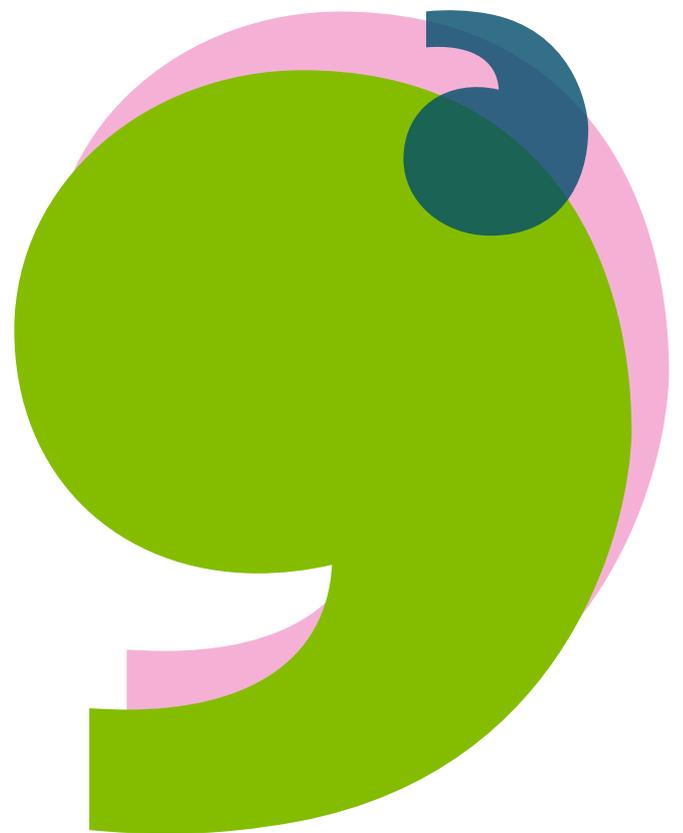


Understanding the Legislation

An overview of the legal requirements for local Healthwatch

April 2015



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1 Information for local Healthwatch

The Government has put in place legislation that places duties or obligations on local Healthwatch. This means that there is a requirement for you to undertake certain actions or activities. In addition there are some powers for local Healthwatch. These allow you to undertake an action or activity at your discretion. The aim of this document is to help local Healthwatch understand what these requirements mean for you. Healthwatch England is grateful for the advice it has received from Mills and Reeve LLP on many of the issues outlined in this document.

As local Healthwatch are new entities and your status and functions have not been tested through case law, the information here should be regarded as our own subjective interpretation.

Whilst Healthwatch England cannot provide legal advice to local Healthwatch, if there are areas of the legislation on which you would welcome further clarity then please send these to enquiries@healthwatch.co.uk and we will look to incorporate them in future versions of this document.

1.1 What does the Legislation say local Healthwatch must do?

Local Healthwatch are corporate bodies and within the contractual arrangements made with their local authority must carry out particular activities.¹ A lot of the subsequent legislative requirements are based on these activities which include:

- Promoting and supporting the involvement of local people in the commissioning, the provision and scrutiny of local care services.
- Enabling local people to monitor the standard of provision of local care services and whether and how local care services could and ought to be improved.
- Obtaining the views of local people regarding their needs for, and experiences of, local care services and importantly to make these views known.
- Making reports and recommendations about how local care services could or ought to be improved. These should be directed to commissioners and providers of care services, and people responsible for

¹ Section 221(2) of The Local Government and Public Involvement in Health Act [2007](#)



managing or scrutinising local care services and shared with Healthwatch England.

- Providing advice and information about access to local care services so choices can be made about local care services.
- Formulating views on the standard of provision and whether and how the local care services could and ought to be improved; and sharing these views with Healthwatch England.
- Making recommendations to Healthwatch England to advise the Care Quality Commission to conduct special reviews or investigations (or, where the circumstances justify doing so, making such recommendations direct to the CQC); and to make recommendations to Healthwatch England to publish reports about particular issues.
- Providing Healthwatch England with the intelligence and insight it needs to enable it to perform effectively.

Each local Healthwatch must produce a report in relation to your activities at the end of each financial year.² These reports must address such matters as the Secretary of State may direct³ and will include details of expenditure. For more detailed information about requirements relating to the annual report see the FAQ [“What is the requirement in relation to your annual reports?”](#)

1.2 Transparency and accountability of decisions

The Regulations for local Healthwatch⁴ state that each local Healthwatch must have a procedure for making relevant decisions. This procedure includes:

- Provision as to who may make such decisions.
- Provision for involving lay persons or volunteers in such decisions.
- Provision for dealing with breaches of any procedure referred to in the two previous points which should include the circumstance in which a breach would be referred to the local authority.

² Section 227 of The Local Government and Public Involvement in Health Act [2007](#).

³ Please note further Directions about the content of annual reports are expected in September 2013.

⁴ Regulation 40, The NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) [Regulations](#) 2012.



The procedure must be complied with and must be published prior to any relevant decisions being made. Any amendments to procedures should be published as soon as possible.

A relevant decision should not be taken without the necessary published procedure being in place. Relevant decisions include:

- How to undertake your activities.
- Which health and care services you are looking at covering with your activities.
- The amounts you will spend on your activities.
- Whether to request information.
- Whether to make a report or a recommendation.
- Which premises to enter and view and when those premises are to be visited.
- Whether to refer a matter to an overview and scrutiny committee.
- Whether to report a matter concerning your activities to another person.
- Any decisions about subcontracting.

Local Healthwatch may have developed these procedures and decision making process for inclusion in your tender. You may also have developed them within your governance structure and processes, but you will have to ensure they are published.

After a relevant decision has been made the local Healthwatch should publish a written statement of that decision and the reasons for that decision. It may be that the publishing of your minutes enables you to comply with this last requirement.

1.3 Public admission to meetings

Local Healthwatch meetings, including board meetings, should be open to the public where items on the agenda are looking at your “activities.”⁵ (defined earlier as the 8 activities listed under the section “What does the Legislation say local Healthwatch must do?”

It is possible, by resolution, to exclude the public or news agencies from a meeting (or part of a meeting) where publicity would be prejudicial. This could relate to the confidential nature of the business or for other special reasons stated in the resolution such as receiving information, reports or advice from third parties. This

⁵ The Public Bodies (Admission to Meetings) [Act](#) 1960, as amended by Section 189 of the Health and Social Care Act [2012](#).



is a decision that would need to be made on a meeting by meeting basis by local Healthwatch.

For meetings in public (or parts of), at least three days before the meeting you should post a notice of the time and place of the meeting at your offices or, if you have no offices, then in some central place. Upon request from a media outlet you should provide a copy of the agenda and relevant papers. Your local authority will be used to holding public meetings and may be able to offer you some insight or advice into how to go about this. Minutes of these meetings should then be made available after the meeting.

1.4 What does the Legislation say about what local Healthwatch can do?

Local Healthwatch may involve persons or organisations (other than the local authority) to help you carry out some (but not all) of your activities.⁶ You may therefore choose to subcontract the delivery of particular activities, for example the advice and information activity.

Local Healthwatch can ask providers for information which they must make available to you.⁷ For public bodies, local Healthwatch must rely on good relationships or use the Freedom of Information Act to get information. However, there is a separate requirement on NHS bodies and local authorities to implement the necessary arrangements to ensure that independent providers respond to your requests for information.⁸

Local Healthwatch have an additional reporting power enabling you to refer matters relating to social care services to an overview and scrutiny committee⁹ of a local authority. These committees must then have regard to any relevant information you have sent to them. For information Overview and Scrutiny see the FAQ "[What is your role in relation to Overview and Scrutiny?](#)"

Local Healthwatch have an additional power to Enter and View providers^{10, 11} so you can observe matters relating to health and social care services. These powers do not extend to services relating to local authorities' social service's functions for

⁶ Section 222 of The Local Government and Public Involvement in Health Act [2007](#).

⁷ Section 224 of The Local Government and Public Involvement in Health Act [2007](#).

⁸ The arrangements to be made by Relevant Bodies in Respect of Local Healthwatch [Regulations](#) 2013." (28 March 2013)

⁹ Section 226 of The Local Government and Public Involvement in Health Act [2007](#).

¹⁰ The Local Authorities (Public Health Functions and entry to Premises by Local Healthwatch Representatives) [Regulations](#) 2013. (18 February 2013).

¹¹ The arrangements to be made by Relevant Bodies in Respect of Local Healthwatch [Regulations](#) 2013." (28 March 2013).



people under the age of 18. For information about Enter and View see the FAQ [“Enter and View.”](#)

2 Frequently asked questions:

2.1 What is meant by local care services - does it cover health and social care?

Local care services are defined as services provided as part of the health service in England, as well as services provided as part of social services functions. You would therefore cover both health and care services.

2.2 What is your role in relation to children and young people?

The expectations with regards to the work of local Healthwatch are the same for adults and children. The only difference being that local Healthwatch do not have the power to “Enter and View” premises where services relating to a local authority’s social services functions are being carried out for people under the age of 18. Please contact us if you need the legislation trail that confirms that children and young people are covered by Healthwatch.

2.3 What happens to your reports and recommendations?

To help make the views of people known to the people that are responsible for the commissioning, providing, managing or scrutinising of local care services, you can make reports and recommendations. These reports and recommendations can cover how local care services could or ought to be improved. The service providers must have regard to your views, reports and recommendations and respond to you explaining what action they will take, or why they are not taking action.¹² Your reports and recommendations should also be shared with Healthwatch England.

¹² Section 221 [3A] and Section 224 of The Local Government and Public Involvement in Health Act 2007 and implemented by “The arrangements to be made by Relevant Bodies in Respect of Local Healthwatch [Regulations](#) 2013.” (28 March 2013)



2.4 What is the requirement in relation to your annual reports?

By the 30th June, each local Healthwatch must produce a report in relation to your activities for the financial year that ended 31st March.¹³ These reports must address such matters as the Secretary of State may direct¹⁴ and will include information about the amount of your (and subcontractors that are delivering Healthwatch activities) spending and details what those amounts were spent on. Your reports must be made publicly available and a copy sent to each of the following:

- Healthwatch England.
- The local authority.
- NHS England.
- Each clinical commissioning group, whose area or any part thereof, falls within the area of the local authority.
- Any overview and scrutiny committee of the local authority.
- The Care Quality Commission.

Further Directions about local Healthwatch annual reports are expected to be published in September 2013.

2.5 What is your role in relation to Enter and View?

Local Healthwatch have an additional power to Enter and View providers^{15, 16} so you can observe matters relating to health and social care services. These powers do not extend to Enter and View of services relating to local authorities' social services functions for people under the age of 18.

Organisations must allow an authorised representative to Enter and View and observe activities on premises controlled by the provider as long as this does not affect the provision of care or the privacy and dignity of people using services.^{17, 18}

¹³ Section 227 of the Local Government and Public Involvement in Health Act [2007](#).

¹⁴ Please note further Directions about the content of annual reports are expected in September 2013.

¹⁵ The Local Authorities (Public Health Functions and entry to Premises by Local Healthwatch Representatives) [Regulations](#) 2013. (18 February 2013).

¹⁶ The arrangements to be made by Relevant Bodies in Respect of Local Healthwatch [Regulations](#) 2013.” (28 March 2013).

¹⁷ The Local Authorities (Public Health Functions and entry to Premises by Local Healthwatch Representatives) [Regulations](#) 2013. (18 February 2013).

¹⁸ The arrangements to be made by Relevant Bodies in Respect of Local Healthwatch [Regulations](#) 2013.” (28 March 2013).



Providers do not have to allow entry to parts of a care home which are not communal areas or allow entry to premises if their work on the premises relates to children’s social services.

Local Healthwatch or the relevant contractor must comply with and publish a procedure for making decisions about who may be an authorised representative; updating this procedure if it is amended. The local Healthwatch must maintain and publish a list of individuals who are authorised representatives; and provide each authorised representative with written evidence of their authorisation.¹⁹

2.6 Do authorised representatives need a Disclosure and Baring Service (DBS) check?

The The Criminal Records Bureau (CRB) and the Independent Safeguarding Authority (ISA) have merged to become the Disclosure and Barring Service (DBS). CRB checks are now called DBS checks²⁰.

DBS check applicants must be 16 or over.

There are 3 types of check:

- Standard: This will check for spent and unspent convictions, cautions, reprimands and final warnings, and will take about 2 weeks.
- Enhanced: Includes the same as the standard check plus any additional information held by local police that’s reasonably considered relevant to the workforce being applied for (adult, child or ‘other’ workforce). It takes about 4 weeks.
- Enhanced with list checks: This is like the enhanced check, but includes a check of the DBS barred lists, and takes about 4 weeks.

It will be up to each local Healthwatch to decide the level of check you apply for, however as Healthwatch activity is not a regulated activity, you would not be entitled to carry out the enhanced with list checks. We understand that while a standard check should be sufficient, the DBS would recommend you may want to apply for an enhanced check if the person will be coming into contact with children and vulnerable adults.

Local Healthwatch must also which should also be satisfied that the individual is a suitable person for the purposes of Enter and View, and observing activities on premises owned or controlled by a services-provider²¹.

¹⁹ Regulation 42, The NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) [Regulations](#) 2012

²⁰ Disclosure and Barring Service (DBS) checks (previously CRB checks) [overview](#) (12 February 2014)



A minority of local Healthwatch have raised concerns that their registered body is refusing to submit forms to the Disclosure and Barring Service. In these cases, please make them aware of the legislation and if they still refuse, then seek another registered body to process the application forms.

2.7 Are there requirements relating to campaigning?

The regulations²² prevent a local Healthwatch from being set up as a political body or making political activities its main activity. The regulations allow local Healthwatch to speak out and to campaign (including for policy or legislative change) provided it is in support of their core purpose of being a consumer champion.

A local Healthwatch must not give support or funding to a political party, nor to a candidate or politician. The local Healthwatch must not be used as a vehicle for the expression of political views. A local Healthwatch must not endorse or comment upon any party or candidate but instead concentrate on the issue that they are raising as it relates to consumers.

During an election period, local Healthwatch should be careful not to produce material that could be regarded as “election material”, e.g. anything that explicitly advocates a particular political party or party candidate or advises on voting for or against a particular party or candidate.

2.8 What are the requirements relating to work with Healthwatch England?

The Government recognises the strength of a network of 153 organisations with a local and national remit, and therefore places a number of requirements on you to work with Healthwatch England. You must share your views, as well as any reports or recommendations you make about how local care services could or ought to be improved with Healthwatch England. Local Healthwatch must provide Healthwatch England with the intelligence and insight needed to enable it to perform effectively. You are also able to make recommendations to Healthwatch England to advise the Care Quality Commission to conduct special reviews or investigations or recommend that Healthwatch England publish reports about particular issues.²³ Local Healthwatch must send Healthwatch England your annual reports. The hub

²¹ Regulation 42, The NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) [Regulations](#) 2012

²² Regulation 36, The NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) [Regulations](#) 2012

²³ Section 221(2) and Section 227 (4) of The Local Government and Public Involvement in Health Act [2007](#).



has been set up as a route to facilitate the sharing of views and information to help meet the requirements within the legislation.

2.9 Must local Healthwatch use the Healthwatch trademark?

Local Healthwatch must, by the date set by the local authority, apply to Healthwatch England for a licence to use the Healthwatch trademark. This trademark must be used in relation to your activities. If Healthwatch England is considering or taking out infringement proceedings, local Healthwatch must provide advice, support or other assistance as required.²⁴

2.10 What are the requirements relating to lay people and volunteers?

A lay person is someone who is not a health or social care professional or an employee of a local Healthwatch organisation. A volunteer is a person who is not being paid to be a member or Director of a local Healthwatch or a person who is engaged in carrying out local Healthwatch activities. Each local authority will enter into bespoke arrangements with its own local Healthwatch and the issue of lay and volunteer involvement will be covered in these contracts. The governance arrangements of the local Healthwatch must include provision for the involvement of lay persons and volunteers in the governance of the body and involve lay persons and volunteers in your activities.²⁵

2.11 Does Healthwatch cover private sector services?

Healthwatch England has sought guidance from the Department of Health on this issue. Their response is that Healthwatch activities cover private and independent providers who are in receipt of public funding (e.g. providers who provide services to both self-funders and publicly funded service users).

Under the 2007 Act, local Healthwatch activities relate to the NHS and local authority social services. This means that services outside this (e.g. privately funded care that is not provided as part of the NHS or as part of local authority social services) are not within the scope of local Healthwatch activities.

However, as local Healthwatch organisations are not statutory bodies, what you can and cannot do is not governed by legislation in the same way as it would be for statutory bodies. You could (in principle) voluntarily choose to cover private and

²⁴ Regulation 43, The NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) [Regulations](#) 2012

²⁵ Regulation 38 and Regulation 40 (g), The NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) [Regulations](#) 2012



independent providers not in receipt of public funding. However, your constitution or governing document would need to allow this. It is likely that if your local authority funds you to deliver your statutory functions that you would need to use an alternative income source to support this voluntary initiative. Finally whilst you could choose to work with private providers, there is no requirement for private providers to provide you with information or respond to recommendations, if they choose not to do so. Healthwatch England is working with the Department of Health and other interested parties to look at this issue.

2.12 What role does Healthwatch have in relation to Wales or Scotland?

Healthwatch England has sought guidance from the Department of Health on this issue. Their response is that the remit of a local Healthwatch organisation would extend to people from the devolved regions receiving services in England as part of the health service. For example, if an individual living in Wales was receiving services in an English local authority as part of the health service, that individual would be part of the group of “local people” covered by the local Healthwatch organisation for that area.

The remit of a local Healthwatch organisation would also cover people from England who use services in the devolved regions as part of the health service or as part of the social services functions of an English local authority (e.g. a placement in a care home). For example, if an individual from an English local authority was receiving social services in Wales, arranged by that local authority as part of its social services functions, that individual would be part of the group of “local people” covered by the local Healthwatch organisation for that local authority.

2.13 What are the requirements relating to being a Social Enterprise?

Local Healthwatch must be a body corporate which is a social enterprise. You would be considered to be a social enterprise if a person might reasonably consider that you act for the benefit of the community in England,²⁶ and you satisfy the criteria in the local Healthwatch regulations including that lay people and volunteers are involved in the governance.²⁷

In addition, there are additional criteria which only apply to social enterprises that are not:

²⁶ Section 222 (2) and (8) of The Local Government and Public Involvement in Health Act [2007](#) (as amended by section 184 Health and Social Care Act [2012](#).)

²⁷ Regulation 38, The NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) [Regulations](#) 2012



- A company limited by guarantee and registered as a charity in England and Wales.
- A community interest company registered as a company limited by guarantee.
- A charitable incorporated organisation.

Where the local Healthwatch is a social enterprise that does not take the form outlined in the bullet points above, then that local Healthwatch constitution must ensure, that not less than 50% of its distributable profits in each financial year will be used for the purpose of its activities. In addition, in these circumstances the local Healthwatch constitution or governing document must contain a statement or condition that the local Healthwatch is carrying on its activities for the benefit of the community in England. The constitution must also contain provisions relating to the distribution of assets if the local Healthwatch was wound up or dissolved. This would require that the residual assets of the body would be distributed to those members of the body (if any) who are entitled to share and provide that no member would receive an amount which exceeded the paid up value of the shares which they held in the company. The local Healthwatch constitution should ensure that after any distribution to members of the body, assets would then be distributed to another social enterprise.²⁸

2.14 What is your role in relation to the Care Quality Commission?

You may ask Healthwatch England to advise the Care Quality Commission about any special reviews or investigations which you think may be required. If necessary, you may bypass Healthwatch England and make the request directly to the Care Quality Commission. While not governed by legislation, you will want to develop a good relationship with your Care Quality Commission inspectors and share information with them about providers. If you are ever concerned about the quality or safety of a service, where the concern does not amount to a safeguarding issue where an immediate risk is posed to an individual, then your concern should be flagged to your Care Quality Commission Compliance Manager who can determine if there is a breach of regulations.

²⁸ Regulation 35 of the NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch [Regulations](#) 2012



2.15 What is your role in relation to Monitor and Trust Special Administrators?

Trust Special Administrators can be appointed by Monitor following a process in which the Trust is found to be financially unsustainable. Once appointed, the Trust Special Administrator must offer to meet with you and ask you for a written response of your views.²⁹

2.16 What is your role in relation to Overview and Scrutiny?

Local Healthwatch can escalate matters to the overview and scrutiny committee of a local authority where they feel it necessary to do so. The overview and scrutiny committee must acknowledge receipt and keep you informed of any action they take.³⁰

2.17 What is your role in relation to Health and Wellbeing Boards?

Local Healthwatch have a right to attend their health and wellbeing board.³¹ Whilst there is nothing forcing the local Healthwatch to attend, you will no doubt choose to take up your place on the Board. The legislation gives the local Healthwatch equal status and therefore the local Healthwatch should have a vote. However, local authorities do have the power to restrict who can vote but this must be used in consultation with the members of the Health and Wellbeing Board.³²

2.18 What is your role in relation to Quality Accounts?

A Quality Account is a report about the quality of NHS services provided by an NHS healthcare provider. Under the regulations each provider has a legal duty to publish reports annually and make these available to the public.

Service providers must send local Healthwatch a draft version of their Quality Account by April 30th.^{33, 34} Local Healthwatch can choose to produce a statement on whether or not you consider, based on the views of consumers and users and

²⁹ Section 65H (e) (8) and (9) of the National Health Service Act [2006](#).

³⁰ The Local Authority (Public Health, Health and Well Being Board and Health Scrutiny) [Regulations 2013](#).

³¹ Section 194 of the Health and Social Care Act [2012](#).

³² The Local Authority (Public Health, Health and Well Being Board and Health Scrutiny) [Regulations 2013](#).

³³ The National Health Service (Quality Accounts) [Regulations 2010](#).

³⁴ The National Health Service (Quality Accounts) Amendment [Regulations 2012](#)



other information you have access to on the provider, that the report is a fair reflection of the full range of services provided. This statement then has to be included in the Appendix of the Quality Account.

2.19 What are the requirements relating to the Public Sector Equality Duty?

Our preliminary view is that local Healthwatch are not subject to the specific duties set out in the Equality Act (Specific Duties) Regulations 2011. However, you are subject to the general equality duty which requires you to have "due regard" to the relevant statutory needs³⁵ in your work. The Equality and Human Rights Commission has published comprehensive technical [guidance](#) on how organisations may comply with the general public sector equality duty.

2.20 What are the requirements relating to Freedom of Information for local Healthwatch?

The Freedom of Information Act has been amended to include local Healthwatch.³⁶

Our legal advice is that any information generated by a local Healthwatch in discharging its functions is likely to be subject to the Freedom of Information Act 2000 (FOIA) as information held on behalf of the relevant local authority that you contract with. Accordingly, the local authority would be primarily responsible for dealing with FOIA requests made to a local Healthwatch. In light of this, your Healthwatch may want to agree FOIA arrangements with your local authority.

Whilst Healthwatch England cannot provide legal advice to local Healthwatch, if there are areas of the legislation on which you would welcome further clarity then please send these to enquiries@healthwatch.co.uk and we will look to incorporate this in future versions of this document.

2.21 Further sources of information

- The Local Government and Public Involvement in Health Act [2007](#).
- The Health and Social Care Act [2012](#).
- National Health Service Act [2006](#).
- The Equality Act [2010](#).
- The Freedom of Information Act [2000](#).

³⁵ Section 149 of the Equality Act [2010](#)

³⁶ Part 2 of Schedule 1 of the Freedom of Information Act [2000](#)



- The Public Bodies (Admission to Meetings) [Act](#) 1960.
- The NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) [Regulations](#) 2012.
- The arrangements to be made by Relevant Bodies in Respect of Local Healthwatch [Regulations](#) 2013.” (28 March 2013).
- The Local Authorities (Public Health Functions and entry to Premises by Local Healthwatch Representatives) [Regulations](#) 2013. (18 February 2013).
- The Local Authority (Public Health, Health and Well Being Board and Health Scrutiny) [Regulations](#) 2013.
- The National Health Service (Quality Accounts) [Regulations](#) 2010.
- The National Health Service (Quality Accounts) Amendment [Regulations](#) 2012.
- The essential guide to the Public Sector Equality [Duty](#).

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