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 5 – Public involvement and local government

Chapter 2 – Local Government

Scrutiny functions of local authorities

Section 190 - Scrutiny functions of local authorities

1160. This section amends section 244 of the NHS Act which concerns a power to make regulations on review and scrutiny of matters relating to the health service (health scrutiny) by local authority overview and scrutiny committees. Amongst other things, the amendments have the effect that the regulations may make provision relating to health scrutiny by local authorities themselves. The amendments enable those regulations to authorise the local authority to arrange for an overview and scrutiny committee to discharge the health scrutiny functions.

1161. *Subsection (2)* of this section amends *subsection (2)* of section 244 of the NHS Act so that the regulation-making power it confers applies in relation to health scrutiny by a local authority itself as opposed to an overview and scrutiny committee of a local authority. Local authorities will no longer be required to have overview and scrutiny committees to discharge health scrutiny functions, but will continue to have such functions (under regulations under section 244), which they will, in general, be able to discharge in various ways. For example, local authorities may choose to continue to operate their existing health overview and scrutiny committees, or may choose to put in place other arrangements such as appointing committees involving members of the public. As such, the amendments made by this section will not prevent a local authority having an overview and scrutiny committee to discharge its health scrutiny functions.

1162. The regulation-making powers previously enabled provision to be made on the matters on which an NHS body must consult the local authority overview and scrutiny committee and to require officers of NHS bodies to attend before the committee to answer questions and NHS bodies to provide information to it. The amendments to *subsection (2)* of section 244 will instead provide that requirements to consult the local authority, to attend before it and to provide information to it can be applied to or in relation to "relevant NHS bodies" or "relevant health service providers". This will potentially include CCGs, the NHS Commissioning Board and providers of health services commissioned by the NHS Commissioning Board, CCGs and the local authority, including independent sector providers.

1163. *Subsection (3)* inserts *new subsections (2ZA), (2ZB), (2ZC), (2ZD) and (2ZE)* into section 244 of the NHS Act.

1164. New *subsection (2ZA)* sets out the additional provision which may be made where regulations by virtue of *subsection (2)(c)* of section 244 make provision as to matters on which relevant NHS bodies or relevant health service providers must consult the local

authority. This includes provision as to circumstances in which those matters may be referred to the Secretary of State, Monitor, or the NHS Commissioning Board. It also includes provision conferring powers on the Secretary of State to give directions to the NHS Commissioning Board and on the NHS Commissioning Board to give directions to a CCG.

1165. New *subsection (2ZB)* sets out further details of the powers to give directions that may be conferred under new *subsection (2ZA)*. New *subsection (2ZC)* enables regulations under new *subsection (2ZA)* to either disapply any provision of section 101 of the local Government Act 1972 in relation to the local authority's discharge of the function of making referrals, or to provide for such provision to apply with prescribed modifications. For example, this would enable the regulations to prevent the local authority from arranging for a committee to discharge the function of making such referrals under section 101 of the Local Government Act 1972. New *subsection (2ZD)* provides that the local authority's health scrutiny functions are not functions of an executive of the authority under executive arrangements. This means that, under such arrangements, the functions would be functions of the local authority as a whole.

1166. New *subsection (2ZE)* enables regulations under the amended section 244 to authorise a local authority to arrange for its functions, under the regulations, to be discharged by an overview and scrutiny committee.

1167. *Subsection (4)* inserts a definition of "relevant NHS body" and "relevant health service provider" into section 244. *Subsection (5)* inserts a definition of "member" in relation to various NHS bodies or certain "relevant health service providers".

1168. *Subsection (9)* amends section 21 of the Local Government Act 2000 to remove the requirement on local authorities to have health overview and scrutiny committees and to make clear that the prohibition on overview and scrutiny committees discharging particular functions does not extend to functions conferred by virtue of regulations under new *subsection (2ZE)* of section 244 of the NHS Act. This would ensure that local authorities are not prevented from arranging for overview and scrutiny committees to discharge health scrutiny functions. *Subsection (10)* makes similar amendments to section 9F of the Local Government Act 2000 (which will replace section 21 by virtue of the Localism Act 2011).

Section 191 – Amendments consequential on section 190

1169. This section makes consequential amendments to existing provisions on scrutiny in the NHS Act. *Subsections (1) to (5)* of this section amend section 245 of the NHS Act which enables regulations to be made enabling local authorities to discharge their scrutiny functions with each other through a joint overview and scrutiny committee, and to make certain other arrangements. The amendments made by *subsections (1), (2) and (3)* ensure that section 245 reflects the amendments made to section 244 whereby the regulation-making powers apply in relation to local authorities directly as opposed to overview and scrutiny committees. This effectively enables regulations to continue to enable local authorities to make joint or other scrutiny arrangements.

1170. *Subsection (4)* has the effect that the regulation-making power in section 245 includes a power to provide that where a local authority arranges for a joint overview and scrutiny committee to exercise any of its health scrutiny functions, the local authority may not discharge that function.

1171. *Subsections (6) to (9)* amend section 246 of the NHS Act. Section 246 provides that in relation to business discussed at a meeting of an overview and scrutiny committee, information is exempt information for the purposes of provisions of the Local Government Act 1972 if certain conditions are met. Those provisions enable certain local authorities to exclude the public from meetings whenever it is likely that exempt information would otherwise be disclosed. The changes made by *subsections (6) to (9)* reflect the changes to section 244 under which scrutiny functions can be

conferred directly on local authorities and could be discharged by committees. This ensures that, as with the current situation for health overview and scrutiny committees, if there is certain information being discussed in relation to health scrutiny functions at meetings – for example, commercially confidential material – the public can be excluded from meetings.

1172. *Subsections (10) to (13)* amend section 247 of the NHS Act which makes provision in relation to scrutiny by the Common Council for the City of London. The amendments made by *subsections (10) to (13)* ensure that section 247 reflects the amendments made to section 244 under which scrutiny functions can be conferred directly on local authorities and could be discharged by committees. The Common Council will have flexibility like other local authorities in discharging its health scrutiny functions.

Joint strategic needs assessments and strategies

Section 192 – Joint strategic needs assessments

1173. This section amends section 116 of the Local Government and Public Involvement in Health Act 2007 (the 2007 Act), so that a local authority, and CCGs that have a boundary within or overlapping or coinciding with that local authority, have a duty to prepare a joint strategic needs assessment or assessment of relevant needs. A joint strategic needs assessment is essentially a process to identify the current and future health and social care needs of a population in a local authority area.

1174. *Subsection (2)* amends *subsection (4)* of section 116 of the 2007 Act so that the duty to prepare the assessment of relevant needs is transferred from each partner PCT to each partner CCG of the local authority.

1175. *Subsection (3)* amends *subsection (6)* of section 116 of the 2007 Act which sets out when there is a relevant need for the purposes of section 116. The amendments replace references to a partner PCT with references to partner CCGs. They also widen the scope of a "relevant need" so that it covers both the current and future needs of the local population, and not just current needs.

1176. *Subsection (4)* amends *subsection (7)* of section 116 of the 2007 Act to replace references to "the partner PCT" with references to "the partner clinical commissioning group or the National Health Service Commissioning Board".

1177. *Subsection (5)* amends *subsection (8)* of section 116 of the 2007 Act so that the duty to co-operate transfers from each partner PCT to each partner CCG of the local authority.

1178. *Subsection (5)* also imposes an additional duty on CCGs and local authorities to involve the Local Healthwatch organisation and the people who live or work in the local authority's area when preparing their joint strategic needs assessment. This subsection also replaces the duty to consult each relevant district council when preparing the assessment with a duty to involve each such council.

1179. *Subsection (6)* inserts a new *subsection (8A)* into section 116 of the 2007 Act to enable the local authority or partner CCG to consult any person it thinks appropriate when preparing the joint strategic needs assessment.

1180. *Subsection (7)* substitutes the definition of "partner PCT" with a definition of "partner clinical commissioning group" and makes consequential amendments to the definition of "relevant district council".

Section 193 – Joint health and wellbeing strategies

1181. This section inserts new sections 116A and 116B into the 2007 Act. New section 116A imposes a duty on local authorities and CCGs to produce "a joint health and wellbeing strategy" for meeting the needs identified in the joint strategic needs assessment.

1182. New section 116B imposes a duty on partner CCGs, the local authority and the NHS Commissioning Board (in relation to its local commissioning responsibilities) to have regard to the joint strategic needs assessment and joint health and wellbeing strategy when carrying out their functions.

1183. Section 116A does not specify the form the joint health and wellbeing strategy should take. It requires a strategy for meeting the needs identified in the joint strategic needs assessment to be prepared, and requires the local authority and partner CCGs to have regard to the Secretary of State's mandate under section 13A of the NHS Act and any guidance issued by the Secretary of State when preparing the strategy. For example, subject to guidance, the strategy could be high level and strategic, focusing on the interface between the NHS, social care and public health commissioning, rather than being a detailed study of all the commissioning across health and social care in the local authority area.

1184. *Subsections (1) and (2)* of new section 116A have the effect that where an assessment of relevant needs is prepared under section 116, the local authority and each partner CCG must prepare a strategy for meeting those needs.

1185. *Subsection (3)* requires the local authority and its partner CCGs to consider how the needs in the joint strategic needs assessment could more effectively be met through the use of flexibilities available under section 75 of the NHS Act, such as pooled budgets, when preparing the joint health and wellbeing strategy.

1186. *Subsection (4)* requires the local authority and its partner CCGs to have regard to the Secretary of State's mandate to the NHS Commissioning Board when preparing the joint health and wellbeing strategy. It also requires them to have regard to guidance issued by the Secretary of State in preparing the strategy. This duty mirrors the duty of a local authority and partner CCGs to have regard to guidance on the preparation of the joint strategic needs assessments under section 116 of the 2007 Act.

1187. *Subsection (5)* imposes an additional duty on CCGs and local authorities to involve the Local Healthwatch organisation and the people who live or work in the local authority's area when preparing the joint health and wellbeing strategy. This is similar to the duty imposed by section 192(5) in relation to the joint strategic needs assessment.

1188. *Subsection (6)* requires the local authority to publish the joint health and wellbeing strategy.

1189. *Subsection (7)* enables the local authority and partner CCGs to include in the strategy their views on how arrangements for the provision of health-related services could be more closely integrated with arrangements for the provision of health services and social care services in the area.

1190. *Subsection (1)* of section 116B places a duty on a local authority, and each partner CCG in exercising functions to have regard to any joint strategic needs assessment and joint health and wellbeing strategy which is relevant to the exercise of those functions. *Subsection (2)* places a duty on the NHS Commissioning Board to have regard to any joint strategic needs assessment and joint health and wellbeing strategy which is relevant to its local commissioning functions when discharging those functions.

Health and Wellbeing Boards: establishment

Section 194 – Establishment of Health and Wellbeing Boards

1191. This section requires each upper tier local authority to establish a Health and Wellbeing Board for its area (*subsection (1)*).

1192. The section also sets out their membership (*subsection (2)*). This includes the director of children's services, the director of adult social services and the director of public health. There must be at least one elected representative, which may be the elected

mayor or leader of the local authority and/or a councillor or councillors nominated by them (*subsections (3) and (4)*). The Local Healthwatch organisation and each relevant CCG must also appoint representatives (*subsections (5) and (6)*). A CCG may, with the consent of the Health and Wellbeing Board, be represented by the representative of another CCG which has a boundary within or coinciding with the local authority area (*subsection (7)*).

1193. *Subsection (8)* enables the Board to appoint additional persons as members. The local authority will also be able to invite other persons or representatives of other persons to become members, for example local voluntary groups or service providers *(subsection (2)(g)). Subsection (9)* requires the local authority to consult the Health and Wellbeing Board before appointing additional persons after the Board has been established. *Subsection (10)* requires each relevant CCG to co-operate with the Health and Wellbeing Board in the exercise of the Board's functions.

1194. *Subsection (11)* provides that the Health and Wellbeing Board is a committee of the local authority and is to be treated as if it were appointed under section 102 of the Local Government Act 1972.

1195. *Subsection (12)* enables regulations to be made to disapply legislation which applies in relation to committees appointed under section 102 of the Local Government Act 1972 or to provide for such legislation to apply with modifications in relation to Health and Wellbeing Boards.

Health and Wellbeing Boards: functions

Section 195 – Duty to encourage integrated working

1196. This section imposes a duty on Health and Wellbeing Boards to encourage integrated working between commissioners of NHS, public health and social care services for the advancement of the health and wellbeing of the local population. A Health and Wellbeing Board must provide advice, assistance or other support in order to encourage partnership arrangements such as the developing of agreements to pool budgets or make lead commissioning arrangements under section 75 of the NHS Act.

1197. *Subsection (1)* requires a Health and Wellbeing Board, for the purpose of advancing the health and wellbeing of the people in its area, to encourage persons who arrange for the provision of health or social care services in its area to work in an integrated manner.

1198. *Subsection (2)* requires the Health and Wellbeing Board, in particular, to provide advice, assistance or other support as it thinks appropriate for the purpose of encouraging arrangements under section 75 of the NHS Act. These are arrangements under which, for example, NHS bodies and local authorities agree to exercise specified functions of each other or pool funds.

1199. *Subsection (3)* enables the Health and Wellbeing Board to encourage persons who arrange for the provision of services related to wider determinants of health (health-related services), such as housing, to work closely with the Board; while *subsection (4)* enables the Board to encourage such persons to work closely with commissioners of health and social care services. *Subsection (6)* defines expressions such as "health services", "health-related services" and "social care services" for the purposes of this section.

Section 196 – Other functions of Health and Wellbeing Boards

1200. This section makes provision about the functions of Health and Wellbeing Boards.

1201. *Subsection (1)* requires the functions of CCGs and local authorities of preparing joint strategic needs assessments and joint health and wellbeing strategies to be discharged by a Health and Wellbeing Board.

1202. *Subsection (2)* enables the local authority to delegate any functions exercisable by it to the Health and Wellbeing Board it established. This could, where appropriate, potentially extend to functions relating to wider determinants of health, such as housing, that affect the health and wellbeing of the population.

1203. *Subsection (3)* enables a Health and Wellbeing Board to inform the local authority of its views on whether the authority is discharging its duty to have regard to the joint strategic needs assessment and joint health and wellbeing strategy in discharging functions.

1204. *Subsection (4)* prevents the local authority from delegating its scrutiny function (under section 244 of the NHS Act) to the Health and Wellbeing Board.

Health and Wellbeing Boards: supplementary

Section 197 - Participation of the NHS Commissioning Board

1205. This section provides for participation of the NHS Commissioning Board in a Health and Wellbeing Board's activities. The NHS Commissioning Board will be required to appoint a representative to participate in the preparation of the joint strategic needs assessment and joint health and wellbeing strategy. It will also be required, upon request of the Health and Wellbeing Board, to appoint a representative for the purpose of considering a matter in relation to its local commissioning responsibilities – for example primary medical services commissioning. This could also involve taking part in discussions to improve joint working.

1206. *Subsections (1) and (2)* have the effect that where a Health and Wellbeing Board is preparing an assessment of relevant needs under section 116 of the 2007 Act or a joint health and wellbeing strategy under section 116A of that Act, the NHS Commissioning Board must appoint a representative to participate in the preparation of the assessment or strategy.

1207. *Subsections (3) and (4)* have the effect that where a Health and Wellbeing Board is considering a matter that relates to the NHS Commissioning Board's exercise or proposed exercise of commissioning functions in relation to the area of the local authority that established the Health and Wellbeing Board, then if the Health and Wellbeing Board so requests, the NHS Commissioning Board must appoint a representative to participate in the consideration of that matter.

1208. *Subsection (5)* enables the NHS Commissioning Board to appoint as its representative someone other than a member or employee of its, subject to the agreement of the Health and Wellbeing Board.

1209. *Subsection (6)* defines "commissioning functions" in relation to the NHS Commissioning Board, and it defines "the health service".

Section 198 - Discharge of functions of Health and Wellbeing Boards

1210. This section makes further provision about how the functions of Health and Wellbeing Boards could be discharged across local authority boundaries by enabling them to arrange for their functions to be exercised jointly. It enables the Boards to arrange for a joint sub-committee to advise them.

Section 199 – Supply of information to Health and Wellbeing Boards

1211. This section allows a Health and Wellbeing Board to request the provision of information from certain persons, for example, the Local Healthwatch organisation represented on the Board and the CCGs so represented, for the purpose of enabling or assisting it to perform functions. *Subsection (2)* requires those persons to supply the information. *Subsection (4)* requires that the information requested must relate to a function of the person from whom the information is requested, or a person in respect of whom a function is exercisable by that person. For example, information could be

requested to support the analysis within the joint strategic needs assessment or the development of the joint health and wellbeing strategy. *Subsection (3)* requires the information supplied to be used only for the purpose of enabling or helping the Health and Wellbeing Board to exercise its functions.

Care Trusts

Section 200 – Care Trusts

1212. This section amends section 77 of the NHS Act to make it possible for NHS foundation trusts or CCGs, alongside local authorities, to form Care Trusts, if they decided that this was the best way to meet the needs of their local populations. The section also makes amendments that abolish the direct role of the Secretary of State in the process of forming or removing the designation of a Care Trust.

1213. Care Trusts, provision for which is made in section 77 of the NHS Act, provide opportunities for close integrated working across health and social care services..

1214. *Subsections (1), (11) and (12)* make changes to subsections (1), (10) and (12) of section 77 of the NHS Act to make it possible for foundation trusts and CCGs to be designated as Care Trusts. Current legislation makes no provision for Care Trusts to be formed with any NHS partners other than PCTs and NHS trusts. Provisions in other Parts of this Act for the abolition of PCTs and NHS trusts mean that Care Trusts, in their current form, would cease to exist without these changes. Inclusion of NHS foundation trusts and CCGs in subsection (10) of section 77 ensures that forming the Care Trust will not affect any of their core functions, rights or responsibilities. In addition, new subsection (5D) (inserted by *subsection (7)*) enables the parties to agree to act separately or jointly in respect of duties imposed by section 77 on the NHS body and local authorities.

1215. *Subsections (1), (2) and (5) to (7)* address subsections (1) and (5) of Section 77 of the NHS Act; subsections (2) and (5) in particular insert new subsections (1A), (5A), (5B), (5C) and (5D). These changes end the direct involvement of the Secretary of State in the process of forming a Care Trust or removing a designation as a Care Trust. This includes removing the Secretary of State from any direct involvement in specifying the area of the Care Trust. The decision to form or remove the designation of a Care Trust would be for local bodies and they would make the designation themselves. *Subsection (4)* makes amendments to subsection (4) of section 77 which enables the designated NHS body to also be able to perform the health related functions of the local authority in agreed areas of that local authority, even though it may not exercise NHS functions in that area. In future the area served by the Care Trust will be agreed by the NHS body and local authority in the Care Trust arrangement rather than by Secretary of State and this will be influenced by the scope of their partnership agreement and the areas which the NHS body and local authority cover.

1216. Repealing subsections (2) and (3) of section 77 of the NHS Act removes the requirement to make a joint application to the Secretary of State for designation as a Care Trust. Subsection (1)(c) to (f) provides that the NHS body and the local authority wishing to form a Care Trust must satisfy themselves that the Care Trust arrangement would lead to an improvement in the health or care outcomes for their local populations. Subsection (2) of section 200 inserts new sections (1A) and (1B) into section 77 which require the body and the local authority to publish and consult on their reasoning and the proposed Care Trust governance arrangements. Regulations may prescribe the manner and form of the consultation, when a consultation must commence, how long the consultation period must be and what actions must happen after consultation. This could include publishing the date on which the Care Trust designation would begin (or end in the case that the Care Trust designation was removed) and the names of the bodies involved in the Care Trust.

1217. Subsections (2) and (5) (in particular, new subsections (1B) and (5B)) provide that having decided to form a Care Trust or remove a Care Trust designation, the NHS body and the local authority will have to notify interested parties. The prescribed persons to be notified could include the NHS Commissioning Board, Monitor, the lead elected member of the local authority and the Care Quality Commission. In addition, if local Health and Wellbeing Boards are established, notification would be extended to cover those Boards.

1218. The intention is that the NHS and health related functions of the local authority should be exercised together as far as possible in order to provide or commission integrated services.

1219. *Subsections (13) to (15)* are saving provisions. Subsection (13) ensures that that the requirement to consult (see new subsection (1A)) before being designated as a Care Trust will not apply to Care Trusts that have already gone through the process under the previous legislative requirements. Care Trusts that have already met those requirements will not have to fulfil any additional requirements to enable them to remain as Care Trusts.

1220. Subsections (14) and (15) provide that an NHS trust or PCT which became a Care Trust prior to the commencement of the new provisions but then decided to cancel the arrangement after commencement of this Section, will still need to notify the Secretary of State, who will amend the establishment order to remove the words ‘Care Trust’ from its title. These provisions will remain in force until the point when PCTs and NHS trusts are abolished. This is because the name of a PCT or NHS trust is set out in its establishment order which could only be amended by an order made by the Secretary of State. By repealing subsection (6) of Section 77 the requirement than an NHS body must include the words “Care Trust” in its title or branding is removed.