

**Health & Social Care Bill 2011
House of Lords Committee stage**

Briefing Note 7

Clause 8 (Amendments 60B- 75A) for Monday 14 November 2011

Summary and Recommendations

Clauses 8 and 9 transfer certain NHS public health responsibilities to local government. But because of uncertainty created by Clause 10, which fails to specify services that CCGs must provide for everybody, the dividing line between the two sectors is not defined in the Bill. **This failure to clarify statutory responsibilities obscures government intentions with respect to health service funding and charges, and threatens vital public health functions.**

Responsibilities for a range of services, not all of which have been clearly described or defined, will be split by the Bill across several bodies: CCGs (and NCB), Public Health England and local government (LG). Services affected include immunisation; cancer and cardiovascular disease screening; mental health care; sexual health services; management of drug and alcohol addiction; emergency planning and health protection services; and child health services (5 to 19 years).

In addition to the non exhaustive list of public health services set out by the DoH in Earl Howe's response (see Annex below), Earl Howe has made clear that **some services and facilities provided under section 3(1)(e) might fall to be provided under public health functions. These include "such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as the clinical commissioning group considers are appropriate as part of the health service."**

Lack of clarity in the Bill about these matters makes it impossible to say at this stage which functions will be required of NHS bodies, which will pass to local authorities, and which will become the responsibility of individuals.

We recommend that further clarification be sought with respect to the issues as outlined below.

Background and questions for the committee stage:

The transfer of poorly defined functions and responsibilities from the NHS to local government may have significant legal and constitutional implications as the NHS and LG operate under different regimes.

- Are there any services being transferred to local government which should remain within the NHS (regardless of whether

those services and functions are accompanied by a ring-fenced budget from the NHS)?

- What implications do the different regimes of the NHS and LG have for the delivery of PH functions in terms of financing, accountability, cost recovery and equity?
- Why are the services not on the face of the Bill?
- When and how will the responsibilities and services be defined and by which bodies?
- Is the division of responsibilities for public health sensible, efficient and appropriate and appropriate? What are the implications of the Bill for the responsibility, accountability, monitoring and needs-based resource allocation of these programmes on behalf of the populations?
- How will the geographic area based information for population needs assessment and the provision of health services and monitoring of inequalities be secured?

At present the Bill states that CCGs will have responsibility for commissioning health care for their registered populations (who may come from any part of the country) whilst ensuring access to emergency and urgent care for their local population (however that may be defined). Public health departments within local government will have responsibility for their borough and council based populations. Public Health England is likely to have boundaries that are co-terminous with local authorities. **As such, the delivery of public health programmes will be based on multiple structures, each operating with a different population-base and with CCGs having two different sets of populations to commission services for. Multiple denominators are not just a data and information problem they represent vulnerable people falling through the gaps in the system and put at risk the goal of comprehensive care.**

- How will the different populations currently being suggested in the Bill be reconciled to allow the effective and efficient delivery of key PH programmes and functions such as surveillance, and population-based monitoring, evaluation and trends analysis?
- How will comprehensive integrated care be ensured and how will the government prevent people from falling through the gaps in coverage?

Geographic area based populations are the bedrock of public health and the NHS.

Information for service planning and provision must be informed by geographic area based populations; these data are essential to inform equity in provision of health services and needs assessment and monitoring of inequalities.

- Why are these data and the systems which support the population not included currently as public health LA and CCG functions?

National working groups are examining the optimum division of functions, responsibilities and budgets between PHE, LG and CCGs; and how this division will then be coordinated. This work is intended to contribute to the determination of the resource allocation formula for the ring-fenced PH budget.

- Is there a sound legal and functional basis for the division of responsibilities and functions between PHE, LG and CCGs that will ensure effective, efficient and equitable delivery in five years' time - when PCTs no longer exist and when the market may be in full swing? If not, what needs to change in the Bill?

Earl Howe has made clear that the public health budget in Local authorities will fund the NHS to commission services and that the Sec of state has power to make arrangements with the CB (CCGs) and local authorities for those bodies to exercise his public health function (see Annex below).

- What is the logic behind the separation of responsibilities for public health services and why does public health have a different population basis for resource allocation?
- What is the logic of first separating public health and CCG budgets and then expecting local government to commission public health services from CCGs, especially when their population and resource allocation mechanisms are not the same?
- How will service integration with the NHS be ensured when child health and mental health and sexual health services are transferred to local authorities?

As set out in Briefing 6 greater clarity is needed on charging.

- How will the delineation between health protection and health improvement be defined and what are the implications for charging policies?

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13th November 2011

Appendix

Extract from Annex of letter from Earl Howe to Caroline Lucas 19th October 2011

Questions relating to public health:

Firstly, I wish to highlight the fact there has been widespread support for transferring public health functions to local authorities. Giving this role to local government opens new opportunities for community engagement and to develop holistic solutions to health and wellbeing embracing the full range of local services (for example, health, housing, leisure, planning, transport, employment and social care), underpinned by broad, democratic accountability. Whilst local-authority commissioned services will not be part of the NHS, they will be part of the comprehensive health service which incorporates both public health and NHS functions.

Peter Roderick raised a number of questions in relation to the specific application of section 3(1)(d) and (e) and how this could apply to public health. A number of these questions overlap and I have addressed the questions thematically rather than numerically. The questions are set out at the end of this annex.

Public health functions

In our publication *Healthy Lives, Healthy People "Update and Way Forward"* (July 2011) the Department outlined the proposed commissioning responsibilities for public health including those services we would expect local authorities to provide under new section 2B of the National Health Service Act 2006. The new responsibilities of local authorities would include activity on:

- Tobacco control;
- Alcohol and drug misuse services;
- Obesity and community nutrition initiatives;
- Increasing levels of physical activity in the local population;
- Assessment and lifestyle interventions as part of the NHS Health Check Programme;
- Public mental health services;
- Dental public health services;
- Accidental injury prevention;
- Population level interventions to reduce and prevent birth defects;
- Behavioural and lifestyle campaigns to prevent cancer and long-term conditions, local initiatives on workplace health;
- Supporting, reviewing and challenging delivery of key public health funded and NHS delivered services such as immunization programmes.
- Comprehensive sexual health services;
- Local initiatives to reduce excess deaths as a result of seasonal mortality;

- Promotion of community safety, violence prevention and responses, and
- Local initiatives to tackle social exclusion.

The published list of local initiatives is not exhaustive and there may be additional services provided by local authorities such as children's public health services (ages 5-19).

In addition, new section 6C provides for regulation making powers which enable the Secretary of State to require local authorities to exercise any of the Secretary of State's public health functions or to prescribe steps that a local authority must take in the exercise of its health improvement duties or public health functions. We plan to prescribe that local authorities deliver the following services or steps:

- Appropriate access to sexual health services;
- Steps to be taken to protect the health of the population, in particular, giving the Director of Public Health a duty to ensure there are plans in place to protect the health of the population;
- Ensuring NHS commissioners receive the public health advice they need;
- The National Child Measurement Programme;
- NHS Health Check assessment; and
- Elements of the Healthy Child Programme.

NHS Act 2006 Section 3(1) (d) and (e) and overlap with public health functions.

Section 3 of the National Health Service Act refers to the duties of CCGs to commission certain health services, section 3(1)(d) refers to "such other services or facilities for the care of pregnant women, women who are breastfeeding and young children as the clinical commissioning group considers are appropriate as part of the health service"

Section 3(1)(d)

Peter Roderick asked which services under section 3(1)(d) could be provided under new section 2B and referred specifically to health visiting. We believe our commitment to increase the health visitor workforce by 4,200 by 2015 is best achieved by the NHS commissioning Board initially commissioning health visiting services. However, in the medium term, we remain committed to transferring the commissioning of children's public health services from pregnancy to aged 5 to local authorities. It is likely that elements of the Healthy Child Programme, for which health visitors are responsible for would be prescribed under section 6C regulations, which we have proposed should be subject to the affirmative parliamentary procedure.

We anticipate that there would be no other significant services provided under section 3(1)(d) that would be provided as public health services but there may be a degree of overlap and synergy. That is to say, where a local authority is

providing obesity and nutrition initiatives, they may be providing services to women who are or have recently been pregnant. Services provided under 3(1)(e) could also be provided under section 3(1)(d).

Section 3(1)(e)

A similar question was posed in relation to what services and facilities provided under section 3(1)(e) might fall to be provided under public health functions. Section 3(1)(e) refers to “such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as the clinical commissioning group considers are appropriate as part of the health service.”

Under new section 2A of the National Health Service Act 2006, the Secretary of State has a duty to take such steps as the Secretary of State considers appropriate for the purpose of protecting the public in England from disease. Such steps could include providing other services or facilities for the prevention, diagnosis and treatment of illness in addition to vaccination, immunization and screening services. New section 2B of the National Health Service Act 2006 gives local authorities the duty to take steps as it considers appropriate for improving the health of people in its area. Such steps could include providing services or facilities for the prevention, diagnosis and treatment of illness. There is a degree of overlap between the example steps in sections 2A and 2B and section 3(1)(e).

However, the principal delineation is that where the primary purpose is health protection, the function should be carried out under section 2A and where the primary purpose is health improvement, under section 2B. Close working relationships between the NHS, Public Health England and local authorities will be vital.

The public health budget will fund the NHS to commission certain public health services, which will include immunization programmes, contraceptive services, screening programmes, public health care for those in prison or custody and children’s public health services from pregnancy to age five (including health visiting). Section 7A gives the Secretary of State power to make arrangements with the Commissioning Board, CCGs and local authorities for those bodies to exercise his public health functions. Our broad intention is that where the NHS Commissioning Board or CCGs are exercising functions through section 7A arrangements they should do so in the same way as they exercise their other functions. This should ensure that NHS commissioners are commissioning services in a consistent way regardless of whether they are NHS services or funded from the public health budget.

The NHS will also commission and deliver many more interventions that improve public health from within the NHS budget over and above this. For example, many public health outcomes could not be achieved without the ongoing contribution of the NHS, such as brief interventions in primary and secondary care.

Charging provisions

Clause 47 inserts a new section 186a of the NHS Act 2006, which sets out when the Secretary of State would be able to charge for steps taken in the exercise of his public health protection functions. The Secretary of State may not, however, make charges in respect of the provision of a service to an individual, or the taking of any other step in relation to an individual, if the service or step provided is for the purpose of protecting that individual's health.

New section 186A also provides power for the Secretary of State to make regulations enabling a local authority to make and recover charges in respect of its public health functions. Under section 2B, each local authority has a duty to take steps as it considers appropriate for improving the health of the people in its area. A local authority may also be required by regulations under section 6C to take steps to protect the public in England from disease or other dangers to health. These steps are services which form part of the comprehensive health service provided for in new section 1(1) of the NHS Act 2006 and as such they would be subject to the prohibition on charging in section 1(3) of the Act (that is, that services provided as part of the health service should be free of charge unless legislation provides otherwise).

Local authorities are currently able to provide services under existing powers, some of which could be considered to fall under the new health improvement duty. If a service or other step is considered to be appropriate for improving public health it should be carried out under new section 2B and not under alternative powers. The Department's position is that it should in principle be possible, subject to the affirmative resolution procedure, for a local authority to charge for some services or steps where appropriate, for example, providing training to businesses. This approach is similar to other provisions of the NHS Act 2006 under which charges may be imposed by way of regulations, for example prescription charges under section 172.

Role of Monitor with respect to public health services

Clause 60(4) clarifies that for the purpose of Part 3 of the Bill, "the NHS" means the comprehensive health service continued under section 1(1) of the National Health Service Act 2006, except the part of it that is provided in pursuance of the public health functions (within the meaning of the Act) of the Secretary of State or local authorities. At this time, it is not felt necessary to legislate for Monitor, or any regulator, to have a role with regard to local authority public health services. Our approach is that regulation of sectoral markets should only take place where it is an appropriate and proportionate response to a problem.