

Open Report on behalf of Glen Garrod, Executive Director of Adult Care and Community Wellbeing and Derek Ward, Director of Public Health

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| Report to: | Councillor Mrs S Woolley, Executive Councillor for NHS Liaison and Community Engagement |
| Date: | 1st – 7th June 2018 |
| Subject: | Local Healthwatch Procurement |
| Decision Reference: | I015652 |
| Key decision? | Yes |

Summary:

The Council's existing grant agreement for Local Healthwatch Services in Lincolnshire has been in place for five years. This report gives an update on Local Healthwatch Services, the proposed re-commissioning and seeks approval to proceed with the re-procurement of this service on a grant agreement basis.

Giving people a greater say in how the health and care system works was a central pillar of the coalition Government's ambition and a key component of the Health and Social Care Act 2012 ("the Act"). To achieve this Government outlined a framework for a network of local Healthwatch organisations with the aim of creating a credible, representative and influential public voice in the system.

Local authorities with adult social care responsibilities are required, under the Act, to commission a local Healthwatch service covering the local authority area. The Act also makes provision for contractual arrangements between local authorities and their local Healthwatch organisation however it allows flexibility for councils to choose the commissioning route that offers the best value for money in their communities.

Recommendation(s):

That the Executive Councillor

1. Approves that the Local Healthwatch Service is re-procured through a competitive bidding process and awarded as a grant agreement;
2. Approves the scope, budget and duration of the Local Healthwatch Service as set out in this Report; and

3. Delegates to the Director of Public Health in consultation with the Executive Councillor for NHS Liaison and Community Engagement the authority to determine the final form of the grant agreement, to approve the award of the grant and entering into the grant agreement, and any other legal documentation necessary to give effect to the decision set out in paragraphs 1 and 2 above.

Alternatives Considered:

1. Negotiate a revised grant with the current provider

The current agreement has been in place since April 2013 and extended by two and half years. Given the relative maturity of Local Healthwatch Services nationally there is now a good opportunity to test the market whilst providing an opportunity for the existing provider to further develop its competitive credentials.

2. Undertake a procurement in order to award a contract, rather than grant agreement, for the delivery of the service

Due to the statutory status and duties that a Healthwatch organisation must adhere to there is limited justification or utility for the Council to establish a contract. Under a grant agreement the Council will still be able to ensure that service outcomes are delivered and that any failure to perform can be remedied while still allowing for the necessary independence that a Healthwatch Local organisation must have under law.

Reasons for Recommendation:

1. Current Agreement

The current agreement has been in place since April 2013 and extended by two and half years. We therefore need to commence the procurement in order to facilitate both the bidding process and a mobilisation period that is sufficient to allow potential for new entrants to the market to mobilise effectively, and to commence the new service in October 2018.

2. Market Maturity

Given the relative maturity of Local Healthwatch Services across the country there is now a good opportunity to test the market whilst providing an opportunity for the existing provider to further develop its service model.

3. Independence

The statutory responsibility for delivering Local Healthwatch Services sits with the provider of these services and not the Council. A level of independence from the local authority is, therefore, required in order for the provider to satisfactorily discharge its legal functions.

1. Background

The Council's existing grant agreement for Local Healthwatch Services in Lincolnshire has been in place for five years. This report gives an update on Local Healthwatch Services, the proposed re-commissioning and seeks approval to proceed with the re-procurement of this service on a grant agreement basis.

Giving people a greater say in how the health and care system works was a central pillar of the coalition Government's ambition and a key component of the Health and Social Care Act 2012 ("the Act"). To achieve this Government outlined a framework for a network of local Healthwatch organisations with the aim of creating a credible, representative and influential public voice in the system.

Local Healthwatch Services

Local Healthwatch organisations are overseen by the national body Healthwatch England, itself a statutory committee within the Care Quality Commission (CQC), whose purpose is to be "the independent national champion for people who use health and social care services ... (making) sure that those running services, and the government, put people at the heart of care". Healthwatch England provides support and advice to commissioners as well as providers of Local Healthwatch Services and they have been supporting the work in Lincolnshire, most recently in providing advice regarding the specification for the service moving forward.

Local Healthwatch gathers people's views (whether current users or not) and experiences of the health and social care system. This can help commissioners and services providers to be more responsive to what matters to service users, carers and the public, and enable them to design services around their needs. In this way, community views will have real influence with those who commission and provide services.

The Act sets out the statutory activities that Local Healthwatch organisations are required to undertake. These are:

- promoting, and supporting, the involvement of people in the commissioning, provision and scrutiny of local care services;
- enabling people to monitor the standard of provision of local care services, including how services could or ought to be improved;
- obtaining the views of people about their needs for, and their experiences of, local care services; and

- making views known, and 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.

Local Healthwatch have the power to conduct 'Enter and View' visits in health and care settings. However, 'Enter and View' is not a statutory function of local Healthwatch but is a tool to help them carry out their activities e.g. by gathering views from people who use services.

Additional functions introduced for local Healthwatch organisations include the need to:

- Provide advice and information about access to local care services and about choices that may be made with respect to aspects of those services.
- Reach views on the standard of provision of local care services, and whether, and how, local care services could or ought to be improved.
- Make those views known to Healthwatch England.
- Make recommendations to Healthwatch England to advise the Care Quality Commission about special reviews or investigations to conduct (or, where the circumstances justify doing so, make such recommendations direct to the Care Quality Commission).
- Make recommendations to Healthwatch England that it should publish a report on a particular health or social care matter.
- Give Healthwatch England such assistance as it may require enabling it to carry out its functions effectively, efficiently and economically.

National guidance instructs us that for local Healthwatch to deliver services successfully, it must be:

- Independent - a free-standing body which is ethical, trusted and respected by residents and stakeholders
- Transparent – operate openly and involve the public in decision-making
- Inclusive and representative – champion the voice of the user and be representative of the local population
- Accountable – work to a clear vision and purpose described in appropriate policies and procedures to ensure accountability to the public and commissioners
- Knowledgeable – have expertise of health and social care services gained from the personal or professional experience of its board, staff and volunteers
- Influential – a robust and credible organisation that can demonstrate its impact in improving local outcomes
- Evidence based – use robust, local evidence as the basis for priority setting and reporting processes
- Recognisable – have a clear identity which is distinct from other local organisations
- Networked – maintain strong relationships with a variety of local and regional statutory, voluntary and provider agencies

- Prudent – demonstrate efficient use of its resources to meet agreed priorities
- Committed to continuous improvement - actively seek feedback on its own performance and make service improvements, where required.

Local Healthwatch services in Lincolnshire will be expected to work within this framework.

Commercial Approach

Local authorities with adult social care responsibilities are required, under the Act, to commission a local Healthwatch service covering the local authority area. The Act also makes provision for contractual arrangements between local authorities and their local Healthwatch organisation however it allows flexibility for councils to choose the commissioning route that offers the best value for money in their communities.

During the initial setup period “councils took different approaches to commissioning local Healthwatch, which variously involved tendering processes, or a grant-funded route” (Local Government Association, 2012). In Lincolnshire a grant funded route was pursued which established Healthwatch Lincolnshire as a freestanding corporate body in order to deliver the statutory duties defined within the Act.

Whilst grants are legal agreements in their own right they are not subject to public procurement law, and have different characteristics to a standard service contract;

What is a contract?

A contract for services between a public authority and a provider is essentially a legally enforceable agreement between those parties under which the provider provides services in return for payment. The services may be provided either directly to the public authority or to third parties. In the latter case the provider would provide services to individuals on a public authority’s behalf in return for payment by the public authority.

A contract will contain a description of the complete service, known as a specification. This is one side of the agreed promise. Once the specification is met, the other side of the promise needs to be met, i.e. payment. All parties need to fulfil their side of the promise to fulfil the contract. If either party fails to meet its obligations, there would be a breach of the contractual relationship which could result in compensation being paid by the party in breach which amount could be more than the value of the contract. Typically contracts that the Council put in place would also have detailed and complex performance management procedures including service credits, liquidated and ascertained damages or profit sharing mechanisms. A grant agreement would not be able to contain these types of contractual measures.

What is a grant?

A grant is a specific amount of funding given to an organisation for specific activity

to be delivered within a specific time frame. HMRC defines a grant as “a financial transfer used to fund an activity which is in broad alignment with the funder’s objectives”. The funder receives the outcomes stated as grant conditions in return for this and unless, the grant agreement is a deed, the funder is under no obligation to pay. Similarly if the grant funded organisation fails to deliver the stated outcomes or uses those funds for activities beyond the scope of the agreement the funder can 'claw back' those funds. There exists a grey area between what constitutes a grant or a contract however if there is a predominance of financial and legal consequence to both parties then it is likely to amount to contract.

Given the conditions of how a Healthwatch Local organisation must operate under the Health and Social Care Act and that the Council is similarly bound under the Act to fund a service the recommendation is that this service should continue to operate as a grant agreement. This will enable the Council to ensure there is funding and support for a Local Healthwatch service; that the Local Healthwatch organisation has sufficient independence, but also there is adequate commercial oversight and control through the conditions of the grant agreement

Under the Public Contracts Regulations 2015, any re-commissioning and procurement of Local Healthwatch Services should follow the general duty to comply with the principles of fair competition, equal treatment and non-discrimination. For this reason there will still be a competitive bidding process as part of awarding the grant and due to the value of the grant will also still be subject to a formal decision by the Council to proceed to procurement. However as the proposed agreement is a grant rather than a contract there is additional flexibility available to the Council in determining timescales, the conditions of competition but also greatly reduces the risk of any potential challenge.

A competitive bidding process will have a number of benefits including its ability to test the market, investigate potential for financial efficiencies and enable creativity and innovation whilst providing an opportunity for the existing provider to further develop its competitive credentials. This process will also be in line with one of the guiding principles of the Localism Act 2011 by ensuring that local social enterprises and community groups with local solutions have the opportunity to be heard, bringing decision making closer to those affected and driving improvement in local services.

There has also been some market testing through issuing a questionnaire to the wider market to gauge the level of interest to ask some specific questions related to governance and outcomes for the Local Healthwatch Services.

Six organisations have responded to the questionnaire with five indicating a desire to put in a bid for the opportunity. This shows a good level of interest at this stage and is sufficient to carry out an effective competition. Further feedback from interested parties can be summarised as follows.

- All interested parties at this stage meet the statutory requirements to be able to operate as a Local Healthwatch

- The majority of interested parties have experience of delivering Local Healthwatch services across more than one local authority area
- Strong appreciation of the draft specification and service objectives
- That the proposed funding envelope for the service is reasonable

More detailed feedback will be analysed further and taken into consideration for the final drafting of Bid documents.

Grant Commencement and Duration

The intention is to have in place a new grant agreement for the Local Healthwatch Service on the 01 October 2018. The timescales are set out in the table below:

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| Issue of bidding documentation | No later than 18 June 2018 |
| Evaluation of bids | 23 July 2018 to 29 July 2018 |
| Grant award date | 09 August 2018 |
| Mobilisation period | 10 August 2018 to 30 September 2018 |
| Go live | 01 October 2018 |

It is proposed that the grant agreement will be for a period of three years with the option to extend this by further periods of 12 months up to a maximum of 36 months.

Budget

The annual budget for the Local Healthwatch Service is currently £300,000. In 2017/18 this was made up of £192,108 from the national Local Reform and Community Voices Grant with the remainder of the funding (£107,892) being provided through County Council budgets.

The future budget to be allocated to local Healthwatch services in Lincolnshire is proposed to remain at £300,000. As the majority of the budget for this service comes from a grant from central government there is a risk that, should this grant be altered by central government, the service would see a considerable reduction in its funding that may make it unsustainable. In order to mitigate this risk the proposed start date will allow, in future years, for the Council and the provider to have a significant amount of time to negotiate and agree a way forward. Additionally, the grant agreement will be worded in such a way as to allow a break clause to be enacted should such an eventuality happen.

The provider will also be encouraged to identify additional income streams through delivery of certain trading activities, such as training and commissioned evaluation, survey and research work. They will also be expected to ensure this does not interfere with their delivery of the main service itself.

2. Legal Issues:

Equality Act 2010

Under section 149 of the Equality Act 2010, the Council must, in the exercise of its functions, have due regard to the need to:

- Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act
- Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The relevant protected characteristics are age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation
Having due regard to the need to advance equality of opportunity involves having due regard, in particular, to the need to:

- Remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic
- Take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it
- Encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low

The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to tackle prejudice, and promote understanding.

Compliance with the duties in section 149 may involve treating some persons more favourably than others.

The duty cannot be delegated and must be discharged by the decision-maker. To discharge the statutory duty the decision-maker must analyse all the relevant material with the specific statutory obligations in mind. If a risk of adverse impact is identified consideration must be given to measures to avoid that impact as part of the decision making process.

Local Healthwatch governing bodies will also be expected to conform to the Nolan principles of standards in public life. As they provide public functions, they will have duties under the Equality Act 2010 and the Freedom of Information Act and safeguarding responsibilities when they come into contact with vulnerable adults and children.

As such, Local Healthwatch Services in Lincolnshire will be accessible to all, universally and equally across the county. They will take a pro-active approach to gather the views and experiences of local people, including reaching our most 'seldom heard' groups and those with protected characteristics under the Equality Act.

Joint Strategic Needs Analysis (JSNA and the Joint Health and Wellbeing Strategy (JHWS)

The Council must have regard to the Joint Strategic Needs Assessment (JSNA) and the Joint Health & Well Being Strategy (JHWS) in coming to a decision.

Every Health and Wellbeing Board has a responsibility to undertake a JSNA and, based on the evidence included in the JSNA, a JHWS. Healthwatch are a statutory member of the Health and Wellbeing Board and, as such, are directly involved in the production and governance associated with both the JSNA and JHWS in Lincolnshire.

The provider will work collaboratively with the Lincolnshire Health and Wellbeing Board and JSNA partners/JHWS Delivery groups to provide authoritative, evidence-based feedback, that will inform and impact on a number of JSNA topics. This might include, for example, feedback from service users generated from using their powers to 'enter and view' health and care services, as well as ensuring that the views, experiences and priorities of local people support and inform these processes.

Crime and Disorder

Under section 17 of the Crime and Disorder Act 1998, the Council must exercise its various functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent crime and disorder in its area (including anti-social and other behaviour adversely affecting the local environment), the misuse of drugs, alcohol and other substances in its area and re-offending in its area

Section 17 matters have been taken into account in preparing the Report. The Proposals in this Report do not directly contribute to the furtherance of the section 17 matters and there is no risk of adverse impact identified.

3. Conclusion

The Council's existing grant agreement for Local Healthwatch Services in Lincolnshire has been in place for five years. The time is right to test the market providing an opportunity for the existing provider to further develop its service model via competition but also to ensure the Council and Lincolnshire residents receive the best possible service.

Local Healthwatch has a legal duty to gather peoples' views (whether current users or not) and experiences of the health and social care system. Having considered alternative procurement routes the recommendation is that this service should continue to operate as a grant agreement. Given the statutory requirements for delivering Local Healthwatch Services sits with the provider of these services and not the Council, a level of independence from the local authority is required in order for the provider to satisfactorily discharge its legal duties.

4. Legal Comments:

The Council has the power to enter into the contract proposed.

The procurement law implications and the other matters to which the Executive Director for Adults and Community Wellbeing must have regard are dealt with in detail in the Report.

The decision is consistent with the Policy Framework and within the remit of the Executive if it is within the budget.

5. Resource Comments:

The Council's existing grant agreement for Local Healthwatch Services in Lincolnshire has been in place for five years. This report recommends that the Local Healthwatch Service is re-procured at an annual cost of £300,000 funded partly via Reform and Community Voices Grant with the remainder of the funding being provided through County Council base budgets. The report identifies that grant funding is not guaranteed in the long term and members will need to consider how this service should be funded in the event that this funding ceases.

I can confirm that the decision to delegate the final decision on a procurement of this value to the Director of Public Health in consultation with the Executive Councillor or NHS Liaison and Community Engagement is consistent with the rules laid out in the County Council's Financial Regulations and Procedures.

6. Consultation

a) Has Local Member Been Consulted?

N/A

b) Has Executive Councillor Been Consulted?

Yes

c) Scrutiny Comments

This Report will be considered by the Adults and Community Wellbeing Scrutiny Committee on 30 May 2018 and the comments of the Committee will be reported to the Executive Councillor for NHS Liaison and Community Engagement.

d) Have Risks and Impact Analysis been carried out??

Yes

e) Risks and Impact Analysis

See the body of the report

7. Background Papers

| Document title | Where the document can be viewed |
|--------------------------------------|---|
| Healthwatch maintaining independence | https://www.healthwatch.co.uk/resource/maintaining-independence |

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