

*These notes relate to the Commons Amendments to the Care Bill [HL]  
as brought from the House of Commons on 12th March 2014 [HL Bill 93]*

## **CARE BILL [HL]**

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# **EXPLANATORY NOTES ON COMMONS AMENDMENTS**

### **INTRODUCTION**

1. These Explanatory Notes relate to the Commons amendments to the Care Bill [HL], as brought from the House of Commons on 12th March 2014. These notes have been prepared by the Department of Health in order to assist the reader of the Bill and the Commons amendments, and to help inform debate on the Commons amendments. They do not form part of the Bill and have not been endorsed by Parliament.
2. These Notes, like the Commons amendments themselves, refer to Bill 123, the Bill as first printed for the Commons.
3. These notes need to be read in conjunction with the Commons amendments and the text of the Bill. They are not and are not meant to be a comprehensive description of the effect of the Commons amendments.
4. All Commons amendments were tabled in the name of the Minister.
5. The Notes contain updates to the sections on summary of impact assessment and human rights which are required as a consequence of Commons amendments. A glossary of terms and abbreviations used in these Explanatory Notes is provided at the end of these Notes.

### **COMMENTARY ON COMMONS AMENDMENTS**

#### **Part 1 – Care and Support**

##### **Commons Amendments 1, 12, 13, 15 to 17, 25 and 34 to 36**

6. Commons Amendments 1, 12, 13, 15 to 17, 25 and 34 to 36 would make it easier for the reader to understand the meaning of certain terms used in the Bill.

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**Commons Amendments 2 and 3**

7. Commons Amendment 2 would ensure that regulations setting the financial limit (see clause 17(10)) can specify not only cases where the local authority must not contribute towards the care and support costs of an adult whose resources exceed that limit, but other cases where the local authority may (but does not have to) contribute.
8. Commons Amendment 3 would have a parallel effect in relation to the contribution by the local authority to the costs of support for carers (clause 17(9)).

**Commons Amendment 4**

9. Commons Amendment 4 would clarify that the regulation making power at clause 25 (13), which allows for any otherwise mandatory elements of a care and support plan or a support plan not to be required in prescribed cases, could be used to disapply the requirement for those elements in relation to specified needs or matters.

**Commons Amendment 5**

10. Commons Amendment 5 would allow regulations to specify circumstances where costs to a local authority are not required to be included in a personal budget if the costs are incurred in meeting needs for which the authority does not, or is not permitted to, make a charge. This would mean that where these services are provided to meet eligible needs, they will not count towards the cap on care costs.

**Commons Amendments 6 to 8**

11. Commons Amendment 6 would add a new paragraph to subsection (2) of clause 33 so that regulations could set out that in specified cases or circumstances a person who lacks capacity to request a direct payment must or can be regarded as having capacity to do so. The new paragraph is a mirror image of paragraph (e), which allows regulations to specify cases or circumstances where an adult who no longer lacks capacity to request a direct payment must or can be regarded as lacking the capacity to do so. The effect would be to enable regulations under the Bill, (as is permitted now by regulations currently in force for direct payments), to require or allow local authorities in specified circumstances and subject to conditions not to terminate the making of direct payments for a person whose capacity, or lack of capacity, to request a direct payment is temporary. Commons Amendments 7 and 8 would make minor consequential drafting changes to paragraph (e).

**Commons Amendments 9 and 10**

12. Commons Amendments 9 and 10 would make two clarificatory changes to the provisions in the Bill concerning deferred payment agreements.
13. Clause 34 of the Bill makes provision for two types of deferred payment agreement: the first for people whose care is arranged or provided by the local authority (a deferral of charges); and the second for people who arrange their own care (deferring the repayment of a loan made by the local authority).

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14. Clause 34(7) is intended to apply to both types of agreement so regulations can specify whether part or all of the charges due, or the loan made, can be deferred. It is also intended to allow the regulations to provide a calculation mechanism for ascertaining the amount of the payment which can be deferred. These amendments would ensure that this is achieved in relation to loans.

**Commons Amendment 11**

15. Commons Amendment 11 would remove clause 48 (Provision of “care and support services”) from the Bill. Clause 48 provides that all service providers who provide regulated “social care”, whether or not arranged by the local authority, are to be taken to be exercising a function of a public nature for the purposes of section 6(3)(b) of the Human Rights Act 1998.

**Commons Amendments 14, 20 and 22**

16. Commons Amendment 14 would enable a transition assessment carried out in the case of a child’s carer to be treated as a carer’s assessment when the child concerned becomes 18. The Bill already makes equivalent provision where the child concerned in a child’s needs assessment or a young carer’s assessment turns 18, but due to an oversight does not do so in the case of a child’s carer’s assessment. These amendments would correct that oversight. Amendments 20 and 22 are consequential on Amendment 14.

**Commons Amendments 18, 19, 21, 23, 24 and 26 to 30**

17. Government amendments made in the Lords at Report Stage removed the requirement that transition assessments must be requested by a child, parent or carer, as the case may be. Commons Amendments 18, 19, 21, 23, 24 and 26 to 30 would make consequential amendments to clause 67 (Continuity of services under other legislation), to remove unnecessary references to “the requested assessment” that still remain in the text of the Bill, along with similar oversights.

**Commons Amendment 31**

18. Commons Amendment 31 would remove a proposed new section which was to have been inserted into the Carers and Disabled Children Act 2000. Because the Children and Families Bill was amended to include provisions for young carers that replace those in the Carers and Disabled Children Act 2000, this insertion is no longer necessary.

**Commons Amendments 32, 46**

19. Commons Amendment 32 would add a new clause titled ‘Part 1 appeals’. It would give the Secretary of State the power to make regulations providing for a process through which appeals may be made against decisions taken by a local authority in respect of individuals under Part 1 of the Bill. Amongst other things, the regulations may specify the type of decision that may be appealed and the details of the process that must be followed.
20. The regulations made under that clause would provide for investigations to be carried out into things done or not done by the person or body with power to consider the appeal. This would enable overview of the appeals process itself and would, for example, enable the Secretary of

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State to provide for the involvement of the Local Government Ombudsman in the overall appeal process.

21. Regulations made under the power provided for under Amendment 32 may include provision conferring functions on a statutory body. In order to do so the regulations may need to amend or repeal primary legislation. Commons Amendment 46 would require any such regulations to be made using the affirmative procedure.

**Commons Amendment 33**

22. Clause 78 allows local authorities to delegate the majority of their care and support functions, with some exceptions. Currently functions relating to the making of direct payments are among those exceptions. Amendment 33 to clause 78 would allow a local authority to authorise a third party to exercise on its behalf its functions relating to direct payments.

**Part 2 – Care standards**

*Care Quality Commission*

**Commons Amendment 37**

23. Commons Amendment 37 would insert a new clause which would amend the 2008 Act to ensure individuals in relation to whom the Care Quality Commission (CQC) requires action to be taken can appeal. This is in anticipation of a new registration requirement for providers of health or adult social care services, to be set in secondary legislation, that their directors (or persons of equivalent position) must be fit and proper persons. Where CQC decided to impose a condition on a registered provider requiring removal of an individual director who was not considered to be a fit and proper person to fulfil their role, the new provisions would ensure the individual could appeal against CQC's decision.

**Commons Amendment 38**

24. Commons Amendment 38 would correct an oversight in the drafting, removing a superfluous reference to “local authorities” in the new section 46 to be substituted by clause 89 (Reviews and performance assessments). This amendment would be consequential on a change made at Lords Report which ensured that the CQC must only undertake routine performance assessments of the provision of regulated activities by registered service providers, and not of the commissioning or provision of other adult social care services.

**Part 3 – Health**

*Chapter 2 - Health Research Authority*

**Commons Amendment 39**

25. Commons Amendment 39 would amend clause 108 to remove functions relating to children's social care research from the Health Research Authority's (HRA) remit. Research ethics

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committees established or recognised by the HRA would still be permitted to consider the ethics of children's social care research in the round where proposals cover both (a) children's social care research and (b) health research and/or adult social care research.

***Chapter 4 – Trust Special Administration***

**Commons Amendments 40, 41, 42 and 43**

26. Commons Amendment 41 to clause 118 would require a Trust Special Administrator (TSA) appointed to an NHS trust or foundation trust to consult formally by seeking a written response from other provider trusts and their commissioners affected by the administrator's draft recommendations, and with staff (and their unions) at those other affected trusts. The TSA would also be required to hold at least one meeting with the other affected trusts; and commissioners of those affected trusts would be included in the meeting already required for other commissioners, including the Board, and the CQC (under amendments made in Part 2). At least one meeting to seek responses from staff and their representatives would be required in the case of each affected trust.
27. Commons Amendment 41 would also require an administrator appointed to an NHS trust or foundation trust to consult local authorities and Local Healthwatch organisations. A Trust Special Administrator would be required to consult formally (by seeking a written response and holding at least one meeting) with local authorities in whose area the trust in administration and other provider trusts affected by the administrator's recommendations provide services. The Trust Special Administrator would also have to seek written responses from the Local Healthwatch organisations for those local authorities and invite them to the meeting with local authorities. As a consequence of the Local Healthwatch organisation becoming a statutory consultee in this way, the power of the Secretary of State or Monitor to direct the Trust Special Administrator to consult those organisations would become redundant and the clause would remove this power.
28. Amendment 40 would make the same provision as is already made in clause 118 to extend the requirement for commissioner approval for the recommendations of a TSA (by inserting a new subsection (8) into section 65F of the 2006 Act). The policy intention is to commence the extension following Royal Assent of the Care Bill. The existing provision in clause 118 would apply in relation to as yet un-commenced provisions in section 65F of the Act. This amendment would correct the omission and ensure that the same provision was made in relation to the provisions of section 65F(5) which are currently in force. This extension of commissioner sign-off would apply in relation to TSAs appointed to foundation trusts only.
29. Commons Amendments 42 and 43 are consequential amendments.

#### **New Part 4**

##### **Commons Amendments 44 and 47**

30. Commons Amendment 44 would make provision for the Better Care Fund (integration fund), by amending section 223B of, and inserting a new section 223GA into, the National Health Service Act 2006. The Better Care Fund would ensure that each clinical commissioning group (CCG) ring-fences an amount of funding to be shared with one or more local authorities in a jointly held pooled budget. The fund would be used for purposes of integrating health, health-related and social care services. The size of the fund and its objectives would be set by the Secretary of State in the Mandate to the NHS Commissioning Board (which operates under the name NHS England) under section 13A of the 2006 Act.

The amount to be pooled by each CCG would be determined in a manner specified in the Mandate, or if not specified then determined by the Board as it considered appropriate. The Board would be able to set conditions on the use of the money, including the preparation and agreement of a plan as to how the money is to be spent. Conditions could also relate to the setting and meeting of performance objectives. The Board could withhold or recover payments if conditions were not met and the Mandate could include a requirement for the Board to consult with the Secretary of State or other persons before doing so. The Board must use all these powers in the joint interest of health and social care. .

31. Commons Amendment 47 would be consequential on Amendment 44, enabling the new clause to be commenced by order of the Secretary of State.

##### **Commons Amendment 45, 49 and 50**

32. Commons Amendment 45 to the 2012 Act would make clear that the Health and Social Care Information Centre (HSCIC) could only disseminate information under its general dissemination function for the purposes of the provision of health care or adult social care or for the promotion of health. This would enable data to be made available for a wide range of health and care related purposes - including for the commissioning of those services, for public health or for research relating to health and care provision, for example, the epidemiological research that is needed at the earlier stages of developing new treatments – but not for solely commercial purposes such as for commercial insurance. The amendment would make clear that, in carrying out any of its functions HSCIC must have regard to the need to respect and promote the privacy of those receiving health services and adult social care services in England. HSCIC would also have to have regard, in exercising its functions under the 2012 Act of publishing or otherwise disseminating information, to any advice given to it by the committee that must be appointed by the HRA under paragraph 8(1) of Schedule 7 to the Bill
33. Commons Amendment 49 would provide for the committee of the Health Research Authority (HRA) that must be appointed under paragraph 8(1) of Schedule 7 to the Bill to advise the HRA and the Secretary of State on certain functions under the Health Service (Control of Patient Information) Regulations 2002 made under section 251 of the 2006 Act, to also give

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advice to HSCIC. The advice would supply external scrutiny of HSCIC's exercise of functions conferred in further regulations under section 251, and also any publication or other dissemination of information which identifies an individual or could potentially be used to identify an individual..

34. Commons Amendment 50 would provide power to set out in secondary legislation the specific factors or matters that the committee appointed by HRA under paragraph 8(1) of Schedule 7 must have regard to when advising on releasing patient information or information which identifies or could be used to identify an individual - such as the need to ensure processing must respect and promote patient privacy and that an applicant for access to such information has not breached confidentiality in the past

**Commons Amendment 48**

35. Commons Amendment 48 would remove the "privilege amendment", in accordance with the Commons' sole privilege of dealing with money matters.

**Commons amendments to the Title**

**Commons Amendment 51**

36. Commons Amendment 51 would update the long title of the Bill to cover the integration fund.

**SUMMARY OF IMPACT ASSESSMENTS**

37. Impact assessments covering the Trust Special Administration provisions (clause 118) and the integration fund (new clause) have now been published. The impact of extending the remit of the committee of the Health Research Authority that must be appointed under paragraph 8(1) of Schedule 7 to provide advice to Health and Social Care Information Centre will be considered alongside the development of related secondary legislation.

**COMPATIBILITY WITH THE EUROPEAN CONVENTION OF HUMAN RIGHTS**

38. Commons Amendment 11 would remove clause 48 (Provision of "care and support services") from the Bill. Clause 48 provides that all service providers who provide regulated "social care", whether or not arranged by the local authority, are to be taken to be exercising a function of a public nature for the purposes of section 6(3)(b) of the Human Rights Act 1998. The effect of removing this clause would be that where a provider is providing care and support that is not funded or arranged by the local authority, it would not be taken to be exercising a function of a public nature for the purposes of section 6 of the Human Rights Act 1998.
39. None of the other amendments made in the Commons would affect the assessment that the Bill is compatible with the convention rights.





## **GLOSSARY OF ABBREVIATIONS**

### *Abbreviations used in notes*

| <b>Abbreviation</b> | <b>Meaning</b>  |
|---------------------|---|
| 2006 Act            | National Health Service Act 2006  |
| 2008 Act            | Health and Social Care Act 2008   |
| 2012 Act            | Health and Social Care Act 2012   |
| CCG                 | Clinical commissioning group  |
| CQC                 | Care Quality Commission   |
| ECHR                | European Convention on Human Rights   |
| HSCIC               | Health and Social Care Information Centre   |
| HRA                 | Health Research Authority   |
| NHS England         | The name used by the NHS Commissioning Board established under the Health and Social Care Act 2012. |
| TSA                 | Trust Special Administrator   |

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