

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5 – Public involvement and local government

Chapter 1 – Public involvement

Healthwatch England

Section 181 - Healthwatch England

1112. This section amends Schedule 1 to and Part 1 of the Health and Social Care Act 2008 (the 2008 Act) and makes consequential amendments to other enactments in relation to the establishment of Healthwatch England as a statutory committee of the Care Quality Commission (CQC).
1113. *Subsection (2)* inserts new sub-paragraphs into paragraph 6 of Schedule 1 to the 2008 Act. New sub-paragraph (1A) provides for the establishment of the Healthwatch England committee of the CQC in accordance with regulations. New sub-paragraph (1B) sets out Healthwatch England’s purpose. Healthwatch England will be a national body representing the views of users of health and social care services, other members of the public and Local Healthwatch organisations (as to which see section 182).
1114. New sub-paragraph (5A), inserted by *subsection (3)*, requires the regulations under sub-paragraph (1A) to require the person with power to appoint members to secure that a majority of the members are not members of the CQC. New sub-paragraph (5B) enables those regulations to specify other results to be secured. New sub-paragraph (5C) enables the regulations, in particular, to make provision about eligibility for appointment as a member, and about procedures for selecting or proposing persons to be appointed as members. New sub-paragraph (5D) enables the regulations, in particular, to make provision as to the removal or suspension of members and the payment of remuneration or allowances.
1115. *Subsection (4)* inserts new sections 45A to 45C into Chapter 3 of Part 1 of the 2008 Act. *Subsections (1) to (6)* of section 45A make provision as to the functions to be performed by Healthwatch England. *Subsection (1)* provides that those functions are functions of the CQC which the CQC must arrange for Healthwatch England to exercise on its behalf.
1116. The function in *subsection (2)* is a duty to provide Local Healthwatch organisations with advice and assistance of a general nature in relation to the making of arrangements with local authorities under section 221(1) of the Local Government and Public Involvement in Health Act 2007 (the 2007 Act) (local arrangements relating to patient and public involvement in health and social care), the making of arrangements, pursuant to those arrangements, with “Local Healthwatch contractors” and the carrying-on of activities mentioned in section 221(2) of the 2007 Act. Those activities relate to patient and public involvement in health and social care. “Local Healthwatch contractors” are persons

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(individuals or bodies) who assist a Local Healthwatch organisation to carry on those activities or who carry on some of those activities on its behalf.

1117. The function in *subsection (3)* is a power to make recommendations to English local authorities about the making of arrangements with Local Healthwatch organisations under section 221(1) of the 2007 Act. The function in *subsection (4)* is a power to give written notice to an English local authority in circumstances where Healthwatch England is of the view that the activities mentioned in section 221(2) are not being properly carried on in its area.
1118. The function in *subsection (5)* read with *subsection (6)* is a duty to advise and provide information to the Secretary of State, the NHS Commissioning Board, Monitor and English local authorities on various matters. Those matters are the views of users of health or social care services and others on their needs for such services and their experiences of such services and the views of Local Healthwatch organisations and other persons on the standard of provision of such services and whether or how this could or should be improved.
1119. The function in *subsection (5)* could include informing the NHS Commissioning Board of concerns Healthwatch England has identified from feedback from Local Healthwatch organisations about problems with, for example, the commissioning of maternity services across England. *Subsection (7)* requires the Secretary of State, the NHS Commissioning Board, Monitor and English local authorities to inform Healthwatch England in writing of their response or proposed response, to advice given by Healthwatch England.
1120. *Subsection (8)* enables Healthwatch England to provide the CQC with advice and information on various matters. Those matters are the views of users of health or social care services and others on their needs for such services and their experiences of such services and the views of Local Healthwatch organisations and other persons on the standard of provision of such services and whether or how this could or should be improved. *Subsection (8)* also requires the CQC to inform Healthwatch England in writing of its response, or proposed response, to advice given by Healthwatch England.
1121. The CQC is required by *subsection (9)* of new section 45A to publish details of what arrangements it has made for Healthwatch England to perform its functions and these details must be published in a separate report to that published under section 83 (annual reports of the CQC). Healthwatch England is required by *subsection (10)*, when performing functions, to have regard to particular aspects of government policy where the Secretary of State so directs.
1122. New section 45B requires the CQC and Healthwatch England to have regard to any guidance from the Secretary of State on managing conflicts of interest between themselves. It requires the CQC, in making arrangements for Healthwatch England to exercise functions on its behalf under section 45A, and Healthwatch England, in exercising functions on behalf of the CQC, to have regard to any guidance issued by the Secretary of State on managing conflicts between the exercise of functions by the CQC and the exercise of functions on behalf of the CQC by Healthwatch England.
1123. New section 45C requires Healthwatch England to report annually to the CQC on the views of users of health or social care services and others on their needs for such services and their experiences of such services and the views of Local Healthwatch organisations and other persons on the standard of service provision and whether or how this could or should be improved. It also requires Healthwatch England to publish a report each year on how it has discharged functions during the year. *Subsection (2)* requires Healthwatch England to lay before Parliament its report on how it has discharged its functions and to send a copy of this report to the Secretary of State and to each Local Healthwatch organisation. *Subsection (3)* allows Healthwatch England to publish other reports at other times about matters relating to health and social care. *Subsection (4)* places a duty on Healthwatch England to have regard to recommendations from Local

Healthwatch organisations to publish reports on particular matters under *subsection (3)*. *Subsection (5)* requires that before publishing reports under section 45C(1)(b) or (3) Healthwatch England must exclude, as far as is practicable, information relating to an individual's private affairs which, if published, would seriously and prejudicially affect that individual's interests or might do so.

1124. *Subsections (5) to (10)* of section 181 amend section 82 of the 2008 Act which concerns a power for the Secretary of State to issue a direction to the CQC if the Secretary of State considers that the CQC is failing to carry out its functions, or to carry them out properly and enables the Secretary of State to carry out the CQC's functions if the CQC fails to comply with the direction. The amendments to section 82 ensure that the Secretary of State may similarly direct Healthwatch England if the Secretary of State considers that it is significantly failing or has significantly failed to carry out, or properly carry out, the functions set out in new section 45A or any other functions it is required to discharge. If Healthwatch England fails to comply with the direction, the amendments to section 82 enable the Secretary of State to carry out the function in question or to arrange for someone else to carry out the function.
1125. *Subsections (11) and (12)* of this section insert new *subsections (1A) and (2A)* into section 83 of the 2008 Act. New *subsection (1A)* has the effect that the duty on the CQC to report annually on its exercise of functions does not apply in relation to its functions under section 45A. The CQC is required by section 45A(1) to arrange for Healthwatch England to carry out those functions and the preparation of annual reports on those functions is the duty of Healthwatch England itself under section 45C(1) of the 2008 Act. New *subsection (2A)* inserted by *subsection (12)* has the effect that the CQC's annual report on the provision of NHS care and adult social services must separately set out and identify the contents of Healthwatch England's report made to it on the matters mentioned in section 45A(5). Those matters are the views of users of health or social care services and others on their needs for such services and their experiences of such services and the views of Local Healthwatch organisations and other persons on the standard of service provision and whether or how this could or should be improved.
1126. *Subsection (13)* makes consequential amendments to the Public Records Act 1958, the House of Commons Disqualification Act 1975 and the Northern Ireland Assembly Disqualification Act 1975 to provide that the records of Healthwatch England are public records for the purposes of the Public Records Act 1958 and that its members are disqualified from being members of the House of Commons and of the Northern Ireland Assembly.
1127. *Subsection (14)* has the effect that meetings of the Healthwatch England committee will, in general, have to be open to the public as per the Public Bodies (Admission to Meetings) Act 1960.

Local Healthwatch organisations

Section 182 – Activities relating to local care services

1128. This section amends section 221 of the 2007 Act as part of a set of amendments to Part 14 of that Act, which concerns local arrangements for patient and public involvement in health and social care. Section 221 of the 2007 Act imposes a duty on local authorities to make contractual arrangements for the involvement of people in the commissioning, provision and scrutiny of health and social services. In this context *subsection (2)* of section 182 replaces references in section 221(2)(a), (b) and (c) of the 2007 Act to "people" with references to "local people"; and *subsection (8)* introduces a definition of "local people" in section 221(6).
1129. *Subsections (3) to (5)* further add to the list of Local Healthwatch activities mentioned in section 221(2) of the 2007 Act in relation to which local authorities must make contractual arrangements. *Subsection (3)* adds an activity of making people's views known and making reports and recommendations for improvements to health and social

care services to Healthwatch England. *Subsection (4)* read with *subsection (5)* adds activities of reaching views on service standards and improvements, making those views known to the Healthwatch England committee, giving advice and information about access to local health and social care services and about choices in relation to these services, making recommendations to Healthwatch England to advise the CQC to conduct special reviews or investigations or directly making such recommendations to the CQC, making recommendations to Healthwatch England to publish reports about particular matters relating to health or social care and assisting Healthwatch England. In accordance with amendments made by section 183 to section 222 of the 2007 Act the contractual arrangements would have to be made with Local Healthwatch organisations.

1130. *Subsection (6)* inserts new *subsection (3A)* into section 221 to place a duty on persons to whom the views of people are made known or reports or recommendations for service improvements are made under section 221(2)(d) to have regard to those views, reports or recommendations when exercising functions relating to health or social care services. Under section 221(2)(d) such views, reports or recommendations could be given or made to persons responsible for commissioning, providing, managing or scrutinising health or social care services.
1131. *Subsection (7)* requires the local authority to ensure that only one contract under section 221(1) (with a Local Healthwatch organisation) is in force in relation to its area at any one time.
1132. *Subsection (11)* inserts new section 45D into the 2008 Act which provides a power for the CQC to grant a licence for use of a registered trademark, of which the CQC is the proprietor, to Local Healthwatch organisations in relation to the carrying-on of Local Healthwatch activities. It would enable the licence to provide for the grant of a sub-licence authorising use of the trademark by a Local Healthwatch contractor, in relation to the carrying-on of those activities under arrangements made by Local Healthwatch organisations.

Section 183 – Local authority arrangements

1133. This section makes provision as to the contractual arrangements that a local authority is required to make under section 221(1) of the 2007 Act.
1134. *Subsection (2)* amends section 222 of the 2007 Act to specify who a local authority must contract with under section 221(1) for the carrying-on of Local Healthwatch activities. It requires the contractual arrangements under section 221(1) to be made with a body corporate which is a social enterprise, and which satisfies any criteria prescribed by regulations. It inserts new *subsection (2A)* into section 222 which provides that the body contracted under section 221(1) is to have the function of carrying on the Local Healthwatch activities in the area concerned and is to be known as the Local Healthwatch organisation for that area. *Subsection (2)* of section 183 also inserts new *subsection (2B)* into section 222 of the 2007 Act which enables local authorities to authorise Local Healthwatch organisations to make arrangements (Local Healthwatch arrangements) for other persons (Local Healthwatch contractors) (which could be individuals or bodies) to assist them to carry on the activities or to carry on some of the activities on their behalf.
1135. *Subsections (3) to (5)* make consequential amendments to section 222 of the 2007 Act.
1136. *Subsection (6)* inserts new *subsections (7A)* and *(7B)* into section 222 of the 2007 Act. New *subsection (7A)* places a duty on local authorities to seek to ensure that the arrangements they make with Local Healthwatch organisations are operating effectively and are providing value for money. *Subsection (7B)* requires the local authority to publish a report of its conclusions in seeking to meet these two objectives.
1137. *Subsection (7)* substitutes *subsection (8)* of section 222 of the 2007 Act and inserts new *subsections (9)* and *(10)* into that section. *Subsection (8)* as substituted sets out when a

body is a social enterprise for the purposes of the duty under section 222(2). For these purposes a body is a social enterprise if it could reasonably be considered to act for the benefit of the community in England (the community benefit test) and it satisfies any criteria prescribed in regulations. *New subsection (9)* provides a regulation-making power to allow provision to be made about the sort of activities that are to be treated as meeting the community benefit test and the activities that are to be treated as not meeting it. *New subsection (10)* clarifies that “community”, for these purposes, includes a section of the community and provides a regulation-making power to allow provision to be made as to what constitutes a section of the community, what does not constitute a section of the community and what may constitute a section of the community.

1138. *Subsection (9)* inserts new section 222A into the 2007 Act to impose a duty on the local authority to have regard to any guidance from the Secretary of State on managing conflicts of interest between the making of arrangements under section 221(1) of the 2007 Act with Local Healthwatch organisations and the carrying-on of Local Healthwatch activities. It also requires the local authority to require the Local Healthwatch organisation to have regard to such guidance.

Section 184 – Local arrangements: power to make further provision

1139. This section amends section 223 of the 2007 Act, which concerns a duty to make regulations concerning the contents of local authorities’ contractual arrangements with Local Healthwatch organisations under section 221(1) of the 2007 Act.
1140. *Subsection (2)* makes a consequential amendment to section 223(1) of the 2007 Act.
1141. *Subsection (3)* inserts new *subsection (1A)* into section 223 which provides a power for the Secretary of State to make regulations requiring local authorities, in their contractual arrangements under section 221(1), to require Local Healthwatch organisations to include particular provision in their arrangements with Local Healthwatch contractors.
1142. *Subsection (4)* makes amendments to section 223(2). These include a power for regulations under section 223(1) or (1A) to require local authorities to include prescribed provision in their contractual arrangements with Local Healthwatch organisations and, similarly, to require local authorities to require Local Healthwatch organisations in their arrangements with Local Healthwatch contractors to include prescribed provision. The provision which may be prescribed includes provision relating to the activities which a Local Healthwatch contractor may not carry out on behalf of a Local Healthwatch organisation, the obtaining (by a Local Healthwatch organisation) of a licence from the CQC for use of a trade mark, the grant of a sublicense to a Local Healthwatch contractor, the use or infringement of the trade mark, and the imposition of a requirement for a Local Healthwatch organisation to act with a view to securing that its Local Health contractors are representative of local residents and service users or potential service users.

Section 185 - Independent advocacy services

1143. This section requires local authorities to make arrangements for the provision of independent advocacy services in relation to their area for complaints relating to the provision of health services and, as set out in *subsection (2)*, removes this duty from the Secretary of State.
1144. *Subsection (1)* of this section inserts new section 223A into the 2007 Act to require local authorities to make arrangements for the provision of independent advocacy services in relation to their area.
1145. *Subsection (2)* of new section 223A defines “independent advocacy services”. These are services providing assistance (whether by way of representation or otherwise) to persons making various types of complaints in relation to the provision of health services, or to persons intending to make such complaints. *Subsection (3)* enables a local

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authority to make other arrangements for the provision of services to assist individuals in connection with complaints relating to services provided as part of the health service.

1146. *Subsection (4)* of new section 223A provides that where a local authority makes arrangements for a person to arrange for the provision of independent advocacy services, that person may not commission the services from a Local Healthwatch organisation. This does not prevent local authorities from making arrangements for the provision of independent advocacy services by Local Healthwatch organisations directly, or by other providers.
1147. *Subsection (5)* of new section 223A provides that local authorities must have regard to the principle that, as far as practicable, the provision of independent advocacy services or other services under section 223A should be independent of the person being complained about, or involved in investigating the complaint or adjudicating on it.
1148. *Subsection (6)* of new section 223A enables the local authority to make payments to providers of independent advocacy services or other services under section 223A and to persons arranging for the provision of such services.
1149. *Subsection (7)* of new section 223A enables the Secretary of State to make regulations to require a provider of independent advocacy services to have in place insurance cover against any claims that could be made against the provider for negligence whilst providing those services.
1150. *Subsections (8) and (9)* of new section 223A enable the Secretary of State to direct local authorities about the exercise of functions under section 223A, and to vary or revoke such directions. This would allow the Secretary of State to direct local authorities to, for example, make arrangements for the provision of independent advocacy services to a particular level or in a particular way.
1151. *Subsections (3) and (4)* of section 185 make consequential amendments to section 134 of the Mental Health Act 1983 and section 59 of the Safeguarding Vulnerable Groups Act 2006 respectively.

Section 186 - Requests, rights of entry and referrals

1152. *Subsections (1) to (5)* amend section 224 of the 2007 Act, the effect of which is to enable the Secretary of State to make regulations to impose a duty on certain persons such as certain providers or commissioners of health or social care services to respond to requests for information, or reports or recommendations made by Local Healthwatch organisations or Local Healthwatch contractors when those organisations or contractors are carrying on Local Healthwatch activities or when Local Healthwatch organisations are discharging the duty under regulations under section 223(2)(i) to act with a view to securing that Local Healthwatch contractors are representative of the local area.
1153. *Subsections (6) to (11)* amend section 225 of the 2007 Act, the effect of which is to require the Secretary of State to make regulations to impose a duty on certain persons such as certain providers of health or social care services to allow representatives of Local Healthwatch organisations to enter and view premises and carry out observations for the purposes of carrying-on of Local Healthwatch activities, under arrangements under section 221(1) or Local Healthwatch arrangements.
1154. *Subsections (12) to (16)* make consequential amendments to section 226 of the 2007 Act, which imposes duties on local authority overview and scrutiny committees in relation to referrals of social care matters, including a duty to acknowledge receipt of referrals and to keep the referrer informed of the committee's actions. The amendments provide that those duties apply in relation to referrals by Local Healthwatch organisations or Local Healthwatch contractors instead.

Section 187 – Annual reports

1155. This section amends section 227 of the 2007 Act. The effect is that Local Healthwatch organisations are to be required to produce an annual report for each financial year. This includes a requirement for the report to be prepared by 30 June following the end of each financial year and copies of it to be made publicly available. Arrangements made by local authorities under section 221 must also have a requirement for the person preparing the report, in deciding the manner in which it is appropriate for the report to be made publicly available, to have regard to any guidance issued by the Secretary of State. The report must be required to set out the amounts spent by the Local Healthwatch organisation and its Local Healthwatch contractors and what those amounts were spent on.
1156. *Subsection (5)* amends section 227(4) of the 2007 Act to ensure that arrangements made by local authorities under section 221 must require copies of the annual reports to be sent to the NHS Commissioning Board, relevant CCGs and Healthwatch England in addition to the categories of persons to whom such reports were previously required to be sent. Under the amendments made by *subsection (5)*, those categories no longer include the Secretary of State.

Section 188 – Transitional arrangements

1157. This section is intended to assist local authorities to transfer arrangements under section 221(1) of the 2007 Act to Local Healthwatch organisations, upon commencement of the provisions amending the 2007 Act. The Secretary of State under *subsection (2)* may make a scheme to transfer property, rights and liabilities from the current persons with whom arrangements under section 221 have been made to the new Local Healthwatch organisations. *Subsections (3) to (9)* set out further details in respect of property and staff transfer schemes which may be made. A scheme may make provision for transfer of staff and may make provision which is the same or similar to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (S.I. 2006/246) (*subsection (3)*). The scheme may transfer property, rights and liabilities, including those that could not otherwise be transferred (*subsection (4)*). New rights can be created, or liabilities imposed, in relation to the property or rights transferred (*subsection (5)*). Provision may be made in the scheme about the continuing effect of things a person ("the transferor"- the person from whom the things are being transferred) has done in respect of the things transferred. Provision may also be made about the continuation of things done in relation to the transferor in respect of the things transferred (*subsection (6)*). A scheme can provide for the continuation of legal proceedings (*subsection (7)*).
1158. *Subsection (8)* enables the Secretary of State's scheme to require a local authority to pay compensation to the transferor and to require the local authority to determine the amount of the compensation or to give powers to the Secretary of State to do so. A scheme may also make supplementary, incidental and consequential provision (*subsection (9)*).

Section 189 – Consequential provision

1159. This section makes amendments to various provisions of legislation consequent on the provisions relating to Local Healthwatch organisations.