Statutory Authorities under the *Local Health System Integration Act, 2006*

Questions and Answers

<u>Consultation Process</u>

1. What did the Ministry of Health and Long-Term Care consult on?

A. The Ministry of Health and Long-Term Care ("Ministry") consulted with key internal and external stakeholders on the development of policy guidelines to support implementation of new Ministerial and Local Health Integration Network (LHIN) statutory authorities under the *Local Health System Integration Act, 2006* (LHSIA). In Spring 2017, the Ministry consulted on the development of guidelines that are intended to clarify the principles and potential uses of:

- Minister's authorities to issue directives to, and appoint investigators and supervisors over LHINs; and
- LHIN authorities to issue directives to, and appoint investigators and supervisors over Health Service Providers.

2. Why were guidelines developed on these statutory authorities under LHSIA?

A. In response to feedback the Ministry received during the Legislative Standing Committee hearings on Bill 41, *Patients First Act, 2016* and to enable implementation of the new LHIN authorities with our health system partners in a manner that is aligned with the goals of a more local and integrated health care system, the Ministry committed to developing clear and consistent guidelines for the application of the new Ministerial and LHIN directive, investigatory and supervisory authorities. The Ministry conducted consultations with internal and external stakeholders on the development of policy guidelines for each set of authorities.

These consultations were modeled after the consultation process that the Ministry undertook with the Ontario Hospital Association over the course of Fall/Winter 2016 to develop a framework that outlines the principles that will guide the potential use of the new Ministerial directive authority over public hospitals under the *Public Hospitals Act*.

3. Who did the Ministry consult with on the development of these guidelines?

A. The Ministry consulted with the LHINs and internal Ministry stakeholders that manage relationships with LHINs on the development of guidelines for the Ministerial authorities to direct, investigate and supervise LHINs under LHSIA.

To develop guidelines for the LHIN authorities to direct, investigate and supervise Health Service Providers under LHSIA, the Ministry consulted with internal Ministry stakeholders that manage relationships with Health Service Providers and external organizations and associations that represent Health Service Providers. The Ministry invited a group of diverse external stakeholders with representation from the LHINs, inter-professional primary care organizations and the hospital, long-term care, community support services and physiotherapy sectors to participate in these consultations.

4. What were the consultation timeframes?

A. The Ministry conducted consultations with internal and external stakeholders in Spring 2017.

5. What issues were raised by HSP associations during the consultations?

A. Consultation participants raised a number of concerns that were addressed during the consultation process:

- Some HSPs possess corporate and governance structures that span multiple jurisdictions (e.g., Salvation Army). It is expected that LHINs note any unique aspects of the governance structure and consider any potential unintended consequences of appointing a supervisor when contemplating potential use of these new authorities.
- HSPs raised concerns about bearing the cost for the appointment or an investigator. The Ministry has clarified in the guidelines that, in the normal course, it is expected that that the LHINs would bear the cost.
- HSPs raised concerns about having an opportunity to be consulted on the report and findings of an investigator or supervisor before it is made publically available by the LHIN. The Ministry has clarified in the guidelines that, in the normal course, a LHIN is expected to provide an advance copy of the investigator's report to the affected HSP before it is publically released.

Proclamations under the *Patients First Act, 2016*

6. When did the LHIN authorities over Health Service Providers come into effect?

A. The LHSIA provisions for LHIN directive, investigatory and supervisory authorities over Health Service Providers came into effect on September 1, 2017.

As you may know, the Minister's authorities over LHINs came into effect upon Royal Assent of the *Patients First Act, 2016,* on December 8, 2016.

Applicability of New Authorities

7. To whom do the new LHIN authorities under LHSIA apply?

A. The new LHIN authorities apply to Health Service Providers (HSPs) that are funded by, and have a Service Accountability Agreement (SAA) with, a LHIN. HSPs are entities funded by a LHIN under the authority of LHSIA to deliver health care services in Ontario.

The following are LHIN HSPs under LHSIA:

- Public Hospitals

- Private Hospitals
- Psychiatric Facilities (as defined in the *Mental Health Act*), with certain exceptions
- Non-profit community mental health and addiction services entities
- Approved agencies under the *Home Care and Community Services Act, 1994* (HCCSA) (e.g., providers of community support, homemaking, personal support and professional services as defined in HCCSA)
- Community Health Centres
- Long-Term Care Homes
- Family Health Teams
- Nurse Practitioner-Led Clinics
- Aboriginal Health Access Centres
- Entities providing primary care nursing services, maternal care or inter-professional primary care programs and services
- Hospices and other non-profit palliative care service providers
- Community Physiotherapy Clinics
- Independent health facilities

The statutory authorities apply to all HSPs with some exceptions (i.e., long-term care homes are not subject to LHIN directive, investigative and supervisory authorities and public hospitals are not subject to LHIN directive and supervisory authorities because separate legislative regimes apply).

The new LHIN authorities do not apply to:

- Home and community care services provided or arranged by the LHINs because these services are provided for the LHINs under applicable legislation. Service Provider Organizations contracted by a LHIN to deliver home and community care services on its behalf are not defined as Health Service Providers.
- Physicians when practising in a clinical capacity or physician-specific practices because physicians are not health service providers under section 2(3) of LHSIA.

At this time, not all of the listed HSPs under LHSIA have a SAA with the LHIN. The following listed HSPs in LHSIA are funded by, and have contracts with, the Ministry:

- Family Health Teams;
- Nurse Practitioner-Led Clinics;

- Entities providing primary care nursing services, maternal care or inter-professional primary care programs and services;
- Community Physiotherapy Clinics.

As such, the new LHIN authorities would not apply to these listed HSPs. Should the LHINs have a funding relationship with these HSPs in the future, then the new LHIN authorities would apply to these HSPs.

Other Considerations

8. Is a LHIN legally authorized to remove a board and appoint a supervisor to a Health Service Provider that is independently-governed and receives its funding from multiple sources?

A. Yes. Section 21.2 of LHSIA provides LHINs with the authority to appoint a person as a supervisor of a Health Service Provider to which it provides funding when it considers it to be appropriate to do so in the public interest. A LHIN is legally authorized to remove a board of a Health Service Provider defined under LHSIA when it is in the public interest to do so, without limitation on the basis of the percentage of LHIN funding.

The LHIN's supervisory authority under LHSIA is modelled after existing precedents in law that have been used successfully for many years. For example, the supervision provision under the *Public Hospitals Act* has been applied to public hospitals, which are legally incorporated institutions governed by voluntary boards, funded by multiple sources and many have charitable status. Although not exactly the same, public hospitals and community health service provider organizations share these features.

During the Legislative Standing Committee hearings for Bill 41: *Patients First Act, 2016*, concerns were raised about whether a LHIN can legally remove a board and appoint a supervisor when LHIN funding accounts for less than fifty per cent of the Health Service Provider's funding.

The LHIN supervisory authority to appoint a supervisor is constrained by criteria set out in a definition of 'public interest' under LHSIA, rather than a threshold of LHIN funding to a Health Service Provider. These criteria include:

- the quality of the management and administration of the health service provider;
- the proper management of the health care system in general;
- the availability of financial resources for the management of the health care system and for the delivery of health care services;
- the accessibility to health services in the geographic area or sub-region where the health service provider is located; and
- the quality of the care and treatment of patients.

When proposing to appoint a supervisor, a LHIN could consider:

- **Source of funding**: While a certain proportion of funding may come directly from a LHIN, it is likely that other sources of funding would be from public sources (e.g., other provincial ministries, federal or municipal governments) that may warrant greater public accountability measures. Other sources may be private, although this may be a small proportion of a Health Service Provider's total funding.
- **Nature of the funding (operational base or one-time)**: If a Health Service Provider, such as a community health centre or an Aboriginal Health Access Centre, receives a percentage of funding that is base funding critical to the organization's ongoing operations year-over-year, this may warrant greater public accountability measures.
- **Threshold**: It is not clear what an appropriate threshold level would be or how to measure it (i.e., the proportion of funding received from a LHIN may change from year to year based on other revenue the Health Service Provider receives).
- **Purpose of supervisor role**: The focus of the LHIN's decision to appoint a supervisor would be based on the Health Service Provider's role in the health care system. Identifying a threshold of revenue received from a LHIN focuses on the Health Service Provider's revenue, rather than its role in the system, or the nature of the services it provides.

The Ministry reviewed the Ontario Healthcare Financial and Statistical (OHFS) 2015-16 year end data in order to assess the potential impact of a LHIN's use of its supervisory authority on Health Service Providers (i.e., community and primary health care agencies) that are less than 50% funded by the LHINs.

Based on this analysis, the Ministry identified that out of the 996 community and primary health care agencies reviewed, an approximate **41 (4%)** receive less than or equal to 50% of total revenues from the LHIN and the Ministry.

9. Can there be a situation in which an HSP supervisor is appointed by the LHIN to exercise less than a full supervision over the HSP? For example, can a supervisor be appointed to oversee only one program or a part of the organization's functions?

A. The legislation does contemplate situations where the appointment of an HSP supervisor could be scoped based on the specific circumstances of a situation. Section 21.2(6) of the *Local Health System Integration Act, 2006* (LHSIA) provides an HSP supervisor with the exclusive right to exercise all of the powers of the governing body of the provider, its directors, officers, members or shareholders unless the appointment provides otherwise. Section 21.2(7) of LHSIA permits a LHIN to specify the powers and duties of an HSP supervisor and the terms and conditions governing those powers and duties. These provisions are modeled after the government's supervision authority over hospitals under the *Public Hospitals Act*.

It is anticipated that most situations warranting the appointment of a supervisor would warrant a full-scope of supervision. Any scoping of a supervisor's appointment would have to be made in the public interest and on a case-by-case basis. Circumstances warranting supervision are likely to be situations where there are multiple performance factors. Consideration will need to be given to whether it would be sufficient to appoint a supervisor for one program or part of the organization's functions. If there is only one program being funded by a LHIN, the LHIN would need to consider whether it could achieve its objectives by terminating the funding and funding another HSP.

10. How does the LHIN authority to appoint a supervisor apply when an HSP operates with federal funding (e.g., Aboriginal Health Access Centres (AHACs)?

A. If an HSP is named under LHSIA and has a funding agreement with the LHIN, then the LHIN may exercise its new authorities to issue directives or appoint an investigator or supervisor to that HSP. A LHIN's use of these new authorities is not limited by the percentage of funding that the HSP receives from the LHIN. As set out in the guidelines, it is expected that any LHIN use of its new authorities would, where possible, consider the impacts on the interests of other funders of the HSP and follow consultation with the Ministry and discussion with the affected HSP and funders.

11. How does the LHIN authority to appoint a supervisor apply when an HSP is a federally incorporated organization?

A. The incorporation of an HSP under federal statute raises additional considerations for the application of the LHIN's supervisory authority.

The legislation sets out that a LHIN appointment of a supervisor must be on notice to the Minister and clarifies that the scope of a LHIN-appointed supervisor can be specified by a LHIN. In these circumstances, the Ministry could clarify how it expects the LHINs to limit any supervision in respect of a federally incorporated organization. This can be done through a policy guideline, instruction or Minister's directive to the LHINs. Under the legislation, a Minister's directive is binding upon the LHINs.

12. Are HSP officers and directors provided immunity from the exercise of any of the LHIN authorities?

A. No. There is no provision under LHSIA or in its regulations that holds the director and officers of an HSP harmless for implementing a LHIN directive. Indeed, directors and officers are required to comply with the law, which would include complying with a LHIN directive.

Existing protections already found in normal corporate mechanisms for operating a health service provider organization (e.g., corporate indemnity) are sufficient to protect HSP directors and officers from any potential liability arising from the implementation of a LHIN directive.

In the case where an HSP supervisor is appointed by the LHIN to exercise full supervision over an HSP, the supervisor would replace the HSP's board of directors (unless otherwise specified by the LHIN) and would assume the board's responsibilities and liabilities.

13. What would happen if a LHIN directive is in conflict or deemed to be in conflict with an HSP's officers' and directors' fiduciary duties?

A. The HSP must comply with the directive and by doing so, would be complying with the law and in turn, fulfilling the fiduciary duties of the corporation's officers and directors. If a corporation's officers and directors breach a directive, they would be putting their organization's administration at risk.

14. Who pays for the LHIN-appointed investigator or supervisor to an HSP?

A. In the normal course, it is expected that a LHIN would bear the costs for an appointment of an investigator or supervisor to an HSP. The HSP would not be expected to pay for a LHIN-appointed investigator or supervisor. However, the financial implications of each LHIN appointment would be assessed on a case-by-case basis. It is expected that as part of the 'advanced consultation' principle set out in the guidelines, the LHINs would have a discussion with the HSP about the implications (e.g., financial, communications, etc.) of the appointment of an investigator or supervisor.

15. Does the LHIN's supervisory authority extend to assets (e.g., land, houses) held by an HSP?

A. Yes. Unless the appointment provides otherwise, a LHIN-appointed supervisor could exercise all of the powers of the governing body of the HSP and its directors, officers, members or shareholders as the case may be. In general, it is not anticipated that the supervisor's role would be that of a receiver or trustee charged with a collection function or the disposal of an organization's assets. Those functions are governed by separate legislation (i.e., the federal *Bankruptcy and Insolvency Act*). It is more likely that the supervisor's role would be to stabilize the organization so that a board of directors could be re-engaged.

16. Will an HSP be consulted on the report and findings of an investigator or supervisor before it is made publicly available by the LHINs?

A. In the normal course, a LHIN is expected to provide an advance copy of the investigator's report to the affected HSP before it is publicly released. This expectation is contained in the 'publication' principle set out in the guidelines.

This is not likely to arise in the case of an HSP supervisor because a full-scope supervision is likely to be in place and the supervisor would replace the HSP's board of directors and assume the board's responsibilities and liabilities.

17. There seems to be a conflict in LHSIA between the requirement that a LHIN investigator keep all information that comes to his/her knowledge during the course of the investigation confidential and the requirement for a LHIN to make an investigator's report to the LHIN available to the public. How is this reconciled?

A. The requirements to keep information confidential and make reports publicly available are found in other legislation such as the *Auditor General Act, 1990*.

The collection of information by an investigator during the course of an investigation will be kept confidential. However, the investigator also has an obligation to produce a report to the LHIN, which must be made publicly available. This report may include any information the investigator deems to be in the public interest to report. No personal health information will be included in the investigator's report.

18. How do the directive, investigatory and supervisory authorities under the *Public Hospitals Act* relate to the LHIN directive, investigatory and supervisory authorities over Health Service Providers under LHSIA?

A. The Minister's directive authority and Lieutenant Governor in Council (LGIC) authority over hospitals under the *Public Hospitals Act* are separate authorities that do not overlap with the LHIN directive and supervisory authorities over Health Services Providers under LHSIA. The LHIN directive authority does not apply to public hospitals and the LHIN supervisory authorities do not apply to hospitals (public and private) because separate legislative regimes apply (*Public Hospitals Act* and *Private Hospitals Act)*.

Both the LGIC under the authority of the *Public Hospitals Act* and the LHIN under LHSIA, may appoint one or more investigators to investigate and report on the quality of the management of a hospital, the quality of the care and treatment of persons by the hospital or any other matter relating to the hospital when it is in the public interest to do so.

In considering when this authority would be used and by whom, it is expected the principles outlined in the LHIN Authorities guidelines would be applied and the proposed intervention framework used to guide any decisions by the LGIC and the LHIN. The Ministry and the LHIN would consult with each other prior to the use of the respective investigatory authorities to ensure there is no duplication. Efforts would be made by the Ministry and the LHIN to identify, monitor and co-resolve any routine issues that may arise in a hospital. Any further response taken would be proportionate to the urgency or severity of the situation.

19. When do integration authorities apply and when do directive authorities apply?

A. LHIN integration authorities are set out in sections 25, 26 and 27 of LHSIA. These authorities are not new and have been available for use by the LHINs for over a decade. Integration authorities are likely to be used by the LHIN to address the questions of "what services" should be combined to advance integrated patient care and "by whom". Any use of the LHIN's integration authorities would be done in the public interest. For example, where there are two different HSPs providing the same services, a LHIN may choose to use its integration authorities to combine services in a community or region.

It is anticipated that the new LHIN directive authority would not duplicate the LHIN integration authorities. The directive authority is likely to be used by the LHIN to address the question of “how services should be delivered” to advance integrated patient care in a region. For example, a directive may be used to formalize a region- or sub-region-wide approach through a common protocol for referrals.

20. What is the distinction and interaction between Minister’s provincial standards and LHIN directives?

A. Under section 11.2 of LHSIA, the Minister may issue a provincial standard for the provision of health care services that are provided or arranged by a LHIN or an HSP where the Minister considers it in the public interest to do so. This is a new Minister’s authority under LHSIA. LHIN directives are not meant to be duplicative of the Minister’s authority to issue provincial standards and would not address the identification of provincial clinical standards to be adopted by a LHIN or HSP. However, a LHIN directive could be used to supplement a Minister’s provincial standard by requiring that all HSPs adopt the standard in their delivery of care.

21. Can a LHIN sub-region exercise the LHIN directive, investigatory and supervisory authorities?

A. No. A LHIN sub-region is not a legal entity. Only a LHIN may exercise the LHIN directive, investigatory and supervisory authorities under LHSIA.

22. The public interest test is so broad. How would the public interest test criteria be applied?

A. Section 35 of LHSIA sets out key criteria to be considered in the application of the public interest test:

(a) the quality of the management and administration of the local health integration network or the health service provider, as the case may be;
(b) the proper management of the health care system in general;
(c) the availability of financial resources for the management of the health care system and for the delivery of health care services;
(d) the accessibility to health services in the geographic area or sub-region where the local health integration network or the health service provider, as the case may be, is located; and
(e) the quality of the care and treatment of patients.

The public interest test in LHSIA is modeled after the public interest test in the *Public Hospitals Act.* The test is a statement of factors that can be considered before the exercise of an authority but is not meant to provide an exhaustive list of criteria. The application of the test will depend on the facts of a situation, on a case-by-case basis. The new LHIN directive, investigatory and supervisory authorities cannot be delegated by the LHIN Board of Directors and any decision to exercise these authorities must be made at an open meeting of the Board unless one of the exceptions outlined in the legislation applies.

23. If a LHIN is concerned about the performance of an HSP, why wouldn't it simply terminate the funding contract/Service Accountability Agreement with that provider? Why would the LHIN resort to appointing a supervisor over that HSP?

A. A funder always reserves the right to terminate a funding contract with a provider as per the terms and conditions of that funding contract. In the case of a funding contract between a LHIN and an HSP, a LHIN could decide to exercise its right to terminate a Service Accountability Agreement with an HSP where the HSP's performance is not meeting expectations.

The LHIN also has a legislated mandate to plan, fund and integrate the local health system and would have to consider a number of factors related to the needs in a community and the services available to address these needs. In the case where an HSP provides a service that can be readily delivered by another HSP in the same area, it may make sense for a LHIN to terminate a funding contract. Where an HSP provides a service that cannot be readily delivered by another HSP, the LHIN may consider the use of other available authorities to address the situation.

24. How are the LHINs held accountable for the uses of their new authorities?

A. Under LHSIA, the Minister of Health and Long-Term Care has the authority to direct or investigate a LHIN where the Minister considers it in the public interest to do so. On recommendation of the Minister, the Lieutenant Governor in Council may appoint a supervisor to a LHIN where it is in the public interest to do so.

In general, the LHINs are held accountable to the public and the Ministry through a number of mechanisms. The Ministry-LHIN Accountability Agreement (MLAA) with each LHIN outlines the funding and performance expectations (including targets and reporting obligations). The MLAA complements the accountability measures contained LHSIA, and the Memorandum of Understanding (MOU) that is signed between the Minister and each LHIN.

In support of the expanded mandate of the LHINs, the ministry worked with LHINs to enhance the current agreements (e.g., the MOU and MLAA) to ensure that the LHINs are held accountable for their new mandate, supported by the *Patients First Act, 2016*.

In addition to enhancing the accountability agreements, the ministry and LHINs have worked together to develop an escalation process to address any LHIN performance issues including concerns about the ability to meet local health system targets.

The LHINs must also submit quarterly performance reports to the Ministry, publicly report on key indicators and publicly report on their plans and progress through their Annual Business Plan and Annual Report against the Minister's expectations as set out in the Minister's annual mandate letter to the LHINs posted on the LHINs websites.

The *Patients First Act, 2016*, strengthened the LHINs' accountability for local health service planning and performance as well as supported the goal of providing care that is more integrated and responsive to local needs.

Under the *Patients First Act, 2016*, each LHIN is required to establish a patient and family advisory committee, which will enhance the voice of patients and families in health care planning.

25. Many HSPs are multi-service organizations that provide community services other than health services (e.g., day care, women's programs). What expertise does the LHIN have to investigate or supervise an HSP?

A. LHINs have been in operation for ten years and have developed knowledge about the health and health care needs of their local communities. The experience, insight and structure of the LHINs make them the proper mechanism for regional leadership for transforming the health care system.

In considering who to appoint as an investigator or supervisor to an HSP, it is expected that the LHIN would carefully consider the structure and mandate of the affected HSP and identify a person with the appropriate competencies, knowledge and expertise to effectively address the scope of issues to be resolved through the appointment.

Where appropriate, it is expected that an HSP investigator or supervisor would seek out the expertise required to understand and address the range of programs delivered by a multi-service provider that are within its scope.

26. What recourse does an HSP have if it disagrees with a LHIN directive or a LHIN's appointment of an investigator or supervisor?

A. The legislation sets out that the issuance of a LHIN directive or a LHIN appointment of an investigator or supervisor must be on notice to the Minister and the HSP. The guidelines set out the principles and a proposed intervention framework for the use of these new LHIN authorities. It is intended that a collaborative and responsive process be followed by the LHINs and their HSPs to effectively resolve HSP performance issues. When an HSP performance issue escalates to the LHIN, each successive level of intervention should involve discussion between the LHIN and HSP senior leadership.

The principles in the guidelines include an expectation that an HSP may, upon receipt of notification from the LHIN, respond by writing to the Minister or LHIN, or requesting a meeting with the Minister or LHIN to outline any concerns. It is anticipated that any HSP concerns would be adequately addressed through these processes.