National Association of LINks Members

The Clerk
Secondary Legislation Scrutiny Committee
House of Lords
London SW1A 0PW

31st December 2012

RE SI 3094 National Health Service,-NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) Regulations 2012 (Negative procedure) laid on the 17th December 2012

I would be very grateful if you would pass onto the Committee our concerns about the Regulations above which relate to the structure and governance of Local Healthwatch. Our concern is that the SI does not deliver the policy intentions of impartiality and independence for Local Healthwatch promised by the Secretary of State for Health and our reasons for believing this to be the case are set out below.

A local authority is required by the Health and Social Care Act 2012 to contract with one social enterprise organisation to create a Local Healthwatch from April 1st 2013. The Local Healthwatch is not a statutory body, but must carry out statutory activities. The Local Healthwatch may subcontract some or all of its statutory activities. The subcontractors are not statutory bodies and do not need to be social enterprises.

SI 3094 is underpinned by policies set out in the White Paper Equity and Excellence (July 2010) which aimed to 'strengthen the collective voice of patients' through 'a new independent consumer champion within the Care Quality Commission' manifest at local

level as local HealthWatch with ‘a strong local infrastructure’.

Health Minister Lady Northover described Healthwatch as – ‘indeed the voice of the people.’ (col.1956) during the Report stage of the Health and Social Care Bill in House of Lords on the 8th March 2012. The need for such a powerful public voice has been highlighted by the tragedies at Mid Staffordshire NHS Foundation Trust, Winterbourne View, Worcester NHS Acute Hospitals Trust and University Hospitals of Morecambe Bay NHS Foundation Trust.

Local Healthwatch is intended to monitor local health and social care services using its ‘enter and view powers’, seek views from patients, social care service users and the public and make recommendations for improvement to providers and commissioners. Local Healthwatch also has the power to gather information, receive responses to its recommendations and escalate issues to the Care Quality Commission and to Healthwatch England.

It is essential that Local Healthwatch is independent and led by the service users and the public if it is to have credibility and influence. It must not be the tool of those it monitors and inspects – i.e. the NHS, local authorities and other providers of health and social care in the public and private sector. This level of independence was promised by Andrew Lansley, the former Secretary of State for Health and conveyed to the House of Lords by Baroness Northover at the Report stage of the Health and Social Care Act 2012, on the 8th March 2012 (col. 1980):

"I have listened to the concerns expressed about the need for Local Healthwatch to have strong lay involvement. I completely agree. This will be vital to the success of local Healthwatch. Therefore, I confirm to the House today that we will use the power of the Secretary of State to specify criteria, which Local Healthwatch must satisfy, to include strong involvement by volunteers and lay members, including in its governance and leadership. This will have the effect that a local authority cannot award a Local

Healthwatch contract to a social enterprise unless this condition is satisfied. I hope that that provides reassurance to noble Lords. My noble friend Lady Jolly also flagged this up." (Baroness Northover).
However, the Regulations which you the Committee are considering are not consistent with the intentions expressed by the Secretary of State.

A. Decision-makers in Local Healthwatch or its contractors: The SI defines two types of 'lay involvement'. Section 34. (1)

a. 'lay people' to exclude health and social care professionals - but not paid managers or other staff in those services ((34.(1)), nor staff of Local Healthwatch contractors

b. 'volunteers' as unpaid members of the governance of Local Healthwatch or its contractors.

The definition of a volunteer fails to define who might or might not be included as a volunteer, therefore the definition might include staff employed at any level in health and social care or local government.
We believe it was the intention of the Secretary of State that only those members of the public who are engaged in the seeking out of views of the public about services and monitoring of services should have designated governance roles. Any other definition would in our view completely undermine the independence of Local Healthwatch. The consequence of the Regulations as they now stand is that senior staff in health, social care or local government can be involved as 'lay people' or 'volunteers' in Local Healthwatch, provided they are not paid by Local Healthwatch. The Regulations would also permit paid staff from the Local Healthwatch contractor and its sub-contractors to act as 'lay persons' or 'volunteers' as defined in the Regulations. These definitions fail to deliver independent or meaningful lay involvement in the governance of Local Healthwatch or its sub-contractors. Also people who are excluded as 'lay people' could be Local Healthwatch leaders as 'volunteers' and vice versa.

B. Local Healthwatch as a social enterprise

Section 35 of the Regulations sets out the criteria for a body to become a Local Healthwatch social enterprise. Inexplicably, these Regulations do not apply to Local Healthwatch sub-contractors, which may carry out all of the activities of the body contracted by the local authority as the Local Healthwatch. Thus, Local Healthwatch can sub-contract with other organisations to provide statutory activities, but there is no restriction on the type of organisations these can be; except that they cannot be NHS organisations or local authorities. Any the sub-contractors are not bound by the duties laid on Local Healthwatch as a social enterprise providing statutory services. Local Healthwatch can contract with any number of subcontractors for the provision of statutory activities. It is also important to note that only 50% of the profits from Local Healthwatch must be applied to Local Healthwatch activities, unless it is a charity or Community Interest Company.

C. The nature of the involvement of lay people and volunteers as defined.

Section 38 of the Regulations requires the 'involvement' of 'lay' persons and 'volunteers' in the 'governance' of Local Healthwatch, but 'involvement' is not defined which means that Local Healthwatch might not the powerful consumer champion promised by the Secretary of State. The aspirations of the Secretary of State could have been secured in section 40(4) (a) by requiring that lay people, appropriately defined, were those who made 'the relevant decisions'.

D. Freedom of speech of Local Healthwatch

Section 36 of the Regulations, defines of what constitutes 'community benefit' – the statutory criteria required of social enterprises to make them eligible to be a Local Healthwatch. Some crucial activities are excluded from 'community benefit', effectively banning Local Healthwatch from participating in these activities. Local Healthwatch cannot oppose or promote any national or EU law, any national or local policy or planned or actual changes in either. This could include local authorities, the NHS, Clinical Commissioning Groups etc.

Subsection (2) legitimises such activities in certain circumstances only if: … a person might reasonably consider to be activities carried on for the benefit of the community in England if – (a) they can reasonably be regarded as incidental to other activities, which a person might reasonably consider to be activities carried on for the benefit of the community in England;
The definition of 'incidental' is confusing and the concept of activities that would benefit the public's health and social care services, not being carried out by the bodies set up to carry them out, incomprehensible to us and we suspect to most local people who are expected to participate in Local Healthwatch activities.

A central theme of government policy is that local people should able to influence improvements to local health and social care and advise authorities, through Local Healthwatch, of any concerns they have been unable to resolve by raising issues themselves. The mechanism for them to do this is potentially powerful, but structurally weak, because Local Healthwatch is funded by local authorities, who provide the social care that Local Healthwatch is meant to monitor. It is essential in our view, that in relation to the operation of Local Healthwatch that:

- § governance must be transparent and open to and led by local people with no conflict of interests, but impermeable to any adverse influence

- § it must act in a proportionate but effective manner and be free to do so

- § public money being used for its funding must be protected (ring-fenced) for that purpose and not used for unrelated activities, for profit or otherwise.

We do not feel that SI discharges the government's policy intentions. Furthermore, we believe that the Regulations will be incomprehensible to most local people who are expected to participate in Local Healthwatch.

I hope you will consider these issues and those contained in our Press Release during your deliberations on the Local Healthwatch Regulations.

We are grateful to Elizabeth Manero for advice on these matters.

Yours sincerely

Malcolm Alexander
Chair