.

Furthermore, UHL's words, '*any attempt to undertake a public consultation now would be viewed as pointless because it is apparent that the decisions of both the CCGs and the Trust have been made and both the local authorities and public are fully aware of that fact*' would seem to imply a conviction, which we consider erroneous, that public consultation is neither necessary nor a legal requirement.

The Trust also states in point 4.4. (p2) that '*public consultation now would not add anything to the process as the decisions have already been made*.' However, public consultation remains vital in ensuring that plans, still hidden from public view in the appendices, may be properly scrutinised and alternative suggestions raised. As noted above in the views of others, this is both ''proper process'' and may, indeed, result in a better build or design which UHL might not have considered.

UHL are also concerned about delay and consequent increased costs. However, whilst we note that this matter has already been in process since 2015 anyway, we also ask that UHL considers the longer delay and greater costs which may be incurred if the matter is referred to the Secretary of State and a possible judicial review, and would suggest that the better use of public monies, and, indeed, value for money (and for speed from this point onwards) is to properly consult the public now.

4. HWR's on-going concerns - summary

We list our concerns below:

a) As the previous section sets out, HWR historical challenges to the lack of public consultation on the ICU reconfiguration project have consistently been rebuffed. This, in turn, is thwarting the Healthwatch statutory role to:

> … to make sure that those running services, and the government, put people at the heart of care.
>
> … to understand the needs, experiences and concerns of people who use health and social care services and to speak out on their behalf.
>
> … ensuring that people's worries and concerns about current services are addressed.

We work to get services right for the future[3].

b) The legalities concerning public consultation on substantial changes in the provision of healthcare services generally, and the UHL reconfiguration plans more specifically, have been well covered within the public domain more recently[4], and we do not intend to rehearse them here. The legal issues around this case are complex but it also appears to the case that NHS England, as commissioners of specialised services, such as renal transplant[5], is also responsible for public consultation as set out in section 13Q of the Health Services Act 2006. We will therefore be taking this matter up with NHS England directly.

c) We are concerned about UHL's apparently belated decision to raise the profile of the interdependency of the East Midlands Congenital Heart Centre in the media and into their report presented to the Joint HOSC for the meeting on 4th September. The full business case diagrams and explanations of ward movements on pages 17 and pages 169-170 do not seem to mention this interdependency. UHL's apparently newly altered diagram of ward movements in their report to the Joint HOSC meeting on 4th September 2018) do not sufficiently clarify this claimed interdependency and compounds concerns which have been raised that this matter has recently been given undue emphasis by UHL in order to stir public emotional responses to result in a request to drop demands for public consultation.

Whether this is the case or not, it remains our view that the principle of proper public consultation should not be sacrificed on the grounds of the EMCHC issue.

d) The appendices, which contain much of the detail, are still not within the public domain despite requests from one of our board members. The public needs to have sight of these appendices. Without them, the (non) consultation is even more incomplete.

e) UHL has a repeated argument that public consultation cannot go ahead until funding has been secured. One of the key points in the NHS document, '*Planning, assuring and delivering service change for patients'* (March 2018) is copied below and does **not** support UHL's position (page 8):

''Not all substantial service changes require capital expenditure.

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[3] https://www.healthwatch.co.uk/what-we-do

[4] see for example Underwood et al 2018, the Amended 2006 Health Services Act, Department of Health's *Local Authority Health Scrutiny. Guidance to support local authorities ad their partners to deliver effective health scrutiny* and NHS England (2018) *Planning, assuring and delivering service change for patients*

[5] https://www.england.nhs.uk/commissioning/spec-services/npc-crg/group-a/a06/

However, where this is the case and the scheme has been assessed by NHS England and NHS Improvement as having a reasonable expectation that the level of capital require will be available, **public and local authority consultation should be undertaken before a Strategic Outline Case for capital funding is submitted to NHS Improvement.''** (our emphasis)

f) This reconfiguration plan is described as the ''first stage'' in changing services offered at Leicester General Hospital (LGH) – ie from the acute hospital nearest and most easily accessible to the Rutland population. This preempts public consultation on the future of LGH as the loss of services involved in the ICU reconfiguration makes the argument for LGH's long-term sustainability less valid. Nor does the full business case assess the potential negative impacts on transport logistics for Rutland residents.

g) There are contradictions and ambiguities throughout the full business case, the HOSCs' minutes and UHL's report about whether this ICU reconfiguration is to be considered as part of the Sustainability and Transformation Plan (STP - also referred to as Better Care Together - BCT). However, the STP/BCT final draft has not yet been released, consulted upon or agreed.

h) The fitness for purpose of the proposed new buildings is called into question as health building notes recommendations are not being met.

Therefore, for all the above reasons, we conclude that only an open and formal public consultation will address the many concerns we have listed here.

Yours Faithfully,

P.P.

Professor William Pope
Chair, Heathwatch Rutland

Distribution to:
Members of LLR Joint Health and Scrutiny Committee

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