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National Association of LINks Members

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MAJOR CHALLENCE TO HEALTHWATCH REGULATIONS

LORDS SET TO SAVAGE GOVERNMENT'S PLAN TO INCAPACITATE LOCAL HEALTHWATCH

A motion attacking LOCAL HEALTHWATCH Regulations will be put to the House of Lords today, in a major challenge to the government, on the effectiveness and freedom of its new health and social care watchdog. The motion to be moved by **Lord Collins of Highbury** is expected to be supported by Labour, Liberal Democrat and Conservative peers. The motion attacks the government's virtual ban on Healthwatch campaigning to improve health and social care services, on the grounds that the ban "deliberately ties the hands of Local Healthwatch bodies from giving public voice to patient interests".

The motion follows a critical report from a Parliamentary committee (Secondary Legislation Scrutiny Committee), expressing concern that the Regulations may leave Local Healthwatch vulnerable to manipulation, contrary to the government's claimed intention "to strengthen the collective voice of patients". Concerns centre on the risk of staff of local healthcare contractors becoming members of Local Healthwatch and using their influence in ways not in the public interest and not to the benefit of patients. The Committee concluded that the Department of Health (DH) needs to address urgently, to the satisfaction of the public the points raised, saying without trust in the basic structure of LHW, the DH simply may not get the Local Healthwatch volunteers it needs. The Committee endorsed NALM's view that:

"It is essential that Local Healthwatch is independent and led by service users and the public if it's to have credibility and influence. It mustn't be a tool of those it monitors and inspects".

Malcolm Alexander, Chair of NALM said: "The government's decision virtually to ban Healthwatch from campaigning to improve health and social care services is a death blow for local Healthwatch. Without independence, and without leadership from users of health and social care services and real power, Local Healthwatch will have no credibility or influence. It must be a resource for the public, not those it monitors and inspects. The Francis Report is likely call for more powerful public monitoring of services. The government must withdraw the Local Healthwatch Regulations and redesign Healthwatch to create a genuinely effective people's watchdog in health and social care to ensure safe and effective services for all".

Ruth Marsden, Vice Chair of NALM, said:
"This blatant attempt to limit Local Healthwatch shows the very defensiveness that has bred so many tragedies already. We were promised the "independent patients' champion" not a token talking shop. A government without courage is a sad spectacle".

THE MOTION

Lord Collins of Highbury to move that this House regrets that the NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) Regulations 2012 (SI 2012/3094) fail to guarantee sufficient representation of local patient interests and, despite Government assurances given to the House at Committee stage of the Health and Social Care Bill on 15 December 2011, have through restrictions on campaigning deliberately tied the hands of Local Healthwatch bodies from giving public voice to those patient interests. *23rd Report from the Secondary Legislation Scrutiny Committee*

Notes for editors:

1) Malcolm Alexander is Chair of the National Association of LINks Members. He can be contacted on: 0208 809 6551 or 07817505193 or NALM2008@aol.com

2) Ruth Marsden is the Vice Chair of the National Association of LINks Members. She can be contacted on: 01482 849 980 or 07807519933 or ruth@myford.karoo.co.uk

3) NALM is the national organisation of Local Involvement Network members and was formed on April 1st 2009. NALM aims to stimulate more powerful approaches to public and user involvement and build grass roots movements that can influence local and government policy on health and social care.

4) LHW Regulations can be found at: http://www.legislation.gov.uk/uksi/2012/3094/part/6/made

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

5) Local Healthwatch (LHW) is being set up by government from April 1st 2013 to be the voice of local people and to make sure that health and social care services are designed to meet the needs of patients, social care users and carers. It was intended to be a powerful and influential body, led by local people and intended to influence and challenge the effectiveness of health and social care services and ensure that action is taken when services fail to meet local need.

6) "governmental authority" includes—

(a) any national, regional or local government in the United Kingdom or elsewhere, including any organ or agency of any such government;

(c)any organisation which is able to make rules or adopt decisions which are legally binding on any governmental authority falling within paragraph (a) or (b) of this definition;

7) "public authority" includes— any person whose functions are functions of a public nature;

8) LHW will have a duty to monitoring services, obtaining the views of people about their experiences of care, make and recommendations about how services should be improved, to persons responsible for commissioning, providing, managing or scrutinising local care services.

End

B. NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) Regulations 2012 (SI 2012/3094)

Date laid: 17 December

Parliamentary Procedure: negative

Summary: These Regulations make provision for the partnership arrangements between NHS bodies and local authorities (including the designation of certain NHS bodies as Care Trusts), the public health functions of local authorities (for example in promoting and surveying dental health) and set the criteria for local authority interaction with the Local Healthwatch organisations. The Committee has received representations from those already involved in LINks expressing doubts about whether the legislation will operate as intended. The correspondents all seem to support the Department's stated intention but express concerns that the current wording may leave Local Healthwatch vulnerable to manipulation. The White Paper said the objective is "to strengthen the collective voice of patients", the Department's response acknowledges that staff of local healthcare contractors could become members of Local Healthwatch; their influence may not be disinterested and may not represent the concerns of patients. The Department has offered a legal and policy response, but that may not be enough: the Department needs to address urgently the points raised to the satisfaction of the public because without trust in the basic structure the Department simply may not get the volunteers it wants.

These Regulations are drawn to the special attention of the House on the grounds they give rise to issues of public policy likely to be of interest to the House and that they may imperfectly achieve their policy objective.

26. These Regulations have been laid by the Department of Health under provisions of the National Health Service Act 2006 and the Local Government and Public Involvement in Health Act 2007 (both as amended, in particular by the Health and Social Care Act 2012 ("the 2012 Act")). They are accompanied by an Explanatory Memorandum (EM).

27. The instrument makes provision for the partnership arrangements between NHS bodies and local authorities (including the designation of certain NHS bodies as Care Trusts), the public health functions of local authorities (for example in promoting and surveying dental health) and sets the criteria for local authority interaction with the Local Healthwatch organisations which will carry out certain activities relating to patient and public involvement in health and social care services.

CONVERSION OF LINKS TO LOCAL HEALTHWATCH

28. Under section 221(2) of the Local Government and Public Involvement in Health Act 2007 ("the 2007 Act") LINks (Local Involvement Networks) were required to:

- promote and support the involvement of people in the commissioning, provision and scrutiny of local care services;
- enable people to monitor for the purposes of their consideration of service standards and improvements, and to review for those purposes, the commissioning and provision of local care services;
- obtain the views of people about their needs for, and their experiences of, local care services; and
- make those views known and make reports and recommendations about how local care services could or ought to be improved to persons responsible for commissioning, providing, managing or scrutinising local care services.

29. Part 5 of the 2012 Act includes provision for the activities currently carried on by LINks to be carried on by social enterprises, known as Local Healthwatch organisations, which must satisfy criteria prescribed by regulations, and for LINks to be abolished. Local Healthwatch will also have the following additional responsibilities:

- making the views of people known and reports and recommendations about how local care services could or ought to be improved to the Healthwatch England committee of the Care Quality Commission;
- providing advice and information about access to local care services and about choices that may be made with respect to aspects of those services;
- reaching views on service standards and whether and how standards could or ought to be improved and making those views known to the Healthwatch England committee of the Care Quality Commission;
- making recommendations to that committee to advise the Commission about special reviews or investigations to conduct (or, where the circumstances justify, making such recommendations direct to the Commission);
- making recommendations to that committee to publish reports under section 45C(3) of the Health and Social Care Act 2008 about particular matters; and

- giving that committee such assistance as it may require to enable it to carry out its functions effectively, efficiently and economically.

30. These Regulations set out in more detail the governance and accountability arrangements between local authorities and Local Healthwatch organisations, and impose duties on local authorities and others to respond to Local Healthwatch organisations within a specified time**.**

THE POLICY OBJECTIVE

31. In the Explanatory Memorandum the Department states that one of the key policy objectives of the 2012 Act is to put patients and the public at the heart of care. The White Paper *Equity and Excellence: Liberating the NHS*,[5] set out the following proposal:

"We will strengthen the collective voice of patients, and we will bring forward provisions in the forthcoming Health Bill to create Healthwatch England, a new independent consumer champion within the Care Quality Commission. Local Involvement Networks (LINks) will become the Local Healthwatch, creating a strong local infrastructure, and we will enhance the role of local authorities in promoting choice, through the Healthwatch arrangements they commission."

32. In debate on the Report stage of the 2012 Act, Lords placed great emphasis on the words "strong local infrastructure" and the need for there to be the right balance between the influence of the local authority and the NHS providers and that of local patients and service users when commissioning services. In response the Government gave the following commitment:

"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." [6] (Baroness Northover)

CONCERNS

33. However, the Committee has received representations from three organisations which question whether the wording in these Regulations delivers that undertaking. The correspondence from Health Link, the National Association of LINks Members (NALM) and Rutland LINk is published in full on our website.[7]

34. Section 34(1) of the Regulations defines two types of 'lay involvement': 'lay people' and 'volunteers' but the representations express concern that combined effect of these definitions is that non professional or managerial staff in health, social care or local government can be involved as 'lay people' or 'volunteers' so long as they are not paid by Local Healthwatch and that paid staff from Local Healthwatch contractors could be either lay persons or a volunteer. In response DH officials state that the definitions deliberately do not exclude such people because their contribution would be valuable irrespective of whether the individual was employed in health or social care or even a member of a Local Healthwatch contractor's staff. The Department's full response is also published on our website.

35. The representations also question the intention of Section 38 of the instrument which requires the 'involvement' of lay persons and volunteers in the 'governance' of Local Healthwatch, because it does not define what is intended by either of those terms. Health Link's letter goes on to say:

"In the context of the NHS involving patients and the public, a statutory requirement in the principal Act on clinical commissioning groups, 'involvement' is defined as providing information as a minimum, which means that just giving information is adequate to discharge the involvement duty. It seems likely that to avoid this minimal involvement applying in Local Healthwatch relationship much stronger wording would be needed... They might be told about them afterwards without any say."

36. The Department of Health responded

a) "The policy was aimed at strong lay involvement with a view to ensuring adequate representation of the local community. However it would not be right for the centre to be too prescriptive and, potentially, restrictive in setting out the provisions. It is important to recognise that in line with the localism agenda and to acknowledge the potential for differences between local areas, it is appropriate for each area to have a measure of flexibility. The requirement of "involvement" has been strengthened by incorporating it in several ways: as a qualifying criterion (the governance arrangements of Local Healthwatch (regulation 38) and through provisions on contractual requirements (requirements imposed on the local authority contract in relation to the carrying-on of section 221 activities by Local Healthwatch and its contractors - regulation 40(1)(g) and 41(1)(e) - and the making of relevant decisions by Local Healthwatch - regulation 40(1)(a) read with 40(2),(3) and(4)) Against this, we need to allow for the localism agenda and the need for local flexibilities to enable local Healthwatch organisations to operate in a way that is best for their local people and communities.

b) However, whilst "involvement" does not necessarily require full consultation or participation in all aspects of an activity, it does still require the taking of steps by the body on whom the obligation to involve falls. The appropriate level of involvement

would depend on the matter in question. In most cases, the plain provision of information would not be sufficient to comply with the obligation to involve. For example, where the provisions require the Local Healthwatch organisation to involve lay persons and volunteers in relevant decisions (set out in regulation 40(1)(a) read with 40(2), (3) and (4)), involvement would have to be in the making of that decision. Under the regulations, it would not be sufficient for information about the decision simply to be given after the decision had been made - in the context of the provisions that would not amount to involvement in the decision itself. We hope this assures you on this point."

37. The Committee does note however the qualifying statement above "in most cases".

CONCLUSION

38. The representations come from those already involved in LINks and who therefore have a detailed knowledge of how the system operates - if only in their specific local area. If they are expressing doubts about whether the legislation will operate as intended, the Department would do well to pay close attention to them. As the letter from NALM states:

"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 a tool of those it monitors and inspects".

39. The correspondents all seem to support the Department's stated intention but express concerns that the current wording may leave Local Healthwatch vulnerable to manipulation. The White Paper said the objective is "to strengthen the collective voice of patients", the Department's response (see paragraph 34 above) acknowledges that staff of local healthcare contractors could become members of Local Healthwatch; their influence may not be disinterested and may not represent the concerns of patients. The Department has offered a legal and policy response, but that may not be enough: the Department needs to address urgently the points raised to the satisfaction of the public because without trust in the basic structure the Department simply may not get the volunteers it wants.