

Guide to the 2013 Health Scrutiny regulations

A briefing note to help explain the 2013 regulations applying to local authority health scrutiny.
Mike Cooper 25 March 2013.

The Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013, SI 2013/218, come into force 1 April 2013. Part 4 of the regulations applies to health scrutiny. The Department of Health will be publishing guidance for health scrutiny, probably in May 2013.

1 Scope of health scrutiny

A local authority may review and scrutinise any matter relating to the planning, provision and operation of the health service in its area. (*Regulation 21.*) Where:

- Local authority means all local authorities except districts where there is a county. (NHS Act 2006 section 244(1).)
- Health service means:
 - Services provided under the duty of Secretary of State to promote a comprehensive health service – ie the NHS (NHS Act 2006 section 275); and
 - Health-related services of the local authority provided through joint NHS / local authority arrangements under section 75 of the NHS Act 2006.

2 Conditions on how health scrutiny is carried out (*Regulation 21.*)

It is up to the local authority how it carries out the role, except that in carrying out such review and scrutiny, the local authority must:

- Invite interested parties to comment on the matter; and
- Take account of relevant information available to it; and in particular relevant information provided by a Local Healthwatch organisation (or Local Healthwatch contractor).

3 Scrutiny committees

The local authority may arrange for its health scrutiny functions to be discharged by:

- An overview and scrutiny committee of the local authority.
- An overview and scrutiny committee of another local authority (including a district council) where it considers that that committee would be better placed to undertake the functions and the other local authority agrees to carry them out.

(*Regulation 28.*)

A local authority may delegate its health scrutiny functions to a committee or sub committee of its choice (*under Section 101 of the Local Government Act 1972, as the H&SCA 2012 vests the functions in the local authority itself*), subject to the following restrictions:

- None of the health scrutiny functions can be delegated to an officer. (*Regulation 29(2)(a).*)
- The health scrutiny functions cannot be carried out jointly by 2 or more local authorities, except under the specific joint scrutiny arrangements in these regulations. (*Regulation 29(2)(b).*)
- The power to report to the Secretary of State cannot be delegated to a committee or sub committee other than a designated o&s committee. (*Regulation 29(1).*)

This means that a local authority with a health o&s committee may delegate to that committee all health scrutiny functions including the power to report to the SofS; a local authority that establishes alternative arrangements to carry out health scrutiny may delegate health scrutiny functions to a committee of its choosing, except that the power to report can only be exercised by full council. (*It is understood that this will be confirmed and clarified by guidance from the Department of Health.*)

A county council may 'co-opt' to its o&s committee any member of an o&s committee of a district council within its area. (*Regulation 31.*)

4 Joint committees (Regulation 30.)

Two or more local authorities may appoint a joint o&s committee to carry out any of their health scrutiny functions (and only those functions), subject to any terms and conditions they impose (may include district councils).

Where a relevant NHS body or health service provider consults more than one local authority on a substantial development or variation (see section 8 below), then:

- Those local authorities MUST form a joint o&s committee; and
- Only that joint o&s committee may require the provision of information or the attendance of a member or employee of the relevant body (see section 6 below).

Whilst the regulations suggest that only the joint o&s committee can make a report to the Secretary of State, the Department of Health has indicated that the individual local authorities will retain the power to report to the Secretary of State, and it is understood that this will be confirmed and clarified by the guidance (all subject to section 8.3 below).

5 Referrals from HealthWatch (Regulation 21.)

If a Local Healthwatch refers a matter relating to the planning, provision and operation of the health service in the local authority's area, the local authority must:

- Acknowledge receipt within 20 working days; and
- Keep the referrer informed of any action taken in relation to the matter.

That is a matter referred as part of the activities specified in section 221(1) and (2) of the LGPIH Act 2007, amended by section 182(1) to (4) of the H&SCA 2012. (ie the LINK activities plus provision of information on local services and choice and making reports to Healthwatch England.)

6 Provision of information

Relevant NHS bodies and health service providers must provide the local authority with information about the planning, provision and operation of health services in the local authority area that the local authority reasonably requires in order to carry out its health scrutiny function; except for:

- Information that is confidential and identifies a living person or is prohibited under any enactment; unless the information can be disclosed in a way that does not identify an individual or where the individual has consented (the local authority may require the information to be provided in a way that an individual's identity cannot be ascertained).
- Information in or relating to a trust special administrator's report or draft report under sections 65F or 65I of the NHS Act 2006 or on action that should be taken by a company subject to a health special administration order under section 128 of the H&SCA 2012.

(Regulation 26.)

The local authority may require any member or employee of a relevant NHS body or health service provider to attend before it (or its o&s committee) to answer any questions that it thinks necessary to discharge its health scrutiny functions:

- As long as reasonable notice is given.
- Except that they are not required to provide confidential information or information that they would be entitled to refuse to provide in a court of law.

(Regulation 27.)

'Member' includes a director or governor of the body and a member of a committee or sub committee of a CCG, and a 'member' of any body that is itself a member of a CCG or health service provider.

7 Reports and recommendations (Regulation 22.)

The local authority may make reports and recommendations to any relevant NHS body or health service provider on matters it has reviewed or scrutinised relating to the planning, provision and operation of the health service in the local authority's area.

Such reports and recommendations must include:

- An explanation of the matter reviewed or scrutinised.
- A summary of the evidence considered.
- A list of the participants involved in the review or scrutiny.
- An explanation of any recommendations.

Where the local authority requests a response to its report or recommendations, that response must be made within 28 days.

Where the local authority has made arrangements for any of its health scrutiny functions to be carried out by an o&s committee or sub committee, a joint o&s committee or another local authority or its o&s committee, that body may in addition make reports and recommendations to the local authority or committee that appointed it or gave it those functions.

8 Substantial development and variation (*Regulations 23 to 25.*)

8.1 Consultation

Where a relevant NHS body or a health service provider has under consideration any proposal for a substantial development or variation to the health service in the local authority's area, it must:

- Consult the local authority.
- Publish and provide the local authority with the date by which it intends to make a decision and date by which the local authority must provide its comments, and any changes to those dates. (*Regulation 23(1).*)

The local authority may make comments on the proposal by the specified date. (*Regulation 23(4).*)

Where more than one local authority is consulted on a substantial variation, those local authorities must form a joint o&s committee and only that joint committee may make comments on the proposal. (*Regulations 23(4) and 30(5).*)

Where the service is arranged by a CCG or the NHSCB, it is the responsible commissioner that is responsible for consulting the local authority, not the service provider. (*Regulation 23(12).*) Where that responsibility falls on more than one body, the duty may be discharged by them acting jointly or by one of them acting on their behalf. (*Regulation 23(13).*)

This requirement does not apply:

- If the relevant NHS body or health service provider considers that a decision has to be taken without consultation because of a risk to the safety or welfare of patients or staff; they must inform the local authority of their decision and the reason for not consulting. (*Regulation 23(2).*)
- To any proposal to establish or dissolve or vary the constitution of any NHS Trust or CCG, unless that proposal involves a substantial variation to service. (*Regulation 24.*)
- To any proposals in a trust special administrator's report or draft report or to recommendations by a health special administrator on action that should be taken by a company subject to a health special administration order. (*Regulation 24.*)

8.2 Trying to reach a local agreement

Where the relevant NHS body or health service provider disagrees with any recommendation in the comments from the local authority, then:

- The relevant NHS body or health service provider must notify the local authority; and
- The relevant NHS body or health service provider and the local authority must take reasonable steps to reach agreement, and where the relevant body is a commissioner, they must involve the service provider in these steps. (*Regulation 23(5).*)

8.3 Report to Secretary of State

The local authority may make a report in writing to the Secretary of State where the local authority:

- Considers the consultation (*of the local authority*) has not been adequate in terms of content or time allowed;
- Is not satisfied with the reasons given not to consult on grounds of staff or patient welfare; OR
- Considers that the proposal would not be in the interests of the health service in its area.

(*Regulation 23(9).*)

The power to report may be delegated to an o&s committee, but if a local authority has alternative arrangements to carry out health scrutiny the power to report can only be exercised by full council.

To make such a report, the local authority must have:

- Made, by the notified date, a comment on the proposals that includes a recommendation; and
- Notified the relevant NHS body or health service provider that it wishes to make a referral.

The local authority may make such a report where the relevant NHS body or a health service provider disagrees with the local authority's recommendation, only if:

- Steps have been taken but an agreement has not been reached within a reasonable time; OR
- The relevant NHS body or health service provider has failed to take appropriate steps to seek an agreement within a reasonable time.

The report to the Secretary of State must include:

- An explanation of the proposal.
- The reasons the local authority is not satisfied with the consultation or reason for not consulting.
- A summary of the evidence considered in concluding that the proposal is not in the interests of the local health service.
- An explanation of any steps taken to seek local agreement.
- Where the relevant NHS body or health service provider disagrees with the local authority's recommendation, evidence that the local authority has tried to reach an agreement and that no agreement has been reached within a reasonable time.
- The reasons for making the report and evidence in its support.

(*Regulation 23(11).*)

9 Standard definitions and abbreviations:

- LA = local authority = any local authority, except a district in an area where there is a county council.
- A 'responsible person' = a relevant NHS body or a relevant health service provider.
- A 'relevant NHS body' = the NHSCB; a CCG that arranges the provision of services for people living in the LA area ; and an NHS Trust or Foundation Trust that provides services to people living in the LA area.
- A 'relevant health service provider' = a person or body (other than an NHS trust) that provides any relevant service – ie a service that is the responsibility of the NHSCB or a CCG (NHS service) or local authority public health service - to people living in the area of the local authority. (Paragraph (a) of section 244(3) of the NHS Act 2006 amended by section 190(1) and (4) of the H&SCA 2012).
- Local Healthwatch arrangements = arrangements to carry out LGPIHA Section 221 activities, ie LINK functions plus provision of advice about access and choice and reporting to Healthwatch England. (LGPIHA section 222(1), amended by H&SCA 2012 section 183(2).)
- Local Healthwatch Contractor is a person with whom local Healthwatch makes 'Healthwatch arrangements' (LGPIHA Section 223, amended by H&SCA 2012 section 184(1) and (6)).
- CCG = Clinical Commissioning Group.
- NHS = National Health Service in England.
- NHSCB = NHS Commissioning Board.
- o&s committee is an overview and scrutiny committee of a local authority.
- H&SCA 2012 = Health and Social Care Act 2012.
- LGPIHA = Local Government and Public Involvement in Health Act 2007.

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