

Health and Social Care Act 2012: legal note

1. As Ellis writes, form follows function.

2. Generally, ‘function’ has a specific legal meaning in the context of public authorities (ministers and other public bodies). Basically, a function is either a duty (mandatory, ‘shall’ or ‘must’) or a power (discretionary, ‘may’), though it is not always clear – a function described as a duty can morph into something more like a power (as we will see below).

3. A public authority cannot lawfully do anything, unless there is a law which imposes a duty or confers a power on it. Such a law is the necessary prerequisite for all public authority actions. It is obviously not sufficient, as other things are also required, such as adequate resources, trained staff and institutional location, but these other essentials logically come after formulating necessary functions.

4. Public health duties and powers are spread over many pieces of primary and secondary legislation.¹

5. Although there is no statutory definition of ‘public health’, the host of legislation demonstrates a wide range of what are usually thought of as ‘public health functions’. Within this wide scope - following Getting Ahead of the Curve and establishment of the Health Protection Agency, first as a special health authority [in 2003](#) and then as a body corporate [in 2004](#), followed by new ministerial powers to make regulations [in 2008](#) - ‘health protection’ seems to have become a clear sub-category, covering exposure to chemical and radiological risks, as well as infectious diseases,² and involving central and local government.

6. The HPA was abolished in 2012 and its functions became in England the Secretary of State’s duty to “take such steps as [s/he] considers appropriate for the purpose of protecting the public in England from disease or other dangers to health” [in 2012](#).

7. This is not a duty to protect, nor a duty to take steps necessary to protect. Public Health England – which is not a statutory body or body corporate, unlike NHS England - was set up, administratively not legally, to fulfil the SoS’s duty.

¹ In England, particularly, the Health and Social Care Act 2012, the NHS Act 2006, the Public Health (Control of Disease) Act 1984, the Health Protection (Notification) Regulations 2010, the Health Protection (Part 2A Orders) Regulations 2010, the Health Protection (Local Authority Powers) Regulations 2010, the Local Authorities (Public Health Functions and Entry to Premises by Local Healthwatch Representatives) Regulations 2013, as well as e.g. under the Environment Act 1995, the Water Industry Act 1991, the Air Quality (England) Regulations 2000 (as amended), and food legislation (esp. the Food Safety Act 1990 and the Food Safety and Hygiene (England) Regulations 2013). There is also the Civil Contingencies Act 2004, and the Coronavirus Act 2020 and the multitude of regulations made under it – according to legislation.gov.uk, there are already 290 of these!

² “The [Health Protection] Agency has the following functions in relation to health—

(a) the protection of the community (or any part of the community) against infectious disease and other dangers to health;

(b) the prevention of the spread of infectious disease;

(c) the provision of assistance to any other person who exercises functions in relation to the matters mentioned in paragraphs (a) and (b).” HPA Act 2004, section 2(1).

8. At the [same time](#), each local authority in England was given a duty to “take such steps as it considers appropriate for improving the health of the people in its area”, and the SoS was given a power to take steps s/he considers appropriate for improving the health of the people of England.

(9. The 2012 Act also included within the SoS’s ‘public health functions’ duties to make arrangements in relation to blood and contraception, and a revised function in relation to microbiological services.³ The Act also included within a local authority’s ‘public health functions’ functions that had previously been the SoS’s functions (i.e., under the NHS) in relation to the medical inspection of pupils and weighing and measuring of children, and dental public health. The duty of NHS bodies to cooperate with the prison service under [section 249](#) of the NHS Act 2006 was extended to local authorities in the 2012 Act, though this duty is not included within the definition of a local authority’s public health functions (see [section 1H\(5\)](#)) – I can’t see that anything turns on this.)

10. The protection/improvement distinction introduced in 2012 prevails. It is not absolute, in that local authorities have been given a duty to “provide information and advice to every responsible person and relevant body within, or which exercises functions in relation to, the authority’s area, with a view to promoting the preparation of appropriate local health protection arrangements” under the [2013 regulations](#). But that duty is, legally, an instance of local authorities exercising the SoS’s duty in the primary legislation to take steps to protect – i.e., the SoS is in control of protection, and s/he is empowered to make regulations requiring a local authority to exercise the SoS’s PH functions in its area (NHS Act 2006, [section 6C](#)) or to “arrange” for a local or combined authority (or a CCG or NHSE) to do so (NHS Act 2006, [section 7A](#)).

11. So much for the institutional set up. What about within and across institutions?

12. Directors of Public Health: these are statutory posts within local authorities, appointed jointly by local authorities and the SoS. They have under [section 73A](#) ‘responsibility’ for:

- the exercise of the local authority’s improvement (etc.) duty;
- the exercise by the authority of the SoS’s functions passed on to the authority under sections 6C or 7;
- the exercise by the authority of any of its functions that relate to planning for, or responding to, emergencies involving a risk to public health; and
- the local authority’s duty to establish arrangements for assessing and managing risks posed by certain sexual and violent etc. offenders; and
- “such other functions relating to public health as may be prescribed” – such as [have been prescribed](#) in relation to the Licensing Act .

13. They have one ‘stand-alone’ statutory duty, under [section 73B\(5\)](#): to “prepare an annual report on the health of the people in the area of the local authority”, which the authority must publish. They are also *ex officio* members of the local Health and Wellbeing Board (2012 Act, [section 194\(2\)\(d\)](#)).

³ Nothing turns on the revision, in my view. [Until 2012](#) the SoS had a power to “provide a microbiological service for the control of the spread of infectious diseases” which could “include the provision of laboratories”. Since 2012, such a service may be provided as one of the ‘steps’ that the SoS considers appropriate in pursuance of the duty to take appropriate steps.

14. Local authorities also have a duty to make arrangements for ensuring co-operation between DPHs and its officers with responsibilities relating to adult social care, to housing for such adults/carers and to children's services, under [section 6](#) of the Care Act 2014.

15. Local Health Resilience Partnerships: [LHRPs](#) are not legal entities and have no statutory functions. The administrative documents relating to LHRPs are available on the NHSE website date from 2012, and do not seem to have been updated since May 2014. One of these documents states that "The Local Health Resilience Partnership (LHRP) is a strategic forum for organisations in the local health sector (including private and voluntary sector where appropriate). The LHRP facilitates health sector preparedness and planning for emergencies at Local Resilience Forum (LRF) level. It supports the NHS, Public Health England (PHE) and local authority (LA) representatives on the LRF in their role to represent health sector Emergency Planning, Resilience and Response (EPRR) matters." The LRF in England and Wales is defined in [2005 regulations](#) made under the Civil Contingencies Act 1994 as a "form of co-operation" involving "all general Category 1 responders which have functions which are exercisable in [the] local resilience area co-operating together in a single forum". The equivalent [in Scotland](#) is the "strategic co-ordinating group". There seems to be no such forum in [Northern Ireland](#).

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"proper officer of a local authority"

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Guideline principles document

"Health Protection: Legal and Policy Context

The legal context for managing outbreaks of communicable disease which present a risk to the health of the public requiring urgent investigation and management sits:

- With Public Health England under the Health and Social Care Act 2012
- With Directors of Public Health under the Health and Social Care Act 2012
- With Chief Environmental Health Officers under the Public Health (Control of Disease) Act 1984
- With NHS Clinical Commissioning Groups² to collaborate with Directors of Public Health and Public Health England to take local action (e.g. testing and treating) to assist the management of outbreaks under the Health and Social Care Act 2012
- With other responders' specific responsibilities to respond to major incidents as part of the Civil Contingencies Act 2004
- In the context of COVID-19 there is also the Coronavirus Act 2020.

This underpinning context gives local authorities (public health and environmental health) and Public Health England the primary responsibility for the delivery and management of public health actions to be taken in relation to outbreaks of communicable disease through local Health Protection Partnerships (sometimes these are called Local Health Resilience Partnerships) and local memoranda of understanding. These arrangements are clarified in the 2013 guidance *Health Protection in Local Government*"