These notes refer to the Health Act 2009 (c.21)
which received Royal Assent on 12 November 2009

HEALTH ACT 2009

EXPLANATORY NOTES

BACKGROUND AND SUMMARY

Miscellaneous

Tobacco

44. The Department of Health's *Consultation on the Future of Tobacco Control,* [1] published on 31 May 2008, sought views from stakeholders and the public on further action to combat smoking and the negative effects it has on public health. The consultation was expressed as the first step in developing a new national tobacco control strategy and focused on four main areas: reducing smoking rates and health inequalities caused by smoking; protecting children and young people from smoking; supporting smokers to quit; and, helping those who cannot quit.

45. The consultation ran for three months and sought views on possible measures to reduce young people's access to tobacco and on reducing exposure to tobacco promotion. The consultation received nearly 100,000 responses, details of which can be found in the consultation report published on 8 December 2008[2].

46. The Act includes a series of amendments to the Tobacco Advertising and Promotion Act 2002 (the 2002 Act), the Children and Young Persons (Protection from Tobacco) Act 1991 (the 1991 Act) and the Children and Young Persons (Protection from Tobacco) (Northern Ireland) Order 1991 (the 1991 (NI) Order) to adopt some of these measures for protecting public health. The amendments make further provision in relation to the display of tobacco products and the sale of such products from vending machines.

47. The provisions inserted into the 2002 Act subject to exclusions, prohibit the display of tobacco products in the course of a business. Powers are also given to the Secretary of State, the Welsh Ministers and the Department of Health, Social Services and Public Safety in Northern Ireland (DHSSPSNI) to regulate (but not prohibit) the display of prices of tobacco products and (Secretary of State only) the display of tobacco products and their prices in the course of a business on a website where such products are offered for sale. The 1991 Act and the 1991 (NI) Order are also amended to give power to the Secretary of State, the Welsh Ministers, and DHSSPSNI to prohibit the sale of tobacco from vending machines.

Pharmaceutical services

48. The Department of Health published a pharmacy White Paper, *Pharmacy in England: Building on strengths – delivering the future*[3] on 3 April 2008. The White Paper set

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1 Department of Health (2008). *Consultation on the Future of Tobacco Control*. Department of Health, London. Available at: http://www.dh.gov.uk/en/consultations/liveconsultations/dh_085120

2 Department of Health (2008). *Consultation on the Future of Tobacco Control – Consultation Report, December 2008.* Department of Health, London. Available at:http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_091382

3 Department of Health (2008). *Pharmacy in England: Building on strengths - delivering the future*, Cm 734. Department of Health, London.
Available at: http://www.dh.gov.uk/en/publicationsandstatistics/publications/publicationspolicyandguidance/dh_083815

out the Government's programme for a reformed pharmaceutical service. A series of consultation events were held in May 2008 to consider the proposals in more detail[4]. The White Paper also provided the Government's response to the *Review of NHS pharmaceutical contractual arrangements*[5] commissioned in 2007 and conducted by Anne Galbraith. In addition, the White Paper took account of recommendations of the All Party Pharmacy Group's report, *The Future of Pharmacy*[6] published in June 2007.

49. The White Paper was developed to align closely with the NHS Next Stage Review and the development of a new primary and community care strategy, *Our Vision for primary and community care*,[7] which was published on 3 July 2008.

50. The White Paper promised consultation on a number of proposals for structural change, including any necessary revisions to primary legislation. That consultation, *Pharmacy in England: Building on strengths – delivering the future – proposals for legislative change*,[8] began on 27 August 2008 and ended on 20 November 2008. A series of national listening events were held in October 2008 in support and a report of these events, together with the Department's report of the consultation concerning the primary legislation proposals in the Bill for this Act, was published on 16 January 2009.

51. The purpose of the pharmacy provisions contained in the Act is threefold. First, the provisions concerning market entry replace the previous "control of entry" test which was applicable to all pharmaceutical contractors seeking to enter onto a pharmaceutical list. The new test requires PCTs first to develop and to publish statements of pharmaceutical needs and then to use these to determine applications. The previous test referred to the adequacy of the pharmaceutical services in the neighbourhood in which the premises were to be located.

52. Second, the market exit provisions enable PCTs to be given new powers to take action where there are concerns about the quality or performance of services provided by pharmacy contractors.

53. Third, the pharmacy provisions enable PCTs themselves to provide local pharmaceutical services (LPS) in certain circumstances.

Private patient income

54. The private patient income cap was introduced by the 2003 Act (consolidated by the NHS Act). The private patient income cap, set out at section 44 of the NHS Act, applies to NHS foundation trusts which were previously NHS trusts. It has the effect that the proportion of an NHS foundation trust's total income in any financial year derived from private charges must not exceed the proportion of its total income derived from private charges in the 'base financial year'. The base financial year is the first financial year in which a trust was an NHS trust, or if it was an NHS trust throughout the financial year 2002-2003, that year. As the cap is by reference to the *proportion* of income derived from private charges, NHS foundation trusts can treat more private patients so as to increase their income derived from private charges, but only if there is a corresponding increase in NHS provision.

55. As no mental health NHS foundation trust treated private patients in the base financial year, their cap is set at zero per cent. The Act amends section 44 of the NHS Act so that an authorisation given by the regulator must in the case of a mental health foundation trust restrict the provision of goods and services by the trust with a view to securing

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4 A summary report of those is now available at http://www.dh.gov.uk/en/Publicationsandstatistics/index.htm
5 Anne Galbraith (2007). *Review of NHS pharmaceutical contractual arrangements – Report by Anne Galbraith*
6 All-Party Pharmacy Group (2007). *The Future of Pharmacy- Report of the APPG Inquiry.*
Available at: http://www.appg.org.uk/home.htm
7 Department of Health (2008). *Our Vision for primary and community care*, Department of Health, London.
Available at: http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085937
8 Department of Health (2008). *Pharmacy in England: Building on strengths – delivering the future – proposals for legislative change.* Department of Health, London.
Available at: http://www.dh.gov.uk/en/consultations/Liveconsultations/DH_087324

that the proportion of its total income derived from private charges does not exceed 1.5 per cent of the trust's total income, or the existing cap if greater. The figure of 1.5% is based on the average cap level of all NHS foundation trusts delivering acute care in 2008-09. New section 44(2A) provides for NHS foundation trusts to be designated as mental health foundation trusts if it appears to the regulator that they meet a specified description.

Optical appliances

56. Section 34 and Schedule 6 (repeals and revocations) amend section 180(2) of the NHS Act to omit paragraph (c) which extended eligibility for optical vouchers to persons aged 60 or over. This provision was inserted into the 2006 Act by mistake. Government policy was at the time of the 2006 Act and has continued to be that all people aged 60 and over are eligible for NHS-funded sight tests and that of these, some should also be entitled to optical vouchers, if they are on relevant income-related benefits or require a complex appliance. An optical voucher is intended to meet or contribute to the cost of optical appliances (glasses or contact lenses).

57. Section 180 was inserted into the NHS Act along with provisions to reform NHS optical services to bring them into line with the contractual framework that operates for GPs and dentists. Provisions were also inserted to give Ministers greater control over the redemption of optical vouchers. However, the Government did not intend to extend eligibility for optical vouchers.

58. In the provisions as introduced in the Health Bill 2005 the reference to optical vouchers defined eligibility by referring to an earlier clause in the bill that set out the eligibility for sight tests. Eligibility for sight tests included those aged 60 or over in view of their increased risk of eye disease. The effect of this clause was to oblige the Secretary of State to make regulations for payments for the costs of optical appliances to any person aged 60 or over – not just those in receipt of income related benefits or who require a complex appliance. That was not what the Government had intended.

59. The provisions in the Health Act 2006 were later consolidated into the NHS Act. The provisions relating to payments towards the costs of optical vouchers were consolidated into section 180 of the NHS Act and were commenced on 1 August 2008, but no regulations have been made under section 180(2)(c).

60. As it was never the Government's intention to extend eligibility for optical vouchers the Government has taken the first opportunity after it came to light to bring forward legislation to correct this mistake. The effect of section 34 is to repeal section 180(2)(c) of the 2006 Act with prospective effect.

Adult social care

61. An issue raised in the House of Lords during the debate on the Health and Social Care Bill (now the Health and Social Care Act 2008) was that users of adult social care that has been arranged or funded privately do not have recourse to an independent complaints procedure. A government commitment was made in Parliament[9] to address this matter at the next legislative opportunity.

62. The Government's objective was to enable the Local Commission for Administration (the LGO) to investigate complaints made by people whose adult social care is not arranged or provided by a local authority. This group comprises people who arrange or pay for their own care, estimated to be about 35 per cent of adult social care service users, and also those who are given direct payments by local authorities to purchase their own adult social care services.

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9 Available at: http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80616-0015.htm

63. People whose care is funded and arranged by a local authority have access to the existing statutory local authority social services complaints procedure, under the Health and Social Care Act 2003, and have the right to refer their complaints to the LGO if they are dissatisfied with the local authority's response. During 2007, Department of Health Ministers became concerned, as a result of representations made by stakeholders, that the arrangements for people arranging and paying for their own care were unsatisfactory and that such people should also have access to independent investigation of their complaints. The Government therefore gave a commitment in Parliament to address this issue.

64. The LGO is responsible for investigating complaints of injustice arising from maladministration by local authorities and certain other bodies. The LGO comprises three Local Commissioners, and they each deal with complaints from different parts of the country. They investigate complaints about most council matters including housing, planning, education, social services, consumer protection, drainage and council tax.

65. The Act inserts a new Part 3A into the Local Government Act 1974 (the 1974 Act), the legislation that established the LGO. Part 3A creates a new scheme, which extends the remit of the LGO to include the investigation of complaints about adult social care not arranged or funded by a local authority. The new scheme is largely modelled on the existing legislation for investigation of complaints concerning local authorities in Part 3 of the 1974 Act.

Disclosure of Information

66. HMRC holds information relating to the tax affairs of individuals – including those of GPs and dentists who provide medical and dental care on behalf of the NHS. It has been the practice of HMRC, over a number of years, to assist in statistical enquiries carried out by or on behalf of the Department of Health relating to the earnings and expenses of GPs and dentists by providing summarised data in aggregate anonymised form.

67. This annual exercise has been conducted on behalf of the Secretary of State and the devolved administrations by the NHS Information Centre for Health and Social Care. The dental exercise has not included Scotland or Northern Ireland but there are proposals to extend the scope to include them in future.

68. The Commissioners for Revenue and Customs Act 2005 prohibits officials of HMRC from disclosing information of any kind held by HMRC in connection with a function of the HMRC – subject to certain exceptions.

69. The Act provides a further exception to the restrictions on the disclosure of information by HMRC to enable them to continue to participate in these annual earnings and expenses exercises.

70. The Act will allow HMRC to disclose certain information relating to the income and expenses of GPs and dental practitioners to the Secretary of State and to the devolved administrations or to persons providing services to, or exercising functions on behalf of, the Secretary of State or the devolved administrations. The information disclosed will be an anonymised summary of the earnings and expenses of GPs and dental practitioners and will not extend to other details disclosed to HMRC as part of the tax assessment process, such as investment income. Earnings that are identified as unconnected with medical or dental activities will be excluded.