

Briefing notes on Government
amendments to the Health and
Social Care Bill:
*Report stage (Commons),
September 2011*

Contents

Introduction.....	2
Chapter 1: Continuity of services	4
1.1 Supporting recovery and addressing unsustainability.....	5
1.2 Pricing.....	7
1.3 Foundation trusts that become unsustainable	8
1.3.1 Summary	8
1.3.2 Trust special administration.....	9
1.3.3 Securing agreement to proposals on continuity of services.....	11
1.3.4 Initial action	11
1.3.5 Secretary of State veto	11
1.3.6 Outcomes of trust special administration.....	14
1.4 Health special administration.....	15
1.4.1 Removing foundation trusts from the scope of the health special administration regime	15
1.4.2 Health special administration.....	15
1.4.3 Regulations	15
1.5 Financial support to secure continuity of services.....	17
1.6 Minor, technical and consequential amendments	18
1.6.1 Foundation trusts that become unsustainable	18
1.6.2 Health special administration.....	18
Chapter 2: Monitor’s transitional powers over foundation trusts	19
Chapter 3: Technical Amendments.....	21

Introduction

Important drafting note

These briefing notes supersede those published on 31st August 2011. This document uses the reference numbers assigned when the amendments were formally published by Parliament.

1. Following the listening exercise and the report of the NHS Future Forum, the Government set out a number of changes to its NHS modernisation plans.
2. The Government response to the Future Forum, published on 20th June, made clear that many of the changes could be made within the flexibility of the Bill. However, a number of changes required amendments to the Bill, with many of these being made during the Bill's second Commons Committee stage in June and July 2011.
3. The Government amendments to be debated at Commons Report, tabled on 31st September, continue the process of making changes to the Bill in response to the recommendations of the Future Forum. This document provides briefing notes on those amendments.
4. This document is divided into three chapters:
 - **The first chapter** explains the effect of the amendments designed to ensure the continuity of NHS services, as set out in paragraphs 5.43 – 5.46 of the Government response to the Future Forum report and described in more detail in *Securing continued access to NHS services*, and its accompanying technical annex (both available via www.dh.gov.uk)
 - **The second chapter** explains the effect of the amendments to Monitor's transitional intervention powers over foundations trusts, as set out in paragraph 7.18 of the Government response to the Future Forum report.
 - **The third chapter** explains the effect of the technical amendments the Government has tabled for Report. This includes the amendments required to change the name of 'commissioning consortia' to 'clinical commissioning groups'.
5. These briefing notes have been produced and published by the Department of Health. They are not Explanatory Notes as published by Parliament, and do not have the formal status of Explanatory Notes. A revised version of the Explanatory Notes will be published when the Bill enters the Lords.

Chapter 1: Continuity of services

1. As described in the annex to the accompanying document ‘*Securing continued access to NHS services*’ the Government has proposed to amend its earlier proposals to ensure the continuity of NHS services, whilst retaining the principles that underlay them. The amended proposals are as follows:
 - Commissioners would take the lead in securing continued access to NHS services overseen by the NHS Commissioning Board;
 - Monitor would intervene proactively with the aim of supporting recovery and preventing providers becoming unsustainable, where possible;
 - The previous Government’s unsustainable provider regime for foundation trusts (FTs) established under the Health Act 2009, would be maintained but improved significantly;
 - There would be a separate regime for companies that delivered essential NHS services, which would provide equivalent safeguards for patients and taxpayers; and
 - The Secretary of State would retain a veto over proposals for securing access to NHS services in the event that a provider became unsustainable. Such a veto would be subject to certain criteria and would be expected to only be used in exceptional circumstances, primarily where either the proposals agreed by the NHS Commissioning Board and/or relevant clinical commissioning groups would fail to secure continued access to services or secure services of sufficient safety and quality or provide good value for money.
2. This chapter describes the amendments the Government is tabling to the Health and Social Care Bill to enable these changes.

1.1 Supporting recovery and addressing unsustainability

3. In response to concerns about the practicalities of designating which services should be subject to additional regulation, the Government proposes to delete chapter 3 of Part 3 of the Bill (Amendments 91-99). Instead, the Government proposes that Monitor would support commissioners by intervening proactively where a provider of NHS services gets into difficulty and with the aim of supporting recovery and preventing providers becoming unsustainable, where possible. For example, the amended clauses envisage that where a provider gets into difficulty, Monitor may appoint agents to work with commissioners in drawing-up plans for securing continued access to NHS services. In addition, in the unlikely event of a licence-holder becoming unsustainable, the amended clauses would provide for special arrangements to protect patients' interests, building and improving on existing legislation for foundation trusts established under the Health Act 2009. In addition, a new health special administration regime would provide similar protections for patients in the event of a company supplying NHS services becoming unsustainable.
4. New clause NC2 and amendments 100 – 104 and 106 would enable Monitor to use its licensing powers to support commissioners in securing continued access to NHS services. Currently, the Bill provides that one of the purposes for which Monitor can use that power is ensuring the continued provision of certain (“designated”) services. Amendment 100 replaces the reference to designated services with a reference to health care services provided for the purposes of the NHS, meaning that Monitor could set a licence condition in relation to any such service, where Monitor considers this necessary and proportionate for the purposes of supporting commissioners in their duties to secure access to NHS services.
5. Clause 104 describes various types of condition that may be included in the licence as standard or special licence conditions. This list is not intended to be exhaustive. The effect of this clause would be to give Monitor discretion in determining where it is appropriate to include standard licence conditions for the purposes of securing continuity of services – that would be applicable to all licence holders – or to apply special licence conditions to individual licence holders, where necessary, on a case by case basis. Amendments 101 – 104 remove references to ‘designated’ services included in the descriptions of these conditions and replace them with references to ‘health care services for the purposes of the NHS’.
6. New clause NC2 adds to the list of types of conditions that might be included in standard or special license conditions. These additions are to ensure that Monitor can support commissioners effectively in securing continued access to NHS services. The additions would permit requirements on licence holders:
 - to provide information to commissioners and other parties as Monitor directs;

- to allow Monitor to enter premises owned or controlled by the license holder; and
 - to co-operate with one or more persons appointed by Monitor to assist in the management of the licence holders affairs.
7. New clause NC2 also requires Monitor to keep under review the level of risk to the continued provision of services, where a license includes conditions for these purposes. The combined effect of these amendments is that Monitor should intervene in proportion to risk and as it considers necessary to restore compliance with licence conditions for the purposes of securing continuity of NHS services.
 8. New clause NC2 also requires Monitor to publish guidance for commissioners on the exercise of their functions in relation to providers whose licences include conditions intended to help protect continuity of services. The amendment requires commissioners to have regard to the guidance.
 9. Monitor must also publish guidance for providers whose license conditions include conditions to help secure continued access to NHS services (including continued access planning) about how they should conduct their affairs when such conditions apply.
 10. Monitor may revise the guidance and must obtain approval from the Secretary of State and the NHS Commissioning Board before publishing the guidance.
 11. Amendment 90 updates clause 62 on conflicts of functions for two reasons. Firstly, to reflect the removal of designation and secondly, to allow Monitor the maximum amount of flexibility to secure continuity of NHS Services. Therefore, the amendment removes the restriction that Monitor must ignore its licensing functions relating to securing the continuity of services when considering the imposition of transitional licence conditions on certain foundation trusts.
 12. Amendments 106 and 180 are consequential on the removal of designation. Amendment 106 deletes a reference to chapter 3 of Part 3 (“Designated Services”) in clause 109, which sets out the purposes for which Monitor can use its enforcement powers to obtain documents and information. Amendment 180 removes a reference in clause 153.

1.2 Pricing

13. Removing the prior designation process has led to a number of consequential changes to chapter 5 of Part 3 of the Bill, which sets out the process for agreeing or applying for a local modification to the national price for a service. The policy remains that a provider of NHS services may be eligible for an increase on the prices payable under the national tariff to recover any unavoidable additional costs of delivering the services that need to be continued, where this would otherwise be uneconomic, and in line with a methodology agreed between Monitor and the NHS Commissioning Board. This methodology would be used to determine:
 - whether the price modification is necessary; and
 - the level of the price modification if it is needed.
14. Amendment 113 places a duty on Monitor to publish a methodology, to be included in the national tariff document, which will be used to assess the application for a price modification under clauses 127 and 128. Amendment 114 allows the national tariff to include guidance on the application of this methodology. Amendments 116 to 122 state that this methodology, and any associated guidance must be agreed by the NHS Commissioning Board (or in the default of agreement, decided by arbitration) and included in the draft national tariff for consultation. As result of this inclusion of guidance here, amendments 128 and 135 remove Monitor's ability to set guidance in clauses 127 and 128 respectively, which would have become redundant.
15. Amendments 115, 123 – 127 and 129 – 134 reflect the removal of designation. Amendment 115 removes Monitor's ability to set differential prices for designated services. This provision is no longer necessary.
16. Amendments 123 to 134 make the price modification process work after the changes to the continuity of services regime to remove designation. They open out the regime so it could potentially be applied to any NHS service. Amendments 123 and 124 allow the provider and commissioner to agree a price modification to the national price for any service for the purposes of the national tariff. Monitor would still have to approve the modification using the methodology developed for this purpose (amendment 125). Amendment 126 ensures the Secretary of State is sent notice of the modification and amendment 127 would allow the Secretary of State to block any modification that would breach EU Treaty obligations. Amendments 129 – 133 make the same changes to clause 128 as amendments 122 - 128 do to clause 127, where a provider can apply to Monitor for a price modification without commissioner agreement. Amendment 134 removes the ability for the NHS Commissioning Board and/or the clinical commissioning group to remove the designation of the service when they disagree with the price modification, which is no longer necessary as services will not be designated.

1.3 Foundation trusts that become unsustainable

1.3.1 Summary

17. The continuity of services regime for FTs would be based on the existing regime established under the Health Act 2009¹. However, the Government would make a number of improvements: ensuring that FTs do not revert to being under Ministerial control by removing the ability to de-authorise an FT; replacing the Secretary of State decision making role for FTs with a revised role for Monitor; and at the same time ensuring democratic accountability by setting out a Secretary of State veto process. As a result of the amendment, the regime would be more independent and transparent, reducing unnecessary costs and delays, with additional safeguards for patients and taxpayers.
18. Commissioners would be under a duty to meet patients' reasonable requirements for NHS healthcare services, including in the event of a provider becoming unsustainable². In this event, they would be required to identify where the withdrawal of services would have a significant adverse impact on health or would significantly increase health inequalities; *or* would cause a failure to prevent or ameliorate either damage to health or a significant increase in health inequalities; *and*, there are no alternative providers of services for patients to access. In determining whether the criteria were met, commissioners would have to have regard to current and future healthcare needs and any significant impact on equality of access to services.
19. As a last resort, in the unlikely event where previous interventions had been unsuccessful and a provider became unsustainable in its current form, Monitor would trigger the "continuity of services" regime and appoint a suitably qualified person ("administrator") to take control of the provider's affairs. The administrator would prepare a draft report to Monitor, recommending how to secure continued access to services, in line with requirements determined by the commissioner. The administrator would be required to agree the report with the commissioner, before the 30 working day public consultation can start, where the views of patients, the public, staff, Health and Wellbeing Boards, local Healthwatch organisations and anyone else Monitor deemed appropriate would be sought. Any changes to the report in light of responses to the consultation would also need to be agreed by the commissioner. The administrator would then submit a final version of the report to Monitor.
20. Before Monitor decided what action to take in relation to the services, it would need to be assured of the clinical case for any change. On receipt of an order

¹ The Government recognises that a small minority of NHS Trusts will need to continue beyond April 2014, each with a specifically agreed plan and date to move to Foundation Trust status. Under the Government's proposals, the existing Health Act 2009 regime, without any amendment, will continue to govern NHS Trusts until they become foundation trusts.

² See clauses 6(1) and 12 of the Health and Social Care Bill.

SEPTEMBER 2011

appointing an administrator to a foundation trust, the Care Quality Commission would provide an assessment of the provider's current service provision, to identify any concerns over quality and patient safety, and would expect the Trust Special Administrator (TSA) to:

- secure endorsements from local clinical commissioning groups (or the NHS Commissioning Board, if appropriate) and where possible, secure endorsements from relevant Clinical Senates and/or clinical advisors on the clinical case underpinning the recommended solution; and
- consult the Independent Reconfiguration Panel on any proposals for service change.

21. Monitor would be required to submit its final report and proposals to the Secretary of State, who would have a right of veto, where he could demonstrate, either:
- failure by the TSA to follow due process; or
 - failure by the NHS Commissioning Board, and/or the relevant clinical commissioning groups to secure continued access to services, or secure services of sufficient safety and quality or provide good value for money.

1.3.2 Trust special administration

22. The Health Act 2009 amended the National Health Service Act 2006 to create the previous Government's unsustainable provider regime for FTs. The Government has tabled the following amendments to that regime and hence the National Health Service Act 2006.

23. Clause 181 of the Bill would have repealed the unsustainable FT provider regime in Chapter 5A of Part 2 of the National Health Service Act (Trust Special administrators: NHS Trusts and NHS foundation trusts). Amendment 217 removes this clause from the Bill thereby reinstating the unsustainable provider regime for FTs.

24. New clause NC6 inserts new section 65DA (objective of Trust Special Administration) in the NHS Act 2006. It sets the Trust Special Administrator (TSA) the objective of securing the continued provision of NHS services in line with requirements determined by the commissioner and where withdrawal of a service would, in the absence of alternative arrangements, either:

- have a significant adverse impact on the health of persons in need of service, or significantly increase health inequalities; or
- cause a failure to prevent or ameliorate either a significant adverse impact on the health of such persons, or a significant increase in health inequalities.

25. In making a determination for these purposes, commissioners would have to have regard to:

- the current and future need for the provision of NHS services; and

- any matters specified in guidance published by Monitor (on applying the criteria), where such guidance has been approved by the Secretary of State and the NHS Commissioning Board.
26. The NHS Commissioning Board would be responsible for facilitating agreement between commissioners in determining requirements for securing continued access to services in individual cases. The NHS Commissioning Board would make the decision where commissioners failed to reach agreement.
 27. Amendments 189, 191, 192, 194, 195 and 196 amend the NHS Act 2006 to set out the role and objective (as set out above) of, and other arrangements for, the TSA. As under existing legislation, a TSA would be appointed by Monitor to take control of the FT's affairs and support the commissioner to secure continued access to services, where necessary.
 28. Once Monitor has made an order to appoint a TSA Amendment 190 requires the Care Quality Commission to provide Monitor with a report on the safety and quality of NHS services that the Trust provides. Amendment 193 adds the Care Quality Commission to the list of persons Monitor must consult prior to making the order.
 29. Amendment 197 amends Chapter 5A of the NHS Act 2006 so that the TSA must consult with the NHS Commissioning Board and with all those who commission NHS services from the provider to help with the production of the draft report.
 30. Amendments 198 and 199 amend the NHS Act 2006 so that public consultation on the draft report cannot begin until agreement has been reached with commissioners that the recommendations included in the TSA's draft report would achieve the objective of the administration. If commissioners cannot agree on the draft report the TSA must agree the draft report with the NHS Commissioning Board. The same rules would apply to amending the draft document following consultation. If the NHS Commissioning Board does not agree the draft report would achieve the objective, it must notify the TSA and Monitor of this and set out its reasons for withholding approval.
 31. Amendment 200 amends section 65H (consultation requirements) of the NHS Act 2006 to require the TSA to request a written response from the NHS Commissioning Board, commissioners and anyone else Monitor or the Secretary of State considers appropriate in the case of an FT. The administrator would be required to meet with anyone from whom they requested a written response.
 32. Amendments 201 and 202 provide that Monitor may direct the TSA to request a written response from Health and Wellbeing Boards, Local Healthwatch or any Member of Parliament and anyone else Monitor considers appropriate. Amendment 204 gives the Secretary of State the power to direct Monitor as to its use of the power provided for in amendments 201 and 202.

33. Amendment 203 updates the definition of commissioners and changes references to the Secretary of State to references to Monitor, as appropriate.

1.3.3 Securing agreement to proposals on continuity of services

34. Amendment 205 amends the NHS Act 2006, to set out a process to allow a Secretary of State veto, to be used in exceptional circumstances where there was a failure to comply with due process or the proposals agreed by commissioners would fail to secure access to services or services of sufficient safety and quality or to provide value for money.
35. The annex to the accompanying document '*Securing continued access to NHS services*' includes at figure 2 a flow chart of the stages in the proposed continuity of services regime for FTs.

1.3.4 Initial action

36. Subsection 1 of new section 65KA in the National Health Service Act 2006 sets out what Monitor must do once it receives the final report relating to an NHS Foundation Trust. Within 20 working days of receiving the final report from the TSA Monitor must decide whether it is satisfied:
- that the action recommended in the report would achieve the objective set out in new section 65DA of the NHS Act 2006 (the objective of trust special administration); and
 - that the TSA has carried out its administration duties.
37. Subsection (2) provides that “administration duty” means a duty imposed on the TSA by Chapter 5A of the NHS Act 2006, a direction under Chapter 5A or the administrators terms of appointment.
38. Subsection (3) sets out that if Monitor is satisfied with the TSA’s final report it must soon as reasonably practicable provide Secretary of State with the TSA’s final report and the CQC’s report on the safety and quality of current services.
39. Subsection (4) provides that if Monitor is not satisfied, it must as soon as reasonably practical give notice of that decision to the TSA. Subsection (5) gives Monitor discretion to decide which elements of the process for preparing the draft report the TSA must re-do.

1.3.5 Secretary of State veto

40. New section 65KB in the NHS Act 2006 provides for Secretary of State’s right of veto over the recommendations submitted to Monitor and agreed between the TSA and the commissioner under subsection (1) of new section 65KA. The background to the Government’s proposals on this is set out in the annex to the

accompanying document ‘*Securing continued access to NHS services*’. It states that within the period of 30 working days beginning with the day on which the Secretary of State receives the draft report from Monitor, the Secretary of State must decide whether he is satisfied that:

- the commissioners have discharged their functions as set out in Chapter 5 of the NHS Act 2006;
- the TSA has carried out the administration duties;
- Monitor has discharged its functions as set out in Chapter 5A;
- the action recommended in the final report would secure the continued provision of the services as set out in new section 65DA;
- the recommended action would secure the provision of NHS services that are of sufficient safety and quality; and
- the recommended action would provide good value for money.

41. Subsection (1) of new section 65KC in the National Health Service Act 2006 sets out that if the Secretary of State exercises the veto, the administrator must, within 20 working days of receiving notice of this, provide Monitor with a further version of the report, including changes that the administrator considers necessary to secure that Secretary of State would be satisfied (on the grounds set out at section 65KB(1)).

42. Subsection (2) provides that within 10 working days of receiving the report Monitor must decide if the action recommended in the revised report would achieve the objective and whether the TSA has carried out its administration duties.

43. Subsection (3) permits the Secretary of State to increase the time the administrator has to draft the revised report, if Secretary of State considers that 20 working days would not be sufficient time for the TSA and/or the commissioners to complete the necessary action(s). In particular, if the remedial action was to carry out consultation, it would allow for a longer period for such consultation.

44. Subsection (4) states that the TSA must publish a notice stating when the extended period would end if an order is made under subsection (3). Where the TSA is proposing to carry out consultation in response to the Secretary of State’s veto, they must publish a statement setting out how they will consult during the extended period.

45. New section 65KD in the NHS Act 2006 provides for how Secretary of State may respond to a re-submitted report. Subsection (1) states that within 30 working days of receiving the draft report the Secretary of State must decide whether he is satisfied as set out in new section 65KB(1).

46. Subsection (2) provides that on receiving the revised report and recommendations, if the Secretary of State is still not satisfied as to the matters listed in new section 65KB(1)(a) to (f), he must as soon as reasonably practical:

SEPTEMBER 2011

- publish a notice of that decision and the reasons for it; and
 - lay a copy of the notice before Parliament.
47. Subsection (4) states that if the notice given under subsection (2) states that the NHS Commissioning Board has failed to discharge a function:
- the NHS Commissioning Board is to be treated as having failed discharge the function for the purposes of the National Health Service Act 2006 ; and
 - the failure is to be treated for the purposes as significant and new section 13Z1 (failure by the Board to discharge any of its functions) of the 2006 Act is to apply.
48. Subsection (5) provides that if the notice states that a clinical commissioning group has failed to discharge a function:
- the clinical commissioning group is to be treated as having failed to discharge the function for the purposes of the National Health Service Act 2006;
 - the Secretary of State may exercise the functions of the NHS Commissioning Board under Clause 14Z19(2), (3)(a) and (8)(a) (Board's intervention powers); and
 - the Board would not be able to exercise any of its functions under 14Z19 in respect of that failure of the clinical commissioning group.
49. Subsection (6) requires the clinical commissioning group to co-operate with the Secretary of State if he exercises any such function under subsection (5).
50. Subsection (7) stipulates that if the notice stipulates that the TSA has failed to discharge an administration duty:
- The administration duties are to be treated as functions of Monitor;
 - Monitor is to be treated as having failed to discharge those functions; and
 - the failure is to be treated as significant for the purposes of clause 66 of the Bill (failure to perform functions) which would apply accordingly.
51. Similarly, subsection (8) provides that if the notice states that Monitor failed to discharge a function:
- Monitor is to be treated as having failed to discharge a function for the purposes of the Health and Social Care Act; and
 - the failure is to be treated as significant for the purposes of clause 66 (failure to perform functions) which would apply accordingly.
52. The effect of subsections (4) to (8) is to allow the Secretary of State to take control in the event that he rejects a re-submitted final report, which would be treated as a significant failure by Monitor and/or the commissioners to perform their functions.
53. Subsection (9) makes provision for action to be undertaken by the Secretary of State once he takes control. Within 60 days of publishing a notice rejecting the re-

SEPTEMBER 2011

submitted final report, the Secretary of State must decide what action to take in relation to the Trust.

54. Subsection (10) states that the Secretary of State must as soon as reasonably practicable:
- publish a notice of the decision and the reasons for it; and
 - lay a copy of the notice before Parliament.
55. Amendment 207 inserts new section 65LA of the NHS Act 2006 which provides that where the decision is that the Foundation Trust in question is to be dissolved, Monitor may make an order:
- dissolving the FT, and
 - transferring, or providing for the transfer of, the property and liabilities of the trust—
 - to another FT or the Secretary of State, or
 - between another FT and the Secretary of State.
56. Subsection (4) provides that the order may include provision for the transfer of employees. Subsection (5) allows criminal liabilities to be included as part of the liabilities transferred to another Foundation Trust.

1.3.6 Outcomes of trust special administration

57. Amendment 206 sets out a process that an FT coming out of administration would follow. It would allow Monitor, rather than the Secretary of State to carry out the process.

1.4 Health special administration

1.4.1 Removing foundation trusts from the scope of the health special administration regime

58. Amendments 139, 141, 142, 145, 147, 149 – 154 and 163 remove FTs from the scope of the health special administration regime. Instead, the existing, unsustainable provider regime for FTs, established under the Health Act 2009, would be retained with improvements (see above). Amendment 136 therefore removes the provision in the Bill (clause 130) which would extend insolvency law to FTs. Amendment 143 changes the scope of health special administration to reflect the removal of provisions relating to ‘designated services’. In the Bill as previously drafted, the regime would have only applied to such services.
59. The amendment changes this, so that health special administration could apply in relation to companies whose licences included conditions intended to ensure continuity of any NHS service where Monitor considers this necessary and made under clause 104(1) (i), (j) or (k) of the Bill.

1.4.2 Health special administration

60. Under the Government’s revised proposals health special administration will not apply to FTs, only to companies (which includes public limited companies, private limited companies, community interest companies, companies limited by guarantee and unregistered companies). The wording of these clauses has been amended accordingly.
61. Amendment 144 changes the objective of health special administration by replacing a reference to designated services with provision for commissioners to determine their requirements for securing continued access to services, in line with criteria to be set out in regulations. Health special administration regulations (provided for in clause 133) would make provision for how commissioners would make this determination.
62. Amendments 137 and 140 add further detail about the proposed health special administration regime for companies. They replicate existing insolvency legislation and help to differentiate health special administration from the regime that would apply to NHS FTs. The amendments specify that a health special administrator must be a qualified insolvency practitioner, and that he or she will be an officer of the court who acts as the company’s agent in carrying out their functions.

1.4.3 Regulations

63. Amendments 155 and 156 make additional provision about the content of health special administration regulations.

64. Amendment 155 has the effect that the regulations can place requirements on Monitor with regard to publishing and maintaining a list of companies who may be subject to health special administration.
65. Amendment 156 provides that the regulations could require Monitor to publish guidance to commissioners about the exercise of their functions in applying the criteria – which would be set out in the regulations – when determining their requirements for securing continued access to services subject to health special administration.
66. The regulations could also:
- Enable Monitor to revise such guidance and require Monitor to obtain the approval of the Secretary of State and the NHS Commissioning Board on such guidance or revised guidance.
 - Require commissioners to have regard to any such guidance issued by Monitor; and provide for the NHS Commissioning Board to facilitate agreement between commissioners in determining their requirements for these purposes and, where commissioners fail to reach agreement, for the NHS Commissioning Board to determine the issue.
 - Require Monitor or the administrator to run a public consultation on the plans to secure continued access to NHS services. The intention is that any such provision would apply where a company that had become unsustainable was delivering NHS services to more than one commissioner.

1.5 Financial support to secure continuity of services

67. Chapter 7 requires Monitor to set up effective mechanisms for providing financial assistance to special administrators appointed, in the event of a provider becoming unsustainable, to secure the continued provision of NHS services, in line with the service requirements determined by commissioners.
68. Monitor would have power to establish a financial mechanism to fund the operation of administration once a provider became unsustainable. If Monitor deemed it appropriate, it would be able to establish and maintain a risk-pool, with power to levy contributions from providers and (subject to regulations) commissioners. This risk pool could be used to fund the operating costs of maintaining services during administration and one-off costs of restructuring
69. Because of changes elsewhere in Part 3, the following consequential amendments have been made to Chapter 7 in order to permit financial assistance to a TSA, ensuring the risk pool can apply to FTs in Trust Special Administration.
70. Amendments 166, 167 and 168 place a duty on Monitor to establish mechanisms for providing financial assistance in cases where an FT is in Trust Special Administration.
71. They also amend clause 137 to allow payments from the financial mechanisms to be made to cover indemnities given to a TSA appointed to an FT (provision for which is currently made in clause 177(4) of the Bill).
72. Amendments 170, 171, 172, 173 and 174 amend clause 139 so that applications for financial assistance by a TSA appointed to an FT would apply in the same way as applications for financial assistance by a health special administrator of a company.
73. Amendment 176 applies grants and loans to a TSA and an FT in Trust Special Administration in the same way as they apply to a Health Special Administrator and a company in Health Special Administration.
74. Clause 146 allows Monitor to alter the amount payable by a provider in year. Amendment 178 is consequential to reflect the new arrangements for FTs.
75. Amendment 179 requires Monitor to undertake and publish a review of trust special administration for FTs each year.
76. Amendments 169, 175 and 177 reflect the removal of designation of services.

1.6 Minor, technical and consequential amendments

1.6.1 Foundation trusts that become unsustainable

77. Amendment 208 updates the requirement on Monitor to publish guidance for TSAs so that it includes what would happen in the event of the publication of notices under new section 65KC(4)(a) on how a proposed consultation by the TSAs will take place following a Secretary of State veto.
78. Amendments 209, 210, 211, 214, 215 and 216 would require any notice published under trust special administration to be published, made available free of charge and published in the NHS Foundation Trust Register.
79. Amendments 212 and 213 make consequential amendments following changes to the FT regime to the provisions on orders, regulations and directions in clause 272 of the NHS Act 2006.
80. Amendment 218 provides for consequential amendments as Chapter 5A of Part 2 of the NHS Act 2006 is no longer being repealed. The amendment deletes paragraphs (b) and (c) of clause 182(5) from the Bill because these subsections provided for circumstances for which chapter 5A of part 2 of the National Health Service Act 2006 would continue to apply. As this chapter is not now being repealed, these paragraphs are no longer necessary.
81. Amendments 371 and 372 make a number of consequential amendments to Schedule 14 (abolition of NHS Trusts: consequential amendments) to the Bill.
82. Amendment 107 extends Monitor's power to require documents and information so that it would also apply to trust special administration.
83. Consequential amendments to the National Health Service Act 2006 formerly set out in clause 130 (which will be deleted by Amendment 138 will now be moved by Amendment 188 to clause 176.

1.6.2 Health special administration

84. Amendment 157 is a consequential on the removal of NHS foundation trusts from the scope of health special administration. Clauses 133 (5) and (6) provide that health service administration regulations could modify chapter 6 of Part 3 of the Bill, the Insolvency Act 1986, any other enactments relating to insolvency and administration and section 242 of the National Health Service Act 2006. Section 242 concerns public involvement and consultation duties for FTs. As health special administration will no longer cover FTs, there will be no need for regulations to amend this section. The amendment removes the provision that would have enabled them to do so.

Chapter 2: Monitor's transitional powers over foundation trusts

New clauses NC3-NC5 and amendments 88-89, 108-112, 282 and 285

85. These amendments extend the transitional period where Monitor retains specific intervention powers over foundation trusts until March 2016. They also make all foundation trusts subject to these powers. They amend clause 117 and replace clause 116 which would have applied the powers for two years to only some designated foundation trusts. Extending the powers would, as recommended by the NHS Future Forum, give the governors' time to build capability in holding their board to account. Through these powers Monitor would also be able to protect the taxpayers' investment in foundation trusts.
86. New clause NC3 (Duration of transitional period) extends the transitional period where Monitor retains specific intervention powers over all foundation trusts until March 2016. Where a foundation trust was authorised after April 2014, Monitor's oversight powers would still last for two years. The new clause would still enable the Secretary of State to extend the transitional period, specifying that this extension would be for a maximum of two years at any one time. The powers could be extended for all or some foundation trusts.
87. New clause NC4 (Orders under section (Duration of transitional period) that apply only to some trusts) sets out the process that would apply if Secretary of State wishes to extend the transitional powers beyond 2016 for only some foundation trusts. It places a duty on the Secretary of State to inform Monitor and on Monitor to publish criteria to be used to determine which foundation trusts should remain subject to its powers and obtain Secretary of State's approval, before publishing them
88. New clause NC5 (Repeal of sections (Duration of transitional period) and (Orders under section (Duration of transitional period) that apply to only some trusts) repeals all the clauses on transitional intervention powers when no foundation trusts remain subject to the powers, or where no NHS trusts are in existence.
89. Amendment 88 is a consequential amendment following the removal of clause 116 and the amendment of clause 117.
90. Amendment 108 removes clause 116 which allowed for the initial designation of foundations trusts to be subject to the powers. This clause is no longer needed as all foundation trusts would initially be subject to Monitor's transitional powers, rather than only a subset. Amendments 89 and 109-112 make consequential amendments to clause 117.

SEPTEMBER 2011



91. Amendments 282 and 285 make consequential amendments to clause 302 governing Secretary of State's powers to make regulations under this Act.

Chapter 3: Technical Amendments

92. In addition to the amendments detailed above, a number of other amendments have also been put forward to make technical changes to clauses across the Bill. These changes are required for a variety of reasons, for example to correct omissions or errors, clarify policy, make consequential changes or improve drafting to avoid inconsistencies and ambiguities.

New clauses

New clause NC1

93. This amendment inserts a new clause into the Bill, inserting a new section 73C of the National Health Service Act 2006. The new section gives the Secretary of State powers to make regulations setting up procedures for the handling and consideration of complaints about the exercise of public health functions by local authorities. The regulations may also provide for a complaint, or any matter raised by a complaint, to be referred to a Local Commissioner (that is, the local government ombudsman) for consideration as to whether to investigate the complaint under the local government ombudsman system.

New clause NC8

94. This amendment would allow property, rights or liabilities that have been transferred from the Secretary of State, a Primary Care Trust or a Strategic Health Authority to a special health authority or a qualifying company, to be transferred to a further body mentioned in the second column of schedule 23. For example, this could allow property transfers from a special health authority to a local authority or to a qualifying company.

New clause NC9

95. This amendment inserts a new clause into the Bill which places a duty on the Secretary of State to consult Scottish Ministers before making an order commencing certain provisions of the Bill in which Scottish Ministers have a particular interest. The provisions in question relate to public health and regulation of health and social care workers.

Changing commissioning consortia to clinical commissioning groups

Amendments 403-1117

96. A series (715 in total) of technical amendments which change the legal name of commissioning consortia to clinical commissioning groups and make the necessary consequential amendments to the terminology throughout the Bill, to clarify the role and membership of these organisations. This change was

announced in the publication of the Government response to the NHS Future Forum on 13 June. MS(H) read a statement to the Public Bill Committee on 30 June notifying the Committee of the intention to change the name, and the new nomenclature was used by the Government in debating the amendments to the Bill. These amendments do not change the effect of the Bill.

Clause 14

Amendment 49

97. Clause 14 of the Bill amended Schedule 1 to the National Health Service Act 2006 to provide that the duty on local authorities to provide medical inspection and treatment of school children includes dental inspection and treatment. The amendment removes the reference to dental inspection and treatment. Dentists no longer routinely provide dental treatment in schools and PCTs currently have no duty to arrange such services. The amendment ensures that this position will be reflected in the new arrangements for local authorities.

Clause 15

Amendment 50

98. The amendment ensures that when the Secretary of State makes regulations which require local authorities to exercise his public health functions, he can also enable them to exercise other associated functions. For example, his powers to make arrangements with, or make facilities available to, providers of services, including voluntary organisations, under section 12 of the National Health Service Act 2006.

Amendment 51

99. The amendment clarifies the liability of local authorities when exercising the Secretary of State's public health functions under regulations under the new section 6C of the National Health Service Act 2006. The effect is that a local authority, and not the Secretary of State, will be liable for the acts or omissions of the authority when exercising those functions.

Clause 16

Amendments 52 and 53

100. These amendments make two provisions: that the Secretary of State may continue to exercise any EU function he has delegated under this clause; and that, where EU functions are delegated to the Board or clinical commissioning group under new section 6D, they should be legally responsible for the exercise of that function.

Clause 19

Amendment 54

101. The amendment clarifies the liability of the NHS Commissioning Board, clinical commissioning groups and local authorities when exercising the Secretary of State's public health functions under arrangements under section 7A of the National Health Service Act 2006. The effect is that the body exercising the functions, and not the Secretary of State, will be liable for the acts or omissions of the body when so exercising those functions.

Clause 20

Amendment 60

102. This amendment clarifies that the duty on the Board to encourage CCGs to enter into partnership arrangements (new section 13M(3)) should apply where the Board considers that such partnership arrangements would secure the provision of health services that are integrated either with other health services or with health-related or social care services where this would improve the quality of health services or reduce inequalities in outcomes from or access to health services.

Amendments 63, 66, 78, 81, 84-86, 300-301, 318-319, 323, 329, 334-344, 348 and 350

103. The purpose of amendments 66 and 81 are to ensure clarity on the face of the Bill as to when references to the Board and CCGs' functions include public health functions of the Secretary of State that have been delegated to them by virtue of arrangements under section 7A of the 2006 Act as inserted by clause 19 of the Bill. They also add powers for the lists of provisions specified to be amended by order of the Secretary of State. Amendments 63 and 78 are technical amendments which insert an express reference to "functions" to enable sections 13P and 14Z to be included in the lists of provisions in sections 13Z3 and 14Z22 inserted by amendments 66 and 81. The effect of sections 13P(1) and 14Z(1) is unchanged by these.

104. Amendments 84-86, 300-301, 318-319, 323, 329, 334-344, 348 and 350 serve a similar purpose, making it clear whether references throughout the Bill to arrangements made by the Board or clinical commissioning groups for the provision of services in the NHS Act 2006 and other enactments include arrangements made by the Board or clinical commissioning groups in pursuance of the Secretary of State's public health functions which they are exercising by virtue of arrangements under new section 7A of the NHS Act 2006.

Amendments 55-59, 61-62, 64-65, 72-77 and 79-80

105. These amendments simplify the Bill by removing separate definitions of "health services" in a number of new sections inserted by clauses 20 and 23 of the Bill, and instead provide a single definition at the end of each of those clauses.

Clause 21

Amendment 67 and 68

106. If the Secretary of State revised the mandate to the Board following a general election (under new section 13B(3)(b)) then this might necessitate a change in the amount allotted for that year by the Secretary of State towards meeting the expenditure of the Board which is attributable to the performance by it of its functions in that year (new section 223B) and to the limits on Board's total capital resource use and total revenue resource (new section 223D). Currently the Bill only allows the Secretary of State to revise the annual allotment to the Board or the annual limits on total revenue and total capital resource use with the Board's agreement or in exceptional circumstances. These amendments would enable an incoming Secretary of State to also make changes to the allotment or to the resource limits following a general election.

Clause 22

Amendment 69

107. This is a technical amendment to correct an error in the text. The amendment removes the first reference to "services" in section 14A(4)(c) so that the subsection reads '(c) section 92 arrangements for the provision of primary medical services of a prescribed description'. This was a hitherto unnoticed error, and does not affect the meaning of the section.

Amendment 70-71, 292, 293 and 294-298

108. These amendments amend the Bill to make further provision for the payment of allowances, expenses and pensions by a clinical commissioning group, for example they enable a group to pay allowances and expenses to those working on its behalf, including in committees, and allow certain people access to any pension scheme the clinical commissioning group may wish to put in place (note that this would be an alternative to the NHS Pension Scheme). These amendments are in recognition that not all circumstances may be covered by the Bill as it stands.

SEPTEMBER 2011

109. Amendment 70 gives the governing body of the clinical commissioning group responsibility for determining allowances which the group will pay under any pension scheme it establishes.
110. Amendments 71 and 292 omit provisions which are currently in the Bill but are subsumed in these amendments. The provision removed by amendment 71 now appears in subsection (1) of amendment 297 and the provision removed by amendment 292 now appears in subsection (c) of amendment 298.
111. Amendment 294 makes it clear that the governing body of the clinical commissioning group has responsibility for determining travelling and other allowances in addition to the remuneration to be paid to employees of the CCG.
112. Amendment 295 amends paragraph 11(5) of Schedule 1A to make clear that, where the accountable officer is not an employee of a clinical commissioning group (or, in the case of a joint appointment, an employee of any of the groups he acts for), a group may pay the accountable officer travelling or other allowances, in addition to remuneration, in accordance with determinations made by its governing body.
113. Amendment 296 allows a clinical commissioning group to make arrangements to provide pensions, allowances and gratuities to its accountable officer, including by way of compensation in respect of loss of office or loss or diminution of emoluments, and access to any pension scheme the clinical commissioning group establishes under 10 (4) of Schedule 1A (note that this would be an alternative to the NHS Pension Scheme).
114. Amendment 297 consolidates and adds to the provision which allows remuneration and allowances to be paid to members of the clinical commissioning group's governing body. It allows for payment to members of the governing body of remuneration, travelling or other allowances and gratuities, as well as for provision of pensions. These arrangements may include the establishment and administration of pension schemes, and arrangements for the provision of pensions, allowances or gratuities by way of compensation for loss or diminution of emoluments. However, the arrangements for providing pensions, allowances or gratuities do not apply to members of the governing body who are members or employees of the clinical commissioning group, or members or employees of a practice which is a member of the clinical commissioning group.
115. Amendment 298 allows a clinical commissioning group to pay such travel and other allowances as it considers appropriate to members of the group who are individuals (as opposed to practices), individuals authorised to act on behalf of a member of the group in its dealings with the group, and any members of committees or sub-committees of the group or its governing body. This is intended to ensure that where persons who are not employees undertake work on behalf of the group, they can receive expenses.

SEPTEMBER 2011

Clause 24

Amendments 82, 260, 264, 266 and 355

116. These amend provisions of the Bill which refer to the NHS Commissioning Board or clinical commissioning groups commissioning public health services pursuant to arrangements made with the Secretary of State under sections 7A or 12 of the 2006 Act. The amendments remove the reference to arrangements under section 12 of the Act, as only section 7A will be used to delegate public health functions to the Board or clinical commissioning groups. The Secretary of State will use section 12 to commission public health services from providers, but not from the Board or commissioning groups (who will not directly provide services themselves).

Clause 42

Amendment 83 and 288

117. These amendments ensure that if the NHS Commissioning Board makes arrangements for another body or person to carry out any of its responsibilities for emergency planning, resilience and response, that this will include any function or duties the Board has as a Category 1 responder under the Civil Contingency Act 2004.

Clause 60

Amendment 87

118. This amendment makes it explicit that the Secretary of State's delegated power under Clause 60, to extend the remit of Monitor's functions to adult social care, can be applied in relation to England only.

Clause 108

Amendment 105

119. This amendment provides that Monitor, the Competition Commission, OFT and the Secretary of State cannot use the powers conferred on them in chapter 4 to modify standard license conditions in order to omit the license conditions provided for in subsections (1) of clause 108.

120. Clause 108 requires Monitor to include in the licenses of all providers a condition requiring providers to act transparently in the setting and application of eligibility and selection criteria wherever services are subject to patient choice of provider.

SEPTEMBER 2011

121. The clause was introduced following the listening exercise to help ensure that patients are not rejected by the providers of their choice on non-clinical grounds, and so help to address the potential risk of providers being able to restrict patient choice by ‘cherry picking’ the simplest, most profitable cases.
122. Specifically the amendment ensures that the standard condition cannot be omitted by:
- clause 105 and paragraph 7(2) of Schedule 10, which give Monitor the power to modify the standard conditions applicable to all licences, or to licences of a particular description;
 - the power conferred on the Competition Commission by paragraph 8(5) of Schedule 10 to modify standard conditions; or
 - the power conferred by clause 107 on the Office of Fair Trading, Competition Commission and Secretary of State to modify standard conditions.
123. The effect of this amendment is to ensure that such a condition must be included in all licenses.

Clause 132

Amendments 146, 148, 159 and 164

124. These amendments are technical amendments to clauses 132 and 134. They clarify that during health special administration, preparations can be made for the transfer of services to another existing provider who does not currently hold a licence but would obtain one in due course.

Clause 133

Amendment 158

125. This amendment reflects existing insolvency law. It would allow the Secretary of State to make special administration rules in relation to Scotland, enabling the health special administration regime to apply to any Scottish companies providing services for the NHS in relation to England.

Clause 134

Amendment 160

126. This amendment will allow for regulations to make provision for any modifications made to a transfer scheme in health special administration to take effect from a date specified by Monitor. That date may be a date before the date the modifications were made.

SEPTEMBER 2011

Amendments 161, 162 and 165

127. These amendments make it clear that regulations about transfers from a company in health special administration to an alternative provider may include provisions for the transfer of employees.

Clause 166

Amendments 181-184

128. These amendments retain the Secretary of State's ability to issue a range of financial assistance to foundation trusts, rather than just loans as currently proposed in the Bill. Secretary of State would continue to be able to issue public dividend capital grants and other payments to foundation trusts. The amendments would also extend the transparency requirements being introduced for loans to these other types of financing. These amendments would give Secretary of State a greater range of options for providing support to foundation trusts, for example to finance capital investment.

Clause 171

Amendment 185, 186 and 187

129. These amendments make it clear that a foundation trust cannot merge with, or acquire, a Welsh NHS trust. The current definition of an NHS trust in the NHS Act 2006 includes NHS trusts in Wales. Section 56 of the Act enables a foundation trust to merge with an NHS trust. Clause 172 would enable a foundation trust to acquire an NHS trust. These clauses amend section 56 (mergers) and clause 172 (acquisitions) to make the position clear that references to NHS trusts would, in those provisions only, relate to NHS trusts in England.

Clause 183

Amendments 219 and 220

130. These amendments repeal references to NHS trusts once the legislation relating to them is repealed.

Clause 184

Amendment 221

131. This amendment will ensure consistency between the descriptions of the purpose and functions of HealthWatch England in different parts of Part 5, Chapter 1 of the Bill. The aim is to avoid the risk of confusion or misinterpretation arising from the current minor difference in descriptions.

Amendment 222

132. This amendment will extend the duty on HealthWatch England to ensure that, so far as practicable, it excludes information relating to the private affairs of an individual from all reports it publishes, rather than only in its annual report, where publication of that information would, or might, be significantly detrimental to that individual.

Amendment 223

133. This amendment will amend section 229 of the Local Government and Public Involvement in Health Act 2007 (the 2007 Act), to take account of the insertion of new section 220A and Schedule 16A into the 2007 Act by clause 185(3) & (4) of the Bill, and to ensure that the provisions of s229 apply to them.

Amendment 224

134. This amendment will add Local HealthWatch organisations to Part 2 of Schedule 1 to the Freedom of Information Act 2000. This will mean that Local HealthWatch organisations will be subject to the provisions of that Act.

Amendment 225

135. This amendment qualifies the duty on local authorities in new section 223A of the 2007 Act to make arrangements for the provision of independent advocacy services so that it applies only in relation to the local authority's area.

Amendment 226

136. The purpose of this amendment is to limit the discretion of local authorities to make arrangements other than those specified in new section 223A(1) and (2) of the 2007 Act to provide support to NHS complainants, so that it only applies in relation to each local authority's area.

Amendment 227

137. This amendment would give the Secretary of State powers to direct local authorities to exercise their functions in relation to making arrangements for the provision of independent advocacy services in a particular way or to a particular level.

Amendments 228 and 229

138. These amendments are inter-dependent and should be considered together. They will allow Local HealthWatch organisations to obtain from specified bodies information needed in order to exercise their duties as to the representativeness of those persons with whom they make arrangements to either exercise functions on its behalf, or assist the LHW in exercising its functions. Such information will be able to be included in regulations governing how specified persons must respond to requests from Local HealthWatch organisations.

Amendment 230

139. This amendment changes the reference to “local involvement networks” in the title of s224 of the 2007 Act to “Local HealthWatch organisations”.

Clause 193

Amendments 231-235, 237-240

140. Clause 193 concerns the scrutiny functions of Local Authorities. These amendments correct an error whereby the description of those who may be required under regulations to attend before the local authority scrutiny functions to answer questions was not entirely accurate. It also clarifies the "relevant health service providers" who may be required under regulations to attend before the local authority to answer questions. The amendment ensures that the requirement applies to the correct people and includes providers of public health services commissioned by the NHS Commissioning Board or a clinical commissioning groups or local authorities.

Amendment 236

141. This amendment makes it clear in primary legislation that the health scrutiny functions of local authorities are functions of the full council of the local authority as opposed to the executive. The full council would have the flexibility of appointing a committee to discharge the functions.

Clause 226

Amendment 241

142. This amendment inserts a definition of the term ‘health care profession’ into Section 26A of the NHS Reform and Health Care Professions Act 2002. Section 26A provides for the Secretary of State and devolved administrations to request advice, investigations and reports from the Council for Healthcare Regulatory Excellence (CHRE), which is to be renamed the Professional Standards Authority for Health and Social Care (the Authority). The definition clarifies the Secretary

SEPTEMBER 2011

of State's and the devolved administrations' powers and the Authority's duties under this section.

Amendment 242

143. This amendment makes changes to Section 27 of the 2002 Act, which enables the CHRE to direct the regulatory bodies it oversees to make rules. The current duties of the Secretary of State under this section are conferred on the Privy Council by this amendment, in keeping with the other changes the Bill makes to make the Authority more independent of Government.

Amendment 243

144. This amendment makes changes to Section 38 of the 2002 Act consequential on amendments to Section 27 of that Act. It maintains the current position that orders made under Section 27 are subject to the affirmative resolution procedure, and that regulations made under this section are subject to the negative resolution procedure.

Clause 227

Amendment 244

145. This amendment is consequential on the Interpretation and Legislative Reform (Scotland) Act 2010. It amends the procedure in the Scottish Parliament which is applicable to the new duty conferred on the Privy Council to make regulations requiring the regulatory bodies to pay fees to the Authority.

Clause 229

Amendment 245

146. This amendment amends clause 229 to reflect that new subsections are to be inserted into Section 38 of the 2002 Act (by amendments to clauses 226 and 227).

Clause 230

Amendment 246-253, 255 and 256

147. These amendments replace various references to the 'appointment powers' of the Privy Council and the devolved administrations with references to 'appointment functions'.

SEPTEMBER 2011

Amendment 254

148. This amendment enables various bodies and persons to assist the Privy Council to appoint chairs from among the members (rather than just members) of the regulatory bodies, and to assist the Privy Council to determine members' terms of office on appointment.

Clause 233

Amendment 257

149. This is a technical amendment to Section 38 of the 2002 Act which provides for the procedure to be followed by the Privy Council in the exercise of its new power to make regulations under Section 27 (conferred by the amendments to section 27 made in clause 226).

Clause 237

Amendment 258

150. This amendment removes any possibility of an alternative reading of this line whereby an obligation is placed on the relevant commissioner to endorse any quality standard prepared by NICE. The policy intention remains the same - a quality standard has no statutory effect unless it is endorsed by the relevant commissioner: the NHS Commissioning Board or Secretary of State.

Amendment 259

151. This amendment acknowledges that the term 'publication' has a different meaning to the term 'dissemination', and both are intended in this case. The distinction between 'publication' and 'dissemination' has been made elsewhere in the Bill, including within the clauses relating to NICE and the Information Centre, so this amendment also ensures there is consistency in our approach.

Clause 244

Amendment 261

152. This amendment clarifies that, when asking NICE to disseminate commissioning guidance, the NHS Commissioning Board will be able to specify defined groups of persons or bodies to whom it should be disseminated. This amendment also makes the wording around dissemination in this clause consistent with other references to dissemination in the Bill.

SEPTEMBER 2011

Clause 253

Amendments 262 and 263

153. Amendments 262 and 263 are technical amendments to clause 253. The amendments are intended to simplify the drafting as the words “to which the information standard relates” can be removed without changing the practical effect.

Clause 257

Amendments 265, 267-269, 272, 276, 279 and new clause NC7

154. This set of amendments are minor and technical amendments intended to clarify the legislation so that it is easier to follow.

155. In the main, the amendments remove provisions on dissemination (as distinct from publication generally) of information from clauses 257, 258 and 262 and place them into a new clause NC7. These changes necessitate further technical amendments (amendments 276 and 279) to ensure that the definition of “relevant person” applies in all provisions in the Chapter.

156. New clause NC7 makes minor and technical provision in subsections (2)(d) and (3), to put beyond doubt that if publication of information is prohibited by a direction of the Secretary of State or Board pursuant to clause 262(2)(d), that information may be disseminated if dissemination is permitted by the same direction.

Clause 258

Amendment 270

157. This minor amendment ensures that the Secretary of State or Board can direct the Information Centre to comply with a request to collect information made by a person outside England but within the United Kingdom - such as a request made by a devolved administration.

Clause 262

Amendments 271, 273-275

158. This is a set of minor and technical amendments relating to publication of information collected by the Information Centre. Amendment 271 clarifies that it is the *same* direction which specifies a collection (under clause 257) that may also require the Information Centre in certain circumstances to publish the information collected. Amendment 273 makes it clear that where a direction (under clause

257) or a mandatory request (under clause 258) sets out requirements as to the form, manner and timing of publication, the Information Centre *must* comply with these. The Information Centre has discretion to also publish the information as it considers appropriate. Similarly, amendment 274 clarifies that the Information Centre *may* comply with any such requirements in any other request (under clause 258). The substituted words in amendment 275 provide both for one instance of publication as well as for a series of instances of publication.

Clause 274

Amendments 277 and 278

159. Amendments 277 and 278 alter the definition of devolved authority in relation to Northern Ireland. The amendments make it clear that the First Minister and the Deputy First Minister as well as the Department of Health, Social Services and Public Safety in Northern Ireland are considered to be a devolved authority for the purposes of Part 9, Chapter 2 of the Bill. The definition of “Northern Ireland Minister” is consistent with that in Part 11, clause 294.

Clause 299

Amendment 280

160. The amendment clarifies that references to the transfer of property in new clause NC8 (Subsequent property transfer schemes) include references to the grant of a lease.

Amendments 281, 313, 314 & 315

161. The Bill provides for schemes to transfer staff, property, rights and liabilities from a number of organisations, due to be abolished by the Bill, including PCTs, to a range of transferees including for example, local authorities, a SpHA or a qualifying company. This is a company formed under section 223 of the NHS Act 2006, and wholly or partly owned by the Secretary of State or the NHS Commissioning Board. This amendment will allow a qualifying company which receives former PCT property to access the NHS Indemnity Scheme in respect of those properties in order to support the delivery of high quality community services.

Clause 302

Amendment 283

162. This amendment is consequential on the Interpretation and Legislative Reform (Scotland) Act 2010. It amends the procedure in the Scottish Parliament which is

SEPTEMBER 2011

applicable to the new power for the Privy Council to make by order transitional, transitory or saving provisions under clause 233.

Amendment 284 and 287

163. These amendments clarify that any power to make regulations, orders and directions under the Bill would include a power to make transitory as well as transitional provision.

Amendment 286

164. Clause 302(10) currently provides that all directions given under the Bill may be given either in writing (typically in a document published by the Department) or in regulations. This amendment specifies more precisely the direction-giving powers for which the regulations option should be available. This is consistent with the NHS Act 2006.

Clause 305

Amendments 289, 290 and 291

165. These amendments clarify that the powers for the Board to enter into arrangements with Northern Ireland Ministers under clause 294 and Scottish Ministers under clause 295 need only extend to England and Wales. Clause 305 lists exceptions to the rule that the provisions in the Bill apply only to England and Wales. Currently, clause 305 provides that the power for the Board to enter into arrangements with Northern Ireland Ministers under clause 294 extends to Northern Ireland, and that the power for the Board to enter into arrangements with Scottish Ministers under clause 295 extends to Scotland. This is in fact unnecessary because those provisions only confer powers on the Board; clauses 294 and 295 do not confer any powers on the Scottish Ministers or the Northern Ireland Ministers and so do not need to extend to Scotland or Northern Ireland.

Amendment 292

166. An amendment to clarify that references in paragraph 6 of Schedule 2 to the functions of the governing body of a clinical commissioning group, include any functions which the governing body might undertake on behalf of the clinical commissioning group under paragraph 3 (3).

Schedule 2

Amendment 299

167. This technical amendment removes the provision in paragraph 14(9) of Schedule 1A that stated that the requirements relating to a clinical

SEPTEMBER 2011

commissioning group's accounts and audits do not require a clinical commissioning group to keep accounts or records, or to prepare annual accounts, in respect of anything done by it as a trustee. This amendment is necessary as new international accounting standards which will apply from 2013 may require accounts relating to charitable trusts to be consolidated with the accounts of an NHS body if they are under common control i.e. the trustees are also members of the board (or, as will be the case in relation to a clinical commissioning group, its governing body).

Schedule 4

Amendment 302-311

168. This group of amendments ensure that local authorities are able to make personal health budget payments to patients, subject to the legislation for direct payments for healthcare in the National Health Service Act 2006 and related regulations, when exercising their public health functions.

Amendment 312

169. This amendment removes references to clauses in the NHS Act removed by other clauses in the Health and Social Care Bill.

Amendment 316 and 317

170. This amendment removes references to PCTs and SHAs in the schedule setting out the details around the constitution and establishment of NHS Trusts.

Amendment 320 and 321

171. This amendment will be to put beyond doubt the circumstances in which the requirement, under the proposed new subsection (4A) of section 164 of the NHS Act 2006, for an instrument of appointment (as defined in that section) to be contained in regulations is triggered.

Amendment 322

172. This amendment clarifies the definition of “appropriate hospital authority” for the purposes of private trusts for hospitals.

Amendment 324

173. This amendment is consequential to the amendment to the heading of section 8 of the NHS Act made by the Bill (see paragraph 5 of Schedule 4).

SEPTEMBER 2011

Amendment 325

174. This amendment ensures that clinical commissioning groups and the NHS Commissioning Board are treated as “services of the Crown” for the purposes of their functions. This reflects the current arrangement for PCTs and SHAs.

Amendment 326

175. This amends section 272 of the NHS Act 2006, which concerns the making of orders, regulations and directions under the Act, to remove references to orders under section 95(1) or 110(1) of the Act, as those sections relate to Strategic Health Authorities and are being repealed by the Bill .

Amendment 327

176. This amendment aims to achieve consistency in the procedure for exercising the Secretary of State’s powers to direct the different NHS organisations where they are significantly failing to exercise their functions. It ensures that directions given by the Secretary of State to the Board under new section 13Z1 may be given either in writing, or by regulations, and this means that both procedural options are available for all cases where Secretary of State has powers to direct organisations in the case of significant failure.

Amendment 328

177. This amendment ensures that SHAs remain NHS bodies for the purposes of the 2006 Act during the transition period between the establishment of the NHS Commissioning Board and the abolition of SHAs.

Schedule 5

Amendment 330

178. This amendment clarifies the extent of a consequential amendment made by the Bill.

Amendment 331

179. This amendment will amend the Local Government Act 1974 to enable the Local Government Ombudsman to consider complaints about public health services for which local authorities are responsible by virtue of arrangements with the Secretary of State to perform his public health functions (see clause 19), where those complaints are unresolved at the local resolution stage.

SEPTEMBER 2011

Amendment 332

180. This amends section 145(1) of the Mental Health Act 1983 so that if a hospital was provided by the Secretary of State under his public health powers in which patients were detained under the Mental Health Act, the Secretary of State would be responsible for carrying out the functions of the hospital "managers" under the Act .

Amendment 333

181. This amends section 40(2)(aa) of the Dentists Act 1984 to remove an erroneous reference in that provision to primary medical services arrangements under section 92 of the NHS Act and to include a reference to primary dental services agreements under section 107 of that Act. Similar amendments are also made to references in section 40(2)(aa) of the Dentists Act 1984 to corresponding provisions of the NHS (Wales) Act 2006.

Amendment 345

182. This amendment will amend the Health Service Commissioners Act 1993 to ensure that the Ombudsman will be able to investigate individual NHS complaints made against the National Health Service Commissioning Board and clinical commissioning groups. It also reflects the new NHS system architecture by removing the duty on the Health Service Ombudsman to send copies of her investigation reports on individual NHS complaints to Secretary of State.

Amendment 346

183. This amendment is a technical amendment to tidy up the drafting of schedule 5 of the Bill to reflect the introduction of amendment 345.

Amendment 347

184. This amends the Regulation of Investigatory Powers Act 2000 so that directions to providers of high security psychiatric services under new section 4(3A)(a) of the NHS Act 2006 can authorise the interception of a communication by a telecommunication system in hospital premises where high security psychiatric services are provided. This replicates the existing position for directions to providers under section 8 of the NHS Act.

Amendment 349

185. This amendment will amend Section 113 of the Health and Social Care (Community Health and Standards) Act 2003 to enable regulations on the procedures for the handling and consideration of complaints to include complaints relating to the exercise of the Secretary of State's public health functions by the

SEPTEMBER 2011

National Health Service Commissioning Board and clinical commissioning groups pursuant to arrangements made with the Secretary of State (see clause 19).

Amendments 351 and 365

186. These amendments amend the list of responders in Civil Contingencies Act 2004, removing Health Protection Agency, PCTs and SHAs, and replacing them with references to the NHS Commissioning Board and the Secretary of State (in his public health role) as category 1 responders and CCGs as category 2 responders.

Amendment 352

187. This amends the Mental Capacity Act 2005 so that if a hospital was provided by the Secretary of State under his public health powers, the Secretary of State would be responsible for carrying out the functions of the hospital "managing authority" under the Act in relating to patients lacking mental capacity.

Amendment 353

188. This amendment adds the NHS Commissioning Board and clinical commissioning groups to the definition of persons to whom regulations made under s224(1) of the Local Government and Public Involvement in Health Act 2007 can apply. The amendment also changes the overarching reference for that definition to "responsible person" instead of "services-provider".

Amendment 354

189. The purpose of this amendment is to amend the title of section 224 of the Local Government and Public Involvement in Health Act 2007 so that it refers to "responsible persons" instead of services-providers", to provide consistency in terminology throughout that section in line with changes made by amendment 354.

Amendment 356

190. This amendment amends section 36 of the Health Act 2009 by adding the NHS Commissioning Board to the list of persons specified in subsection (3) of that section to whom Her Majesty's Revenue and Customs (HMRC) may disclose anonymised information relating to the income or expenses of dental practitioners or general medical practitioners. This is intended to enable the NHS Commissioning Board to receive, and participate in the analysis of, the information provided by HMRC, work that underpins the annual published reports on GP and dental earnings and expenses.

Schedule 6

Amendments 357, 360 and 363

191. These amendments introduce transitional powers related to the establishment of the NHS Commissioning Board. Amendment 357 is to ensure that SofS can consult the NHSCB Special Health Authority (SpHA) on the first mandate and proposals for regulations requiring the Board to commission certain services under clause 12, if the full Board has not been established by the time the Secretary of State consults. Amendment 360 is to enable SofS to require the Board to exercise his functions in relation to SHAs if necessary, until their abolition in April 2013. The Bill already provides for the SofS to delegate powers in relation to PCTs. Amendment 363 is to ensure that the SofS can fund the Board once established during the period up to April 2013 to avoid the need to commence clause 21 on arrangements for funding the Board while existing funding arrangements for PCTs and SHAs remain in place.

Amendments 358, 394 and 395

192. These amendments ensure that the Secretary of State’s default intervention and direction powers apply to SHAs until clause 29 of the Bill (Abolition of Strategic Health Authorities) is commenced.

Amendment 359

193. This amendment makes a minor consequential change to the transitional provisions in Schedule 6 which provide for the situation where clause 18 (which repeals the Secretary of State’s power to direct PCTs) is commenced before PCTs are abolished by clause 30. This amendment ensures that “commencement” of clause 18 does not include the partial commencement on Royal Assent of all the provisions of the Bill which contains powers to make secondary legislation or give directions.

Amendments 361 and 364

194. These amendments ensure that references in the listed provisions relating to the functions of a clinical commissioning group, include any function of a Primary Care Trust which the group is exercising on its behalf, under arrangements made during the initial period. The PCT may provide assistance or support to a commissioning consortium during the initial period, including financial assistance, or making available the employees or other resources of the PCT, to the group. The support may be provided under such terms and conditions, including restrictions on the use of financial support, as the PCT considers appropriate.

Amendment 362

195. This amendment ensures that where a clinical commissioning group exercises functions of a PCT on behalf of the PCT, during the transitional period between authorisation of the first clinical commissioning group by the NHS Commissioning Board, and the point at which PCTs are abolished and clinical commissioning groups assume full responsibility for commissioning, the PCT retains statutory responsibility for those functions. This does not impose any new duty on either PCTs or clinical commissioning groups, but clarifies the legal position.

Schedule 13

Amendment 366

196. This amends the Equality Act 2010 to reflect the change to Monitor's legal name.

Schedule 14

Amendments 367 and 369

197. These amendment repeals references to NHS trusts once the legislation relating to them is repealed.

Amendments 368 and 370

198. These amendments repeal references designed to distinguish between NHS trusts and NHS foundation trusts once the legislation relating to NHS trusts are repealed.

Schedule 15

Amendment 373

199. This amendment gives Secretary of State powers to include in regulations made under paragraph 2 of new Schedule 16A of the Local Government and Public Involvement in Health Act 2007, provisions imposing duties on a responsible person as respects responding to requests for information from a person with powers to appoint Local HealthWatch organisation members.

SEPTEMBER 2011

Schedule 16

Amendment 374

200. This amendment repeals section 70 of the Care Standards Act 2000 which provides for the abolition of the Central Council for Training and Education in Social Work, and the transfer of its staff to other bodies, including the General Social Care Council. The Central Council for Training and Education in Social Work has now been abolished, and all its staff transferred, and so section 70 is no longer needed.

Amendment 375

201. This amendment makes amendments to the Care Standards Act 2000, which are consequential on the repeal of section 70 of that Act

Amendment 376

202. This amendment gives Welsh Ministers the power to commence sections 124, 125, 126 of, and Schedule 9 to, the Health and Social Care Act 2008, which are disapplied in relation to England by the Bill

Amendment 377 and 379

203. This amendment removes an amendment in the Bill to the National Assembly for Wales (Disqualification) Order 2006, on the grounds that the order has now been revoked.

Amendment 378

204. This amendment removes the definition of ‘health care profession’ from Section 26 of the 2002 Act, as the term was removed from this section by the Health and Social Care Act 2008.

Schedule 18

Amendment 380 and 381

205. These amendments add NICE as a specified body to the list of “relevant health bodies” under section 50 of the Employment Rights Act 1996. This preserves the current provision that applies to NICE as a special health authority following its re-establishment. Section 50 of the Employment Rights Act 1996 requires employers to permit an employee who is also a member of a relevant health body to take time off during working hours to perform the duties of the office.

Amendment 382

206. This amendment adds NICE to the list of bodies defined as a “health service body” in section 69 of the Data Protection Act 1998. When read with the amendment to the definition of “health professional” made by paragraph 77(a) of Schedule 5 to the Bill, which includes reference to a health service body, this amendment ensures that the intended effect of provision that currently applies to NICE as a Special Health Authority is retained following its re-establishment. The definition of “health professional” in section 69 is relied on in legislation outside the DPA, for example for the information gateway provided in regulation 7 of the Health Service (Control of Patient Information) Regulations 2002 made under section 251 of the 2006 Act, which enables a health professional or person who owes a duty of confidentiality equivalent to that which would have been owed by a health professional to process confidential patient information.

Schedule 20

Amendment 383

207. Amendment 383 is a consequential amendment which ensures that the Health and Social Care Information Centre will be a health service body as defined in section 11 of the Access to Health Records Act 1990. This is relevant because the Centre might hold health records in the future and the Act provides a right of access to health records of patients, and includes provision for the correction of inaccurate health records.

Amendments 384 and 385

208. Amendments 384 and 385 are consequential amendments to the Employment Rights Act 1996. The amendments preserve the position that currently applies in relation to rights of members of the Health and Social Care Information Centre Special Health Authority who are employees of other bodies to have time off to perform their public duties as the status of the Centre shifts from it being a Special Health Authority to a non departmental public body.

Amendment 386

209. Amendment 386 is a consequential amendment to the Data Protection Act 1998, which ensures that the Health and Social Care Information Centre will be a “health service body” for the purposes of that Act.

SEPTEMBER 2011

Schedule 22

Amendments 387-390, 391-393 and 396-397

210. These amendments modify the amendments of NHS legislation made by the Bill which provide for the resolution of disputes over NHS contracts between NHS bodies in different countries of the UK. In particular, the amendments provide for cases where there is an NHS contract between a Scottish NHS body and a Special Health Authority in England and Wales.

Amendments 398 and 399

211. These amendments remove the specific duties on Welsh Local Health Boards to cooperate with each other and the NHS Commissioning Board in the discharge of their functions relating to the provision of primary medical and dental services. The duties are unnecessary given the general duty on the Board and Local Health Board to co-operate in section 72 of the Act as modified by the Bill.

Amendments 400 and 401

212. These amendments remove the State Hospital Management Committee constituted under section 91 of the Mental Health (Scotland) Act 1984 from the list of bodies that can enter into Health and Social services contracts under the Health and Personal Social Services (Northern Ireland) Order 1991, as that body has been abolished.

Schedule 23

Amendment 402

213. This amendment allows property (transferring under a section 299 transfer scheme) to be transferred from the Secretary of State to a Special Health Authority or a qualifying company.