

# HEALTH AND SOCIAL CARE ACT 2008

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## EXPLANATORY NOTES

### TERRITORIAL EXTENT

#### *Reviews and investigations*

#### *Section 46: Periodic reviews*

190. In place of the annual reviews currently conducted by CHAI and CSCI, the Commission will carry out periodic reviews under section 46 of PCTs, NHS providers in England and local authorities in England.
191. PCTs and local authorities provide health and adult social services but they also commission from other organisations health and adult social services that they consider necessary to meet the needs of their local populations. For example, a local authority might pay for people with particular kinds of needs to be cared for in a private facility that specialises in catering for such people.
192. The Commission will therefore carry out reviews of the effectiveness of commissioning by reviewing the overall provision of health care in PCT areas under *subsection (1)* and of adult social services in English local authority areas under *subsection (3)*. These reviews will assess how well the services they put in place, whether provided directly or commissioned from other people, are meeting the needs of their local populations.
193. The Commission will also carry out individual reviews of NHS bodies that provide services, referred to as English NHS providers, under *subsection (2)*. This includes English NHS Trusts and NHS Foundation Trusts. PCTs will also be reviewed in respect of the health care they provide, so that their performance in this regard can be distinguished from their effectiveness as commissioners.
194. Reviews will be by reference to a set of indicators which will either be devised by the Secretary of State in whole or in part or devised by the Commission and approved by the Secretary of State. For reviews of PCTs and local authorities under subsections (1) and (3) it is intended that these will primarily be based on outcomes that the Government has decided are the most appropriate measurements by which to judge the performance of PCTs and local authorities. The Government intends that the indicators set under this power in relation to local authorities (working alone or in partnership with PCTs, other NHS bodies or other local service providers) will be part of the single set of national indicators to which the Government committed itself in the Local Government White Paper – “*Strong and Prosperous Communities*” in October 2006.
195. Reviews of English NHS providers under subsection (2) will also look broadly at the quality of care provided, taking account of the same outcomes against which commissioners are assessed. The intention is that the Commission will be given responsibility for setting the indicators used for provider reviews from the outset. Reviews of English NHS providers under subsection (2), and reviews of the overall quality of provision in PCT or English local authority areas under subsections (1) and (3), may well use much of the same information. In these cases it is intended that the Commission will only collect that information once.

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196. For each type of review, the Commission must devise a methodology for assessing and evaluating bodies against relevant indicators, and this methodology must be approved by the Secretary of State. It must publish its methodology, as well as the indicators used for reviews, whether they are set by the Secretary of State, or set by the Commission and approved by the Secretary of State.
197. Following a review the Commission will publish a report of its assessment. Regulations may set out the procedure that should apply to allow people to make representations to the Commission before the report is published. The reason for setting out this procedure is to ensure that the reviewed body is given time to comment, and that any comments are considered by the Commission.

***Section 47: Frequency and period of review***

198. Under section 47 the Commission is required to publish details of how often it will conduct periodic reviews. It can decide to undertake reviews at different intervals in different circumstances. For instance, the Commission may decide that it will review bodies that perform consistently well less frequently. The Commission must submit its proposals on the frequency of reviews to the Secretary of State for approval.

***Section 48: Special reviews and investigations***

199. **Section 48** enables the Commission to conduct additional reviews and investigations (referred to as ‘special reviews and investigations’). These can cover: any aspect of health and adult social services provided or commissioned by a PCT or English local authority; functions carried out by Strategic Health Authorities; or, where the majority of their functions are carried out in England, functions carried out by Special Health Authorities. Reviews and investigations under this section could look specifically or generally at any issue to do with different kinds of health or adult social care, including the commissioning of that care, how particular functions are carried out or provision by particular people or bodies. Investigations may be carried out where the Commission identifies a risk to a care recipient’s health or welfare. For instance, the Commission might investigate older people’s services in a particular area, and then nationally where there is evidence to suggest a problem is more widespread. The Commission may also carry out reviews into topics of particular interest, for instance, it may carry out a review of care pathways for people with long-term conditions. The Commission must carry out a particular review or investigation if requested by the Secretary of State.
200. The Commission will have to publish reports of any review or investigation carried out under section 48. It must also consider whether its report raises matters which make it appropriate for the Commission to exercise its powers under section 53 to advise the Secretary of State. This duty does not affect or duplicate the duties the Commission has under section 50 (in relation to a failing English local authority). Regulations will set out what procedure should apply to allow people to make representations to the Commission before it publishes a report. As with similar powers in other sections, the reason for this is to give the reviewed body time to comment and to ensure that any comments are considered by the Commission.

***Section 49: Power to extend periodic review function***

201. Whereas section 46 provides for periodic reviews of publicly funded health and social care, this section enables the Secretary of State to make regulations requiring the Commission to carry out periodic reviews of the carrying on of regulated activities by any registered service provider. The regulations can also require the Commission to publish reports of its reviews or assess the performance of registered service providers following such reviews and publish reports of its assessment.
202. **Section 49** also allows for a greater degree of specificity about what is covered by the review. Regulations under this section can require the Commission to carry out periodic reviews of some or all registered service providers, in respect of some or all of the

regulated activities they provide, or even in respect of particular aspects of a regulated activity. Direct overlap with section 46 is prevented by *subsection (3)* but this subsection still permits a particular aspect of the carrying on of a regulated activity by a PCT, other English NHS provider or English local authority to be reviewed separately, despite the fact that it may already have formed part of a broader review under section 46.

203. This will allow the Commission to look at certain types of services. For instance, it is the Government's intention to use this power to require the Commission to review and assess all residential premises providing adult social care, whether run privately or by a local authority, as the CSCI has done through its "Quality Ratings" scheme. Similarly, regulations could require that all maternity services should be reviewed by the Commission. This will be possible even if these services have already been covered under the review of health care provision in a PCT area under section 46(1).
204. In other cases, the Secretary of State may want the Commission to publish information on a particular aspect of a service. For instance, many NHS Trusts sub-contract with private hospitals to provide additional capacity for routine surgery such as hip operations. Although these services would be covered by reviews by the Commission (under section 46) of the overall provision of health care by a Trust, the Secretary of State may want the Commission separately to review the quality of provision under such arrangements. The Secretary of State may also prefer the Commission to carry out periodic reviews of such care, rather than a one-off review under section 48, because they will demonstrate how performance changes over time. Although it may not be useful to aggregate performance across a small number of indicators into results for each provider of hip operations, the Commission could still be required to publish details of the review.
205. Where regulations are made extending periodic reviews, the Commission must publish details of how often these reviews will be conducted, as with periodic reviews under section 46. These reviews will also be by reference to a set of indicators devised or approved by the Secretary of State.
206. As with periodic reviews under section 46, the Commission must devise a methodology for assessing and evaluating bodies against relevant indicators, and this methodology must be approved by the Secretary of State. It must publish its methodology, as well as the indicators used for reviews, whether they are set by the Secretary of State, or set by the Commission and approved by the Secretary of State.
207. Regulations may set out the procedure that should apply to allow people to make representations to the Commission before a report is published. The reason for setting out this procedure is to ensure that the reviewed body is given time to comment, and that any comments are considered by the Commission
208. It is intended that, where possible and appropriate, the same information will be used to inform a review under this section as is used in other reviews of health or adult social care provision that the Commission carries out. This will help avoid duplication in the information requests that providers and commissioners receive.

### ***Section 50: Failings by English local authorities***

209. **Section 50** sets out steps which the Commission must or may take when, following a review under section 46 or 49, or a review or investigation under section 48, it judges that there are failings in an English local authority's discharge of its adult social services functions.
210. If the failings are not substantial, the Commission may give a notice to the local authority, setting out details of the failure, the action to be taken to rectify it and the time by which the Commission considers that this should be done. The Commission must inform the Secretary of State of the giving of the notice.

211. If the Commission considers that a local authority is significantly failing to discharge any of its adult social services functions to an acceptable standard it is obliged to inform the Secretary of State and recommend any special measures that it considers that the Secretary of State should take. Following a recommendation by the Commission of special measures, the Commission must, if asked to do so by the Secretary of State, undertake a further review of the local authority concerned and prepare a further report, covering any particular issues the Secretary of State might specify.
212. Measures which may be recommended by the Commission include the use by the Secretary of State of his powers of intervention (as set out in the Local Authority Social Services Act 1970 (section 7D), the Children Act 1989 (sections 81 and 84), the Local Government Act 1999 (section 15), and the Health and Social Care Act 2001 (section 46)). Under special measures the Secretary of State may issue the failing local authority with directions. In the most serious cases a direction may require that a specific function shall be exercised by the Secretary of State or a nominee. The report by the Audit Commission for Local Authorities and the National Health Service in England ('the Audit Commission') "*A Force for Change*" shows how special measures can improve performance.
213. The Commission does not have equivalent powers in relation to NHS bodies, as their performance is managed by Strategic Health Authorities on behalf of the Secretary of State.

#### ***Section 51: Failings by Welsh NHS bodies***

214. Where the Commission considers there are significant failings in the provision of health care by or for a Welsh NHS body or in the running of a Welsh NHS body or in the running of a body, or the practice of an individual, providing health care for a Welsh NHS body, *subsection (1)* requires the Commission to inform the Welsh Ministers. *Subsection (2)* allows the Commission to recommend that the Welsh Ministers take special measures to improve the situation.

#### ***Chapter 4 – Functions under Mental Health Act 1983***

##### ***Section 52 and Schedule 3 – Transfer and amendment of functions under Mental Health Act 1983***

215. **Section 52** and Schedule 3 transfer the functions exercised by MHAC under the Mental Health Act to the Commission in relation to England, and to the Welsh Ministers in relation to Wales. The "regulatory authority" is defined for the purposes of the Mental Health Act as meaning the Commission (in relation to England) or the Welsh Ministers (in relation to Wales): see the amendments made by paragraph 13 of Schedule 3.
216. **Section 121** of the Mental Health Act confers certain functions directly on MHAC, including a duty to review certain decisions relating to the withholding of post sent by or to patients detained under the Mental Health Act in high security psychiatric hospitals and a duty to publish a biennial report on its activities. Section 121 also requires that the Secretary of State direct MHAC to exercise certain functions on his behalf. In Wales, this requirement falls on the Welsh Ministers. The functions which the Secretary of State and the Welsh Ministers must direct MHAC to exercise include the appointment of registered medical practitioners to act as second opinion appointed doctors to approve certain forms of treatment under Parts 4 and 4A of the Mental Health Act. They also include functions under section 120 of the Mental Health Act in relation to the general protection of patients subject to the Act, including the duty to keep under review the discharge of certain duties and the exercise of certain powers under the Act (note that the functions conferred by section 120 are themselves amended in some respects by Schedule 3 to this Act – see below.)
217. *Subsection (1)* of section 52 transfers to the Commission the functions which the Secretary of State must currently direct MHAC to perform in relation to England, as

well as two associated functions. *Subsection (3)* transfers to the Commission the powers conferred directly on MHAC by section 121 of the Mental Health Act. In relation to Wales, those functions are transferred to the Welsh Ministers. *Subsection (4)* provides that section 121 of the Mental Health Act ceases to have effect, which means (amongst other things) that there is no longer a requirement on the Welsh Ministers to direct MHAC (or anyone else) to exercise any of their functions under the Mental Health Act on their behalf. In practice, the effect is to transfer to the Welsh Ministers the functions which MHAC is currently required to perform on their behalf in Wales. *Subsection (2)* provides that registered medical practitioners and other people appointed or authorised by the Commission in the exercise of a function under the Mental Health Act may include members or employees of the Commission (just as section 121 of the Mental Health Act currently allows members of MHAC to be appointed).

218. *Subsection (5)* of section 52 introduces Schedule 3 which makes further amendments to the Mental Health Act. In particular, *paragraph 8* of Schedule 3 replaces section 120 of the Mental Health Act. Under subsection (1) of new section 120, the regulatory authority has a responsibility to review the exercise of powers and the discharge of duties in relation to detention, supervised community treatment and guardianship under the Mental Health Act. Under subsection (3) it must make arrangements for authorised people to visit and interview relevant patients. These are equivalent to the functions exercisable by MHAC under the Mental Health Act as it stands now, except that they are extended to cover patients subject to guardianship as well as detention and supervised community treatment. The responsibility under subsection (1) does not extend to monitoring the functions conferred on any court, including the Mental Health Review Tribunal, or the Secretary of State (the performance of the Mental Health Review Tribunal is subject to separate scrutiny). The regulatory authority must undertake an investigation into the exercise of the relevant functions if it thinks it is appropriate to do so. Under subsection (4), it must also make arrangements for the investigation of complaints concerning the exercise of relevant powers and duties under the Mental Health Act, but it is not required to undertake or continue investigation of a complaint if it does not consider it appropriate to do so.
219. Subsection (7) of new section 120 provides that a person authorised by the regulatory authority has a right of entry to hospitals, to care homes registered under the Care Standards Act 2000 and to premises used for carrying out regulated activities in respect of which a person is registered under Part 2 of this Act in order to carry out a review or investigation. The Act does not confer a similar right to enter private homes. However, a patient may consent to be interviewed (in private, where appropriate). Authorised people may also require relevant records or other documents on the premises to be produced for inspection.
220. *Paragraph 9* of Schedule 3 inserts sections 120A to 120D into the Mental Health Act. Under section 120A, the regulatory authority is able to publish a report of any review or investigation it undertakes under section 120(1). The Secretary of State and the Welsh Ministers may make regulations about the making of representations before the publication of such a report. This will allow people who are subject to review and investigation an opportunity to respond if they think that there are mitigating factors, errors or other circumstances that might have affected the findings and which they do not think have been adequately taken into account. The Secretary of State will consult the Commission before doing this.
221. New section 120B enables the regulatory authority to require hospital managers, social services departments and other prescribed people to publish a statement of the action they propose to take in response to any recommendations following a review or investigation undertaken under section 120(1). This will provide a public statement about the steps the person or body in question will take to address any concerns that are raised in reports.

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222. The Mental Health Act confers powers and duties on a variety of people, including individual professionals and both statutory and independent bodies. For the most part, the people to whom these powers and duties fall are either responsible for hospitals (known as hospital managers in the Mental Health Act) which care for patients subject to the Mental Health Act, or are local social services authorities, or else are individuals working within such hospitals or on behalf of such authorities.
223. However, it is not only hospital managers and social services authorities and their staff who exercise relevant functions under the Mental Health Act and contribute to its operation. There may, therefore, be circumstances in which reviews or investigations make recommendations that are addressed (in whole or in part) to other people. In these cases, it would make sense for the people concerned to be asked directly to publish a report of the action they propose to take as a result. This might include, for example, other NHS bodies that are responsible for providing or commissioning services for patients subject to the Mental Health Act. The regulations can also set out what such statements should contain and how quickly they should be published.
224. New section 120C obliges hospital managers, local social services authorities and other prescribed people to provide the regulatory authority with information, including records and documents, that the authority may require in relation to its functions under section 120. Examples of the kind of information which might be requested are:
- statistical information on people subject to the formal powers under the Mental Health Act, including data relating to particular groups of patients such as children, adolescents, women, and black and ethnic minority patients;
  - information on the use of particular powers, such as the granting of leave of absence;
  - the number of deaths and other serious incidents;
  - information on the use of seclusion in respect of patients.
225. New section 120D requires the Commission to publish an annual report on the way it has exercised its functions under the Mental Health Act, a copy of which must be laid before Parliament. The Welsh Ministers will also have to publish such a report, a copy of which they will have to lay before the National Assembly for Wales.
226. *Paragraph 12* of Schedule 3 inserts a new section 134A into the Mental Health Act. Section 134 of that Act provides, in particular, for the withholding of postal packets sent to or by patients detained in high security psychiatric hospitals in specified circumstances. Subsection (1) of the new section 134A provides that the regulatory authority must review any decision to withhold a postal packet or anything contained in it on application by a specified person. These provisions are the equivalent of powers that already exist in section 121 of the Mental Health Act in relation to the review by MHAC of decisions to withhold postal packets under section 134 of that Act.
227. Subsection (5) provides that the Secretary of State may, by regulations, make provision in connection with applications to the Commission and the determination of any such application. This includes provision for the production to the Commission of any postal packet in question. Subsection (6) gives the Welsh Ministers a similar power to make regulations about the making of applications to them.
228. This is, in effect, a restatement of the power to make regulations in subsection (9) of section 121 of the Mental Health Act as it stands now. The provision made under that power is currently to be found in Regulation 18 of the [Mental Health \(Hospital, Guardianship and Consent to Treatment\) Regulations 1983 \(SI 1983/893\)](#). Regulation 18 provides, in particular, that an application for a review of a decision to withhold a postal packet may be made to MHAC in any form that MHAC accepts as sufficient in the circumstances, and need not be in writing. Applicants must let MHAC have a copy of the notice of withholding provided by the relevant hospital. Regulation 18

also empowers MHAC to direct people to produce any documents, information or other evidence it reasonably requires for its review of the decision. The Government envisages that the powers in subsection (5) of the new section 134A will be used to make similar regulations in relation to the Commission.

## **Chapter 5 – Further Functions**

### **Section 53: Information and advice**

229. **Section 53** places a duty on the Commission to keep the Secretary of State informed about the provision of NHS health care and adult social services in general, and about the carrying on of regulated activities. *Subsection (2)* allows the Commission to give advice to the Secretary of State on anything connected with these matters. In particular, the Commission may advise the Secretary of State of any changes it thinks should be made to: the registration requirements (made by regulations under section 20); the code of practice on HCAs (issued under section 21); or statements of standards issued under section 45. *Subsection (4)* requires the Commission to give to the Secretary of State any advice or information requested by the Secretary of State in relation to the matters about which it has a duty to keep him informed. The section also allows the Commission to give advice to the Secretary of State, an English NHS body or an English local authority in relation to the establishment or conduct of certain inquiries.

### **Section 54: Studies as to economy, efficiency etc.**

230. **Section 54** enables the Commission to undertake wider studies that are designed to enable it to make recommendations for improving economy, efficiency, and effectiveness in the provision of health care by an English NHS provider, or the provision of adult social services by an English local authority, or the way in which health care or adult social services are commissioned. The Commission may also undertake studies that will enable it to make recommendations for improving the management of an English local authority with regard to the provision of adult social services, or the management (but not the financial management) of an English NHS body.

### **Section 55: Publication of results of studies under s.54**

231. **Section 55** requires the Commission to publish recommendations made, and results of studies undertaken, under section 54. The section also allows regulations to be made by the Secretary of State which set out a procedure for representations to be made to the Commission before any recommendations or reports of studies are published.

### **Section 56: Role of Audit Commission**

232. **Section 56** allows the Audit Commission to carry out studies relating to health care or English NHS bodies (under sections 54 and 55) on the Commission's behalf, with the Commission's agreement. Where a matter could be considered to fall within the remit of both organisations, as is the case for studies regarding economy, efficiency, and effectiveness in relation to adult social care, *subsection (5)* directs them to have regard to any guidance issued by the Secretary of State as to who should carry them out.

### **Section 57: Reviews of data, studies and research**

233. **Section 57** enables the Commission to review certain studies and research undertaken by others. It enables the Secretary of State to request such reviews, which the Commission must undertake. Where the Commission conducts a review, it must publish a report.

***Section 58: Publication of information***

234. **Section 58** allows the Commission to make information available about the provision of NHS care, adult social services, and the carrying on of regulated activities.

***Section 59: Additional functions***

235. **Section 59** allows the Secretary of State to confer additional functions on the Commission through regulations. It sets out the extent of the remit within which the Secretary of State may give the Commission these additional functions. If any of these functions relate to NHS Foundation Trusts then *subsection (2)* requires the Secretary of State to consult with Monitor first.

***Chapter 6 – Miscellaneous and General***

**Inspections**

***Sections 60 and 61: Inspections***

236. **Section 60** enables the Commission to carry out inspections in relation to its regulatory functions. Its regulatory functions are its registration and review functions under Chapters 2 and 3 and most of its functions under Chapter 5, such as studies as to economy and efficiency. It cannot carry out inspections purely for the purposes of providing information and advice to the Secretary of State under section 53 or conducting a review of data, studies or research under section 57. Regulations under section 59 will set out whether any additional functions conferred on the Commission under that section are to be treated as regulatory functions and thereby whether inspections can be carried out in relation to them.
237. Under section 61, the Secretary of State may set out in regulations how often the Commission should undertake inspections in relation to the Commission's registration functions under Chapter 2, the manner in which they should be carried out and who should carry them out. For instance, the regulations may require hospitals to be inspected annually, by people with particular skills, for compliance with requirements relating to hygiene and infection controls.
238. After carrying out an inspection under section 60 for the purposes of the Commission's functions under Chapter 2, the Commission is required to prepare and publish a report. The Commission must send a copy of the report to the registered service provider and, if there is one, the registered manager.
239. Regulations will set out what procedure should apply to allow people to make representations to the Commission before it publishes a report under section 61. As with similar powers in other sections, the reason for this is to give the inspected body time to comment and to ensure that any comments are considered by the Commission.