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

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 11 – Miscellaneous

Information relating to births and deaths etc.

Section 284 - Special Notices of Births and Deaths

1490. Section 269 of the NHS Act previously provided that local registrars of births and deaths must provide particulars of registered births and deaths to PCTs. In relation to births, the section also required a child's father (for a home birth) or person attending the mother (in other cases) to notify the PCT in whose area the birth takes place. The section also provided for the local registrar to have access to the notification of births provided to the local PCT.

1491. This section replaces references to PCTs in section 269 of the NHS Act with references to "relevant body or bodies" and provides for a new regulation-making power, which allows the Secretary of State to specify in regulations which bodies are to be notified of births and deaths. "Relevant bodies" are defined as the NHS Commissioning Board, CCGs and local authorities. *Subsection (8)* inserts, among others, a new subsection (12) into section 269 so as to ensure that information received by a local authority by virtue of this section may be used by it only for the purposes of functions exercisable by it in relation to the health service.

Section 285 – Provision of Information by Registrar General

1492. This section amends section 270 of the NHS Act. Previously, section 270 of the NHS Act allowed the Registrar General to provide information, such as births and deaths data to the Secretary of State in order to assist the Secretary of State in the performance of his functions in relation to the health service.

1493. It amends section 270 of the NHS Act so as to extend the list of persons who can receive information from the Registrar General of Births and Deaths.

Section 286 – Provision of Information by Registrar General: Wales

1494. This section amends section 201 of the National Health Service (Wales) Act 2006 to make provision for the Registrar General to provide information to a number of bodies in addition to Welsh Ministers. These bodies are listed in the insertion made by *subsection (2)(b)*.

Section 287 – Provision of Statistical Information by Statistics Board

1495. This section amends section 42 of the Statistics and Registration Service Act 2007, which contains provision to specify that the Statistics Board (ONS) may disclose information on births & deaths to a number of bodies.

1496. In a similar way to the amendment to section 270, section 287(2) replaces the reference to the Secretary of State with a range of persons and bodies connected to the health service. The section also gives the Secretary of State and Welsh Ministers a new direction making power to specify additional organisations which can receive information from the Statistics Board.

1497. The Act also clarifies the respective roles and responsibilities of the Registrar General and the Office for National Statistics as there is considerable overlap between the Statistics and Registration Service Act 2007 and the NHS Act.

1498. Previously, there was a memorandum of understanding between the two organisations that defined the responsibilities for providing data to the Secretary of State. Broadly speaking, the Registrar General provides administrative data and the Office for National Statistics provides statistical data. These amendments to section 42 formalise the effect of the memorandum of understanding between the two organisations by limiting the powers of the Office for National Statistics, so that it is required to provide statistical information only.

1499. *Subsection (2)* sets out the information which may be disclosed by the Statistics Board as follows:

a) information consisting of statistics and is disclosed for the purpose of assisting a person performing health-related functions,

b) information disclosed for the purpose of assisting a person to produce or analyse statistics for the purpose of assisting a person performing health-related functions.

1500. *Subsection (4)* provides definitions of local authorities, clinical commissioning groups and Special Health Authorities.

Duties to co-operate

1501. The subsequent sections contain provisions which ensure that Monitor and the CQC work effectively together and with other relevant bodies.

Section 288 – Monitor: duty to co-operate with Care Quality Commission

1502. This section places a duty on Monitor to co-operate with the CQC in the exercise of their respective functions (*subsection (1)*), including operating a joint licensing and registration regime which must provide for a single application form and document for new applicants, and must ensure consistency of licence conditions with any conditions on a person's registration with the CQC (*subsection (2)*). It also places a duty on Monitor to, on request, provide the CQC with any relevant information in relation to Monitor's concurrent competition functions with the Office of Fair Trading relating to market investigations (*subsection (3)*).

Section 289 – Care Quality Commission: duty to co-operate with Monitor

1503. This section amends section 70 of the Health and Social Care Act 2008 (co-operation between the Commission and the Independent Regulator of NHS foundation trusts), to provide that the CQC's duty to co-operate with Monitor in the exercise of their respective functions mirrors the co-operation duties placed on Monitor under section 288 of this Act.

Section 290 – Other duties to co-operate

1504. This section places a duty on Monitor and each of the bodies listed in *subsection (3)* and a duty on the CQC and each of those bodies to co-operate with each other in the exercise of their respective functions, except in respect of their regulatory functions. Where Monitor or the CQC regulates the activities of a relevant body, the duty to co-operate does not apply to the regulator or the relevant body when regulating or carrying

out those activities. The Secretary of State may, by order subject to the affirmative procedure (see section 304(5)(k)), amend the list of relevant bodies.

Section 291 – Breaches of duties to co-operate

1505. This section gives the Secretary of State power to address any breaches of the duties of co-operation in sections 288 or 290, section 70 of the Health and Social Care Act 2008, or any other enactment which imposes co-operation duties on the bodies listed in *subsection (3)* of the preceding section. Where the Secretary of State believes that any of those duties has been breached or there is a significant risk that they will be, a written notice of opinion may be issued to the bodies concerned. If the bodies breach or continue to breach the duty following such a notice, the Secretary of State may prohibit each body from exercising certain functions, or exercising them in a certain way, unless the other body in question agrees in writing that they may continue to exercise those functions. In default of such an agreement, the matter may be determined by arbitration. Any prohibition is limited to a period of one year unless the Secretary of State considers the breach is continuing and is having a detrimental effect on the health service; in which case, the period may be extended by one year.

The Care Quality Commission

Section 292 – Requirement for Secretary of State to approve remuneration policy etc.

1506. This section amends Schedule 1 to the Health and Social Care Act 2008, with the effect that the CQC must obtain the approval of the Secretary of State of its pay and remuneration policy before making any determinations about payments to staff it employs. This would make the approach for the CQC consistent with that for other arm's-length bodies established by this Act (see Parts 8 and 9 regarding NICE and the Information Centre).

Section 293– Conduct of reviews etc. by Care Quality Commission

1507. This section amends the Health and Social Care Act 2008 so as to require the CQC to gain the approval of the Secretary of State before undertaking a special review or investigation pursuant to section 48, a study as to economy or efficiency under section 54 or a review of data, studies or research under section 57 of the Health and Social Care Act 2008.

1508. The new section 48(1A) of the Health and Social Care Act 2008 provides the CQC with an exemption so that the CQC does not need to seek the Secretary of State's approval for an investigation where the CQC considers that there is a risk to the health, safety or welfare of people receiving care.

Section 294 - Failure to discharge functions

1509. This section amends the power the Secretary of State has under section 82 of the Health and Social Care Act 2008 to direct the CQC when he considers that it is failing, or has failed, to perform its functions. This is in line with similar powers of intervention introduced for other non-Departmental public bodies including Monitor and the NHS Commissioning Board. The amendment limits the use of the power to direct to circumstances where the failure is significant and includes a requirement for the Secretary of State to publish the reasons for any intervention. For the purposes of the section a failure to exercise functions properly includes the case where the Secretary of State considers that the CQC is failing to:

- Discharge its functions consistently with what he considers to be the interests of the health service; or
- Exercise a function consistently with the purpose for which it was conferred.

1510. The amendment also prevents the Secretary of State from being able to intervene in a particular case; he will need to demonstrate that there is evidence of more widespread failure. This is in line with the Secretary of State's intervention powers over Monitor and is necessary to ensure the independence of the regulators. For example, the Secretary of State could use this power if the CQC failed to register service providers carrying on a specific regulated activity. However, he could not use it if he simply disagreed with a regulatory decision made by the CQC in the case of a particular trust.

Arrangements with devolved authorities etc.

Section 295 – Arrangements between the NHS Commissioning Board and Northern Ireland Ministers

1511. This section allows the NHS Commissioning Board to make arrangements with a Northern Ireland Minister to commission services for the purposes of the Northern Ireland health service. Examples of health services which Northern Ireland Ministers might ask the NHS Commissioning Board to commission for the Northern Ireland health service are specialised services for rare conditions and high secure psychiatric services.

Section 296 – Arrangements between the NHS Commissioning Board and Scottish Ministers etc.

1512. This section allows the NHS Commissioning Board to make arrangements with the Scottish Ministers or a Scottish health body to commission services for the purposes of the Scottish health service. Examples of health services which Scottish Ministers might ask the NHS Commissioning Board to commission for the Scottish health service are specialised services for rare conditions and high secure psychiatric services.

Section 297 - Relationships between the health services

1513. This section introduces Schedule 21.

Schedule 21 – Amendments relating to relationships between the health services

1514. This Schedule makes a number of amendments to health legislation by or in relation to Northern Ireland, Scotland and Wales. For example, removing references to PCTs and SHAs, and replacing them with references to CCGs or the NHS Commissioning Board.

1515. These amendments are:

Act	***Amendment***
National Health Service (Scotland) Act 1978 (c.29)	The Schedule removes references to SHAs and PCTs, and adds references to CCGs and the NHS Commissioning Board. It makes certain other adjustments in consequence of the changes made by the Act.
	The Schedule adds NICE and the Health and Social Care Information Centre to Section 17A of the Act so that arrangements with these bodies will be NHS Contracts for the purposes of the NHS (Scotland) Act 1978.
NHS Act 2006 (c.41)	The Schedule adds Special Health Boards, Healthcare Improvement Scotland and the Scottish Ministers to section 9 of the Act so that arrangements by certain health service bodies with any of these persons will be NHS contracts for the purposes of the NHS Act.
	The amendment adopts the existing dispute resolution mechanism which applies when an agreement is an NHS

Act	*Amendment*
	contract under the NHS Act and a Health and Social Services contract under the NHS Act and the NHS (Scotland) Act 1978.
	Paragraphs 8 to 11 of the Schedule are related to changes made by the Act which impact upon certain bodies in Wales.
National Health Service (Wales) Act 2006 (c.42)	The Schedule removes references to SHAs and PCTs, and adds references to CCGs and the NHS Commissioning Board.
	Paragraph 13 of this Schedule adds Special Health Boards, Healthcare Improvement Scotland and the Scottish Ministers to section 7 of the Act so that arrangements by certain health service bodies with any of these persons will be NHS contracts for the purposes of the NHS (Wales) Act 2006.
	The amendments to the rest of the NHS (Wales) Act 2006 made in this schedule are either consequential on the changes made elsewhere in the Act, or are designed to ensure that provisions which are parallel in the NHS (Wales) Act 2006 and the NHS Act continue to work in parallel.
Health and Personal Social Services (Northern Ireland) Order 1991	The Schedule adds health bodies, for example, Healthcare Improvement Scotland, NICE and the Health and Social Care Information Centre, to Article 8 of the Order so that arrangements by these bodies will be HSS contracts for the purposes of the Health and Personal Social Service (Northern Ireland) order 1991.
	Certain amendments to this order are consequential to changes made elsewhere in the Act.

Section 298 - Advice or assistance to public authorities in the Isle of Man or Channel Islands

1516. This section allows the NHS Commissioning Board and CCGs to provide advice or assistance to public authorities in the Isle of Man or the Channel Islands, for example, assisting them when they enter into arrangements with bodies for the provision of specialised services.

Supervised community treatment

Section 299 – Certificate of consent of community patients to treatment

1517. This section amends the rules in the Mental Health Act 1983 (the 1983 Act) about the treatment of patients on supervised community treatment. In particular, it changes the circumstances in which their treatment has to be approved by a second opinion appointed doctor (SOAD), appointed (in England) by the CQC or (in Wales) by the Healthcare Inspectorate Wales on behalf of the Welsh Ministers. The effect of the changes is that approval by a SOAD will not generally be necessary if the patient is consenting to the treatment in question.

1518. Supervised community treatment was introduced into the 1983 Act by the Mental Health Act 2007. Patients who have been detained in hospital for treatment for their mental disorder may be discharged by their responsible clinician from detention on to supervised community treatment by means of a community treatment order, provided the relevant criteria are met (see section 17A of the 1983 Act). While on a community

treatment order, supervised community treatment patients (referred to in the Act as "community patients") remain liable to recall to hospital for further treatment, if necessary.

1519. One of the criteria for putting patients on to supervised community treatment is that it is necessary for their own health or safety, or for the protection of others, that they receive medical treatment for their mental disorder. However, supervised community treatment patients may not (in general) be treated against their will unless they are recalled to hospital by their responsible clinician.

1520. The rules on treating supervised community treatment patients for mental disorder (unless recalled to hospital) are set out in Part 4A of the 1983 Act. They differ depending on whether the patient has the capacity, or (in the case of a child under 16) the competence, to consent to the treatment. (For the purposes of these explanatory notes, "capacity" will be used to include competence.)

1521. In brief, patients who have the capacity to consent to treatment may not be treated unless they do, in fact, consent. In addition, whether or not the patient has the capacity to consent, certain treatments could previously only be given if they had been approved as appropriate by a SOAD. This is known as the "certificate requirement", because approval had to be given by the SOAD on a "Part 4A certificate" in a form set out in regulations by the Secretary of State in England, or by the Welsh Ministers in Wales.

1522. A SOAD's Part 4A certificate was generally required for medication (after the patient has been on supervised community treatment for one month) and for electro-convulsive therapy. In the 1983 Act, these are known respectively as "section 58 type treatment" and "section 58A type treatment", after the sections of the Act which set out the rules on when the treatments in question may be given to detained patients. In emergencies, certificates are not required where the treatment is immediately necessary.

1523. It is the rules about these certificates which are changed by this section.

1524. The section amends sections 64C and 64E of the 1983 Act so that, if the patient consents to the treatment in question, the approved clinician in charge of the treatment will satisfy the certificate requirement by issuing their own Part 4A certificate stating that the patient consents to the treatment and has the capacity to do so. This new approved clinician's Part 4A certificate is now sufficient to meet the certificate requirement so long as the patient continues to consent and has capacity to do so. But it is still possible to meet the certificate requirement by means of a Part 4A SOAD certificate instead.

1525. This new rule does not apply to electro-convulsive therapy for patients under 18 (nor to any other treatments for such patients which are in future added to section 58A by order of the Secretary of State in England, or the Welsh Ministers in Wales). That is because, unless it is an emergency, treatments covered by section 58A may not be given to any patient under 18 (whether or not they are otherwise subject to the 1983 Act) without the approval of a SOAD.

1526. The section also inserts a new section 64FA into the 1983 Act to make clear that a supervised community treatment patient who has consented to treatment may at any time withdraw that consent. The new section also sets out what happens if a patient who has consented to treatment subsequently loses the capacity to do so. In both cases, the patient will be treated as having withdrawn consent to the treatment in question. This, in turn, means that any approved clinician's Part 4A certificate relating to the treatment would no longer be valid, and a SOAD's Part 4A certificate would be required instead.

1527. However, new section 64FA(5) provides that treatment may continue whilst a new certificate is being sought, if the approved clinician thinks that stopping the treatment would cause serious suffering to the patient. This might allow treatment to continue in the case of a patient who has lost capacity to consent, but it does not allow treatment to continue against the wishes of a patient who still has capacity to consent, unless the

patient were recalled to hospital. That is because there is no legal authority to give the treatment even if a SOAD's Part 4A certificate has been obtained.

1528. The section makes some further amendments to the 1983 Act to reflect the fact that there are now two different types of Part 4A certificate. It amends section 64H to enable the Secretary of State in England, and the Welsh Ministers in Wales, to set out different forms for the different Part 4A certificates in regulations. It amends section 17B so that the power in section 17E, to recall a supervised community treatment patient to hospital for examination with a view to a Part 4A certificate, will continue (as before) to apply only to a SOAD's Part 4A certificate. It also amends section 61 to provide that the Care Quality Commission and the Welsh Ministers retain the power to withdraw a SOAD's Part 4A SOAD certificate, but are not able to withdraw an approved clinician's certificate.

1529. The rules on treating detained patients are in Part 4 of the 1983 Act. For the most part, detained patients may be given treatment for mental disorder without their consent, even if they have capacity to refuse it (although this does not apply to electro-convulsive therapy unless it is an emergency). However, sections 58 and 58A set out circumstances in which detained patients may not be given medication or electro-convulsive therapy unless it has been approved by a SOAD on a certificate, or an approved clinician has issued a certificate saying that the patient consents to the treatment (and has the capacity to do so).

1530. In general, supervised community treatment patients recalled to hospital are subject to the same rules as detained patients, although section 62A provides that a new certificate under section 58 or 58A is not required if the treatment has already been expressly approved by a SOAD on a Part 4A certificate.

1531. This section extends the exception in section 62A to approved clinicians' Part 4A certificates. In other words, a new certificate under section 58 or 58A is not required if the treatment in question is already covered by an approved clinician's Part 4A certificate, provided that the patient continues to consent to the treatment (and still has the capacity to do so).

1532. Section 62A also provides that, even if the treatment has not been expressly approved by a SOAD's Part 4A certificate, it may be continued while a new SOAD certificate is sought, if the approved clinician in charge thinks stopping the treatment would cause the patient serious suffering. This section adds a new section 62A(6A) which extends that to include cases where (either before or during recall) the patient withdraws consent to treatment to which an approved clinician's Part 4A certificate applies, or loses capacity to consent to it. As amended, section 62A will allow an approved clinician to continue giving medication to a patient who has withdrawn consent if they consider that its discontinuance would cause serious suffering to the patient, but it does not allow electro-convulsive therapy to be given against such a patient's will (because it is not possible to obtain a SOAD certificate authorising electro-convulsive therapy for a detained patient who has capacity to consent, but is refusing to do so).

1533. None of these changes affects the ability to give medication or electro-convulsive therapy without a certificate in emergencies, where it is immediately necessary.

Transfer schemes

Section 300 – Transfer schemes

1534. This section enables the Secretary of State to establish schemes to transfer staff or property, rights and liabilities from one body to another, in connection with the establishment, modification or abolition of a body by the Act. For example, the schemes may transfer property currently held by a PCT (which are being abolished by the Act) to a CCG; or transfer staff currently involved in the provision of public health commissioning from a PCT to a local authority.

1535. *Subsection (1)* allows the Secretary of State to establish transfer schemes for property or staff.

1536. *Subsection (2)* defines a property transfer scheme and sets out the organisations or bodies that may transfer or receive property under these schemes. Property transfers can be made from the bodies listed in column 1 of the table in Schedule 22 (property transfer schemes) to a body listed in the corresponding entry in column 2 of that table.

1537. *Subsection (3)* defines a staff transfer scheme and sets out the organisations or bodies that staff may be transferred from or to under these schemes. Staff transfers can be made from the bodies listed in column 1 of the table in Schedule 23 (staff transfer schemes) to a body listed in the corresponding entry in column 2 of that table.

1538. *Subsection (4)* allows the Secretary of State to direct the NHS Commissioning Board or a "qualifying company" to exercise the Secretary of State's functions and make staff or property transfer schemes in connection with the abolition of one or more PCTs or SHAs. A qualifying company is a company defined for these purposes in *subsection (8)* as wholly or partly owned by the Secretary of State or the NHS Commissioning Board and formed under section 223 of the NHS Act, for the purpose of providing facilities or services to the NHS, or a subsidiary of a company formed under that section and wholly owned by the Secretary of State. Such a company could be used, for example, as an intermediate solution to hold PCT property before it is transferred to, for example, local authorities, consenting persons or public authorities providing services as part of the health service in England, or CCGs. Section 223 has been used by Secretary of State in the past to set up a number of companies to offer services to the NHS, such as NHS Professionals Limited, Bio Products Laboratory Limited and Community Health Partnerships Limited (the LIFT delivery company).

1539. *Subsection (5)* allows the Secretary of State to give directions to the NHS Commissioning Board or to qualifying company about how to do this.

1540. *Subsection (6)* makes provision as to how individuals employed by the civil service are to be treated for the purposes of transfer schemes under section 300 and section 301.

1541. *Subsections (7),* (8) *and (9)* cover definitions, including defining a "qualifying company" and clarifying that a transfer of property includes the grant of a lease.

Section 301 – Transfer schemes: supplemental

1542. This section makes additional provision relating to the transfer schemes made under section 300. It sets out in more detail what may be transferred, and how it may be done - for example, it enables transfer schemes to make provision about the shared use of property transferred.

1543. *Subsection (1)* makes provision about what may be transferred by a staff or property transfer scheme.

1544. *Subsection (2)* sets out the bodies to whom criminal liabilities can be transferred.

1545. *Subsection (3)* allows property or staff transfer schemes to make supplementary, incidental, transitional or consequential provisions associated with the transfer of staff or property. For example, a covenant could be placed on property transferred under a transfer scheme to require it to be used for healthcare purposes.

1546. *Subsection (4)* allows property transfer schemes to make provision for shared ownership or use of property.

1547. *Subsection (5)* allows staff transfer schemes to make the same or similar provisions to the Transfer of Undertakings (Protection of Employment) Regulations. *Subsection (8)* defines "TUPE regulations".

1548. *Subsection (6)* allows transfer schemes to be modified by agreement once they come into operation.

1549. *Subsection (7)* requires the Secretary of State to ensure that all property, rights and liabilities of a PCT, SHA or Special Health Authority covered by a transfer scheme are transferred.

Section 302 – Subsequent property transfer schemes

1550. This section allows any property, rights or liabilities initially transferred from a PCT, SHA or the Secretary of State to a Special Health Authority or a qualifying company, to be subsequently transferred to one of the organisations listed in Schedule 22 to this Act.

1551. *Subsection (2)* allows the Secretary of State to establish such subsequent transfer schemes. *Subsection (3)* ensures that the supplemental provisions for transfer schemes apply in the same way as for other property transfer schemes.