These notes refer to the Health and Social Care Act 2012 (c.7) which received Royal Assent on 27 March 2012

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – The Health Service in England

The health service: overview

Section 1 - Secretary of State's duty to promote comprehensive health service[1]

65. This section amends section 1 of the NHS Act, which contains the Secretary of State's duty to promote a comprehensive health service designed to secure improvement in the physical and mental health of the people of England, and in the prevention, diagnosis and treatment of mental and physical illness.

66. Section 1 of the NHS Act now has four subsections. The Act introduces a new *subsection (3)* and makes changes to *subsections (1)* and *(2)*. The Act also makes a technical drafting change to subsection (4) which does not affect its meaning.

67. *Subsection (1)* retains the duty on the Secretary of State to promote a comprehensive health service. This is the core duty, dating back to the founding NHS Act of 1946, which makes the Secretary of State accountable for the health service. The Secretary of State must bear the duty in mind whenever he exercises any of his functions.

68. The Act inserts the words "physical and mental" in front of "illness" in section 1(1)(b). This change serves to emphasise that a comprehensive health service is one which addresses mental as well as physical illness.

69. This section replaces *subsection (2)* of the existing section 1 of the NHS Act (which imposes a duty on the Secretary of State, for the purposes of promoting a comprehensive health service (as set out at subsection (1)), to "provide or secure the provision of services in accordance with this Act", with a duty to "exercise the functions conferred by this Act so as to secure that services are provided in accordance with this Act". This reflects the fact that the functions of commissioning services and the provision of services will no longer be delegated by the Secretary of State, but will be directly conferred on the organisations responsible for performing them. The Secretary of State's role is to ensure that these functions are being carried out effectively; he or she retains ultimate responsibility for securing the provision of services through the exercise of his functions, such as his powers to set objectives for the NHS Commissioning Board (through the mandate to the NHS Commissioning Board under new section 13A), to oversee the effective operation of the health service and to intervene in the event of significant failure (see new section 13Z2).

70. Prior to the amendments made by this Act, the Secretary of State's duty to provide services under section 3 of the NHS Act was for the most part not fulfilled by the direct provision of services by the Secretary of State or by bodies to which he delegated

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*1 **Further information about the interpretation of these sections can be found on the Department of Health website at: http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_129415.***

that function. This duty was instead almost entirely discharged by using the power (in section 12 of the NHS Act) to enter into arrangements with other persons or bodies to provide services - in other words by commissioning a service and not by direct provision of a service. The majority of service provision is carried out by NHS trusts and foundation trusts, which have their own statutory functions of providing services under existing legislation, or by independent providers under contract. The only services that were directly provided under the Secretary of State's duty were those that PCTs provided prior to their abolition, where the Secretary of State's function of providing services was delegated to the PCT.

71. The change made by the Act to subsection (2) of section 1 of the NHS Act largely reflects changes in the delivery of health services which have been implemented by successive governments over a period of approximately 20 years. In the past, the Secretary of State, or the health authorities to which he delegated his functions, have provided hospital or other services directly (the Secretary of State and SHAs are not providers of NHS services). However, in recent years there has been a move towards securing a commissioner/provider split in NHS services. This separation is almost complete. Once PCTs stop providing services, the Secretary of State's section 1(2) duty to provide services (which he delegates to SHAs and PCTs) would no longer be necessary. Under the new arrangements, which seek to complete the implementation of the commissioner/provider split, the Secretary of State, the NHS Commissioning Board and CCGs would not have the function of providing NHS services. The NHS Commissioning Board and CCGs would be responsible for arranging services (that is for their commissioning and not for their provision).

72. The Secretary of State and local authorities will have powers to both commission and provide public health services, under their new functions in relation to the protection of public health and health improvement.

73. New subsection (3) of the amended section 1 clarifies that the Secretary of State retains ministerial responsibility to Parliament for the provision of the health service.

74. Subsection (4) of the amended section 1 maintains the principle that health services must be free of charge, unless charges are specifically provided for in legislation. Subsection (4) is slightly amended from the NHS Act; this is a drafting change, consequential on subsection (2). The only difference in the wording is to refer to services which are "part of the health service" rather than to the services which the Secretary of State provides or secures. 'Services which are part of the health service' cover all services commissioned by the NHS Commissioning Board, CCGs, and, in relation to public health, local authorities.

Section 2 - The Secretary of State's duty as to improvement in quality of services

75. This section inserts new section 1A into the NHS Act. This new section creates a duty on the Secretary of State to act with a view to securing continuous improvement in the quality of individuals' healthcare.

76. Subsection (1) of new section 1A details the duty on the Secretary of State to exercise the functions conferred on the Secretary of State in relation to the health service in a way that would secure continuous improvements in the quality of services provided as part of the health service. This includes both the Secretary of State's public health functions (the prevention of illness and the protection or improvement in public health) and those functions that the Secretary of State exercises in relation to the NHS along with the NHS Commissioning Board and CCGs (the diagnosis and treatment of illness). Any service that is associated with both public health and the NHS, such as screening, also comes within the ambit of this duty. The duty is therefore comprehensive. In discharging this duty, the Secretary of State must have regard to the NICE quality standards.

77. Subsection (2) of new section 1A specifies that, in discharging this duty, the Secretary of State must focus on securing continuous improvement in the quality of outcomes

achieved from health services. This duty is also placed on the NHS Commissioning Board and on CCGs by later sections in this Part. In keeping with the policy set out in the White Paper *Equity and Excellence: Liberating the NHS*[2], the outcomes are to focus particularly on the effectiveness, safety and patient experience aspects of healthcare (subsection (3) of new section 1A).

Section 3 - The Secretary of State's duty as to the NHS Constitution

78. Section 3 inserts new section 1B into the NHS Act, placing a duty on the Secretary of State to have regard to the NHS Constitution when exercising his functions in relation to the health service. Therefore when discharging any of those functions, the Secretary of State must do so with regard to the principles, values, rights and pledges in the NHS Constitution. The NHS Constitution is included in the list of defined expressions in section 276 of the NHS Act, directing readers of the Act to the definition at subsection (2) of new section 1B.

Section 4 The Secretary of State's duty as to reducing inequalities

79. This section inserts new section 1C into the NHS Act, which places a further duty on the Secretary of State when exercising his or her functions in relation to the health service. The duty is for the Secretary of State, when exercising his functions in relation to the health service, to have regard to the need to reduce inequalities between the people of England in respect of the benefits that may be obtained by them from the health service. This would include consideration of the need to reduce inequalities in access to health services and the outcomes achieved. This duty encompasses the Secretary of State's functions in relation to both the NHS and public health and relates to all the people of England.

80. Equivalent duties to consider the need to reduce inequalities are placed on the NHS Commissioning Board and on CCGs in later sections in this Part. This includes consideration of the need to reduce inequalities in access to health services and the outcomes achieved.

81. Later sections in this Part require the Secretary of State, the NHS Commissioning Board and CCGs to include in their annual reports an assessment of how effectively they have discharged their duties as to reducing inequalities.

82. In addition, later sections in this Part require the NHS Commissioning Board and CCGs to include in their business plan (NHS Commissioning Board) and commissioning plans (CCGs) an explanation of how each of them proposes to discharge their respective duties, in the exercise of their functions, to have regard to the need to reduce inequalities. The duty imposed by new section 14Z16 of the NHS Act requires the NHS Commissioning Board to include in the annual performance assessment of CCGs an assessment of how well CCGs have discharged their duties as to the need to reduce inequalities.

Section 5 - The Secretary of State's duty as to promoting autonomy

83. This section inserts new section 1D into the NHS Act. It seeks to establish an overarching principle that the Secretary of State should act with a view to promoting autonomy in the health service. Subsection (1) of new section 1D identifies two constituent elements of autonomy: freedom for bodies/persons in the health service (such as CCGs or Monitor) to exercise their functions in a manner that they consider most appropriate (new section 1D(1)(a)), and not imposing unnecessary burdens upon those bodies/persons (new section 1D(1)(b)). The section provides that when exercising his functions in relation to the health service, the Secretary of State must have regard to the desirability of securing these aspects of autonomy so far as consistent with the

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2 Copies are available in the Library, and from the Department of Health website at http://www.dh.gov.uk/en/Healthcare/LiberatingtheNHS/index.htm

interests of the health service. Subsection (2) of new section 1D makes clear that in the event of a conflict between those aspects of autonomy, on the one hand, and the discharge by the Secretary of State of his duties to promote the comprehensive health service and as to securing the provision of services on the other, it is the latter which take precedence.

84. This duty would therefore require the Secretary of State, when considering whether to place requirements on the NHS and local authorities, to make a judgement as to whether these were in the interests of the health service. If challenged, the Secretary of State would have to be able to justify why these requirements were necessary.

85. The duty covers the arm's-length body sector and commissioners and providers of NHS services. Although the Secretary of State will not in future have the same direct relationship with providers of NHS services as he has under existing legislation with NHS trusts, he will still have certain functions which impact on providers. For example, he will be able to require certain terms to be included in contracts entered into by the NHS Commissioning Board and CCGs for the provision of NHS services, by virtue of regulations made under new section 6E of the NHS Act.

86. Section 23 of the Act inserts new section 13F into the NHS Act, placing a parallel duty on the NHS Commissioning Board to promote autonomy.

87. These duties are intended to address the policy outlined in *Liberating the NHS: Legislative Framework and Next Steps*[3] to:

"enshrine the principle of autonomy at the heart of the NHS" by "maximising the autonomy of individual commissioners and providers and minimising the obligations placed upon them, in a way that is consistent with the effective operation of a comprehensive health service

Section 6 – The Secretary of State's duty as to research

88. This section places a duty on the Secretary of State to promote research on matters that are relevant to the health service and to promote the use within the health service of evidence obtained from research. Parallel duties to promote research and the use of research evidence are also placed on the NHS Commissioning Board and on CCGs by later sections in this Part.

Section 7 – The Secretary of State's duty as to education and training

89. Section 7 inserts a new section 1F into the NHS Act subsection (1) of which places a duty on the Secretary of State to exercise certain functions so as to secure that there is an effective system for the planning and delivery of education and training to people employed, or considering becoming employed, in the health service, or in activities connected to it. The duty would apply to education and training for all healthcare professionals delivering health care including doctors, dentists, nurses, midwives, pharmacists, healthcare scientists and the allied health professions. It would also cover trainee professionals at the start of their career, before they enter employment in the NHS.

90. Subsection (2) of new section 1F places a requirement on any person commissioning services as part of the health service to include in the arrangements made for the provision of those services a duty on the provider to co-operate with the Secretary of State in discharging his duty as to education and training. If a Special Health Authority is discharging that duty on behalf of the Secretary of State (such as the planned Special Health Authority - Health Education England), then the duty will relate to co-operation with that body.

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91. Subsection (3) lists the Acts which contain functions which must be exercised by the Secretary of State so as to discharge the duty in subsection (1).

Section 8 – Secretary of State's duty as to reporting on and reviewing treatment of providers

92. This section inserts a new section 1G into the NHS Act to impose a duty on the Secretary of State to report on and review the treatment of providers of NHS services.

93. Subsection (1) requires the Secretary of State to lay a report before Parliament on any matter, including taxation, which might affect either the ability of NHS health care providers to provide health care services for the purposes of the NHS or the reward available to them for doing so. This report has to be laid before Parliament within 12 months of Royal Assent to this Act.

94. Subsection (2) provides that the report must include recommendations as to how any identified differences in the treatment of NHS health care providers could be addressed.

95. Subsection (3) requires the Secretary of State to keep under review the treatment of NHS health care providers as respects any matter mentioned in subsection (1).

Section 9 - The NHS Commissioning Board

96. This section inserts new section 1H into the NHS Act. This section establishes a new body to be known as the National Health Service Commissioning Board. The NHS Commissioning Board will be an independent body, which will hold CCGs to account for the quality of services they commission, the outcomes they achieve for patients and for their financial performance. The NHS Commissioning Board will have the power to intervene where there is evidence that CCGs are failing or are likely to fail to discharge their functions. The specific functions of the NHS Commissioning Board, such as commissioning specialised services, are conferred by provision made elsewhere in the Act.

97. Like the Secretary of State, the NHS Commissioning Board will be subject to the duty to promote the comprehensive health service (as set out in section 1 of the NHS Act). However, in relation to the NHS Commissioning Board this duty would not apply to those services falling within the public health functions of the Secretary of State or local authorities.

98. Subsection (3) of new section 1H provides that, in order to fulfil this general duty, the NHS Commissioning Board has two specific functions:

a) Firstly, it must commission services in accordance with the NHS Act. The services which the NHS Commissioning Board may, by regulations, be required to commission are described in new section 3B and include services which can be more effectively commissioned at national level, or which it would be inappropriate or impractical for CCGs to commission. Those services could include some dental services, specialised services, prison health services and health services for the armed forces. The NHS Commissioning Board will also be responsible for commissioning primary care services and high secure psychiatric services.

b) Secondly, when exercising functions in relation to CCGs (for example, when issuing commissioning guidance under new section 14Z8), the NHS Commissioning Board must do so in such a way as to secure the provision of services.

99. *Subsection (2)* introduces Schedule 1.

Schedule 1 - The National Health Service Commissioning Board

100. This Schedule inserts new Schedule A1 into the NHS Act. This new Schedule makes provision for the constitution and establishment of the NHS Commissioning Board. Paragraph 1 provides that the NHS Commissioning Board (a non-Departmental public body) is not to be regarded as a servant or agent of the Crown.

101. Paragraph 2 makes provision about the membership of the NHS Commissioning Board.

102. Sub-paragraph (3) of paragraph 2 requires that the number of executive members of the NHS Commissioning Board must not exceed the number of non-executive members. This would mean that where there were resignations, suspensions or other departures of non-executive members, it might be necessary to appoint additional members or remove members from the NHS Commissioning Board to ensure that the number of executives was less than the number of non-executives.

103. Paragraph 3 provides that the executive members of the NHS Commissioning Board must be appointed by the non-executive members. Sub-paragraph (2) requires that the appointment of the chief executive receives the approval of the Secretary of State. Sub-paragraph (3) provides that the chief executive and the other executive members must be employees of the NHS Commissioning Board. Sub-paragraph (4) requires that the Secretary of State appoints the first chief executive of the NHS Commissioning Board. The other remaining first executive members will therefore be appointed by the non-executive members.

104. Paragraph 4 makes provision about the terms of appointment and tenure of office of non-executive members of the NHS Commissioning Board which are equivalent to those for members of Monitor under Schedule 8 to the Act: the terms of their appointment will set out the detail of the basis on which non-executive members will hold and vacate office. In sub-paragraph (2) provision is made to enable a non-executive member to resign at any time by giving notice to the Secretary of State and sub-paragraphs (3) and (4) enable the Secretary of State to remove or suspend non-executive members from office on grounds of incapacity, misbehaviour or failure to carry out their duties as a non-executive member.

105. Sub-paragraphs (5) and (6) specify that the maximum term of appointment for non-executive members of the NHS Commissioning Board is 4 years and that a person who ceases to be a non-executive member is eligible for re-appointment.

106. Paragraph 5 sets out the procedural requirements to be complied with when the Secretary of State suspends a non-executive member of the NHS Commissioning Board under the power in *sub-paragraph 4 (4)*.

107. Paragraph 6 provides that the Secretary of State has power to appoint an interim chair where the chair is suspended. The NHS Commissioning Board will have no power to appoint an interim chair but could choose in practice to appoint a deputy chair (regardless of any suspension of the chair).

108. Paragraph 7 requires the NHS Commissioning Board to pay to the non-executive members such remuneration, pensions, allowances or other gratuities as the Secretary of State may determine. Sub-paragraph (3) provides that, where a non-executive member of the NHS Commissioning Board ceases to be a non-executive member and the Secretary of State decides that there are exceptional circumstances for that person to receive compensation, the NHS Commissioning Board is required to make compensation payments of such amount as Secretary of State may determine with HM Treasury approval.

109. Paragraph 8 gives the NHS Commissioning Board powers to appoint employees.

110. Paragraph 9 provides that the NHS Commissioning Board can employ staff on such terms and conditions and pay such remuneration, pensions or allowances as it may

determine. In common with the other arm's-length bodies covered by this Act (for example, NICE and the Information Centre), the NHS Commissioning Board will be required to seek the approval of the Secretary of State for its policies on the payment of remuneration, pensions and allowances to staff before making a determination under this paragraph.

111. Paragraph 10 provides that the NHS Commissioning Board may appoint committees and sub-committees, and pay remuneration and allowances to those members of a committee or sub-committee who are not employees of the NHS Commissioning Board.

112. The NHS Commissioning Board may hold property on trust and paragraph 11 confers a power on the Secretary of State to appoint trustees to oversee the management of any property held on trust.

113. Paragraph 12 provides that the NHS Commissioning Board is to regulate its own procedure and must make any arrangements that it considers appropriate for the discharge of its functions. The NHS Commissioning Board may, for example, use this power to manage the risk of a conflict of interest by preventing executive members from being involved in determining their own pay.

114. Paragraph 13 gives the NHS Commissioning Board the power to arrange for the exercise of any of its functions on its behalf by:

a) any non-executive member,

b) any employee (including any executive member), or

c) one of its committees or sub-committees.

115. Paragraph 14 gives the Secretary of State power to require the NHS Commissioning Board to provide the Secretary of State with such information as the Secretary of State requires, in such form, and at such time or within such period, as the Secretary of State considers is necessary to delivery of the Secretary of State's functions in relation to health services.

116. Paragraph 15 requires that the NHS Commissioning Board must keep proper accounts and proper records in relation to the accounts (in such form as the Secretary of State may direct with the approval of HM Treasury). The chief executive of the NHS Commissioning Board is to be its accounting officer.

117. The NHS Commissioning Board sits within the Department of Health accounting and budgeting boundaries and the Department requires information to effectively and efficiently manage its financial position against, for instance, Departmental Expenditure Limits. In addition, the Department has a responsibility to provide information on those bodies for which it is accountable in order to meet requirements that may be set by HM Treasury and others on both financial and non-financial matters.

118. Paragraph 16 requires the NHS Commissioning Board to prepare consolidated annual accounts in respect of each financial year. Consolidated annual accounts should contain the NHS Commissioning Board's own annual accounts and separately a consolidation of the NHS Commissioning Board's own annual accounts and the annual accounts of each CCG.

119. Sub-paragraph (3) of paragraph 16 requires the NHS Commissioning Board to submit the consolidated annual accounts to the Secretary of State and to the Comptroller and Auditor General for audit to a timetable prescribed by the Secretary of State, who will remain accountable to HM Treasury for the Department's Departmental Expenditure Limit. The Department's annual Resource Account must be prepared in accordance with the accounting rules and instructions set out by HM Treasury in its annual Financial Reporting Manual (FReM). In turn, the accounts of all bodies that are consolidated into the Department's Resource Account must be prepared in accordance with the same HM Treasury accounting framework. The Secretary of State therefore requires powers to

ensure that the NHS Commissioning Board's accounts, including the consolidation of its accounts with those of CCGs, are prepared in accordance with the requirements set by HM Treasury.

120. Sub-paragraph (4) of paragraph 16 requires the Comptroller and Auditor General to examine the consolidated annual accounts of the NHS Commissioning Board and lay copies of the accounts, along with a report on them, before Parliament.

121. Additional provision is made in paragraph 17 for the Secretary of State, with the approval of HM Treasury, to require in-year 'interim' accounts to be prepared and for the Secretary of State to direct that these are audited.

122. Paragraph 18 makes provision in relation to the NHS Commissioning Board's seal.

Section 10 (new section 1I) -Clinical commissioning groups

123. As set out in *Equity and Excellence: Liberating the NHS*[4], the Act will create a comprehensive system of CCGs. Their purpose would be to commission most NHS services, supported by and accountable to the NHS Commissioning Board.

124. This section inserts new section 1I into the NHS Act. The new section provides that there are to be corporate bodies to be known as clinical commissioning groups (CCGs). Subsection (1) of new section 1I provides that CCGs will be established in accordance with Chapter A2 of Part 2 of the NHS Act and subsection (2) sets out that CCGs will have the function of commissioning services for the purposes of the health service in England in accordance with the NHS Act.

4 Copies are available in the Library, and from the Department of Health website at http://www.dh.gov.uk/en/Healthcare/LiberatingtheNHS/index.htm