

HEALTH AND SOCIAL CARE ACT 2012

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – The Health Service in England

Further provision about clinical commissioning groups

Section 26 – Clinical commissioning groups: general duties etc.

315. This section inserts new sections 14P to 14Z24 into the NHS Act, which contain CCGs' duties, and powers, and provision for the NHS Commissioning Board to intervene in the event of failure.
316. *Duty to promote the NHS Constitution.* New section 14P imposes a duty upon CCGs both to act in the exercise of its functions (for example through their commissioning functions) with a view to securing that health services are provided in a way that promotes the NHS Constitution and to promote awareness of it among staff, patients and the public. This means that not only must CCGs act in accordance with the NHS Constitution, but they should ensure that people are made aware of their rights under it. They may also do this by contributing, as far as possible, to the advancement of the Constitution's principles, rights, responsibilities and values, through their own actions and through facilitating the actions of stakeholders, partners and providers.
317. *Duty as to effectiveness, efficiency etc.* Under new section 14O, each CCG must exercise its functions effectively, efficiently and economically.
318. *Duty as to improvement in quality of services.* New section 14R places CCGs under a duty to exercise their functions with a view to securing continuous improvements in the quality of services provided to individuals, as part of the health service. This also reflects the accepted definition of quality¹ as comprising effectiveness, safety and patient experience. Subsection (4) requires CCGs, in discharging this duty, to have regard to any guidance issued by the NHS Commissioning Board under new section 14Z8 (on how CCGs should discharge their commissioning functions).
319. *Duty in relation to quality of primary medical services.* New section 14S provides that each CCG must assist and support the NHS Commissioning Board in discharging its duty under 13E as to improvement in the quality of services insofar as that relates to securing continuous improvement in the quality of primary medical services. In this way, each CCG would support the continuous improvement in the quality of primary medical services provided by CCG members.
320. *Duties as to reducing inequalities.* New section 14T sets out that CCGs must, in the exercise of their functions, have regard to the need to reduce inequalities between patients in access to health services and in the outcomes achieved from health services.

¹ See, for example, the NHS Outcomes Framework published by the Department of Health on 20 December 2010, available at http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_122944

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321. *Duty to promote involvement of each patient.* Section 14U requires CCGs in exercising their functions, to promote the involvement of patients and their carers and representatives in decisions about their own care (shared decision-making). This duty is intended to address the commitment outlined in the White Paper *Equity and Excellence: Liberating the NHS* to the policy of “no decision about me without me”.
322. The duty would apply to any decisions at all stages of that individual’s health care, from preventative measures, diagnosis of an illness, and any subsequent care and treatment they receive. Effective involvement of patients in these decisions might include such things as opportunities for patients to participate in treatment decisions in partnership with health professionals, to be supported to make informed decisions about the management of their care and treatment and to discuss opportunities for patients to manage their own condition. The NHS Commissioning Board must publish guidance on how to discharge this duty, to which CCGs must have regard.
323. *Duty as to patient choice.* Section 14V imposes a duty on CCGs, in the exercise of their functions, to act with a view to enabling patient choice (for example, by commissioning so as to allow patients a choice of treatments, or a choice of providers, for a particular treatment).
324. *Duty to obtain appropriate advice.* New section 14W requires CCGs to obtain appropriate advice from people who taken together have a broad range of professional expertise in relation to the prevention, diagnosis or treatment of illness, and the protection or improvement of public health to enable them to discharge their functions effectively. This could involve, for example, a CCG employing or otherwise retaining healthcare professionals to advise the CCG on commissioning decisions for certain services, or appointing professionals to any committee that the CCG may set up to support commissioning decisions. It could also involve consulting clinical networks and senates. The NHS Commissioning Board may publish guidance on the exercise of this duty to which CCGs must have regard.
325. *Duty to promote innovation.* New section 14X imposes a duty on CCGs, in the exercise of their functions, to promote innovation in the provision of health services and in making arrangements for the provision of health services. This means that not only will CCGs have to encourage new ways of thinking through commissioning, but they will also have to promote different commissioning methodologies.
326. *Duty in respect of research.* New section 14Y puts a duty on CCGs in respect of research. Each CCG must, in the exercise of its functions, promote health research and the use of evidence obtained from such research. A CCG could, for example, use evidence obtained from health research to inform its commissioning plan.
327. *Duty as to promoting education and training.* New section 14Z places a duty on each CCG in the exercise of their functions to have regard to the need to promote education and training to persons who are employed, or who are considering becoming employed, in an activity which involves or is connected with the provision of services as part of the health service in England, to assist the Secretary of State under his duty under new section 1E to secure an effective system for the planning and delivery of education and training in England for these people.
328. *Duty as to promoting integration.* New section 14Z1 gives CCGs a duty in relation to promoting integration, where it would benefit patients. They must exercise their functions with a view to securing that services are provided in an integrated way where this would improve the quality of the services, reduce inequalities of access or reduce inequalities in outcomes. In this manner, integration is not the aim itself, but a tool to encourage service improvement. This integration can be integration of health services with other health services or health services with health-related services (such as housing services where these have an effect on the health of individuals), or health services with social care services.

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329. *Public involvement and consultation by clinical commissioning groups.* New section 14Z2 sets out requirements for involving the public (whether by consultation or otherwise). CCGs must make arrangements to involve individuals to whom services are being or may be provided in the commissioning process. Specifically, individuals must be involved in planning commissioning arrangements; in developing and considering proposals for changes in the commissioning arrangements, where those proposals would have an impact on how services are provided or the range of health services available; and in decisions that would likewise have a significant impact.
330. Each CCG must set out in its constitution a description of the arrangements made by it to fulfil this duty and a statement of the principles it will follow in implementing those arrangements. The NHS Commissioning Board may publish guidance for CCGs on how to discharge their duties under this section and CCGs must have regard to any such guidance.
331. The NHS Commissioning Board could, for instance, give guidance on effective ways of engaging and seeking views from members of the public, including how to engage people who do not regularly use healthcare services or are from disadvantaged communities. The NHS Commissioning Board could also give guidance to help CCGs decide in what circumstances the duty to involve might most appropriately be met by providing information and in what circumstances a CCG should actively seek people's views through consultation.
332. *Arrangements with others.* New sections 14Z3 and 14Z4 enable CCGs to collaborate with each other and, in particular circumstances, with Local Health Boards.
333. *Arrangements by clinical commissioning groups in respect of the exercise of functions.* New section 14Z3 enables CCGs to collaborate in respect of the exercise of their commissioning functions. CCGs may make arrangements under subsection (2)(a) for one CCG to take a role as lead commissioner and exercise commissioning functions on behalf of other CCGs. CCGs may, under subsection (2)(b), exercise their functions jointly. In exercising these powers, a CCG may make payments to other CCGs, may make the services of its employees or other resources available to other CCGs, and may establish pooled funds. Subsection (6) makes clear that these arrangements do not change the responsibility of any CCG to ensure its functions are discharged properly or any liabilities arising from the exercise of those functions.
334. *Joint exercise of functions with Local Health Boards.* Regulations may be made under new section 14Z4 to allow any prescribed functions of a CCG to be exercised jointly with a Local Health Board. Local Health Boards are the bodies responsible for commissioning and providing health services in Wales. Regulations may also make provision for any such functions to be exercised by a joint committee of the CCG and the Local Health Board. Subsection (3) makes it clear that these arrangements do not change the responsibility of any CCG to ensure its functions are discharged properly or any liabilities arising from the exercise of those functions.
335. A CCG may also provide advice or assistance to any public authority in the Isle of Man or Channel Islands, on such terms, including as to payment, as the CCG considers appropriate (section 298).
336. *Additional powers of clinical commissioning groups.* Additional powers for CCGs are set out in new sections 14Z5 and 14Z6.
337. *Raising additional income.* New section 14Z5 enables CCGs to undertake certain activities to raise additional income for improving the health service, provided that this does not significantly interfere with the CCG's ability to perform its functions. These activities are to acquire, produce, manufacture and supply goods; to acquire land by agreement and manage and deal with land; to provide instruction for any person; to develop and exploit ideas and exploit intellectual property; to do anything whatsoever which appears to the CCG to be calculated to facilitate, or to be conducive or incidental

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to, the exercise of any power conferred by this subsection - and to make such charge as the CCG considers appropriate.

338. *Power to make grants.* New section 14Z6 enables CCGs to make grants or loans, subject to such conditions as the CCG deems appropriate, to voluntary organisations that provide or arrange for the provision of services similar to the services in respect of which the CCG has functions.
339. *Board's functions in relation to clinical commissioning groups.* New sections 14Z7, 14Z8, 14Z9 and 14Z10 make provision for the NHS Commissioning Board to have functions in relation to assisting CCGs.
340. *Responsibility for payments to providers.* New section 14Z7 gives the NHS Commissioning Board the power to publish a document specifying the circumstances in which a CCG is liable to make payments to a provider to pay for services provided under arrangements commissioned by another CCG. This provision would, for instance, enable the NHS Commissioning Board to specify that, where a person uses an urgent care service commissioned by a CCG other than the CCG that is ordinarily responsible for that person's healthcare, the cost of that service is charged to the latter CCG. It could, for instance, decide that CCGs should be left to agree mutual arrangements for sharing costs where patients from a number of different CCGs use the same urgent care service. However, where the NHS Commissioning Board publishes such a specification, a CCG will be required to make payments in accordance with that document (subsections (2) and (3)). In those circumstances, no other CCG will be liable for the payment. Any sums payable by virtue of subsection (2) may be recovered under subsection (5) as a civil debt. Where the NHS Commissioning Board makes a specification, it may publish guidance for the purpose of assisting CCGs understand, and apply, it (subsection (6)).
341. *Guidance on commissioning by the Board.* Section 14Z8 provides that the NHS Commissioning Board must publish guidance for CCGs on the discharge of their commissioning functions (subsection (1)). CCGs must have regard to this guidance (subsection (2)). The Healthwatch England committee of the Care Quality Commission must be consulted before the NHS Commissioning Board publishes any guidance or any revised guidance containing changes that are in the NHS Commissioning Board's opinion significant (subsection (3)).
342. *Exercise of functions by the Board.* New section 14Z9 provides that the NHS Commissioning Board may act on behalf of a CCG and arrange for the provision of services and exercise related functions, if requested to do so by the CCG (or in other words, by mutual agreement between the NHS Commissioning Board and the CCG). Regulations may provide that the power does not apply to services or facilities of a prescribed description. Subsection (3) makes provision for terms, including payment terms, to be agreed between the NHS Commissioning Board and CCGs. Subsection (4) makes clear that these arrangements do not change the responsibility of any CCG to ensure its functions are discharged properly or any liabilities arising from the exercise of those functions.
343. *Power of Board to provide assistance or support.* New section 14Z10 provides that the NHS Commissioning Board has the power to provide assistance or support to CCGs (including financial assistance and making employees or other resources of the NHS Commissioning Board available to CCGs). This assistance may be provided on such terms as the NHS Commissioning Board considers appropriate, including payment terms. The NHS Commissioning Board can impose restrictions on the use of any such assistance.
344. *Commissioning plans.* New section 14Z11 makes provision with regard to commissioning plans. Section 14Z11(1) stipulates that each CCG must prepare a plan before the start of each relevant period to set out how it will exercise its functions. The plan must, in particular, explain how the CCG proposes to discharge its duties to seek continuous improvement in the quality of services (under new section 14R) and

in relation to reducing inequalities (14T) and its financial duties (under sections 223H to 223J) and also its duty in relation to public involvement under 14Z2. This plan must be published and sent to the NHS Commissioning Board before a date specified by the Board. A copy must also be sent to the relevant health and wellbeing board. In a CCG's first financial year the 'relevant period' will begin on a date specified by the NHS Commissioning Board and end at the end of that financial year, it will then be each subsequent financial year. The NHS Commissioning Board may publish guidance on consultation on, and revision of, commissioning plans, to which CCGs must have regard.

345. *Revision of commissioning plans.* Under new section 14Z12, the commissioning plan may be revised. Should the proposed revision be deemed 'significant' by the CCG, it must give a copy to the NHS Commissioning Board by a date specified by the Board and must provide the relevant health and wellbeing board with a copy having carried out consultation under new section 14Z11 (below). Where the CCG revises the plan and the changes are not significant, it must still publish the revised plan. A copy must also be provided to each relevant health and wellbeing board and the NHS Commissioning Board.
346. *Consultation about commissioning plans.* Under new section 14Z12, when preparing a commissioning plan, or making a change it deems significant, the CCG must:
- consult individuals for whom it has responsibility for the purposes of section 3 of the NHS Act, for example the people to whom its members provide primary care services and those included within the CCG's geographic area responsibilities; and
 - involve the relevant health and wellbeing board.
347. It must, in particular, provide the relevant health and wellbeing board with a copy of the draft plan or revised plan (as the case may be) and consult it on whether it adequately takes the latest joint health and wellbeing strategy into account. This means that CCGs would need to discuss their plans in advance with health and wellbeing boards to help ensure that they reflected joint health and wellbeing strategies.
348. The health and wellbeing board would have to give the CCG its opinion on this. It could also give its opinion to the NHS Commissioning Board. If it did so, the CCG must be given a copy of the opinion. If the CCG went on to make further changes, this process would have to be repeated. The revised plan would have to be published and a copy given the relevant health and wellbeing board and the NHS Commissioning Board.
349. When CCGs send their commissioning plans to the NHS Commissioning Board, they would be under an obligation to include:
- a summary of the views of individuals consulted;
 - an explanation of how those views were taken into account; and
 - a statement as to whether the relevant health and wellbeing board(s) agreed that the plans has due regard to the joint health and well-being strategy or strategies.
350. *Opinion of health and wellbeing boards on commissioning plans.* 14Z14 enables each health and wellbeing board to provide the NHS Commissioning Board with its opinion on whether a CCG's commissioning plan has taken proper account of the relevant joint health and wellbeing strategy. If it does so, it must provide a copy of this opinion to the CCG in question.
351. *Reports by clinical commissioning groups.* Under section 14Z15, in each financial year, save the first year of operation, each CCG must prepare and provide to the NHS Commissioning Board an annual report on how it has discharged its functions in the previous financial year. The report must, in particular, explain how it has fulfilled its duties to seek continuous improvement in the quality of services (section 14R), in relation to reducing inequalities (14T), and to involve patients and the public in

commissioning decisions (section 14Z2). The CCG must publish the report and present it at a public meeting. The NHS Commissioning Board can give directions, which may include further provision on the form and content of an annual report. For example, these directions could specify that the report include a review of joint arrangements with local authorities and the outcome of any consultations undertaken under 14Z2.

352. *Performance assessment of clinical commissioning groups.* New section 14Z16 specifies that the NHS Commissioning Board must conduct an assessment of how well each CCG has discharged its functions during each financial year. In particular, it must assess how well the CCG has discharged its duty to seek continuous improvement in the quality of services (under new section 14R), its duty in relation to reducing inequalities (14T), its duty to obtain appropriate advice (14W), its duty to involve and consult the public (14Z2), its financial duties (under new sections 223H to 223J) and its duty to have regard to any relevant joint health and wellbeing strategy. In assessing performance, the NHS Commissioning Board must consult each relevant health and wellbeing board on whether the CCG has taken proper account of the relevant joint health and wellbeing strategy. It must also have regard to any relevant document published by the Secretary of State, which includes the NHS Outcomes Framework, and to any commissioning guidance published by the NHS Commissioning Board. Each financial year, the NHS Commissioning Board must publish a report containing a summary of the results of the performance assessments.
353. *Power to require documents and information etc.* New sections 14Z17 to 14Z20 are concerned with the NHS Commissioning Board's powers to require and use information. The NHS Commissioning Board can use the powers in section 14Z18 and 14Z19 to require documents, information and explanations, where it has reason to believe that a CCG might have failed, might be failing or might fail to discharge any of its functions properly, or where it believes the area of a CCG is no longer appropriate (see new section 14Z17(1)). A failure to discharge a function properly for these purposes includes a failure to discharge it consistently with what the NHS Commissioning Board considers to be the interests of the health service.
354. New section 14Z18 provides that, where the conditions in section 14Z17 are met, the NHS Commissioning Board may require the provision of any information, documents, records or other items from a CCG or any member or employee of the CCG having possession or control of the item, where the NHS Commissioning Board considers that it is necessary or expedient to have this for the purposes of any of its functions in relation to the CCG. When that information is stored on a computer, it must be provided to the NHS Commissioning Board in a legible form. By virtue of subsection (5) this power does not include the power to require the provision of personal records, as defined by reference to section 12 of the Police and Criminal Evidence Act 1984. This power does not therefore permit the NHS Commissioning Board to require documentary and other records concerning an individual (whether living or dead) who can be identified from them and relating to his physical or mental health; to spiritual counselling or assistance given or to be given to him; or to counselling or assistance given or to be given to him, for the purposes of his personal welfare, by any voluntary organisation or by any individual who because of his office or occupation has responsibilities for his personal welfare; or by reason of an order of a court has responsibilities for his supervision.
355. *Power to require explanation.* New section 14Z19 sets out the NHS Commissioning Board's power, where the conditions in section 14Z17 are met, to require an explanation, either orally (at such time and place as the NHS Commissioning Board may specify), or in writing, regarding any matter relating to the CCG's exercise of its functions. That explanation can include an explanation of how the CCG is proposing to exercise its functions.
356. *Use of information.* Where the NHS Commissioning Board obtains information from a CCG in these ways, new section 14Z20 permits the NHS Commissioning Board to use this information in connection with any of its functions which relate to CCGs.

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357. *Intervention powers:* New section 14Z21 sets out the NHS Commissioning Board's powers to intervene in the operations of CCGs.
358. *Power to give directions, dissolve clinical commissioning groups etc.* Under new section 14Z21, if the NHS Commissioning Board is satisfied that a CCG is failing or has failed to discharge any of its functions (which includes a failure to discharge a function consistently with what the Board considers to be the interests of the health service), or there is a significant risk that it will fail to do so, the NHS Commissioning Board has powers to:
- direct the CCG to discharge a functions in a particular way and within a specified period;
 - direct the CCG or the accountable officer to cease to perform any functions for a specified period;
 - terminate the accountable officer's appointment and appoint another person to be accountable officer;
 - vary a CCG's constitution (including by varying its area, adding any GP practice to its list of members, or removing any GP practice from its list of members); or
 - dissolve that CCG.
359. Subsection (8) provides that, where a direction is given for the CCG to cease performing any specified functions, the NHS Commissioning Board may exercise those specified functions. Alternatively, the NHS Commissioning Board may direct that another CCG or the accountable officer of another CCG discharge those functions (providing the NHS Commissioning Board has consulted that CCG). Where the NHS Commissioning Board changes the constitution of a CCG or dissolves a CCG, it may make a scheme transferring any property, liabilities, or staff (as at Part 3 of Schedule 1A) of the affected CCG to the NHS Commissioning Board or another CCG. Subsection (9) sets out that where the NHS Commissioning Board exercises the function of a CCG under subsection (8), the CCG must co-operate with the NHS Commissioning Board. Subsection (9) also provides that when a CCG's functions are being discharged by another CCG or the accountable officer of another CCG, the CCG whose functions are being discharged must co-operate with the other CCG or the accountable officer in question.
360. *Procedural requirements in connection with certain intervention powers.* New section 14Z22 impose procedural requirements which the NHS Commissioning Board must follow before dissolving a CCG under new section 14Z21(7). The NHS Commissioning Board must consult with that CCG, any relevant local authorities (defined in subsection (7)), and any other persons the NHS Commissioning Board considers appropriate; and provide those persons with a statement explaining its proposed actions and the reasons for them. The NHS Commissioning Board must, under subsection (3), publish a report in response to this consultation and, where it decides to exercise its power to dissolve a CCG, explain in the report its reasons for doing so (subsection (4)).
361. Subsection (5) of new section 14Z22 provides that regulations may be made as to the procedure that the NHS Commissioning Board must follow before exercising its powers to require information or explanation (under new sections 14Z18 or 14Z19) or before exercising the intervention powers in new section 14Z21. This will enable regulations to set out a clear, transparent set of triggers or criteria for different stages of intervention and to help ensure that the nature of the intervention is proportionate to the nature of the failure or risk.
362. Subsection (6) of new section 14Z22 provides that the NHS Commissioning Board must publish guidance setting out how it proposes to exercise its powers to require

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information or explanation and its powers of intervention, so as to ensure that the arrangements are clear and transparent.

363. *Permitted disclosures of information.* New section 14Z23 makes provision as to the circumstances when a CCG may disclose information obtained in the exercise of its functions. Unless the information has previously been lawfully disclosed to the public, the disclosure would be made under or pursuant to regulations under section 113 or 114 of the Health and Social Care (Community Health and Standards) Act 2003 (complaints about health care or social services), in accordance with any enactment or court order, or for the purpose of criminal proceedings, the CCG may not disclose information under section 14Z23 if to do so would be contrary to any rule of common law..
364. *Interpretation.* New section 14Z24 sets out when references to CCGs' functions include public health functions of the Secretary of State that have been delegated to them by virtue of arrangements under section 7A of the NHS Act. This list includes certain provisions of other Acts of Parliament that are amended by this Act. There is also a power for the list of provisions specified to be amended by order of the Secretary of State.