

EXPLANATORY MEMORANDUM TO
THE NHS COMMISSIONING BOARD AUTHORITY (ABOLITION AND
TRANSFER OF STAFF, PROPERTY AND LIABILITIES) AND THE
HEALTH AND SOCIAL CARE ACT 2012 (CONSEQUENTIAL
AMENDMENTS) ORDER 2012

2012 No. 1641

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The NHS Commissioning Board Authority (“the Authority”), a special health authority, was set up on 31 October 2011 to prepare for the establishment and operation of the National Health Service Commissioning Board (“the Board”) as an executive non-departmental public body. The intention is to establish the Board on 1 October 2012. Accordingly, the instrument abolishes the Authority and makes provision for the transfer of its employees, property, rights and liabilities to the Board on that date.

2.2 The instrument also makes various amendments to secondary legislation to reflect: the abolition of the Authority; the establishment of the Board, and its ability to establish clinical commissioning groups (CCGs); and the change of name of the Independent Regulator of NHS Foundation Trusts to ‘Monitor’.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1. The Health and Social Care Act 2012 (“the 2012 Act”) amends the National Health Service Act 2006 by inserting new provision into that Act to establish the Board. The Board’s purpose is to arrange for the provision of NHS services in England, either directly, or through its oversight of a system of CCGs. The 2012 Act also abolishes Strategic Health Authorities (“SHAs”) and Primary Care Trusts (“PCTs”).

4.2. The 2012 Act also provides that the body corporate known as ‘the Independent Regulator of NHS Foundation Trusts’ will continue but be renamed ‘Monitor’. Monitor will become a sector regulator of providers of health care services for the NHS, with an overarching duty to protect and promote the interests of patients.

5. Territorial Extent and Application

- 5.1 This instrument extends to England and Wales, although the consequential amendments to secondary legislation included in the instrument have the same territorial extent as the legislation that is being amended. However, certain consequential amendments apply in relation to England only.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- 7.1 The establishment of the Board is central to the Government's arrangements for clinically-led, autonomous commissioning for the NHS. The intention is that the Board will be established as an executive non-departmental public body on 1 October 2012; from this point it will be able to establish CCGs, which will operate using commissioning budgets delegated by PCTs until the abolition of PCTs and SHAs on 1 April 2013; thereafter the Board will allocate resources to CCGs direct and support them to commission the bulk of health and care for their populations. It will also have direct responsibility for commissioning primary care, secure psychiatric services, specialised services and certain other services.

Abolishing the Authority

- 7.2 The Authority is a preparatory vehicle which has allowed the organisation to recruit a senior team; set strategic goals and direction; establish governance processes; and take on some limited delivery functions with regard to the health system, such as the patient safety functions which were previously the responsibility of the National Patient Safety Agency. It was established to ensure that the Board would have systems in place to enable it to function as intended as soon as it is established as an executive non-departmental public body and to help the NHS to manage some of the challenges of the transition from the current system to the new one.
- 7.3 Once the Board exists, the Authority will be obsolete as noted by the Merits Committee's report on the instrument setting it up (39th Report of Session 2010-12, point 4). This instrument therefore abolishes the Authority and transfers the Authority's employees, property, rights and liabilities to the Board, to ensure continuity of operations and that all liabilities are met. Employment contracts of transferred employees are not broken by the transfer, so as to protect accrued rights.

Consequential amendments: the establishment of the Board and CCGs

- 7.4 This instrument amends secondary legislation to reflect the establishment of the Board and its ability to start authorising CCGs, from 1 October 2012. It does not amend all the secondary legislation which will be relevant to those bodies when they take on their full functions in April 2013 – that will be done in a future consequential amendments order. The amendments deal with matters such as adding the Board and CCGs to the list of bodies whose current chairs and non-executive directors, or people removed from such positions, are prevented from being the chair or non-executive director of other bodies with a role in the health service. It also adds the Board and CCGs (as well as NHS Property Services Limited – a Secretary of State owned company) to the list of bodies eligible to join the Secretary of State-run schemes for meeting losses and liabilities.

Consequential amendments: Monitor

- 7.5 The Act provides that the body corporate known as ‘the Independent Regulator of NHS Foundation Trusts’ will continue but be renamed ‘Monitor’ in light of its new functions as sector regulator for the NHS. This instrument updates references to the ‘Independent Regulator of NHS Foundation Trusts’ in secondary legislation.

8. Consultation outcome

- 8.1 The principle of establishing the Board and Monitor was first set out in the NHS white paper. *Liberating the NHS: Commissioning for patients* then sought views on detailed proposals around the work of the Board. *Liberating the NHS: Regulating healthcare*, sought views on proposals for sector regulation.
- 8.2 The Government response was published in December 2010, outlining a number of policy changes (for example, that maternity services would be commissioned by clinical commissioning groups rather than nationally by the Board). The need for a Commissioning Board, and sector regulation, was tested further through the Listening Exercise on the Government’s NHS modernisation plans. The NHS Future Forum recommended in their report that the Board should be established as soon as possible “to ensure focused leadership for quality, safety and the financial challenge”.
- 8.3 Representatives of staff whose contracts of employment will be transferred to the Board have also been consulted, under section 28 of the NHS Act 2006, on the abolition of the Authority and the transfer of directly employed staff to the Board. Union leaders were sent a letter on 30 April 2012. The consultation period closed on 25 May 2012 and one response was received from the Joint Chair of the HR Transition Partnership Forum. The response suggested including a list of substantively employed staff as a schedule to the order which we were unable to accommodate because some staff may be appointed after the

<http://www.dh.gov.uk/health/2012/06/nhscba-consultation-summary/>.

9. Guidance

9.1 None.

10. Impact

10.1 The impact on business, charities or voluntary bodies is negligible.

10.2 The impact on the public sector of abolishing the Authority is negligible because delivery functions and any preparatory functions that are still required will continue to be carried out by the Board, and the Authority's employees, property, rights and liabilities will all be transferred to the Board. The impact of the consequential amendments is similarly negligible.

10.3 An Impact Assessment has not been prepared for this instrument because no impact on the public, private or voluntary sectors is foreseen. The abolition of the Authority and the transfer of its employees, property and liabilities to the Board form part of the transition arrangements to the new commissioning system. Annex A (pages 3 to 29) of the combined Health and Social Care Bill Impact Assessment (attached as an annex to this explanatory memorandum) contains a section on the transition to the new commissioning system, and therefore contains relevant information.

11. Regulating small business

11.1 The legislation does not apply to small businesses.

12. Monitoring and review

12.1 Monitoring of the abolition of the Authority is not necessary, as no further action is required once this instrument comes into effect and its functions employees, property and liabilities pass to the Board.

13. Contact

Stephen Anderson at the Department of Health (Tel: 020 7210 2810 or email: Stephen.anderson@dh.gsi.gov.uk) can answer any queries regarding the instrument.