EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE AND PUBLIC HEALTH (FUNCTIONS AND MISCELLANEOUS PROVISIONS) REGULATIONS 2013

2013 No. 261

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. This instrument makes provision for:

(a) responsibilities for the NHS Commissioning Board ("the Board") with respect to certain EU functions;

(b) arrangements about how information relating to births and deaths will be notified to local authorities, the Board and Clinical Commissioning Groups ("CCGs");

(c) matters relating to joint working arrangements between CCGs and Welsh Local Health Boards ("LHBs");

(d) additions to the list of permitted transferees for staff transferring from Primary Care Trusts ("PCTs") and Strategic Health Authorities ("SHAs");

(e) responsibility for commissioning in relation to certain mental health matters;

(f) a requirement on the Board to commission dental services for persons who are detained in prisons and other prescribed places of detention;

(g) a requirement on the Board to commission services for persons who are detained in Ashfield Young Offender Institution (YOI).

(h) a duty on local authority directors of public health to undertake any responsibility their authority has to provide Healthy Start vitamins as part of a children's health or maternity service.

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 ("the 2006 Act") and sets out the high-level framework for the establishment of commissioning arrangements. It provides the Secretary of State with powers to make regulations to set out specific and general provisions in relation to the establishment, governance and transitional processes associated with the new commissioning arrangements.

EU functions

4.2. Sections 6A and 6B of the 2006 Act respectively place a duty on the Secretary of State to reimburse the cost of healthcare services provided to a patient in another EEA State and set out when prior authorisation is required. These regulations are consequential on the new commissioning arrangements set out in the 2012 Act and make provision for the transfer of these functions from PCTs to the Board. The Regulations also make provision for the Board to authorise an application under Regulation (EC) No. 883/2004 for treatment in another Member State.

Data on births and deaths

4.3. Section 269 of the 2006 Act, as amended by section 284 of the 2012 Act, provides that regulations may be made by the Secretary of State, specifying which relevant body or bodies are to be notified of births and deaths. Section 269 defines relevant bodies as any or all of the Board, CCGs, or local authorities as defined in section 2B of the 2006 Act. The regulations prescribe the bodies that will receive this information from 1 April 2013 and make provision about how the information is to be provided.

Exercise of functions with local health boards

4.4. Section 14Z4 of the 2006 Act allows regulations to be made to specify the functions of a CGG that it may exercise jointly with a LHB and makes provision to enable any of those functions to be exercised by a joint committee of a CCG and a LHB. The regulations specify those functions and provide that any of these may be exercised by a joint committee of a CCG and LHB.

Staff transfer schemes

4.5. Section 300 of the 2012 Act, enables the Secretary of State to make schemes to transfer staff, assets and liabilities from one body to another, in connection to the establishment, modification or abolition of a body by the Act. Section 300(3) defines a staff transfer scheme and sets out that the organisations or bodies staff may be transferred from or to under these schemes are those listed in Schedule 23 of the 2012 Act. The regulations prescribe additional bodies as 'permitted transferees'.

Mental health

4.6. Section 130A of the Mental Health Act 1983 ("the 1983 Act"), as amended by section 43 of the 2012 Act, transfers the responsibility for commissioning Independent Mental Health Advocate (IMHA) services from the Secretary of State to local authorities in England. These are services available to specified persons, including those who are detained under the 1983 Act or being considered for certain treatments for mental disorder. The Regulations amend the definitions of "commissioning body" and "section 130A functions" in the Mental Health Act 1983 (Independent Mental Health Advocates) Regulations 2008 ("the 2008 Regulations") to reflect these changes. A new Regulation 3 is substituted in the 2008 Regulations to require local authorities to ensure that only people who meet the prescribed conditions are appointed to be an IMHA.

4.7. Section 236(1) of the 2006 Act (as amended by paragraph 123 of Schedule 4 to the 2012 Act) imposes a duty on a prescribed CCG to make payments to a medical practitioner who carries out a medical examination of any person with a view to an application being made for their admission to hospital for

Dental health services for prisoners and others in places of detention

4.8. Section 3B of the 2006 Act enables regulations to be made by the Secretary of State requiring the Board to arrange for the provision of certain services (rather than CCGs). These are generally services other than those that the Board will be responsible for commissioning under section 4, and parts 4 to 7 of the 2006 Act. The regulations amend the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012[1] to make provision that all current contractual arrangements for dental health services provided to those in prisons and other accommodation prescribed in the main regulations can continue to be commissioned by the Board.

Health services for persons detained at Ashfield Youth Offender Institution

4.9. This amendment to the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012[2] under section 3B of the 2006 Act makes provision to ensure current contractual arrangements for health services provided to those detained in Ashfield YOI are to be the responsibility of the Board.

Public health

4.10. This amendment to the NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) Regulations 2012[3] adds to the functions of local authority directors of public health responsibility for the authority's functions in relation to healthy start vitamins. .

5. Territorial Extent and Application

5.1. This instrument applies 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

- What is being done and why

7.1. *Equity and Excellence: Liberating the NHS* set out the Government's intention to change how NHS care is commissioned, and the structural changes to the NHS to make this possible. At the heart of the proposals was a new approach to commissioning, in which responsibility would be given to clinicians, and political and central direction reduced to a minimum, to allow those with the best understanding of patients needs to make decisions on the care they need, and focus in particular on the quality and outcomes achieved from those services.

[1] to be found at http://www.legislation.gov.uk/uksi/2012/2996/contents/made
[2] ditto
[3] to be found at http://www.legislation.gov.uk/uksi/2012/3094/contents/made

7.2. The Secretary of State will continue to be under a duty to promote a comprehensive health service, and will be held accountable for the system through the duties in the Act including a duty to keep under review the effective exercise of functions by national bodies, including the Board, and a duty to report annually on the performance of the health service.

7.3. However, the Secretary of State no longer has extensive general powers to intervene in the NHS; these are replaced with specific and limited powers. For example, the Secretary of State will set strategic direction and objectives for the NHS Commissioning Board through the mandate.

7.4. CCGs will be responsible for commissioning most NHS services, supported by, and accountable to, a new non-departmental public body, the Board, which in turn will be accountable to the Secretary of State. This approach builds on the key role that GP practices play in coordinating patient care and acting as patient advocates.

7.5. CCGs will be responsible for commissioning most NHS services, but where conditions are high cost or clinical expertise needs to be concentrated, certain services are better commissioned and organised centrally. In these cases, the Board will have responsibility for commissioning them. Where the Board is required to commission a service, CCGs will not be able to commission those services (unless the Board enters into commissioning arrangements with a CCG or CCGs).

7.6. This instrument complements the provisions in the 2012 Act and provides a consolidated package of measures necessary for the operation of the new arrangements for the NHS from 1 April 2013.

EU functions

7.7. Under EU law, an EU citizen is entitled to obtain healthcare services in another Member State of the European Economic Area (EEA) and to seek to be reimbursed for the cost of those services by their home health system. Related provisions in EU law also make clear that national systems may, in certain limited circumstances, impose a requirement on patients to obtain prior authorisation from their local health commissioners before accessing treatment in another EEA state. In respect of England and Wales the right to seek reimbursement subject to certain limitations and conditions is set out in the National Health Service (Reimbursement of the Cost of EEA Treatment) Regulations 2010[4]. These regulations amended the 2006 Act to insert section 6A and 6B. The legislation defines the services that may be subject to the condition of prior authorisation and provides that prior authorisation must be granted if the patient's home health service cannot make the required service available to the patient "without undue delay". In England, the functions are currently exercised by PCTs in accordance with the National Health Service (Reimbursement of the Cost of EEA Treatment) (England) Directions 2010[5]. Similar arrangements are in place in Wales, Scotland and Northern Ireland. The purpose of these regulations is to make provision for the transfer of these functions and arrangements from PCTs to the Board.

[4] to be found at http://www.legislation.gov.uk/uksi/2010/915/contents/made

[5] to be found at http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_115251.pdf

7.8. Regulation (EC) No. 883.2004 provides, amongst other things, for reciprocal provision of health care. Under Articles 20 and 27(3) a Member State may arrange for a patient to obtain treatment in another Member State. In England the administration of applications for planned care in another Member State is dealt with by PCTs. These regulations provide for the Board to carry out this function.

Data on births and deaths

7.9. This instrument prescribes the bodies that will receive information in relation to births and deaths from April 2013. Under section 269 of the 2006 Act, registrars are currently required to notify PCTs of the births and deaths that they register in a PCT's area. Section 269 also requires midwives or others present at birth to inform PCTs. The information relating to births is used, for example, to activate the health-visiting programme and potentially as a trigger for safeguarding and child protection services. The information relating to deaths is used to update lists, for example, to ensure that patients who have died are not sent screening information or other appointment letters.

Exercise of functions with local health boards (LHBs)

7.10. LHBs are bodies responsible for the commissioning and provision of health services in Wales. These regulations make provision to allow any prescribed functions of a CCG to be exercised jointly with a LHB. The functions that may be exercised jointly are prescribed in the Schedule to the regulations . The regulations also make provision for any such functions to be exercised by a joint committee of the CCG and the LHB. These arrangements do not alter the responsibility of any CCG to ensure its functions are discharged properly or any liabilities arising from the exercise of those functions.

Staff transfer schemes

7.11. Section 300 of the 2012 Act enables the Secretary of State to establish schemes to transfer staff, assets and liabilities from one body to another, in connection to the establishment, modification or abolition of a body by the Act. For example, the schemes may transfer property currently held by a PCT (which will be abolished by the 2012 Act) to a CCG; or transfer staff currently involved in the provision of commissioning from a PCT to a local authority. Section 300(3) deals specifically with staff transfer schemes and the regulations provide that NHS trusts and NHS foundation trusts established under sections 25 and 30 of the 2006 Act are to be prescribed as bodies for these purposes.

Mental health

7.12. Section 130A of the 1983 Act, as amended by the 2012 Act gives local authorities the duty to commission independent mental health advocates (IMHAs). IMHAs provide help and support for people who are 'qualifying persons', such as persons detained under the 1983 Act, or subject to guardianship and others who are being considered for certain treatments for mental disorder.

7.13. Section 236 of the 2006 Act, as amended by paragraph 123 of Schedule 4 to the 2012 Act, confers on CCGs, a duty to make certain payments. These are payments to medical practitioners who have examined

7.14. This instrument amends the definitions of "commissioning body" and "section 130A functions" in the Mental Health Act 1983 (Independent Mental Health Advocates) Regulations 2008 ("the 2008 Regulations"). It substitutes a new Regulation 3 in the 2008 Regulations to require that local authorities ensure that only people who meet the prescribed conditions are appointed to be IMHAs. It also sets out rules for determining which CCG should pay a medical practitioner who carries out a medical examination with a view to detaining a person in hospital under Part 2 of the 1983 Act.

Dental health services for prisoners

7.15. Section 3B of the 2006 Act enables regulations to be made by the Secretary of State requiring the Board to arrange for the provision of certain services (rather than CCGs). These are generally services other than those that the Board will be responsible for commissioning under section 4 (high security psychiatric services) and Parts 4 to 7 (primary care services) of the 2006 Act. The National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012[6] prescribe these responsibilities, and these regulations amend the Principal Regulations to add that dental health services provided to those in prisons and other prescribed accommodation are also to be commissioned by the Board.

Health services for persons detained at Ashfield Youth Offender Institution

7.16. This regulation is a further amendment to the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 prescribing the Board's commissioning responsibilities under section 3B of the 2006 Act, and makes provision to ensure that health services provided to those detained in Ashfield Youth Offender Institution are to be commissioned by the Board.

Public Health

7.17. This regulation is an amendment to the NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) Regulations 2012 concerning the functions of directors of public health, and makes provision to ensure that a local authority's director of public health will be responsible for the authority's functions in relation to health start vitamins.

- ***Consolidation***

7.18. These regulations do not consolidate any previous legislation.

8. Consultation outcome

8.1. The provisions of the 2012 Act are based on policies tested through a series of consultations; the White Paper, *Equity and Excellence: Liberating the NHS,* and the listening exercise led by the NHS Future Forum particularly

[6] to be found at http://www.legislation.gov.uk/uksi/2012/2996/contents/made

8.2. The underlying policy, proposed changes and arrangements covered by this SI were tested with a wide range of stakeholders including:

- the Welsh Assembly Government
- representatives of local government and associations
- officials in the Board
- the Department for Communities and Local Government
- the Identity and Passport Service

8.3. This has improved the policy and design of the new arrangements in a number of ways, for example by; clarifying the range and scope of functions that may exercised jointly by CCGs and LHBs; determining the principles and other matters in relation to the sharing of data about births and deaths; and prescribing new commissioning arrangements and responsibility for commissioning and payments in relation to mental health matters.

9. Guidance

9.1. The Board will have powers (and in some cases will be required) to issue guidance to CCGs. For example, section 2 of the 2006 Act provides a general power for the Board to issue guidance material to CCGs.

10. Impact

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

10.2. The impact on the public sector is negligible.

10.3. A full Impact Assessment has not been prepared for this instrument as no impact on the private sector or civil society organisations is foreseen: the costs and cost-savings of transferring the commissioning responsibilities from SHAs and PCTs to the Board and CCGs have been set out in Commissioning for Patients Impact Assessment (see pages 3 – 29, Annex A)[7] that accompanies the Health and Social Care Act 2012. These costs and cost-savings are not easily attributable to any one particular piece of secondary legislation.

10.4. Since the publication of the Impact Assessment for the Health and Social Care Act 2012, officials have been tracking closely the actual costs and benefits of the changes. The costs were revised and the current estimate is in the range of £1.5 to £1.6 billion. These costs remain within the wider possible range specified in the coordinating document. Full details were set out by Secretary of State in a written statement to Parliament on 18 October 2012.[8]

[7] to be found at http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_129917.pdf

[8] 18 Oct 2012 : Column 36WS: http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm121018/wmstext/121018m0001.htm#12101829000017

11. Regulating small business

11.1. The legislation does not apply to small business.

12. Monitoring & review

12.1. The Secretary of State will keep the Board's performance under review in line with his duty under the NHS Act 2006, as amended by the 2012 Act. In turn and as part of its responsibilities, the Board will monitor the exercise by CCGs of their statutory functions as part of its annual performance assessment of CCGs.

12.2. The exact details of the monitoring arrangements and reviews has not yet been finalised, but will build on planned evaluations of commissioning by external academics from the Department of Health funded Policy Research Programme. This is in addition to ongoing reviews within the system that will examine the extent to which the implemented regulations have achieved their objectives, costs and benefits and identify whether they are having any unintended consequences.

13. Contact

Helen Dixon at the Department of Health (Tel: 0207 210 5719 or email: helen.dixon@dh.gsi.gov.uk) can answer any queries regarding this instrument.