

# HEALTH AND SOCIAL CARE ACT 2012

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 1 – The Health Service in England**

##### **Emergency powers**

##### *Schedule 4 – Amendments of the National Health Service Act 2006*

541. This Schedule makes a number of amendments to the NHS Act as a result of the changes made to the health service architecture elsewhere in Part 1 of this Act.
542. **Part 1 of Schedule 4 (the health service in England)** makes amendments to Part 1 of the NHS Act primarily as a result of the abolition of SHAs and PCTs, the establishment of the NHS Commissioning Board and CCGs and changes to the Secretary of State’s role as provided for in Part 1 of this Act.
543. **Paragraph 1** substitutes section 2 of the NHS Act. Previously, section 2 of the NHS Act empowered the Secretary of State to provide such services as the Secretary of State considers appropriate for the purpose of discharging his duties under the Act (section 2(1)(a)), and to do anything which is calculated to facilitate, or is conducive or incidental to the discharge of such duties (section 2(1)(b)). Section 2(1)(a) is no longer necessary because the Secretary of State will no longer be under a duty to provide services. CCGs will however have a power to arrange such services as they consider appropriate for the purposes of the health service under new section 3A (section 14). In relation to what was section 2(1)(b), the new section 2 substituted by paragraph 1 of Schedule 4 to this Act confers powers on the Secretary of State, the NHS Commissioning Board and CCGs to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of their functions.
544. **Paragraph 2** amends section 6 of the NHS Act so that instead of applying only to the Secretary of State, it applies in addition to the NHS Commissioning Board and CCGs. Section 6 allows for health services to be procured outside of England, and also for functions to be performed outside England in certain circumstances, such as transfers of patients across borders.
545. **Paragraphs 3 and 4** amend sections 6A and 6B of the NHS Act. These sections deal with reimbursement of the cost of services provided in another EEA state and prior authorisation for the purpose of seeking treatment in another EEA state. The changes reflect the fact that services will in future be commissioned by the NHS Commissioning Board and CCGs, or in relation to public health, provided by the Secretary of State and local authorities.
546. References to SHAs and PCTs are removed from sections 8 (Secretary of State’s directions to health service bodies), 9 (NHS contracts) and 11 (Arrangements to be treated as NHS contracts) of the NHS Act by paragraphs 5, 6 and 7 respectively. Paragraph 6 adds the NHS Commissioning Board and CCGs into the definition of “health service body” in section 9 of the NHS Act, meaning that contracts entered into

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by those bodies with other health service bodies will be treated as NHS contracts for the purposes of the NHS Act. Paragraph 7 adds the NHS Commissioning Board into the list of persons in section 11(1) of the NHS Act. This means that certain arrangements which it enters into in relation to ophthalmic and pharmaceutical services will be treated as NHS contracts.

547. [Paragraph 8](#) amends section 12 of the NHS Act to reflect the fact that the Secretary of State will no longer be a provider of NHS services, but may be providing services in the exercise of public health functions. Section 12 allows the Secretary of State to make arrangements with any person or body to secure or assist in the securing of any of the services he or she is under a duty to provide. This includes arrangements with voluntary organisations, and will in future include the NHS Commissioning Board and CCGs.
548. [Paragraph 9](#) inserts new section 12ZA into the NHS Act, which makes special provision about commissioning arrangements made by the NHS Commissioning Board and CCGs. For example, it allows those bodies to make their facilities and employees available to service providers.
549. [Paragraphs 10 to 12](#) amend sections 12A, 12B and 12D of the NHS Act (inserted by the Health Act 2009) to allow the NHS Commissioning Board, CCGs and local authorities rather than the Secretary of State to make monetary payments to patients in lieu of providing them with health care services. These are known as 'direct payments' or 'personal health budgets'. The amendment to section 12B allows the regulations governing the rules around administration of such payments to apply to the NHS Commissioning Board, CCGs and local authorities instead of PCTs.
550. **Part 2 of Schedule 4 (NHS bodies)**, consisting of paragraphs 13 to 23 of Schedule 4 to this Act, makes a series of amendments to Part 2 of the NHS Act (which deals with NHS bodies). Paragraph 13 amends section 28 (special health authorities). Subsection (5) of that section provides that on dissolution of a Special Health Authority, criminal liabilities may be transferred to an "NHS body"; subsection (6) defines "NHS body", but is omitted by paragraph 13. The provision is omitted as a new definition of "NHS body", which does not include SHAs and PCTs, but includes the NHS Commissioning Board and CCGs, is inserted into section 275 of the Act by paragraph 138 of Schedule 4.
551. [Paragraph 14](#) amends section 29, which relates to the exercise of functions by Special Health Authorities, to remove references to section 14 and 19 which relate to the exercise of SHA and PCT functions
552. [Paragraph 15](#) makes provision for the omission of Chapter 5B of Part 2 of the NHS Act, 'trust special administrators: PCTs.' This is consequential on the abolition of PCTs elsewhere in this Act.
553. [Paragraph 16](#) amends section 67 (effect of intervention orders) which makes provision regarding the effect of an order made under section 66. Section 66 enables the Secretary of State to make an intervention order where an NHS body (other than a foundation trust) is not performing its functions adequately or at all, or where there are significant failings in the way it is being run. Section 66 is amended in Schedule 21 to this Act (relations between health services), so that it applies only to NHS trusts and Special Health Authorities. Section 67 is amended to remove the references to SHAs and PCTs. References to the NHS Commissioning Board and CCGs are not inserted, as they are subject to separate powers provided for in Part 1 of this Act.
554. [Paragraph 17](#) amends section 70 (transfer of residual liabilities), which provides that on dissolution of certain bodies, the Secretary of State must ensure that all their liabilities are dealt with by being transferred to the Secretary of State or an NHS body.
555. [Paragraph 18](#) amends section 71 (schemes for meeting losses and liabilities in respect of certain health service bodies) so as to remove references to SHAs and PCTs and insert references to the NHS Commissioning Board and CCGs. This enables the Secretary

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of State to provide in regulations that the NHS Commissioning Board and CCGs are eligible to participate in such schemes or may administer such schemes.

556. **Section 73** (directions and regulations) of the NHS Act makes provision relating to directions and regulations made under the provisions specified in subsection (1). Paragraph 19 of Schedule 4 to this Act removes sections 14, 15, 19 and 20 from the list in subsection (1), as those sections relate only to SHAs and PCTs.
557. **Paragraphs 20 and 21** omit Schedules 2 and 3 to the NHS Act, as they deal with the constitution of SHAs and PCTs.
558. **Paragraph 22** amends Schedule 4 to the NHS Act, which deals with NHS trusts. Sub-paragraphs (2) and (3) of paragraph 15, omitted by sub-paragraph 7, provide that an NHS trust may provide high security psychiatric services only where approved by the Secretary of State. Those provisions are omitted, as this Act makes new provision requiring any provider of such services to have approval – see section 16 of this Act.
559. **Schedule 6** to the NHS Act provides for the Secretary of State to make regulations or give directions about Special Health Authorities transferring staff to, making staff available to, and furnishing information to, various bodies. Paragraph 23 of Schedule 4 removes SHAs from the list of bodies to which those provisions apply.
560. **Part 3 of Schedule 4 (local authorities)** amends Part 3 of the NHS Act (local authorities and the NHS).
561. **Paragraph 24** amends section 74 by removing references to a SHA and a PCT and inserting references to the NHS Commissioning Board and CCGs so that the expression ‘public body’ in the **Local Authorities (Goods and Services) Act 1970 (c.39)** includes the Board and CCGs.
562. **Paragraph 25** amends section 76 by removing references to a SHA and a PCT and inserting references to the NHS Commissioning Board and a CCG so that a local authority can make payments to those bodies towards expenditure incurred or to be incurred by the body in connection with its performance of prescribed functions.
563. **Paragraph 26** amends section 77 by removing the references to PCTs.
564. **Paragraph 27** amends section 78(3) to remove the references to PCTs and SHAs. Section 78 provides a power for the Secretary of State to direct certain bodies to enter into partnership arrangements in the event that they fail to exercise their functions adequately. This section will eventually be entirely repealed by this Act, when section 179 (abolition of NHS trusts) is brought into force.
565. **Paragraphs 28 and 29** amend sections 80 and 81 by removing references to SHAs and PCTs and inserting references to the NHS Commissioning Board and CCGs. The amendment of section 80 gives the NHS Commissioning Board and CCGs powers to supply goods and services to local authorities and such public bodies as the Secretary of State may determine. The amendment also requires the NHS Commissioning Board and CCGs to make certain services available to local authorities so far as is reasonable necessary and practicable to enable local authorities to discharge their functions relating to social services, education and public health. Section 81 is amended so that the conditions of supply under section 80 apply to the NHS Commissioning Board and CCGs.
566. **Part 4 of Schedule 4 (medical services)** makes consequential amendments to Part 4 of the NHS Act. In particular, the NHS Commissioning Board is placed under a duty to secure the provision of primary medical services in England under section 83 of the NHS Act and may make such arrangements as it considers appropriate to meet all reasonable requirements in this area including arrangements for the performance of a service outside England. The NHS Commissioning Board will be unable to provide

primary medical services itself but will make arrangements for the provision of services with general practitioners and other providers.

567. **Sections 89 and 94** are amended to clarify that any consequential changes made to a General Medical Services contract or a Personal Medical Services agreement as the result of the establishment of CCGs may be imposed by virtue of existing provision in section 89(2)(d) and section 94(3)(f) of the NHS Act. Provision is also included to clarify that transitional provision may be made in connection with the commencement of the amendments to section 92 of the NHS Act, for the NHS Commissioning Board to direct a PCT to exercise its functions under section 92 (personal medical services) arrangements during the interim period between the abolition of SHAs and the abolition of PCTs. A new subsection (3)(ca) is inserted into section 94 of the NHS Act which clarifies, for consistency with section 84(4)(b), that section 92 arrangements can include services performed outside England. Section 95 is omitted. Provision is also made in section 97 for the NHS Commissioning Board to recognise Local Medical Committees for an area.
568. **Part 5 of Schedule 4 (dental services)** makes consequential amendments to Part 5 of the NHS Act. In particular, the NHS Commissioning Board is placed under a duty to secure the provision of primary dental services in England under section 99 of the NHS Act and may make such arrangements as it considers appropriate to meet all reasonable requirements in this area including arrangements for the performance of primary dental services outside England. The NHS Commissioning Board will be unable to provide primary dental services itself but will make arrangements for the provisions of services with dentists and other providers.
569. **Section 107** of the Act is amended to enable the NHS Commissioning Board to enter into arrangements for the provision of primary dental services instead of SHAs. Provision is also included to clarify that transitional provision in connection with the commencement of the amendments to section 107 of the NHS Act may be made for the NHS Commissioning Board to direct a PCT to exercise its functions under that section (personal dental services) arrangements during the interim period between the abolition of SHAs and the abolition of PCTs. A new subsection (3)(ca) is inserted into section 109 of the NHS Act which clarifies, for consistency with the new section 99(1A) of the Act, that section 107 arrangements can include services performed outside England. Section 110 is omitted. Provision is also made for the NHS Commissioning Board to recognise Local Dental Committees for an area.
570. **Part 6 of Schedule 4 (ophthalmic services)** makes consequential amendments to Part 6 of the NHS Act. In particular, the NHS Commissioning Board is placed under a duty to provide a sight testing service and other ophthalmic services and may make such arrangements as it considers appropriate to meet all reasonable requirements in this area including arrangements for the performance of ophthalmic services outside England. The NHS Commissioning Board will be unable to provide primary ophthalmic services itself. Provision is also made for the Board to recognise Local Optical Committees formed for an area.
571. **Part 7 of Schedule 4 (pharmaceutical services)** makes consequential amendments to provisions in Part 7 of the NHS Act in respect of pharmaceutical services. In particular, provision is made for the NHS Commissioning Board to commission pharmaceutical services for England. The NHS Commissioning Board cannot provide pharmaceutical services itself but will make arrangements for the provision of services with other persons and bodies. Further amendments are made to section 129 of the Act regarding the preparation and publication of pharmaceutical lists of NHS contractors. The NHS Commissioning Board will be required to prepare such lists by reference to the area in which the premises from which the services are provided are situated. Under section 150A of the NHS Act, the NHS Commissioning Board may remove a pharmaceutical services contractor from a list if they breach their terms of service by, for example, a repeated failure to open in accordance with contracted

hours. Section 132 of the NHS Act is amended to require the NHS Commissioning Board to prepare lists of medical and dental practitioners who are authorised by it to provide pharmaceutical services by reference to an area of a prescribed description. The disqualification provisions in sections 151 to 162 of the NHS Act are also amended to enable the NHS Commissioning Board to make decisions and take action (such as suspension or removal from a list) in fitness to practise matters. Provision is also made for such matters to be referred to the First Tier Tribunal for national disqualification. Provision is made for the NHS Commissioning Board to recognise Local Pharmaceutical Services Committees for an area. Transitional provision is included in Schedule 11 to the NHS Act for the continuation of pilot schemes and in Schedule 12 to that Act for the continuation of Local Pharmaceutical Services (LPS) schemes and for such schemes to be treated as if they had been established by the NHS Commissioning Board. The Secretary of State may continue to establish LPS schemes and, in prescribed circumstances, the NHS Commissioning Board will be able to provide local pharmaceutical services itself.

572. **Part 8 of Schedule 4 (charging)** makes amendments to Part 9 of the NHS Act by removing references to PCTs and SHAs.
573. **Paragraph 94** amends section 176 by inserting a reference to the NHS Commissioning Board to ensure that regulations under subsection (1), which provide for the making and recovery of charges for relevant dental services, may provide for sums otherwise payable by the Board to persons providing relevant dental services to be reduced by the amount of the charges.
574. **Paragraph 96** amends section 180 by inserting references to the NHS Commissioning Board so that the Secretary of State must provide by regulations for payments to be made by the NHS Commissioning Board to meet or contribute to the costs incurred in respect of optical appliances and sight tests. The amendment also inserts new subsection (6A) into section 180 to enable the NHS Commissioning Board to direct a Special Health Authority, or such other body as may be prescribed, to exercise any of the NHS Commissioning Board's functions under regulations under section 180. Section 180 of the Act is also amended to include new provision for the NHS Commissioning Board to direct a Special Health Authority or such other body as may be prescribed to exercise the Board's functions under that section and to omit subsection (10) of that section which is not consistent with the funding arrangements for the Board. The title of section 180 is also amended to reflect that this section now relates to payments for both the cost of optical appliances and sight tests.
575. **Paragraph 98** amends section 183 by removing references to PCTs and inserting references to the NHS Commissioning Board and a CCG so that regulations may provide for the payment by those bodies of travelling expenses to prescribed descriptions of persons.
576. **Paragraphs 99 and 100** amend sections 185 and 186 by removing references to PCTs and inserting references to the NHS Commissioning Board, CCGs and local authorities so that regulations may provide for the making and recovery of charges by those bodies in respect of more expensive supplies and repairs and replacements of appliances or vehicles in certain cases.
577. **Paragraph 101** amends section 187, which enables the Secretary of State to make regulations to provide for charges in respect of services or facilities for the care of pregnant women, women who are breastfeeding and young children, or other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness. This covers certain "community health services" arranged at present by PCTs under section 3(1) of the NHS Act. The amendment ensures that the Secretary of State may continue to make provision for charges for these kinds of services, whether arranged by CCGs under section 3(1) (as amended by section 13 of this Act), or by local authorities under their new health improvement powers (new section 2B inserted by section 12 of this Act).

578. **Part 9 of Schedule 4 (fraud etc.). Paragraph 103** amends section 195 as a result of changes made to section 2 of the NHS Act. Paragraph 104 amends section 196 by removing references to SHA and PCT and inserting references to the NHS Commissioning Board and CCGs in the definition of ‘NHS body’ and ‘public health service contractor’ for the purposes of sections 195(3) and 197(1). Paragraph 106 amends section 201 by enabling the disclosure of certain information if it is in connection with any of the functions of the NHS Commissioning Board, a CCG or a local authority as well as those of the Secretary of State. Paragraphs 105 and 107 amend sections 197 and 210 by substituting the references to ‘NHS contractor’ with references to ‘public health service contractor’.
579. **Part 10 of Schedule 4 (property and finance). Paragraph 108** amends section 211 by replacing the reference to a ‘local social services authority’ with a reference to a ‘local authority’ in order to accurately reflect the definition and functions of a local authority under this Act. Paragraph 109 amends section 213 by removing the reference to a PCT as a ‘relevant health service body’ and providing that CCGs and the NHS Commissioning Board are ‘relevant health service bodies’ who the Secretary of State may provide for the transfer of trust property to and from.
580. **Paragraph 110** amends section 214 which contains a power for the Secretary of State to transfer all trust property by order from any special trustees to certain health service bodies. The amendment makes provision for the NHS Commissioning Board and CCGs to be included as bodies to who all trust property can be transferred and removes the references to PCTs.
581. **Paragraph 111** amends section 215 consequently upon the amendments to section 214. Paragraph 113 amends section 217 by removing references to Schedules 2 and 3 to the NHS Act (which relate to PCTs and SHAs). Paragraph 114 amends section 218 by removing references to PCTs and SHAs.
582. **Paragraphs 112 and 115** amend sections 216 and 220 of the NHS Act 2006 to add a reference to this Act’s provisions on transfer schemes (in sections 300 and 302). The amendments would ensure that existing provisions on property held on trust by the NHS (e.g. charitable property) continue to apply where such property is transferred by transfer schemes under this Act.
583. **Paragraph 116** amends section 222 which contains a power for the Secretary of State to exclude, by way of directions, specified descriptions of activities from the list of activities that NHS bodies (other than Local Health Boards) may undertake in order to raise money. This power has been amended to enable (a) the NHS Commissioning Board to make directions excluding specified descriptions of activities in relation to CCGs and (b) the Secretary of State to make directions excluding specified descriptions of activities in relation to any other NHS body (other than Local Health Boards).
584. **Paragraph 117** amends section 223 by inserting a reference to the NHS Commissioning Board so that the Board also has powers to form and invest in companies. Paragraph 117(2) also inserts new section 223A to apply section 223 to CCGs.
585. **Paragraph 118** omits section 224 which concerns the funding of SHAs. Paragraphs 119 and 120 amend sections 226 and 227 to remove the references to SHAs so that the sections only apply to Special Health Authorities. Paragraph 121 omits sections 228 to 231 which concern the funding of PCTs.
586. **Paragraph 122** provides for the omission of subsection 4 of section 234 to reflect the fact that PCTs are being abolished
587. **Paragraph 123** amends section 236 replacing the reference to the Secretary of State with a reference to the ‘prescribed CCG’ so that a CCG must pay remuneration and reasonable expenses under section 236 rather than the Secretary of State. The amendment also omits the reference in section 236(2)(b), which sets out when payments may not be made to a medical practitioner, to a PCT and inserts a reference to

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arrangements made by the NHS Commissioning Board or a CCG which sets out when payments may not be made to a medical practitioner.

588. **Paragraph 124** omits Schedule 14. Paragraph 125 amends Schedule 15 by removing references to PCTs and SHAs and by removing the requirement for the Secretary of State to prepare summarised accounts.
589. **Part 11 of Schedule 4 (public involvement and scrutiny).** Paragraph 126 removes SHAs and PCTs from the list of bodies to whom duties on public involvement and consultation in section 242 apply. Paragraph 126 omits sections 242A and 242B which provide for regulations to require SHAs to involve health service users in prescribed matters.
590. **Part 12 of Schedule 4 (miscellaneous).** Paragraph 128 inserts new section 254A into the NHS Act. This enables the Secretary of State to continue to be able to provide support services to persons providing services or exercising functions in relation to the health service (subject to subsection 5) where it makes sense to coordinate activity centrally. This function was previously carried out in reliance of the Secretary of State's general power in section 2 of the NHS Act.
591. Support provided under this new section might include providing advice and assistance to NHS trusts and NHS foundation trusts when they procure medicines or other goods to help them get best value for money, and managing central contracts with section 223 companies which provide services to the NHS (e.g. NHS Professionals, which provides recruitment and temporary staff agency services to NHS trusts and NHS foundation trusts).
592. The power does not allow the Secretary of State to commission or provide health services. Nor does it allow him or her to give financial assistance to the private sector.
593. **Paragraph 129(4)** amends section 256 by substituting references to PCTs with references to the NHS Commissioning Board or CCGs so that those bodies they have power to make payments towards expenditure on community services.
594. **Paragraph 129(4)** confers additional powers for the Secretary of State to specify minimum sums that the NHS Commissioning Board must pay to local authorities (or certain other bodies exercising functions in relation to housing) towards expenditure on local authority social care or other community services. This would not affect the powers of the NHS Commissioning Board to make payments to local authorities under these powers in addition to those sums, or the powers of CCGs.
595. The Secretary of State may specify in directions the bodies to which those payments must be made and the functions in respect of which the payments must be made. The Secretary of State may also specify the minimum amount to be paid to each local authority (or other body) specified in the direction. Although a direction would relate to a particular financial year, the Secretary of State would be able to amend the direction at any time during the year, in order to change the minimum amount payable (either in total or to a particular body).
596. The existing powers in section 256 for the Secretary of State to give directions as to the conditions that should apply to such payments continue to apply. These directions could, for example, include a requirement on a local authority to obtain the agreement of their health and wellbeing board as to how the funds are spent.
597. **Paragraph 130** amends section 257 by substituting the reference to a PCT with reference to the NHS Commissioning Board and a CCG as a result of amendments made to section 256.
598. **Paragraph 131** amends section 258 to provide that the Secretary of State, the NHS Commissioning Board and CCGs must exercise their functions to secure that such facilities, as they consider to be reasonably required, are made available in connection

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with clinical teaching and research. The amendment to this section also removes the references to PCTs and SHAs

599. [Paragraph 132](#) amends section 259 as a result of amendments made to the provisions relating to primary medical services (Part 4 of the NHS Act). Paragraph 133 omits section 268.
600. [Paragraph 135](#) inserts a new section 271A of the NHS Act so as to provide that services commissioned by the NHS Commissioning Board or a CCG, or provided or commissioned by a local authority in the exercise of its public health functions, are to be treated as “services of the Crown” for the purposes of Schedule 1 to the Registered Designs Act 1949 and sections 55 to 59 of the Patents Act 1977.
601. [Paragraph 136](#) amends section 272 to remove any references to provisions that concern PCTs and SHAs.
602. [Paragraph 137](#) inserts a reference to the NHS Commissioning Board in section 273 to ensure that a direction under the NHS Act by the NHS Commissioning Board must be given by an instrument in writing.
603. [Paragraph 138](#) inserts a new definition of “NHS body” into section 275 and makes transitional provision to ensure the definition includes a reference to PCTs until they are abolished.
604. [Paragraph 139](#) amends section 276, which lists various expressions defined by other provisions of the Act. The amendment removes the references to ‘NHS Body’ and ‘PCT order’ from the index of defined expressions and inserts references to the definitions in the NHS Act of “public health functions of the Secretary of State” and “public health functions of local authorities”, and the NHS Constitution.