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healthwatch

Rt Hon Jeremy Hunt MP
Secretary of State
Department of Health
Richmond House
79 Whitehall
London SW1A 2NS

cc. Simon Stevens, Chief Executive, NHS England
cc. Cllr David Sparks OBE, Chair, Local Government Association

16th July 2014

Dear Secretary of State,

I am writing to you to share our concerns about the potential impact of the Draft Legislative Reform (Clinical Commissioning Groups) Order 2014 and ask for your support in addressing the issues. In particular, I am concerned about the impact this reform could have on the statutory role of local Healthwatch, the integrity of local accountability mechanisms, and meaningful public involvement in decisions about service redesign.

This letter and the accompanying Advisory Note (contained in the Annex), is in accordance with our powers to provide you with information and advice under s.45A (5/6) of the Health and Social Care Act 2008, as amended by s.181 of the Health & Social Care Act 2012.

As you know, the Legislative Reform (Clinical Commissioning Groups) Order 2014, will build on the current powers in the National Health Service Act 2006 to allow Clinical Commissioning Groups (CCGs) and NHS England to form joint committees to exercise their commissioning functions.

My concerns are based on the experience of local Healthwatch in areas where similar arrangements already exist, such as Greater Manchester. Local Healthwatch have escalated concerns to us about the transparency and accountability of decision making and the effect it is having on their ability to carry out their statutory functions. The issues include:

- Disengagement with local accountability mechanisms;
- Poor public engagement by CCGs and Committees in Common in the formation of their proposals;
- Major decisions, such as on models for service reconfiguration, being taken in closed sessions of the committee;
- Insufficient planning for public engagement in conversations about service reconfiguration that will directly result from decisions made by the committee in common.

Learning from the experiences of local Healthwatch, we are concerned that the proposed reforms could create the conditions for CCG decision-making to become disconnected from the transparency and accountability mechanisms put in place by the Government's health reforms, including Health and Wellbeing Boards and local Healthwatch themselves.

The statutory seat for local Healthwatch on Health and Wellbeing Boards was created to ensure that the local community is able to shape, scrutinise and challenge decisions made by local commissioners. Unlike Health and Wellbeing Boards, neither CCGs nor Committees in Common are currently mandated to have local Healthwatch in their decision-making forums.

Whilst I recognise the important role CCG collaborations can play in the effective commissioning of health and social care, and the transformation of traditional service models, I am sure you will agree that it is vital they are accompanied by strong accountability and engagement mechanisms. This is of particular importance given the scale of decisions being made by joint committees, and our anticipation that many more of these joint arrangements will be put in place. Without these safeguards in place, the public are far less likely to understand, or be accepting of, the changes that happen in their community.

To date, we have brought these issues and emerging practices to the attention of your officials in the Department, and our colleagues in NHS England, and we continue to support local Healthwatch who are navigating the existing CCG collaborative arrangements.

Given the on-going conversations about this draft Order, and that it would come into force in October 2014, I would ask that you consider the following proposals to address the above issues:

First, I would advise that the accountability measures in the draft Order be strengthened. I understand, however, from your officials that it is not possible at this stage in the process for you to amend the draft Order due to the parliamentary procedure governing this instrument.

I am therefore asking that you use the next legislative opportunity to amend the Order to:

a. Ensure CCGs acting in collaborative arrangements have in place adequate mechanisms meaningfully to engage the public and the local community in decision making.

b. Introduce a mandatory non-voting constitutional seat on Committees in Common for local Healthwatch to enable them to scrutinise decision-making and hold the committee to account for the decisions they make.

c. Place a duty on all lead or coordinating commissioners to have due regard to existing local agreed priorities and plans (including Joint Strategic Needs Assessments and Health and Wellbeing Plans).

d. Place a duty on all lead or coordinating commissioners to act within existing local accountability mechanisms (which might include being held to account at a Health and Wellbeing Board outside of their CGG's geographic jurisdiction).

More immediately to enhance transparency, accountability and public involvement in the operationalisation of this Order, I advise you to consider:

1. Jointly issuing, with NHS England, statutory guidance to CCGs and local authorities on establishing accountability arrangements between local accountability structures, Health and Wellbeing Boards and Committees in Common, ensuring these models enable local Healthwatch fully to exercise their statutory functions. This statutory guidance should include a requirement on CCGs to enhance their public engagement and involvement when working in collaboration or under joint commissioning arrangements.

2. Your officials work with my staff, our colleagues in NHS England and the Local Government Association to ensure adequate safeguards are put in place in the governance arrangements for Committees in Common. This would assure the public that there is a mechanism to address breakdowns in accountability or blocking of local Healthwatch statutory functions. We feel this is particularly important given that many of these collaborative commissioning arrangements will involve major reconfiguration programmes.

I look forward to hearing your thoughts on how we take this forward.

Kind regards,

Anna Bradley
Chair, Healthwatch England

Annex – Healthwatch England advisory note on the Legislative Reform (Clinical Commissioning Groups) Order 2014

16th July 2014

1. Purpose of the Advisory Note

The purpose of this advisory note is to outline the legislative changes coming into force under a new statutory instrument called the Draft Legislative Reform CCG Order 2014.

This new legislative reform order formalises the creation of joint commissioning committees between Clinical Commissioning Groups and NHS England. It is anticipated that these changes will lead to commissioning decisions increasingly being made at regional and supraregional level.

We explore the potential impact this may have on local Healthwatch and their ability to carry out their core statutory functions.

This Advisory Note has been produced in accordance with our powers to provide the Secretary of State for Health with information and advice on '*the views of Local Healthwatch organisations and of other persons on the standard of provision of health and social care services and on whether or how the standard could or should be improved*' under s.45A (5/6) of the Health and Social Care Act 2008 as amended by s.181 of the Health & Social Care Act 2012.

2. Background to the issue

Under the NHS Act 2006, as amended by the Health and Social Care Act 2012, CCGs have the power to collaborate and exercise their commissioning functions jointly. However, each CCG remains fully accountable for commissioning services that meet local needs and quality standards.

In August 2012, NHS England created a framework and guidance to help CCGs establish commissioning arrangements jointly to commission services and manage the joint contract. These arrangements govern the collaborative commissioning that CCGs might do together and must be reflected in the constitutions of all CCGs that enter them.

In terms of decision-making, the model Collaborative Commissioning Agreements for CCGs importantly clarifies that the co-ordinating commissioner cannot make decisions on behalf of CCGs and must seek approval from all CCG accountable officers who constitute the membership of the joint committee[1] before taking action.

[1] Referred to in the framework and the model collaborative commissioning agreements as the 'Collaborative Forum'

Under current arrangements, local Healthwatch can attend these joint committees, but only by invitation of the co-ordinating commissioner.

Examples of these arrangements can be seen in the joint working between eight CCGs in North West London, six CCGs in North Yorkshire, twelve CCGs in Greater Manchester and twenty one CCGs that are part of a commissioning consortium in the East of England.

3. New legislative reform

The new Legislative Reform CCG Order 2014[2], which comes into force on the 1st October 2014, will amend the National Health Service Act 2006 in two ways. It will allow:

a. Clinical Commissioning Groups (CCGs) to form joint committees when exercising their commissioning functions jointly.

b. CCGs to exercise their commissioning functions jointly with NHS England, and to form a joint committee when doing so.

In essence this means that CCGs will be able to form a joint committee with each other or NHS England to make joint decisions about the services they commission on behalf of the CCGs they represent.

4. Impact of the reform on local Healthwatch

We anticipate that the new power to make these collaborative arrangements will increasingly lead to a reliance on regional and supraregional Committees in Common, which will have delegated authority to decide on the services they jointly commission on behalf of the CCGs they represent.

In areas where similar arrangements exist, such as Greater Manchester, local Healthwatch have escalated to us concerns about transparency and accountability of decision making and the effect it could have on their ability to carry out their statutory functions. These practices include:

- Disengagement with local accountability mechanisms;
- Poor public engagement by CCGs and the committee in common;
- Major decision-making items, such as models for service reconfiguration, being discussed in closed sessions of the committee;

[2] Section 1 of the Legislative and Regulatory Reform Act 2006 gives Ministers certain powers to make orders (including Legislative Reform Orders) that remove or reduce burdens resulting directly or indirectly from legislation

- Insufficient planning for public engagement and conversations on service reconfiguration that will directly result from decisions made by the committee in common.

Learning from the experiences of local Healthwatch, we are concerned that without full consideration the proposed reforms could create the conditions for CCG decision-making to become disconnected from the transparency and accountability mechanisms put in place for local Healthwatch, communities and other joint decision makers (including members of Health and Wellbeing Boards).

The statutory seat for local Healthwatch on Health and Wellbeing Boards was created to ensure that the local community is able to shape, scrutinise and challenge decisions made by local commissioners. Unlike Health and Wellbeing Boards, CCGs operating in Committees in Common are not currently mandated to have local Healthwatch representation or observation at their decision-making forums.

We share the concerns of the Association of Directors of Adult Social Services (ADASS), that these collaborative arrangements could, therefore, diminish the role of Health and Wellbeing Boards in scrutinising commissioning decisions, holding commissioners to account and collaboratively directing commissioning strategies across the boundaries of local Government and health.

More specifically, there is a risk that the abstraction of decision making and accountability will undermine the statutory seat of local Healthwatch on Health and Wellbeing Boards and reduce their ability to assess the sufficiency of the joint commissioning arrangements, public engagement in decision making and impact of service change decisions on local communities.

Furthermore, meetings of the committee in common can actively exclude major decision-making from public agendas if they consider it not to be in the public interest and there is no explicit requirement for their meetings to be open to the public or local Healthwatch representation, except for when the committee presents its annual report.

When CCGs operate as a committee in common, decisions can be made by one lead or coordinating CCG, but affect service provision outside their substantive geographical area and coterminous Health and Wellbeing Boards. This poses a considerable challenge for local Healthwatch that cover the geographical area of the affected service, but are unable to hold to account the lead or coordinating commissioner that is not located in their area.

Whilst many local Healthwatch have attempted to address this cross-accountability by coming up with informal collaborations, like those of Greater Manchester, these arrangements are fragile and are dependent on the level of resource of each local Healthwatch; many of which lack sufficient capacity to address decisions on this scale.

The Department of Health has recently provided reassurance that CCG members of Committees in Common would need to be mindful of Joint Strategic Needs Assessments (JSNAs) and the Health and Wellbeing Strategies. However in practice we are observing that the commissioning decisions of Committees in Common have taken precedence, and we anticipate that this practice would continue under the reform.

5. Case example from Greater Manchester

The committee in common in Greater Manchester is made up of twelve CCGs that have joined together to coordinate and commission service reconfiguration in the region under the auspices of the Greater Manchester Association of CCGs in a project known as Healthier Together.

The local Healthwatch in the Greater Manchester area have raised general concerns over poor public engagement by their local CCGs and the committee in common. The governance meetings for Healthier Together have only started to meet in public since March 2014 and major decision-making items, such as the model for service reconfiguration, were discussed in a closed session of the committee. Further local concern remains over a lack of clarity on planned public engagement in conversations on service reconfiguration that will directly result from decisions made by the committee in common.

Similarly, local Healthwatch in the area were not invited to attend the joint committee's External Reference Group until November 2013, and this happened only after an intervention from the local Healthwatch themselves. Despite now attending the External Reference Group, they remain concerned that there is poor attendance from wider external stakeholders, that major commissioning decisions are still being discussed and agreed without adequate accountability to the local community, and that their attendance could be used as tacit approval for both the Healthier Together proposals and the committee in common's model of engagement.

Local Healthwatch in the Greater Manchester area have come together informally to share local intelligence and collectively highlight concerns to the Chair of Healthier Together and Healthwatch England about the lack of public involvement and low levels of transparency and accountability in decision making.

6. Recommendations to strengthen the reform

To strengthen the reforms proposed in the Draft Legislative Reform CCG Order 2014, we recommend that the Secretary of State use the next legislative opportunity to amend the Legislative Reform Order to:

a. Ensure CCGs acting under collaborative arrangements have in place adequate mechanisms meaningfully to engage the public, and more importantly their local community, in decision making.

b. Introduce a mandatory non-voting constitutional seat on Committees in Common for local Healthwatch to enable them to scrutinise decision-making and hold the committee to account for the decisions they make.

c. Place a duty on all lead or coordinating commissioners to have due regard to existing local agreed priorities and plans (including Joint Strategic Needs Assessments and Health and Wellbeing Plans).

d. Place a duty on all lead or coordinating commissioners to act within existing local accountability mechanisms (which might include being held to account at a Health and Wellbeing Board outside of their CGG's geographic jurisdiction).

In addition to this, the Department of Health and NHS England should issue statutory guidance to CCGs and local authorities on establishing accountability arrangements between local accountability structures, Health and Wellbeing Boards and Committees in Common, ensuring these models enable local Healthwatch to exercise fully their statutory functions. This statutory guidance should include a requirement on CCGs to enhance their public engagement and involvement when working in collaboration or under joint commissioning arrangements.

Finally, the Department of Health, NHS England, Healthwatch England and the Local Government Association should work together to ensure adequate safeguards are put in place in the governance arrangements for Committees in Common. This would assure the public that there is a mechanism to address breakdowns in accountability or blocking of local Healthwatch statutory functions. We feel this is particularly important given that many of these collaborative commissioning arrangements will involve major reconfiguration programmes.