

EXPLANATORY MEMORANDUM TO
THE LOCAL AUTHORITIES (PUBLIC HEALTH FUNCTIONS AND ENTRY
TO PREMISES BY LOCAL HEALTHWATCH REPRESENTATIVES)
REGULATIONS 2012

2012 No. XXXX

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The instrument makes provision for the steps to be taken by local authorities in exercising certain public health functions, for the exercise by local authorities of the Secretary of State's public health functions and the making and recovering of charges by local authorities in respect of their public health activities. It also makes provision in relation to Local Healthwatch organisations. These organisations are provided for in Part 14 of the Local Government and Public Involvement in Health Act 2007 (c.28) ("the 2007 Act") as amended by Part 5 of the Health and Social Care Act 2012 (c.7) ("the 2012 Act").
- 2.2 Part 2 of the instrument imposes duties on local authorities to exercise prescribed public health functions of the Secretary of State and to take prescribed steps in exercise of public health functions of their own, in particular their the duty as to the improvement of public health (section 2B of the National Health Service Act 2006) ("the 2006 Act"). These include requirements to provide or secure the provision of: the weighing and measuring children; health check assessments for those aged 40 to 74; open access sexual health services; a public health advice service for clinical commissioning groups; and advice and information relating to local health protection arrangements.
- 2.3 Part 3 makes provision for a local authority to make and recover charges in respect of certain steps taken in exercising its public health functions. The Regulations prohibit charges to individuals in respect of anything which is done for the purpose of improving that individual's health, and charges in respect of anything which the local authority is required to do (in exercise of its public health functions) under Part 2 of the instrument.
- 2.4 Part 4 imposes a duty on certain providers of health and social care services requiring them to allow authorised representatives of Local Healthwatch organisations or Local Healthwatch contractors¹ to enter and view certain premises owned or controlled by them and to allow those authorised representatives to observe the carrying-on of certain activities on those premises.

¹ These are persons with whom Local Healthwatch organisations make arrangements to assist them to carry on activities or to carry on activities on their behalf.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

Mandatory Functions

4.1 The 2012 Act gives upper tier and unitary local authorities a new duty to take appropriate steps to improve the health of their populations (section 2B of the 2006 Act, as inserted by section 12) and other public health functions (e.g. the power to provide for the weighing and measuring of children – paragraph 7C of Schedule 1 to the 2006 Act). Section 18 of the 2012 Act, which inserts new section 6C of the 2006 Act, confers powers to prescribe certain steps which local authorities must take in the exercise of their own public health functions and to require that local authorities perform the Secretary of State’s public health functions by taking prescribed steps. The public health functions of local authorities and the Secretary of State are set out in section 1H(5) of the 2006 Act – for the Secretary of State, this includes the duty as to protecting public health duty (section 2A) and the duty to provide contraceptive services (paragraph 8 of Schedule 1).

Charging

4.2 Under current local government legislation, some local authorities can and do commission or provide health improvement activities that they charge for. However, from April 2013, steps taken by a local authority for the purpose of health improvement will be carried out under section 2B of the 2006 Act and will form part of the comprehensive health service continued under section 1 of the 2006 Act. The local authority would therefore be subject to the general prohibition on charging for health services, unless specific provision is made for a charge in any enactment (section 1(4) of the 2006 Act). The relevant provisions of this instrument are made under the power in section 186A of the 2006 Act (as inserted by section 50 of the 2012 Act) to provide for cases when local authorities can charge for public health activity.

Healthwatch

4.3 Part 14 of the 2007 Act imposes a duty on local authorities to make arrangements for the involvement of people in the commissioning, provision and scrutiny of health services and social care services. It provides for such activities to be carried out by Local Involvement Networks (LINKs).

4.4 Part 5 of the 2012 Act makes various amendments to Part 14 of the 2007 Act. This includes provision for the activities currently carried on by LINKs to be carried on by social enterprises known as Local Healthwatch organisations and for LINKs to be abolished.

- 4.5 Section 225 of the 2007 Act, as amended, requires the Secretary of State to make regulations to impose on certain providers of health and social care services a duty to allow representatives of Local Healthwatch organisations or Local Healthwatch contractors to enter and view premises they own or control, and to observe the carrying-on of activities on, those premises. The instrument makes provision accordingly. It also revokes the current regulations made under section 225, namely the Local Involvement Networks (Duty of Services-Providers to Allow Entry) Regulations 2008 (S.I. 2008/915).

5. Territorial Extent and Application

- 5.1 This instrument applies to England.

6. European Convention on Human Rights

The Parliamentary Under Secretary of State for Public Health, Anna Soubry has made the following statement regarding Human Rights:

In my view the provisions of the Local Authorities (Public Health Functions and Entry to Premises by Local Healthwatch Representatives) Regulations 2012 are compatible with the Convention rights.

7. Policy background

Mandatory Functions

- 7.1 The 2012 Act gives upper tier and unitary local authorities a new duty to take appropriate steps to improve the health of their populations and other public health functions. In general the Government's intention is to permit the greatest degree of flexibility to local authorities to shape services to meet local needs. But there will be certain circumstances where a greater degree of uniformity is required, for example where services must be provided in a universal fashion if they are to be provided at all, or where certain steps are essential to the efficient running of the new public health system.

Charging

- 7.2 Under current legislation, some local authorities can and do commission or provide health improvement activities that they charge for. However, from 2013, such health improvement activities will form part of the comprehensive health service and will therefore be subject to the general prohibition on charging for health services, unless specific provision is made for a charge in legislation. This is consistent with the existing position for NHS services, which are free of charge to patients unless they are specifically exempted from the general prohibition on charging. These regulations seek to create a system where someone who is getting a service free of charge now from the NHS, will continue to receive that service free of charge when the public health responsibilities move to the local responsibilities.

- 7.3 LAs will still be able to charge for services if their primary purpose is not health improvement - leisure and social care, for example - and district councils, which are not directly affected by the legislative changes, will be able to carry on charging as they do now. However, the Department believes that there are circumstances where it is entirely right and proper for a LA to be able to charge for a public health service. They are: where the activity or service relates to an organisation, not an individual – private companies, academic institutions, etc.; and where the activity or service relates to an individual, but does not have the primary purpose of improving that individual's health – training in public health, for example. In summary, the kinds of activity that LAs can charge for in those circumstances are: providing information and advice; providing services or facilities designed to promote healthy living; providing or participating in training; and making available people or other resources.

Healthwatch

- 7.4 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* (July 2010) outlined the Government's intention to "put patients and the public first" by creating a new Healthwatch – to strengthen the collective voice of patients and the public. The White Paper 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."
- 7.5 The 2012 Act proposes that Healthwatch will be the new consumer champion for both health and social care. It will exist in two distinct forms – Local Healthwatch, at local level, and Healthwatch England, at national level.
- 7.6 On 1st October 2012, Healthwatch England was established as a committee of the Care Quality Commission to be responsible for representing the views of patients, service users and the public at a national level.
- 7.7 Locally, it is intended that on 1st April 2013 the provisions of the 2012 Act which amend Part 14 of the 2007 Act in relation to Local Healthwatch organisations will be commenced and thus LINKs will be replaced by these organisations from that date. These organisations will carry out activities relating to the involvement of people in the commissioning, provision and scrutiny of health services and social care services under contractual arrangements made with them by local authorities.

- 7.8 Local Healthwatch goes to the heart of the government’s ambition for a health and care service that is centred around patients and users. Local Healthwatch organisations will gather people’s (whether current users of services or not) views on, and experiences of, the health and social care system. In this way, community views will have real influence with those who commission and provide services about what users, carers and citizens need and want from them. This can help them to be more responsive to what matters to service users and the public, and to design services around their needs.
- 7.9 In contrast with LINKs, Local Healthwatch organisations will be social enterprises which are corporate bodies. They will thus be able to employ staff, in order to carry out the Local Healthwatch activities. Local Healthwatch organisations will also have a seat on the statutory health and wellbeing board, which will help them to influence local decision-making processes and shape the local Joint Strategic Needs Assessment and Joint Health and Wellbeing Strategy. Healthwatch England will also provide leadership and support for the new Healthwatch system.
- 7.10 This instrument imposes a duty on certain providers of health and social care services (“services-providers”), as defined in section 225(7) of the 2007 Act, to allow authorised representatives of Local Healthwatch organisations or Local Healthwatch contractors to enter and view, and observe the carrying-on of activities on, certain premises owned or controlled by them.
- 7.11 Under section 225(7) of the 2007 Act, “services-providers” are local authorities, certain NHS bodies² and any person prescribed by regulations. Regulation 14 prescribes such persons and they will therefore also be services-providers for the purposes of the duty under Part 4 of the instrument. These persons are: providers of primary medical, dental, ophthalmic or pharmaceutical services for the purposes of the 2006 Act and persons who own or control premises where such services are provided. This broadly reflects the persons whose premises LINKs have been able to enter and view.
- 7.12 The duty to allow representatives to enter and view will support and inform several of the activities to be undertaken by Local Healthwatch organisations as set out in section 221(2) of the 2007 Act. These include promoting the involvement of people in the commissioning, provision and scrutiny of local health and social care services, obtaining the views of people about their experiences of such services, and making reports and recommendations on how such services could be improved.
- 7.13 Certain exclusions are included in the instrument, for example those which seek to ensure that people’s dignity and privacy and the efficacy of service provision are preserved. There is also an exclusion in respect of certain children’s services because inspections and visits to gather children’s views are covered by other legislation. There are other exclusions such as in respect of certain children’s services as these fall

²The NHS bodies are: National Health Service trusts, NHS foundation trusts and Primary Care Trusts.

within the remit of Her Majesty's Chief Inspector of Education, Children's Services and Skills.

8. Consultation outcome

Mandatory Functions

8.1 The White Paper *Healthy Lives Healthy People: our strategy for public health in England* described the proposals for a new health and social care system. In addition, *Healthy Lives, Healthy People: consultation on the funding and commissioning routes for public health* was published on 21 December 2010. The Department wanted to ensure that local authorities are accountable to their local communities, and that they are able to determine how best to improve the public health and reduce inequalities in health in their local area. However, it was recognised that some services should be provided in a universal fashion in all areas. The consultation document set out that the Government would prescribe through secondary legislation what public health services local authorities should provide or commission. A copy of the consultation document can be found at the following link:

http://www.dh.gov.uk/en/Consultations/Liveconsultations/DH_122916

8.2 Following the consultation, in July 2011, *Healthy Lives, Healthy People: Update and way forward* was published. The document set out that local authorities will be prescribed to provide or commission the following services: weighing and measuring children, health check assessments, sexual health services, healthcare public health advice service to NHS commissioners and protecting the health of the local population. A copy of the document can be found at the following link:

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_128120

Charging

8.3 There was limited consultation on charging between the Department for Local Government and Communities and the Local Government Association. .

Healthwatch

8.4 A period of engagement was carried out over a period of 2 months (mid-April to mid-June 2012), with face-to-face and virtual workshop-style sessions held with groups of stakeholders including local authorities, LINKs and representatives from the voluntary and community sector. This included work with an expert working group of those with expertise in the area of children's social care services. A summary of the findings from the engagement period was published at the end of July 2012 and is available at the following link:

<http://www.dh.gov.uk/health/2012/07/healthwatch-engagement/>

- 8.5 A further period of consultation was carried out for a 6 week period, from 3rd August to 14th September 2012, specifically related to regulations under sections 224 and 225 of the 2007 Act. The results of the consultation were published as a supplementary report to the report mentioned above.

9. Guidance

Mandatory Functions

- 9.1 Guidance will be published for the mandatory functions.

Charging

- 9.2 Guidance will be published alongside the instrument explaining the restrictions on charging, and when charging is permissible.

Healthwatch

- 9.3 None.

10. Impact

Mandatory Functions

- 10.1 The impact on business, charities or voluntary bodies is negligible.

Charging

- 10.2 The impact on business, charities or voluntary bodies is negligible.
- 10.3 An impact assessment for parts 2 and 3 of this instrument is attached to this memorandum and will be published alongside this explanatory memorandum on the Office of Public Sector Information website.

Healthwatch

- 10.4 The impact on business, charities or voluntary bodies is negligible.
- 10.5 Annex A (pages 92 to 113) of the combined Health and Social Care Bill Impact Assessment contains a section on Healthwatch, and therefore contains relevant information. The combined Health and Social Care Bill Impact Assessment and coordinating document, and combined Equality analyses, can be found on the Department of Health website:
http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_123583.

11. Regulating small business

- 11.1 The legislation does not apply to small businesses.

12. Monitoring and review

12.1. This instrument will not be specifically monitored.

13. Contact

Liliya Skotarenko at the Department of Health [Tel: 02079723205 or email: Liliya.Skotarenko@dh.gsi.gov.uk] can answer queries regarding the mandatory functions provisions.

Jim Fowles at the Department of Health [Tel: 02079723273 or email: Jim.Fowles@dh.gsi.gov.uk] can answer queries regarding the director of public health additional functions provisions.

Kasey Chan at the Department of Health [Tel: 02072105322 or email: Kasey.Chan@dh.gsi.gov.uk] can answer any queries regarding the Local Healthwatch provisions.