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Health and Care Act 2022: Final stages in Parliament

Summary

1 Overview
2 Workforce planning
3 Social care cap
4 Early medical termination of pregnancy
5 Reconfiguration of health services
6 Prohibition of virginity testing and hymenoplasty
7 NHS England and Integrated Care Boards
8 Health Services Safety Investigation Body
9 Other amendments agreed in the Lords

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Contents

Summary **5**

1 Overview **7**

1.1 What does the Health and Care Act do? 7

1.2 What happened in the Bill's final stages? 8

1.3 Response to the Bill becoming an Act 11

1.4 What next? 12

2 Workforce planning **15**

2.1 Background 15

2.2 Consideration in the Lords 15

3 Social care cap **18**

3.1 Background 18

3.2 Consideration in the Lords 19

3.3 Implementation date for the cap 22

4 Early medical termination of pregnancy **23**

4.1 Background 23

4.2 Lords report stage 24

4.3 Commons consideration of Lords amendments 25

5 Reconfiguration of health services **26**

5.1 Background: Secretary of State's decision-making powers 26

5.2 Consideration in the Lords 28

6 Prohibition of virginity testing and hymenoplasty **31**

7 NHS England and Integrated Care Boards **33**

7.1 Integrated Care Board membership 33

7.2 Objectives relating to outcomes for cancer patients 35

7.3 Duties to reduce health inequalities 35

7.4 Duties relating to services for children and young people 36
7.5 Duties relating to research 36
7.6 Duties relating to climate change 37
7.7 Palliative care and dispute resolution 38

8 Health Services Safety Investigation Body 39

9 Other amendments agreed in the Lords 40

9.1 Licensing of non-surgical cosmetic procedures to regulate safety 40
9.2 Storage of gametes and embryos 41
9.3 Mandatory training for health and social care professionals on learning disability and autism 42
9.4 Preventing the NHS purchasing goods and services involving slave labour or genocide 43
9.5 Consent for organ transplantation when travelling abroad 44
9.6 Mental health parity and spending 45
9.7 Information sharing in child safeguarding 46
9.8 Carers and safe discharge from hospital 47
9.9 Information about company payments to people in the health sector 48
9.10 Procurement and provider selection 49
9.11 Medicine Information Systems 50
9.12 Transferring functions of arm's length bodies 51
9.13 Capital spending limits for NHS foundation trusts 52
9.14 Restrictions on advertising foods high in fat, salt or sugar 53

Summary

The Health and Care Act 2022 received Royal Assent on 28 April 2022. Changes were made to the Bill as it progressed through Parliament, including significant amendments introduced in the House of Lords between December 2021 and March 2022. Amendments were also made during the process known as 'ping-pong' between the Lords and Commons.

This briefing looks at what happened to the Health and Care Act in its final stages in Parliament – focussing on the issues debated and amendments made.

What happened in the Bill's final stages?

The most substantive debates in the final stage of the Bill related to:

- Social care reform
- Workforce planning
- Early medical termination of pregnancy
- The Secretary of State's powers to intervene in decisions about local changes to health services

Several Lords amendments relating to a new 'cap' on social care costs and on workforce planning were introduced despite Government opposition. These changes were removed on the Bill's final day of consideration.

There were attempts to remove the Secretary of State's new powers over the process to make local changes to NHS services (known as reconfigurations). The Lords agreed an amendment to this effect which was later overturned by the Government in the Commons. The Government made some concessions to further define when and how these powers could be used.

A 'free vote' was held on provisions relating to early medical termination of pregnancy. Parliament decided to extend provisions for home use introduced during the coronavirus pandemic.

NHS structure and services

The Act introduces significant reforms to the way the NHS in England is organised. It provides for Integrated Care Boards (ICBs) to take on statutory responsibilities for NHS services from 1 July 2022. Several Government

amendments related to the duties of NHS England, ICBs and other NHS organisations. These included changes to strengthen their duties in relation to the reduction of health inequalities.

Other changes made in the Lords

Other new areas were introduced or updated during the Lord stages, including new powers to ban hymenoplasty (also known as hymen reconstruction), after amendments to prohibit virginity testing were introduced during the Commons stages.

Amendments to other parts of the legislation included changes to the rules on the procurement of NHS services, on advertising less healthy food and drinks, and on the protection of evidence gathered by the Health Services Safety Investigations Body (HSSIB).

Entirely new sections were also added to the Bill in the Lords, reflecting concerns about a range of issues, including the regulation of cosmetic treatments, overseas organ transplantation, and the need for mandatory training for health and social care professionals on learning disability and autism.

1 Overview

1.1 What does the Health and Care Act do?

The Government has described the Act as the most significant reforms to the NHS in a decade – the legislation also covers other important areas including social care reform and public health.

The Act builds on proposals for legislative change to the structure of the NHS set out by NHS England, including in its Long Term Plan (2019), with further changes introduced by the Government in response to the pandemic.[1]

Under the Act, every part of England will be covered by a statutory Integrated Care Board (ICB) and Integrated Care Partnership (ICP), in each of the 42 existing Integrated Care Systems (ICS) in England, bringing together NHS, local government and wider system partners to organise health and care services.

The Act abolishes Clinical Commissioning Groups (CCGs), with ICBs taking on responsibility for most NHS services from July 2022, with a greater focus on closer working between NHS bodies. ICPs aim to promote integration between the NHS, local government, and other providers by producing an integrated care strategy for their area.[2]

The Act formally merges NHS England and NHS Improvement. The measures relating to national and ICS structures were largely unchanged during the passage of the Bill, although a number of amendments were made to the duties of ICBs.

More controversially, the Act gives the Secretary of State for Health and Social Care greater powers to direct NHS England, and to decide how health services are organised. It gives the Secretary of State powers to transfer functions between some of the 'arm's length bodies' that lead, support and regulate healthcare services in England, and to intervene in proposed changes to the way health services are delivered.

The Bill as introduced did not include wider reforms to the system for funding social care. A Government amendment introduced at report stage in the

1 See also the Government white paper Integration and Innovation: working together to improve health and social care for all, and NHS England's Legislating for Integrated Care Systems: five recommendations to Government and Parliament, both published in February 2021.

2 Guidance for Integrated Care Systems can be found on the NHS England website. See also the King's Fund, Integrated care systems explained, August 2022

Commons provides that means-tested financial support provided by a local authority towards an individual's personal care costs will not count towards the new £86,000 cap on care costs. There have been concerns this will make the care cap less generous to those with lower assets.

The Act also makes changes to procurement and competition rules relating to health services.

The Act contains many other measures, including: setting mandatory information standards for data across the health and adult social care system; establishing the Health Services Safety Investigations Board as a statutory body; and restricting the advertising of less healthy food and drinks.

1.2 What happened in the Bill's final stages?

The most substantive debates in the final stage of the Bill's passage through Parliament related to:

- The social care cap
- Workforce planning and assessment
- Early medical termination of pregnancy
- The Secretary of State's powers to intervene in decisions about local changes to health services

Some of the Lords amendments relating to the cap on social care costs and on workforce planning were removed during the final day of the Bill's consideration after being overturned in the Commons.

Attempts were made to remove the Secretary of State's new powers over reconfigurations. The Lords agreed an amendment to this effect which was subsequently overturned by the government in the Commons. The Government subsequently made concessions to further delineate when and how these powers could be used.

A free vote was held on provisions relating to early medical termination of pregnancy, with Parliament deciding to extend provisions for home use previously introduced during the pandemic.

New sections added in the Lords

Other new areas were introduced or updated during the Lord stages, including:

- introducing mandatory training for health and social care professionals on learning disability and autism

- new powers to ban hymenoplasty (also known as hymen reconstruction), after amendments to prohibit virginity testing had previously been introduced during Commons stages
- requiring the publication of information about company payments to people working in the health sector
- requirements relating to the storage of gametes and embryos
- licensing of non-surgical cosmetic procedures, to regulate safety
- measures on procurement to prevent the NHS using goods and services involving slave labour or genocide
- measures to prevent 'organ tourism' by ensuring that where individuals travel abroad to receive an organ donation, there must be informed consent from anyone donating an organ
- a commitment to review dispute resolution in children's palliative care
- to explicitly confirm the parity of mental and physical health, to require ICBs to include an individual with expertise in mental illness, and to introduce specific reporting requirements around spending allocated to mental health services.

New duties for the NHS

Several Government amendments related to the duties of NHS England, Integrated Care Boards (ICBs) and other NHS organisations. These included:

- objectives for the outcomes for cancer patients
- duties aimed at reducing health inequalities
- duties in relation to research and climate change
- better information sharing on child safeguarding, requiring ICBs to set out proposed steps to address the particular needs of victims of abuse.

Further changes were made in the Lords to the duties of ICBs to manage potential conflicts of interest, and in relation to ICB membership. During the Lords committee stage a commitment was also made to remove the proposed blanket exclusion of local authority councillors from sitting on ICBs (the Government said this would be done through guidance rather than legislation).[3]

The Act establishes the Health Services Safety Investigations Body (HSSIB) as an independent statutory body. The Government accepted a Lords

[3] HL Deb 9 February 2022, cc1650-1

amendment removing a provision which allowed coroners to require protected material from HSSIB to be disclosed.

Other Lords changes to the Bill included:

- increasing powers of Scottish ministers over new 'medicine information systems'
- changes to capital spending limits for NHS foundation trusts

Rejected or withdrawn amendments

Several non-government amendments in the Lords were defeated or withdrawn after being disagreed by the Commons.

In particular, Lords amendments 85 to 88 would have introduced a statutory scheme to regulate the prices and profits of tobacco manufacturers and importers. These amendments were opposed by the Government and rejected in the Commons, on division, on 30 March 2022.[4] A further amendment, in the name of Lord Crisp (crossbench), required consultation on implementing the tobacco control plan, and was defeated on division in the Lords on 5 April 2022.[5]

At report stage in the Lords a vote rejected an amendment, in the name of Lord Forsyth (Conservative), to require the Government to introduce legislation to allow terminally ill, mentally competent adults to legally end their own lives with medical assistance.[6]

Some areas of the Bill remained largely unchanged, including provisions relating to:

- the NHS payment scheme
- enabling the regulation of healthcare professions to be reformed through secondary rather than primary legislation

Further reading

Background on changes to the Bill during the Commons committee and report stages can be found in the following briefing papers:

- Commons Library: Health and Care Bill: Committee stage report.
- Lords Library: Health and Care Bill.

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4 HC Deb 30 March 2022, cc894-7. It was proposed that the scheme provided for by Lords amendments 85 to 88 could be used to create a 'polluter pays' fund from tobacco company profits. What was termed a 'Smoke Free Fund' would be used to invest in measures such as public education campaigns and stop smoking services.

5 HL Deb 5 April 2022, c2042

6 HL Deb 16 March 2022, c355, Division on Amendment 170 (Content 145, Not Content 179)

- A summary of key divisions and topics of debate during the Lords stages of the Bill is available on the UK Parliament website.

The Commons Library published a briefing ahead of the Health and Care Bill's Second Reading in the Commons, in July 2021: Health and Care Bill 2021-22.

1.3 Response to the Bill becoming an Act

The Government said the Bill's Royal Assent marked a milestone in the recovery from the pandemic and the reform of how health and care services work together. A Department of Health and Social Care press release said the legislation will ensure the NHS can tackle growing backlogs and people can benefit from more joined-up care:

> It marks an important step in the government's ambitious health and care agenda, setting up systems and structures to reform how health and adult social care work together, tackle long waiting lists built up during the pandemic, and address some of the long-term challenges faced by the country including a growing and ageing population, chronic conditions and inequalities in health outcomes.[7]

Amanda Pritchard, NHS England Chief Executive, said the reforms would "help deliver for patients and their families":

> The COVID-19 pandemic has shown what can be achieved when we work together across NHS teams, organisations and systems with our partners in the care sector and beyond, and these reforms will help us to deliver for patients and their families. As the NHS works flat out to recover services and address the COVID-19 backlogs that have inevitably built up during the pandemic, these reforms will accelerate the changes set out in the NHS Long Term Plan that are already giving people greater choice, better support and more joined up care when they need it.[8]

There is widespread support among NHS stakeholders for the parts of the Act that facilitate collaboration and partnership working at a local level.

NHS Providers said they were pleased to have secured safeguards in relation to capital spending limits for foundation trusts and on the reconfiguration of local health services. However, many organisations in the health and care sector highlighted the missed opportunity to introduce a robust duty for long-term workforce planning.[9]

Cllr James Jamieson, Local Government Association Chairman, said:

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7 Gov.uk, Health and Care Bill granted Royal Assent in milestone for healthcare recovery and reform, 28 April 2022

8 See above.

9 See for example, NHS Providers, Much to welcome in new Health and Care Act but lack of NHS workforce planning a major, missed opportunity, 28 April 2022

> The LGA supports the clear focus on improving community health and wellbeing through greater integration between the NHS and local government in the Health and Care Act. The flexible and enabling nature of the legislation is positive recognition that systems are best placed to make their own arrangements for joining up services and setting their own strategies for improving community health, are we are glad to see this bill supporting local areas making their own decisions.
>
> The LGA has worked closely with the government to ensure that local decision-making and a strong role for local authorities are key features of this legislation. We are also pleased that the government has listened to and acted on the LGA proposals that the Secretary of State's increased powers must be used in consultation with local government and relevant, local NHS organisations.[10]

On the final day of consideration of the Bill in the Commons, Labour's frontbench spokesperson Karin Smyth said the legislation had been significantly improved. She said it delivers changes to Health and Social Care Act 2012 that the NHS had called for, with other issues addressed by ministerial assurances and "many valuable new clauses have been added." However, she noted two substantial issues, on workforce and the care cap, where there had been "very little engagement from the Government". She said that on these two matters, the Opposition would "speak for the stakeholders, experts and Members from all parties, who are united in opposing the Government's proposals."[11]

1.4 What next?

Implementation and Integrated Care Board regulations

The commencement clause of the Act provide for Part 7, covering 'general provisions', to come into force on the day of Royal Assent, ie 28 April 2022.

These general provisions deal with consequential amendments, regulations, extent, commencement and the Act's title. Most of the remaining provisions come into force "on the day or days specified by the Secretary of State in regulations".

The first implementing regulations published related to NHS England and Integrated Care Boards (ICBs). The Integrated Care Boards (Establishment) Order 2022 established 42 ICBs with effect from 1 July 2022. See also:

- The Health and Care Act 2022 (Commencement No. 1) Regulations 2022

10 Gov.uk, Health and Care Bill granted Royal Assent in milestone for healthcare recovery and reform, 28 April 2022

11 HC Deb 25 April 2022, c527

- The National Health Service (Integrated Care Boards: Responsibilities) Regulations 2022
- The National Health Service (Integrated Care Boards: Description of NHS Primary Medical Services) Regulations 2022
- The National Health Service (Areas of Integrated Care Boards: Appointed Day) Regulations 2022
- National Health Service (Integrated Care Boards: Exceptions to Core Responsibility) Regulations 2022
- The Integrated Care Boards (Nomination of Ordinary Members) Regulations 2022

Next steps for health and care reform

Integrated Care Boards (ICBs) took up their formal role in managing NHS services on1 July 2022, in each of the 42 existing Integrated Care Systems (ICS) in England.

The NHS Confederation note that the statutory guidance, non-legislative policy set by NHS England and the regulatory framework developed by the national regulators will have significant implications on how ICBs work alongside others parts of the health cand care system from July onwards.[12]

The white paper, Health and social care integration: joining up care for people, places and populations, published in February 2022 set out further non-legislative approaches to joint working at the local 'place-based' level. This followed the People at the Heart of Care white paper in December 2021, which set out a 10-year strategy for social care.

NHS England's Delivery plan for tackling the COVID-19 backlog of elective care, published in February 2022, outlines NHS targets to tackle waiting lists, and how additional funding of £8 billion a year will support this.

In June 2022, the Government published Data saves lives: reshaping health and social care with data. This final version of the strategy detailed the Government's plans to develop how data is used in health and care in England, while maintaining privacy and ethical standards.

The first Women's Health Strategy for England was published in July 2022. Government plans to tackle health disparities were due to be published later in 2022, although it appears a final decision on whether to produce a white paper has not been made.[13]

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12 See also: the Local Government Association, Get in on the Act: Health and Care Act 2022 | Local Government Association, May 2022

13 BMJ, Health inequalities: Government must not abandon white paper, health leaders urge, 30 September 2022

In April 2022, the Government published a 'discussion paper' to support its commitment to develop a new cross-government, 10-year plan for mental health and wellbeing for England.[14]

In July 2022 the Health and Social Care Committee launched an inquiry to consider how Integrated Care Systems (ICSs) will deliver joined up health and care services to meet the needs of local populations.[15]

Launching a National Audit Office (NAO) 'value for money' report on ICSs in October 2022, the head of the NAO said that "The new model of integrated health and social care services is being implemented with broad support, but at a time of extreme pressure on both services."[16] The NAO report noted that the Department of Health and Social Care has started a programme of work to assess the benefits of the Health and Care Act 2022 and commissioned research in May 2022 to assess the benefits of moving to ICSs.[17]

14 Gov.uk. Mental health and wellbeing plan: discussion paper and call for evidence [consultation now closed], 12 April 2022

15 Health and Social Care Committee, Integrated Care Systems: autonomy and accountability inquiry webpage

16 NAO press release, Introducing Integrated Care Systems: joining up local services to improve health outcomes, 14 October 2022

17 See above.

2 Workforce planning

2.1 Background

The Bill, as introduced, included a duty on the Secretary of State to report at least every five years on the system for assessing and meeting workforce needs. The clause did not require projections for future workforce demand and supply.[18]

After the Bill was introduced, a number of organisations, including the Health and Social Care Committee, the Health Foundation, Nuffield Trust and the King's Fund called for it to mandate the regular publication of independently verified projections of future demand and supply of the health and social care workforce in England.

There were several attempts to amend the workforce provisions of the Bill. In the Commons:

- At committee stage, Chris Skidmore MP introduced amendment 94 to clause 33. This would have required two-year assessments of current and future workforce numbers needed to deliver care to the population in England. These assessments would be based on economic projections made by the Office for Budget Responsibility, projected demographic changes, the prevalence of different health conditions, and likely impact of technology. The amendment was withdrawn following debate.[19]
- At report stage, Jeremy Hunt MP tabled a similar amendment.[20] It was defeated by 280 votes to 219.[21]

2.2 Consideration in the Lords

At report stage in the Lords, Baroness Cumberlege (Conservative) introduced amendment 80 on workforce planning. Along similar lines to the previous amendments in the Commons, it required the Government to publish independently verified assessments every two years of current and future workforce numbers required to deliver care in England. The amendment

18 For further information, see the Library briefing on the Bill as introduced (July 2021)
19 House of Commons Library, Health and Care Bill: Committee Stage (November, 2021)
20 Amendment 10, Health and Care Bill, As Amended (Amendment paper), 22 November 2021
21 HC Deb 23 November 2021, c280. See also Health and Care Bill, As Amended (Report stage decisions), 23 November 2021

would also require the report to take into account economic projections made by the Office for Budget Responsibility and NHS England. Health Education England would be required to assist in the preparation of the report.[22] Peers voted 171 in favour of the amendment and 119 against.[23] The amendment was also supported by 100 health and care organisations. The Royal College of Physicians concluded that "Without it, the bill will fail to address the biggest challenge facing the NHS and social care – staffing shortages and pressures."[24]

On 30 March 2022, the Commons voted to disagree with the amendment.[25] In his contribution, the Minister, Edward Argar, said that while he recognised the strength of feeling behind the amendment, the Government was already committed to improving workforce planning and increasing the number of staff working in the NHS.[26]

On 5 April 2022, the Lords agreed an amendment requiring the Secretary of State to publish workforce projections every three years.[27] The Commons rejected the amendment on division.[28]

On the final day of consideration in the Lords on 26 April 2022. The Minister argued the Government's view that the amendment was unnecessary as the Bill already placed a duty on the Secretary of State to report on workforce systems. He said the Government's report would be in addition to wider work to improve workforce supply and planning, including the Health Education England strategic framework (known as Framework 15) and NHS England's long-term workforce strategy.[29] After lengthy debate on the workforce amendment, the Lords decided not to push the matter back to the Commons.

The NHS Confederation said it was disappointed the amendment setting a duty for more regular, independent workforce planning across health and social care was unsuccessful. They described it as "a missed opportunity to take stronger action to address chronic staffing shortages across the health and social care sector."[30]

In July 2021, the Department commissioned Health Education England (HEE) to review long-term trends for the health and regulated social care workforce and to update the existing long-term strategic framework, 'Framework-15'. In January 2022, the Department of Health and Social Care commissioned NHS

22 Health and Care Bill, Explanatory Notes on Lords Amendments, HL Bill 293-EN
23 HL Deb 3 March 2022, c992
24 Royal College of Physicians, Strength in Numbers - stronger workforce planning in the health and care bill (February 2022)
25 HC Deb 30 March 2022, c928. Vote on Government motion to disagree Lords amendment (Ayes 249, Noes 167).
26 See above, c902
27 HL Deb 5 April 2022, c2002
28 HC Deb 25 April 2022, c539
29 HL Deb 26 April 2022, c219
30 NHS Confederation, 28 April 2022

England to develop a long-term workforce plan to supplement the NHS People Plan.[31]

Further background can be found in the Health and Social Care Committee report Workforce: recruitment, training and retention in health and social care, published on 25 July 2022.[32]

[31] PQ17146, NHS staff, 20 June 2022

[32] Health and Social Care Committee, Workforce: recruitment, training and retention in health and social care, 25 July 2022, HC 115 2022-23

3 Social care cap

3.1 Background

In September 2021, the Government published plans to reform adult social care in England (PDF).[33] As part of the reforms, from October 2023 the Government plans to introduce a new £86,000 cap on the amount anyone in England will have to spend on their personal care over their lifetime.

Press reports in October 2022 suggested the Government was considering delaying implementation of the cap for at least a year. However, at the time of writing this had not been confirmed.[34]

The legislative framework for a cap on care costs is provided by the Care Act 2014 but the relevant provisions have not been brought into force. Under the framework as originally legislated for in the 2014 Act, where a local authority contributes towards the cost of meeting a person's eligible social care needs, this spending would count towards the cap (in addition to any contribution made by the individual).[35]

However, in November 2021 the Government announced it would amend the Care Act so that only an individual's contribution towards their eligible personal care costs will count towards the cap (and not any contribution from the local authority).[36]

On 18 November 2021, the Government tabled a new clause to the Health and Care Bill for consideration on report (PDF) in the Commons providing for this change to the Care Act.[37] On 22 November 2021, the new clause was approved by the Commons following a division.[38] An overview of the debate during Commons report stage is provided in section 2.2.1 of the Lords Library Briefing: Health and Care Bill.[39]

The Government estimates the change will save around £900 million a year from 2027/28 (the point when the additional cost to the state of the cap on

33 HM Government, Build Back Better: Our plan for health and social care, CP 506, September 2021

34 Cap on care costs: government reportedly planning delay of a year, Community Care, 19 October 2022.

35 Care Act 2014, section 15

36 HCWS399, 17 November 2021; HM Government, Adult social care charging reform: further details, 17 November 2021

37 Health and Care Bill Notices of Amendments as at 19 November 2019 (PDF), NC49, pp9-11

38 HC Deb 22 November 2021, cc108-156

39 Health and Care Bill, Lords Library Briefing Paper, 2 December 2021

care costs will stabilise).[40] It has also argued the change makes the proposed reforms fairer by ensuring two people contributing the same amount towards their care each week will reach the cap at the same time.[41]

The change has proved controversial among stakeholders, who highlight it will most affect those with low to moderate levels of wealth (ie, people who are eligible for means-tested local authority funding based on their level of assets). It has also been suggested the change is a particular issue for those in the north of England and in the midlands, where wealth tends to be lower.[42]

It was also an area of considerable disagreement between the Commons and the Lords during proceedings on the Bill, as detailed below.

Further information on the Government's proposals for adult social care reform, including its proposed change to the Care Act framework and the reaction to it, is in the Library briefing: Proposed reforms to adult social care (including cap on care costs).[43]

3.2 Consideration in the Lords

Lords committee stage

Several amendments to the clause on the cap on care costs (clause 140 of the Bill as introduced to the Lords), including Government technical amendments, were considered during the Bill's committee stage in the Lords. None of the amendments were agreed.

Lord Kamall, then Parliamentary Under-Secretary at the Department of Health and Social Care, agreed not to press the Government amendments to a vote and instead to return to the matter at report stage following further discussions. The unamended clause was agreed.[44]

Lords report stage

On report in the Lords, the Government moved technical amendments (amendments 128-140) to the clause on the cap on care costs (clause 155 of the Bill at Lords report stage).

The Minister, Lord Kamall, said the amendments were "crucial to make the adult social care charging reforms work as intended." Among other things,

40 DHSC, Adult social care charging reform: analysis, 19 November 2021

41 DHSC, Adult social care charging reform: impact assessment, January 2022, para 40; see also DHSC, Operational guidance to implement a lifetime cap on care costs, 14 March 2022

42 IFS, Does the cap fit? Analysing the government's proposed amendment to the English social care charging system (PDF), February 2022, p6

43 Proposed reforms to adult social care (including cap on care costs), Commons Library Briefing Paper CBP-9315, 27 April 2022

44 HL Deb 31 January 2021, cc735-753

they provided for 'trailblazer' local authorities to implement the reforms ahead of national rollout.

He explained:

> Without these amendments, some costs which individuals have incurred will not meter towards the cap when they should do so. Currently, individuals eligible for funded support who have not had a timely needs assessment may incur costs in getting their needs met in the interim. This applies whatever system of charging we come up with. The costs incurred during periods of delay currently do not count towards the cap, and my amendments fix this. We came across this issue when we were looking back at previous Bills and unintended consequences.
>
> I have also tabled an amendment to clarify the circumstances in which an independent personal budget must be provided by a local authority and what information those documents must include. We want these to be forward-looking documents, personal to the care user. To support this and to simplify the metering process, we are also removing the link between these documents and what meters.
>
> Finally, as set out in the recent impact assessment, our charging reform implementation plan includes a small number of trailblazer local authorities that will implement charging reform earlier than others. I have tabled Amendment 187 to allow these trailblazer local authorities to begin implementing the reforms before others. For these reasons, I ask that noble Lords support my amendments.[45]

The technical amendments to clause 155 were agreed without a vote.[46]

Amendment 141 was then moved by Baroness Wheeler (Labour) to remove the whole of clause 155 from the Bill – ie, to remove the Government's proposed change to the Care Act framework.

She argued the Care Act framework reflected a "carefully crafted…cross-party agreement" and that clause 155 was "a last-minute, hastily scraped together, ill-though-out mishmash…" The amendment, she said, would "ask the Commons to think again about how it implements the care cap" and "presents a key opportunity for fundamental reconsideration of the government's proposals."[47]

Lord Kamall said basing progress towards the cap on both individual and local authority contributions was "unfair" and "considered unaffordable." He also said previous proposals for reform hadn't been implemented because of affordability.[48]

45 HL Deb 7 March 2022, c1177
46 HL Deb 7 March 2022, cc1180-1182
47 HL Deb 7 March 2022, cc1169-1171
48 HL Deb 7 March 2022, cc1177-1179

The amendment was agreed following a division and clause 155 was removed from the Bill.[49]

Consideration of Lords amendments

On 30 March 2022, the Commons re-inserted the proposed change to the Care Act framework into the Bill. It did so by agreeing a Government motion disagreeing with the Lords amendment removing clause 155 The House also agreed Government technical amendments to the clause introduced at report stage in the Lords.[50]

The then Health Minister, Edward Argar, said the Government respected and recognised the "strong views on this issue across the House". He reiterated, however, that the Government believed "the fairest version of the cap would be based on what people contribute towards their care, rather than our counting local authority contributions as well."[51]

The Shadow Care Minister, Karin Smyth, said the introduction of the new clause at report stage in the Commons was "parliamentary sharp practice of the highest order, designed to minimise scrutiny and stifle criticism." The clause, she added, "should never have been in the Bill" and has "never been properly considered and cannot be today." She also reiterated concerns the change would affect those with fewer assets the most.[52]

Lords consideration on 5 April 2022

On 5 April 2022, the Lords insisted on their amendment removing clause 155 from the Bill. An amendment was also agreed giving the Secretary of State the power to make regulations regarding how people progress towards the cap on care costs.

The amendment provided:

- The regulations must ensure costs incurred by a local authority in meeting a person's eligible needs are included.
- The regulations may not be made unless local authority pilots have been evaluated and the Secretary of State has published a further general impact assessment "covering distributional regional analysis, regional eligibility, and the effect of the care cap on disabled adults under 40."
- The regulations must ensure that no charges are imposed on any adult aged under 40 with a disability.[53]

49 HL Deb 7 March 2022, cc1183-1185
50 HC Deb 30 March 2022, cc939-953 (Lords amendment 80)
51 HC Deb 30 March 2022, c939
52 HC Deb 30 March 2022, c942
53 HL Deb 5 April 2022, cc1985-2002 & cc2035-2039 (motion G1)

Commons consideration on 25 April 2022

On 25 April 2022, the Commons disagreed with the Lords amendments (ie, the proposed change to the Care Act framework was re-inserted into the Bill along with the previously agreed technical amendments).[54]

The Health Minister, Edward Argar, suggested the proposal that people under the age of 40 should receive free personal care was unfair:

> If regulations were made using this power, they would result in anyone entering the care system under the age of 40 receiving free personal care up to that age. As local authority contributions would count towards the cap under these changes, a 35-year-old with average care costs would reach the cap and not have to pay anything towards the cost of their care, yet a person who enters care the day after their 40th birthday would need to contribute towards the £86,000 cap over their lifetime. We believe this is unfair.[55]

On 26 April 2022, the Lords voted not to insist on its amendment and thus agreed to the Bill, including the clause amending the Care Act framework.[56]

The clause is now **section 166** of the Health and Care Act 2022.[57]

3.3 Implementation date for the cap

During Lords report stage, an amendment was agreed requiring all provisions on the cap on care costs in the Care Act 2014 to be brought into force by 1 April 2023. Supporters of the amendment said this would ensure there was no delay in implementing the cap.[58]

On 30 March 2022, the Commons agreed a Government motion to disagree with the Lords amendment. The Health Minister, Edward Argar, argued it was "not in the interests of good government to be forced to implement reform of this complexity and scale through a deadline set in primary legislation."[59]

On 5 April 2022, the Lords agreed not to insist on its amendment.[60]

54 HC Deb 25 April 2022, cc525-546

55 HC Deb 25 April 2022, c526. At both committee stage and report stage in the Lords, amendments were tabled providing for a zero cap for people requiring social care support at or under the age of 40. On both occasions the amendments were not moved.

56 HL Deb 26 April 2022, cc219-243 (motion D)

57 Health and Care Act 2022, section 166

58 HL Deb 7 March 2022, cc1169-1188 (amendment 144A)

59 HC Deb 30 March 2022, cc937-938 (Government motion to disagree with Lords amendment 81)

60 HL Deb 5 April 2022, cc1986-1987 & 2039 (motion H)

4 Early medical termination of pregnancy

Early medical abortion did not initially form part of the Health and Care Bill. However, following the Government's decision in February 2022 to return to the pre-Covid arrangements for early medical abortion by the end of August 2022, Baroness Sugg (Conservative) tabled an amendment to maintain the existing provisions, introduced during the pandemic, for at-home early medical abortion following a telephone or video consultation with a clinician. A wide range of views on the matter were expressed during debates, with free votes in the Commons and Lords to make early medical abortion via telemedicine an ongoing option in England (where the pregnancy has not exceeded nine weeks and six days).[61]

4.1 Background

Abortion is a medical intervention to end a pregnancy. A medical abortion involves taking two different medicines, usually one or two days apart. It is defined as an "early" medical abortion if the pregnancy has not exceeded nine weeks and six days.

The pre-pandemic arrangements in England for early medical abortion involved taking the first tablet (mifepristone) at a hospital or clinic, while the second tablet (misoprostol) could typically be taken at home. Further information is provided on the NHS website.[62]

To ensure access to early medical abortion during the pandemic, and to reduce the risk of Covid-19 transmission, two temporary measures were approved by the Health Secretary on 30 March 2022.[63] These allowed both tablets for early medical abortion to be taken at home, without the need to attend a hospital or clinic first. The same medical consultation requirements remained but could be provided via a video link, over the telephone or by other electronic means.

The measures also allowed doctors to prescribe both tablets from their own homes, rather than from a hospital or clinic. The temporary measure was initially scheduled to expire on 30 March 2022 or when the Coronavirus Act 2020 provisions ended, whichever was earlier.

61 HC Deb 30 March 2022, cc898 - 900

62 NHS, Abortion: Overview, 24 April 2020

63 DHSC, Temporary approval of home use for both stages of early medical abortion, 30 March 2020

The temporary measures were also implemented in Wales and Scotland by their respective governments.[64]

From November 2020 to February 2021, the Department of Health and Social Care (DHSC) held a public consultation on whether to make the home use of both pills for early medical abortion in England a permanent option.[65] The Welsh Government held a similar consultation and so did the Scottish Government.[66]

In late February 2022, the Government decided the pre-Covid provision for early medial abortion in England should be re-instated. . It said the success of the Covid-19 vaccine and booster programmes meant England was "now in a position to remove the temporary measures".[67]

To transition back to pre-Covid arrangements, the UK Government extended the temporary measures in England by six months. The Welsh Government, in contrast, made the temporary arrangements permanent in Wales, allowing both tablets for early medical abortion, up to 10 weeks' gestation, to be taken at home.[68]

4.2 Lords report stage

Early medical abortion did not initially form part of the Health and Care Bill. Following the Government's decision to return to the pre-Covid arrangements for early medical abortion by the end of August 2022, Baroness Sugg (Conservative) tabled amendment 183 to the Health and Care Bill during its report stage.

Its purpose was to amend the Abortion Act 1967 to incorporate the temporary measures to "maintain the existing provision of at-home early medical abortion following a telephone or video consultation with a clinician".[69] A wide range of views on the matter were expressed during the debate in the Lords. The Lords subsequently voted in favour of the amendment following a 'free vote' (Content 75, Not Content 35).[70]

64 Letter from the Chief Medical Officer (Scotland), Abortion – Covid-19 – Approval For Mifepristone To Be Taken At Home And Other Contingency Measures (PDF), 31 March 2020; Welsh Government, Legislation: Temporary approval of home use for both stages of early medical abortion, 1 April 2020

65 Department of Health and Social Care, Home use of both pills for early medical abortion, 26 November 2020

66 Welsh Government, Termination of pregnancy arrangements in Wales, 1 December 2021; Scottish Government, Early medical abortion at home: consultation, 30 September 2021

67 Statement UIN HCWS629, Health Update, Statement made on 24 February 2022

68 Welsh Government, Written Statement: Arrangements for Early Medical Abortion at Home, 24 February 2022

69 HL Deb 16 March 2022, c407

70 HL Deb 16 March 2022, c427

4.3 Commons consideration of Lords amendments

The Commons considered Lords amendments to the Health and Care Bill on 30 March 2022. The then Health Minister, Edward Argar, said the Government remained of the view that "the provision of early medical abortion should return to pre-covid arrangements".[71] He emphasised, though, that it was "now a matter for debate and decision" by MPs, adding that, "in line with how we normally treat these matters", there would be a free vote on the amendment.[72]

The Government did, however, raise a "procedural point": according to the Health Minister, the drafting of the Lords amendment would have created (if agreed to) "legal uncertainty for women and medical professionals by including wording on the statute book that does not, in fact, change the law in the way it appears to".[73] In response, the Government tabled an 'amendment in lieu' which, the Minister stated, would "achieve the intended purpose of Baroness Sugg's amendment".[74] A free vote was held on the amendment in lieu which passed with a majority of 27 (Ayes 215, Noes 188).[75]

71 HC Deb 30 March 2022, c868
72 HC Deb 30 March 2022, cc867-8
73 HC Deb 30 March 2022, c868
74 HC Deb 30 March 2022, c868
75 HC Deb 30 March 2022, cc898 - 900

5 Reconfiguration of health services

The Secretary of State has a longstanding role in making decisions on significant NHS service changes, where these are referred to Secretary of State by the local authority.[76] The Government note that hospital and community health services in the NHS are often subject to changes – referred to as service reconfigurations. These proposed changes are usually as part of a reorganisation of services across a larger health geography but can range from the closure of a GP surgery to a more significant replacement of a number of stroke services with a centralised hyper acute stroke unit.[77]

The Health and Care Act gave additional powers to the Secretary of State, enabling them to 'call-in' proposed service reconfigurations at any stage. This does not remove the role of the local authority in scrutinising service changes or the requirement to involve them. The role of the Independent Reconfiguration Panel (IRP) to provide expert advice on reconfigurations to the Secretary of State also remains.

Changes made in the Lords aimed to more closely define how the Secretary of State's intervention powers could be used.

5.1 Background: Secretary of State's decision-making powers

Section 46 and schedule 6 of the Act provide for the Secretary of State's powers over NHS service reconfigurations. Schedule 6 of the Act sets out the range of decisions the Secretary of State might choose to take in relation to a proposed NHS service reconfiguration, including:

- the power to decide whether a proposal should, or should not, proceed, or should proceed in a modified form
- the power to decide particular results to be achieved by the NHS in taking decisions in relation to the proposal

[76] The Department of Health's 2014 guidance Local Authority Health Scrutiny: Guidance to support Local Authorities and their partners to deliver effective health scrutiny explains the regulations and policy background for the scrutiny of local health services. It also provides further information on the circumstances where a proposed substantial development or variation in NHS services may be referred to the Secretary of State.

[77] DHSC, Health and Care Act 2022: combined impact assessments, 19 July 2022

- the power to decide the procedural or other steps that should, or should not, be taken in relation to the proposal
- the power to retake any decision previously taken by the relevant NHS body[78]

When exercising these powers, the Secretary of State must publish guidance for the NHS about the exercise of their functions when a reconfiguration proposal is called in by the Secretary of State. The guidance must also outline the process the Secretary of State will follow, including how they will adhere to their existing duties, including the duty to secure improvement in the quality of services. A Government factsheet on the Bill said:

> The Secretary of State will always need to seek appropriate advice, whether that's from clinicians, local leaders or other experts to inform their decisions, and will be transparent about the rationale for his decision.[79]

The Government's Impact Assessment on the Act, updated in July 2022, provides further information on these powers. It notes that the Act enables the Secretary of State to act as a decision maker in proposed service changes, and that the Secretary of State's powers can be used at any stage of a reconfiguration process:

> The power to intervene in health service reconfigurations will enable the Secretary of State to call-in service change proposals at any point in a reconfiguration process. It will also enable the Secretary of State to act as a decision-maker in relation to service reconfigurations they have called in.[80]

The Impact Assessment further notes that when section 46 of the Act is commenced, the Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013 (the 2013 Regulations) will be amended in parallel to remove the power for Local Authorities to refer proposals to the Secretary of State – in practice this route will be replaced with the 'call in' power. The Impact Assessment provides further information on the costs, benefits, risks and mitigations around these powers, as well as background on the current reconfiguration process.[81]

Response to the new powers

Several organisations highlighted concerns about the Secretary of State's proposed new powers and called for the Bill to be amended.

78 Health and Care Act 2022, schedule 6

79 DHSC factsheet, Health and Care Bill: improving accountability and ensuring public confidence – NHS accountability measures, updated March 2022

80 DHSC, Health and Care Act 2022: combined impact assessments, 19 July 2022

81 As above.

The King's Fund said the new ministerial powers to intervene in local service reconfigurations risked creating a decision-making "log jam".[82]

NHS Providers (PDF) said the provisions in the Bill "open up the possibility of political interference in the health service by drawing significant powers of intervention and direction to the secretary of state." It added:

> Maintaining the clinical and operational independence of the NHS is vital to ensuring this complex system can work effectively. Similarly, we are concerned that new powers to allow the secretary of state to intervene in local service reconfigurations, as currently drafted, risk undermining local accountability in the NHS.[83]

The Local Government Association noted concerns the Bill's provisions to increase the powers of the Secretary of State "will undermine existing local authority health overview and scrutiny powers and corrode local accountability." As such, it supported amendments to require the Secretary of State to consult with relevant health overview and scrutiny committees in exercising these powers.[84]

In their written evidence to the Commons Public Bill Committee, the British Medical Association called for greater accountability for the Secretary of State's powers, saying "unchecked, these wide-ranging powers could result in undue political influence in NHS decision-making". It suggested there should be transparency and consultation requirements attached to the Secretary of State's powers over service reconfigurations.[85]

5.2 Consideration in the Lords

In January 2022, the Lords voted for an amendment not to agree the reconfiguration intervention power clause. This was tabled in the names of Lord Stevens of Birmingham (crossbench), Lord Lansley (Conservative), Baroness Thornton (Labour), and Baroness Walmsley (Liberal Democrat).[86] This followed an earlier Labour attempt to remove the clause in the Commons.

While this Lords amendment was later rejected by the Commons, the Government accepted calls for substantial changes to ministerial powers over reconfigurations. In particular, Baroness Cumberlege, Baroness Thornton,

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82 The King's Fund, Health and Care Bill: House of Commons Report Stage and Third Reading (PDF), 16 November 2021

83 NHS Providers, Health and Care Bill: House of Lords, Committee of the whole House, 11 & 13 January 2022, consideration of clauses 1-34 (PDF) January 202

84 Local Government Association, Health and Care Bill, Committee Stage, House of Lords, 11 January 2022

85 Written evidence submitted by the British Medical Association (BMA) (HCB56) to the Public Bill Committee on the Health and Care Bill, 15 September 2021

86 Lords amendment 30, Marshalled list of amendments to the Health and Care Bill in the Lords, 11 January 2022

Lord Stevens and a number of other Peers, backed by organisations from across the health sector, developed amendments to more closely define how the Secretary of State's intervention powers could be used.[87]

On 25 April 2022, the Government tabled a series of their own amendments on reconfiguration powers. These provide for both NHS organisations and local authorities affected by an intervention by the Secretary of State to make representations, and for the Government to publish a summary of these. The Minister in the Lords, Lord Kamall, said further detail on how local bodies are to be engaged, and on where information provided by the Care Quality Commission should be taken into account, will be in statutory guidance.[88]

Government amendments further require the Secretary of State to provide the reasons for their decisions and directions over service changes. The Secretary of State will also be required to decide on a proposed service change within six months of calling it in for consideration.[89]

The Government amendments also removed requirements for NHS organisations to notify the Secretary of State in all circumstances likely to result in the reconfiguration of NHS services.[90] The amendments instead require the NHS to notify the Secretary of State only about certain reconfiguration proposals, which will be defined through regulations. The Minister in the Lords said the Government intend to align that definition with existing duties on the NHS commissioners to consult on substantial service changes.[91]

Drawing a parallel with planning policy, the Minister, Lord Kamall, added that call-in powers would only be used if changes of more than local importance are involved:

> Throughout the Bill's passage, we have been clear that our intention is to use these powers only in respect of substantial reconfigurations. The vast majority of reconfigurations will be managed without any ministerial intervention. These amendments and our planned regulations reinforce that principle.
>
> Under the Town and Country Planning Act 1990, the Secretary of State for Levelling Up, Housing and Communities has powers to call in any planning application. However, the stated policy for many years has been to be very selective about doing so, and Ministers will, in general, consider the use of call-in powers only if planning issues of more than local importance are involved. I should like to put formally on the record that our intention is that the same principle applies here.[92]

87 NHS Confederation, the King's Fund, the BMA, the Nuffield Trust, and others, Joint letter to Secretary of State for Health and Social Care: local service reconfigurations, 3 March 2022

88 HL Deb 26 April 2022, c220

89 As above.

90 As above.

91 For example, the duty to consult local authorities under the Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013.

92 HL Deb 26 April 2022, c220

The Minister said he believed this set of changes "answers many of the key concerns raised in Parliament." The Lords agreed to these amendments.

6 Prohibition of virginity testing and hymenoplasty

At the Commons report stage in November 2021, Government amendments concerning virginity testing were agreed without division.[93]

These amendments make it an offence in England and Wales, Scotland, and Northern Ireland to carry out virginity testing, to offer to carry out virginity testing, or to aid or abet someone to carry out virginity testing in the UK or on UK nationals overseas. The offences would carry a maximum five-year custodial sentence on indictment and an unlimited fine, or both.

The Act defines virginity testing as "the examination of female genitalia, with or without consent, for the purpose (or purported purpose) of determining virginity".[94] In its position statement on virginity testing and hymenoplasty, the Royal College of Obstetricians and Gynaecologists (RCOG) said such an examination has no scientific merit and there is no known examination that can prove a history of vaginal intercourse.[95]

Baroness Sugg, alongside others in the Lords and Commons, called for a further ban on the practice of hymenoplasty. Hymenoplasty is a surgical intervention that involves reconstructing the hymen; a thin piece of skin that partially covers the vagina. RCOG explains that it usually (but not always) breaks during sexual intercourse and can be broken through other activities. RCOG explain that having a broken hymen cannot be used as an indication of prior vaginal intercourse. Similarly, an intact hymen does not mean that intercourse has not taken place, as the hymen can stretch to accommodate penetration.

Hymenoplasty has been described as "a tool of honour-based abuse that, like virginity testing, is used to oppress vulnerable women and girls."[96]

On 23 December 2021, as part of its Vision for the Women's Health Strategy in England, the Government announced it intended to ban hymenoplasty in the UK at the earliest opportunity.[97]

The Government's decision to ban hymenoplasty followed the recommendations of an Independent Expert Panel which was established to look at the clinical and ethical issues with prohibiting the procedure. The

93 HC Deb 23 November 2021, c201

94 DHSC, Health and Care Bill: banning virginity testing, March 2022

95 RCOG position statement Virginity testing and hymenoplasty (PDF), August 2021

96 See Written Ministerial Statement, Hymenoplasty, HCWS690, 16 March 2022

97 Gov.uk, Our Vision for the Women's Health Strategy for England, 23 December 2021

Government accepted all the panel's recommendations, including introducing legislation to create a criminal offence of hymenoplasty alongside the prohibition of virginity testing.[98]

The Government introduced amendments on 9 February 2022 to insert a new Chapter into the Bill ('Hymenoplasty offences'), which now make up chapter 2, of part 5 of the Act.[99] This chapter makes it an offence to carry out, offer to carry out, or aid or abet a person to carry out a hymenoplasty on a person in the UK, or on a person who is normally resident in the UK.

The Government's amendments followed efforts by the Opposition to introduce amendments at the Commons committee stage prohibiting virginity testing and hymenoplasty.

98 Gov.uk, Report of the expert panel on hymenoplasty, 23 December 2021

99 Lords Hansard, 9 February 2022, c1786-7

7 NHS England and Integrated Care Boards

7.1 Integrated Care Board membership

Schedule 2 of the Act sets out the required constitution and governance arrangements for NHS Integrated Care Boards (ICBs). It provides that ICB membership must, at a minimum, include a chair and chief executive, individual members to represent NHS trusts and primary care, and one person to represent all local authorities in the area.

The chair of the ICB must be appointed by NHS England with the approval of the Secretary of State. The chief executive must be appointed by the chair with the approval of NHS England. The ICB must also have a constitution which explains the process for appointing ordinary members of the Board. The ordinary members must be nominated as follows:

- One member jointly nominated by NHS trusts and NHS foundation trusts that provide services within the area of the ICB;
- One member jointly nominated by persons who provide primary medical services within the area of the ICB; and
- One member jointly nominated by the local authorities within the area of the ICB.

These members are appointed by the ICB chair.

Skills mix

During Lords consideration of the Bill, Peers raised concerns that there was no statutory requirement for board members to have a professional background or experience in other specific areas of health and care.

Baroness Walmsley (Liberal Democrat) suggested that ICBs should carry out a 'skills audit'. The Minister in the Lords agreed that it is important that ICB members have the appropriate range of skills but that "it is also important that we do not over-prescribe". Lord Kamall said ICBs should have the flexibility to design their boards to meet their needs, while also ensuring they have the skills and experience necessary to properly discharge their functions.

In response, to these concerns a Government amendment was introduced (amendment 31) requiring ICBs to review the skills, knowledge and experience

necessary for board members, and to address or mitigate shortcomings.[100] Lord Kamall explained that what was necessary would include skills, knowledge and experience related to mental health, children's health, public health, public and patient involvement, engagement with the voluntary, charity and social enterprise sector, and digital innovation and integration. He noted this approach had been welcomed by stakeholders, including the Allied Health Professionals Federation, which represents 12 professional bodies.[101]

A second connected amendment would ensure that an ICB reports on how it has discharged this new duty in its publicly available annual report.[102]

Another Government amendment required ICBs to include a member with expertise and knowledge of mental illness (amendment 105A).[103] This change was introduced in response to a similar amendment in the name of Lord Bradley (amendment 12), which was agreed after a vote on 1 March 2022 (Contents 162, Not Contents 147).[104]

Conflict of interests

The Government proposed an amendment in lieu (amendment 11A), in place of Opposition amendments that would have prevented the appointment of ICB members with private sector interests. The Lords agreed the amendment in lieu, which prohibits appointments that could be reasonably regarded by an ICB chair as undermining the independence of the health service because of a candidate's involvement with the private healthcare sector.[105]

On the first day of report stage in the Lords there was a vote on an Opposition amendment (amendment 9) to ensure that conflict of interest rules that apply to ICBs also apply to their commissioning sub-committees.[106] The amendment, in the name of Baroness Thornton (Labour), was agreed (Contents 175, Not Contents 161).[107] The Commons disagreed with this change but the Government subsequently introduced an amendment in lieu to clarify that 'conflict of interest' rules which apply to ICBs would also apply to their commissioning sub-committees.[108]

100 HL Deb 1 March 2022, c740
101 As above.
102 As above.
103 HL Deb 5 April 2022, c2063
104 HL Deb 1 March 2022, c756
105 HL Deb 5 April 2022, c1983
106 HL Deb 1 March 2022, c736
107 As above, c753
108 HL Deb 5 April 2022, c1983

7.2 Objectives relating to outcomes for cancer patients

At third reading on 23 November 2021, the Commons agreed a new clause to require the Secretary of State to include objectives on cancer outcome targets in the NHS mandate. The new clause, tabled by Conservative backbencher John Baron, also intended to give outcome targets (such as five-year survival rates) priority over 'process targets' (such as minimum waiting times for cancer treatment).[109]

On 31 January 2022, Lord Kamall introduced Government amendments, supported by John Baron, to change the focus of the cancer outcomes objectives so they capture all cancer interventions (for example so they could cover outcomes of screening as well as treatment).

The Minister also said the Government amendment would mean objectives on cancer outcomes will be prioritised over any other objectives relating to cancer, not just those relating specifically to treatment. The Minister thanked John Barron, and the cross-party support from Members of the Commons and Lords pushing for the new cancer outcomes clause.[110] These Lords amendments were accepted by the Commons on 30 March 2022.[111]

7.3 Duties to reduce health inequalities

During report stage in the Lords, the Government Minister Earl Howe noted that of the many topics discussed in committee, the debate on health inequalities "stands out as one that prompted unanimous and emphatic agreement from all Benches on the need for us to recognise in the Bill the centrality of the inequalities issue."[112]

The King's Fund and other stakeholders had also suggested that reducing health inequalities should be part of the "triple aim" of guiding objectives for NHS England, ICBs and other NHS organisations.[113] The Government introduced the following amendments at report stage in the Lords to extend duties relating to health inequalities:

- Amendments 3 and 20 extend NHS England and ICB duties to reduce inequalities in access to health services to cover 'persons' rather than

109 HC Deb 23 November 2021, c285
110 HL Deb 31 January 2022, c722
111 HC Deb 30 March 2022, c935
112 HL Deb 1 March 2022, c707
113 King's Fund, Briefing on the Health and Care Bill: House of Commons report stage and third reading, 16 November 2021

just 'patients'. The Minister explained this will mean the duty covers everyone, not just people accessing services.[114]

- Amendments at report stage in the Lords similarly extended the 'triple aim' duty on NHS trusts and foundation trusts to include having regard to the effects of decisions in relation to health inequalities. [115]
- Amendment 21 makes it explicit that the duty to have regard to the need to reduce inequalities in outcomes for patients also covers the effectiveness and safety of the services provided, and the quality of the patient experience. [116]
- Amendment 56 introduces a new requirement that NHS England publish a statement describing the powers that ICBs, NHS trusts and NHS foundation trusts have to process information relating to inequalities. It must also express its view on how those powers should be exercised. The annual reports for the relevant bodies would need to state how far their functions have been exercised consistently with those views. ICBs would have to explain how far they have exercised their functions consistently with views expressed by NHS England.[117]

7.4 Duties relating to services for children and young people

A Government amendment was introduced in the Lords to require ICBs to set out any steps they are taking to address the needs of children or young people (amendment 36). The Minister, Lord Kamall said the Government had committed to produce "a package of bespoke guidance, which explains how the ICB and the Integrated Care Partnership (ICP) should meet the needs of babies, children, young people and families."

He said statutory guidance would require one ICB executive member to act as a 'children's lead', with responsibility for championing the needs of babies, children and young people.[118]

7.5 Duties relating to research

The Government introduced amendments at report stage in the Lords to clarify NHS duties to promote research.

114 HL Deb 1 March 2022, c796
115 As above.
116 As above, c707
117 HL Deb 3 March 2022, c955
118 HL Deb 3 March 2022, cc943-4

Amendment 78 inserted a new clause: 'Duties in respect of research: business plan and annual report etc' into the Bill. This is now section 7 of the Act. This sets out that NHS England's duty to promote research includes facilitating research.

Section 7 of the Act also requires that NHS England's business plan and annual report explain how it proposes to discharge (or has discharged) its duty to facilitate or otherwise promote research.[119]

A further change (amendment 23) was made by the Government to clarify that an ICB's duty to promote research includes doing so by facilitating research.[120]

Another Government amendment at report stage requires the NHS's annual performance assessments of each ICB to include an assessment of how well the board has discharged its duty to promote research and on the use of evidence obtained from research.[121]

7.6 Duties relating to climate change

During the Bill's committee stage in the Lords, several members, including Baroness Haymen and Lord Stevens of Birmingham (both crossbenchers), proposed amendments requiring the NHS to act on climate change.

In response, the Government brought forward amendments at report stage in the Lords which inserted a new clause 'NHS England: duties in relation to climate change'. This is now section 9 of the Act. This requires NHS England, in exercising its functions, to have regard to certain matters relating to the environment, including climate change.

Further Government amendments require ICBs, NHS trusts and foundation trusts to have regard to certain matters relating to the environment, including climate change, in the exercise of their functions.[122]

The Lords Minister, Baroness Penn, when introducing these amendments at report stage, said they place a duty on NHS trusts, foundation trusts, ICBs and NHS England to have regard to the Government's ambitions on climate change. She noted some potential examples, including decarbonising procurement:

> This could mean preparing thousands of NHS buildings to adapt to climate impacts, protecting and enhancing biodiversity across 25 million square metres of trust estate, or decarbonising the millions of kilowatts of energy used by trusts every year. I must emphasise to noble Lords that this includes

119 HL Deb 3 March 2022, c971
120 HL Deb 1 March 2022, c717-8
121 Amendment 58: HL Deb 3 March 2022, c955
122 HL Deb 1 March 2022, c729-30

> decisions about the NHS's procurement of goods and services. The noble Lord, Lord Stevens, was quite right to underline in Committee that, according to NHS England's data, the NHS supply chain accounts for some 62% of its emissions footprint. It is clear that the NHS will need to take urgent action to decarbonise procurement.[123]

The Minister outlined some of the commitments and progress already made in this area. She also noted these amendments include a power for NHS England to issue statutory guidance on environmental issues to ICBs, NHS trusts and foundation trusts.[124]

7.7 Palliative care and dispute resolution

During the passage of the Bill through the Lords, Baroness Finlay (crossbench) introduced an amendment to insert a new clause 'Dispute resolution in children's palliative care'. This aimed to ensure that, where there is a difference of opinion between a parent of a child with a life-limiting illness and a doctor responsible for the child's treatment, effective mediation will be involved. The amendment was agreed by the Lords after a vote at report stage.[125]

The Commons subsequently passed an amendment in lieu to require the Secretary of State to commission a review of the causes of disagreements in the care of critically ill children between the providers of care and people with parental responsibility.

The Minister in the Lords, Lord Kamall, said this review will consider "how we can avoid those disagreements and how we can sensitively handle their resolution."[126] He said the review's report will be laid before Parliament with a set of recommendations, alongside the Government's response. The Government's amendment in lieu was agreed by the Lords on 5 April 2022, it is now section 177 of the Health and Care Act 2022.

At report stage in the House of Lords, the Minister, Earl Howe, introduced an amendment to require ICBs to commission services or facilities for palliative care (including specialist palliative care) as they consider appropriate for meeting the reasonable requirements of people for whom they have responsibility.[127]

123 As above.
124 As above.
125 HL Deb 16 March 2022 c381, Division on Amendment 172 (Content 112, Not Content 107)
126 HL Deb 5 April 2022, c1984
127 HL Deb 1 March 2022, c772

8 Health Services Safety Investigation Body

Since April 2017, the Healthcare Safety Investigation Branch (HSIB) has conducted independent investigations of patient safety concerns in NHS-funded care across England.

The HSIB was set up following recommendations from the House of Commons Public Administration Committee and a subsequent expert advisory group.[128] Both recommended that a new body should be focused on investigating and learning from incidents affecting patient safety. HSIB was established as a non-statutory body as an organisational arm of NHS Improvement (now part of NHS England).[129]

Part 4 of the Health and Care Act 2022 replaces the non-statutory HSIB with a new statutory independent arm's-length investigating body called the Health Services Safety Investigations Body (HSSIB).

As initially introduced, the Health and Care Bill would have given coroners access to protected 'safe space' information collected by HSSIB during their investigations of patient safety incidents. There were concerns from several organisations that this would undermine willingness to share information with HSSIB.

On the final day of consideration of the Bill in the Commons, the Government accepted an amendment in the name of Lord Hunt of King's Heath (Labour) to remove the provision allowing coroners to require HSSIB to disclose protected material.

The Minister, Edward Argar, noted the legislation needed to "...balance the need for those who speak to the HSSIB to feel safe to speak openly and candidly to HSSIB staff, while ensuring that coroners can fulfil their judicial functions." The Minister acknowledged the different views and strength of feeling expressed in both Houses. He said the Government had decided to accept the Lords amendment "to give reassurance and strengthen the ability of the HSSIB to deliver "...what we all want across this House, which is to support an open learning culture across the NHS".[130]

128 Public Administration Select Committee, Investigating clinical incidents in the NHS (PDF), 27 March 2015, HC886, 2014-15; Gov.uk, Report of the Expert Advisory Group, Healthcare Safety Investigation Branch, May 2016

129 DHSC, Health and Care Bill: Health Services Safety Investigations Body, updated March 2022

130 HC Deb 30 March 2022, c863

9 Other amendments agreed in the Lords

9.1 Licensing of non-surgical cosmetic procedures to regulate safety

During report stage in the Lords, the Minister, Lord Kamall, tabled a new clause and schedule to the Bill (which was agreed without a division) on the "Licensing of cosmetic procedures".[131]

The new clause, now section 180 of the Act, confers power on the Secretary of State to establish a licensing regime in connection with non-surgical cosmetic procedures. Specifically, it prohibits an individual in England from carrying out specified cosmetic procedures in the course of business unless the person has a personal licence and a premises licence.

A "cosmetic procedure" is defined in the section 180 as meaning "a procedure, other than a surgical or dental procedure, that is or may be carried out for cosmetic purposes", and the reference to a procedure includes:

> (a) the injection of a substance;
>
> (b) the application of a substance that is capable of penetrating into or through the epidermis;
>
> (c) the insertion of needles into the skin;
>
> (d) the placing of threads under the skin;
>
> (e) the application of light, electricity, cold or heat[132]

A new schedule was also inserted into the Bill (now schedule 19 of the Act), setting out the scope of provisions licensing of cosmetic procedures that may be made by regulations. A further Government amendment specified that regulations under the new clause are subject to the affirmative procedure.[133]

Crossbench Peer Baroness Finlay of Llandaff described the Government amendments as a welcome step in the right direction. She said they ensured

131 HL Deb 7 March 2022, c1242 (amendments 153A and 157A)

132 As above, cc1250-51

133 HL Deb 16 March 2022, c444 (amendment 184A)

people carrying out cosmetic procedures such as Botox fillers and threads under the skin will have to meet consistent safety standards.[134]

The Lords amendments on non-surgical cosmetic procedures were agreed to in the Commons without a vote at the end of March 2022. The Minister, Edward Argar, thanked Members from both sides of the House who had campaigned for regulation of non-surgical cosmetic procedures. He said that while the amendment was broad, the Government would work with stakeholders, including parliamentarians, to develop regulations setting out the specific cosmetic treatments that will be subject to licensing, and the detailed conditions and training requirements that individual practitioners will have to meet. [135]

9.2 Storage of gametes and embryos

Background

The Human Fertilisation and Embryology Act 1990, as amended by the Human Fertilisation and Embryology Act 2008, established the storage period for embryos and gametes (sperm or eggs) at a maximum of ten years, but also made provision for this period to be extended by regulations.

In 2009, the law was amended by the Human Fertilisation and Embryology (Statutory Storage Period for Embryos and Gametes) Regulations 2009 which set out that the storage period could be extended beyond 10 years (in ten year periods, up to a maximum of 55 years) but only where premature infertility could be demonstrated.

In 2020, changes were also introduced in response to disruption to fertility services caused by the Covid-19 pandemic. The Human Fertilisation and Embryology (Statutory Storage Period for Embryos and Gametes) (Coronavirus) Regulations 2020 allowed for an additional two-year storage in addition to the maximum limit of 10 years.

In 2020, the Government consulted on making changes to the rules to allow storage for up to 55 years for all patients.[136] In September 2021, the response to the consultation was published. It set out the Government's intention to legislate to "offer renewable 10-year storage periods to a maximum of 55 years for eggs, sperm, and embryos, for all, regardless of medical need."[137]

134 HL Deb 7 March 2022, c1192
135 HC Deb 30 March 2022, cc898-900
136 DHSC, Consultation document: gamete (egg, sperm) and embryo storage limits, September 2021
137 DHSC, Gamete (egg, sperm) and embryo storage limits: response to consultation, September 2021

Lords amendments

Section 171 and Schedule 17 of the Health and Care Act amend the Human Fertilisation and Embryology Act 1990 to introduce changes to the rules on the storage of gametes and embryos.

The new rules allow for gametes and embryos to be stored for up to 55 years (with ten-year renewal periods) for all patients. These parts of the Act came into force on 1 July 2022.

These provisions were added through a Government amendment at Lords committee stage. The Minister, Lord Kamall, explained the changes:

> As many noble Lords will be aware, fertility preservation is achieved through the freezing and storage of gametes or embryos; it is an increasingly common procedure in the UK. The Human Fertilisation and Embryology Act sets limits on the length of time that frozen gametes and embryos can be stored for. The current statutory storage limit is 10 years, with the possibility of an extension up to a maximum of 55 years for those who are certified as prematurely infertile. Extended storage limits were introduced to help those people who became prematurely infertile preserve their fertility, with the hope of starting a family in the future. This would include children who may have undergone treatment for childhood cancers.
>
> However, this approach appears to discriminate between those who have a medical need to freeze their gametes and embryos, and those who do not. This message was clear in response to our 2020 public consultation, and we accept that the current approach creates unfairness. Therefore, we are introducing a new scheme for all who currently freeze or wish to freeze their gametes or embryos. The new scheme will consist of 10-year renewable storage periods up to a maximum of 55 years for everyone, regardless of medical need. It is for these reasons that I ask noble Lords from across the House to support the government Amendments 243A, 313A, 314A and 315A in my name.[138]

A January 2022 Human Fertilisation and Embryology Authority (HFEA) briefing, Health and Care Bill: changing the storage limits for human eggs, sperm and embryos, explains the changes to storage limits and answers common questions.

9.3 Mandatory training for health and social care professionals on learning disability and autism

In November 2019, the Department of Health and Social Care published 'Right to be heard' (PDF) its response to the consultation on proposals for introducing mandatory learning disability and autism training for health and social care staff. The response included a commitment to develop a

[138] HL Deb 4 February 2022, c1170

standardised training package to ensure staff have the skills and knowledge to provide safe, compassionate, and informed care.

Baroness Hollins (crossbench) introduced amendment 91 to insert a new clause requiring mandatory training on learning disabilities and autism for all health and social care staff. This is now section 181 of the Act. This was referred to as 'Oliver McGowan' Mandatory Training, after Oliver McGowan whose death highlighted the need for health and social care staff to have better training in learning disability and autism.[139] Section 181 also requires the Secretary of State to publish a code of practice for specialist training on learning disability and autism.

During 'ping-pong' between the Houses, the Government tabled amendments to ensure Lords amendment 91 would work as intended. These Government amendments require all health and social care providers who carry out Care Quality Commission (CQC) regulated activities to ensure their staff receive appropriate training on learning disabilities and autism.[140]

Over 8,000 staff participated in trials rolling-out this training in 2021, with a final evaluation report published in June 2022. NHS England is working to finalise the standardised training packages for early 2023.[141]

9.4 Preventing the NHS purchasing goods and services involving slave labour or genocide

Conservative Peer Lord Blencathra tabled an amendment to insert a new clause with the title 'Health service procurement and supply chains: genocide convention and obligations'. This would require the Secretary of State to make regulations to ensure that procurement of all goods and services for the health service in England is consistent with the UK's obligations under the Convention on the Prevention and Punishment of the Crime of Genocide.

Procurement would not be consistent with this measure if the Government has assessed there is a serious risk of genocide in the sourcing region. The Lords voted in favour of this amendment (Content 177, Not Content 134).[142]

While the Government opposed Lord Blencathra's amendment (which was rejected in the Commons on 30 March 2022), ministers said they shared the strength of feeling expressed in both Houses on ensuring the NHS is not inadvertently linked to slavery and human trafficking through its supply chain. The Government said it would bring forward an amendment to place a

139 Health Education England, The Oliver McGowan Mandatory Training on Learning Disability and Autism

140 HC Deb 30 March 2022, c860

141 Health Education England, The Oliver McGowan Mandatory Training in Learning Disability and Autism

142 HL Deb 5 April 2022, c2032

duty on the Secretary of State to undertake a review of NHS supply chains.[143] During the first day of consideration of Lords amendments, the Minister, Edward Argar said:

> ...we propose to introduce a duty on the Secretary of State to carry out a review into the risk of slavery and human trafficking taking place in NHS supply chains, and to lay before Parliament a report on its outcomes. That review will focus on Supply Chain Coordination Ltd, which manages the sourcing, delivery and supply of healthcare products, service and food for NHS trusts and healthcare organisations across England. As well as supporting the NHS to identify and mitigate risk with a view to resolving issues, the review will send a signal to suppliers that the NHS will not tolerate human rights abuses in its supply chains and will create a significant incentive for suppliers to revise their practices.[144]

On the final day of considering the Bill, the Minister in the Lords announced a further amendment in lieu to require the Secretary of State to make regulations to help prevent the use of goods or services linked to slavery or human trafficking in the NHS in England.

The amendment introduced what is now secton 81 of the Act. Lord Kamall said the regulations can set out steps the NHS should be taking to assess: the level of risk associated with individual suppliers; the basis on which the NHS should exclude them from a tendering process; and what measures should be included in contracts.[145]

9.5 Consent for organ transplantation when travelling abroad

At report stage the Lords voted to agree an amendment in the name of Lord Hunt of King's Heath (Labour), which aimed to ensure that where individuals travel abroad to receive an organ donation, there must be informed consent from anyone donating an organ.[146] The objective was to prohibit 'organ tourism', involving either forced organ harvesting or black-market organ trafficking.

The Government said it was sympathetic to these aims but noted concerns about potential adverse effects the approach could have on transplant patients and NHS staff. They tabled an amendment in lieu which the Commons Minister, Edward Argar, said would achieve a similar effect without creating a disproportionate impact. He said the Government amendment in lieu would mean:

143 HC Deb 30 March 2022, c906

144 As above.

145 HL Deb 26 April 2022, c221

146 HL Deb 16 March 2022, c307; Division on Amendment 162 (Content 203, Not Content 159)

> ...wherever in the world their actions take place, most UK nationals—and all residents of England, Wales and Scotland—could be prosecuted for existing offences that cover the trade in human organs. The amendment would encompass paying for the supply of an organ, seeking to find someone willing to supply an organ for payment or initiating or negotiating any commercial arrangement for an organ to be supplied. Such things are already illegal, and we are extending the territoriality of that for English, Welsh and Scottish residents.[147]

The Lords agreed to the Government's amendment in lieu.[148]

9.6 Mental health parity and spending

Spending on mental health

During report stage in the Lords, a Government amendment inserted a new clause 'Spending on Mental Health' into the Bill (this is now section 3 of the Act).

It requires the Secretary of State, before the start of the financial year, to publish any expectations the Government has around increases in mental health spending by NHS England and ICBs, including the amount and proportion of expenditure.

It would also require NHS England to include in its annual report information about this spending. The Minister in the Lords, Lord Kamall, said this information would be presented as a written ministerial statement at the start of each financial year. He also noted that other amendments introduced by the Government require ICBs to include information on mental health expenditure in their annual reports.[149]

Parity of esteem

During report stage in the Lords, a Government amendment was made to make it clear that references to "health" in the NHS Act 2006 include mental health. This is intended to move away from the association of "health" with physical health and towards parity of esteem for mental health.

The Government said this amendment would avoid potential confusion created by inconsistent references to mental health in existing provisions of the Act.[150] A further amendment to have at least one member with mental health knowledge and expertise on ICBs was also agreed on report in the Lords.[151]

147 HC Deb 30 March 2022, c908
148 HL Deb 5 April 2022, c2003
149 HL Deb 1 March 2022, c700
150 HL Deb 1 March 2022, c699
151 As above, c755

The Mental Health Policy Group (an informal coalition made of the Centre for Mental Health, Mental Health Foundation, NHS Confederation's Mental Health Network, Mind, Rethink Mental Illness, and the Royal College of Psychiatrists), which pushed for these changes, welcomed the Government's amendments.[152]

9.7 Information sharing in child safeguarding

At report stage in the Lords, the Government introduced a new clause on sharing information in connection with safeguarding children.

The Minister, Lord Kamall, said the Government would publish a policy report in this area and explained the purpose of the new clause:

> The Government are committed to addressing barriers to safe, timely and appropriate sharing of information to safeguard children…
>
> To this end, we are committing in this legislation to publish a report, within one year of the section coming into force, that will describe the Government's policy on information sharing in relation to children's health and social care and the safeguarding of children and will include an explanation of the Government's policy on a consistent identifier for children. It will also include the Government's approach and actions to implement the policy set out in the report.[153]

The Minister said the report will "cover improved information sharing between all safeguarding partners, including the NHS, local authorities and the police, as well as education settings." The Department for Education, he said, "has already started its work, which will look at the feasibility of a common child identifier." The new clause was agreed in the Lords without a vote.[154]

The Commons agreed to the new clause without a vote on 30 March 2022.[155]

The clause is now section 179 of the Act and came into force on 28 July 2022 (three months after the Act received Royal Assent).[156]

152 NHS Confederation, The health and care bill: five influencing successes, 28 April 2022
153 HL Deb 3 March 2022, c944
154 HL Deb 7 March 2022, c1252
155 HC Deb 30 March 2022, c958
156 Health and Care Act 2022, sections 179 & 186(5).

9.8 Carers and safe discharge from hospital

Lords report stage

Clause 80 of the Bill, as introduced to the Lords, revoked the requirement for social care needs assessments to be carried out before a person is discharged from hospital.

The intention is to allow local areas to adopt a discharge model suitable to their needs, including the "discharge to assess" model.

At report stage in the Lords, Baroness Pitkeathley (Labour) introduced a new clause (amendment 113) to place a duty on the NHS to ensure carers are consulted before a patient is discharged from hospital to check they are able and willing to provide care.

Baroness Pitkeathley noted the Bill as it stood removed the requirement to consult carers prior to discharge. She acknowledged the Government suggestion that such a requirement will be set out in statutory guidance but argued this "is not the same as having concrete rights in legislation that can be quoted and used".[157]

Lord Kamall said the amendment would "create new burdens on NHS bodies and local authorities" and in so doing "would undermine the entire purpose of Clause 80 and hinder the ambition…to ensure that people are discharged in a safe and timely manner."[158]

The amendment was agreed following a division.[159]

Consideration of Lords amendments

On 30 March 2022, the Government proposed a motion disagreeing with Lords amendment 113. However, it proposed an amendment in lieu to introduce a duty on NHS trusts to involve carers during the discharge process.

The Commons Minister, Edward Argar, said the Government had "heard about the strength of feeling" on the issue and agreed that "where appropriate, unpaid carers are involved in planning around discharge." He added that, although the Government appreciated the intention behind the amendment and wanted to address the concerns raised, it wanted "to do so in the most effective way, and in a way that does not create unintended delays to discharge."[160]

157 HL Deb 7 March 2022, cc1129-1132
158 HL Deb 7 March 2022, c1137
159 HL Deb 7 March 2022, cc1139-41
160 HC Deb 30 March 2022, c938 (Lords amendment 51)

The Government's amendment in lieu was agreed without a division.[161] The amendment was welcomed by Carers UK.[162]

On 5 April 2022, the Lords agreed not to insist on its amendment and accepted the amendment in lieu agreed by the Commons.[163]

9.9 Information about company payments to people in the health sector

During committee stage in the Lords, the Government introduced amendments to increase the transparency of company payments made, and benefits given, to people in the healthcare sector.

It inserted three new clauses into the Bill to enable the Secretary of State to make regulations requiring manufacturers, commercial suppliers, and "connected persons" to either publish or provide the Secretary of State with information about payments made or other benefits provided by them to people in the health care sector.[164]

The provisions, which cover anyone performing healthcare as part of their duties, are set out in sections 92 to 94 of the Act. The Lords Minister, Lord Kamall, said regulations under these powers could provide for their enforcement, including civil penalties, such as fines.[165]

The Government said amendments on the transparency of payments deliver on a recommendation from Baroness Cumberlege's independent medicines and medical devices safety review. To improve transparency, the review's report, First do no harm (PDF, July 2020), recommended:

> ...there should be mandatory reporting for pharmaceutical and medical device industries of payments made to teaching hospitals, research institutions and individual clinicians.[166]

At the conclusion of the Lords committee stage on 9 February 2022, Lord Kamall said the Government amendments would deliver on this recommendation by allowing the Secretary of State to require information to be made public. He explained:

> The amendment also allows for the Secretary of State to make regulations requiring that the information be made public and make further provision

161 HC Deb 30 March 2022, c952 (Lords amendment 51)
162 Carers UK, Carers UK welcomes Government amendment to Health and Care Bill to retain rights of unpaid carers, 30 March 2022
163 HL Deb 5 April 2022, cc2034-2035 (motion E)
164 HL Deb 9 February 2022, c1751-4
165 As above.
166 The report of the Independent Medicines and Medical Devices Safety Review, First do no harm (PDF), July 2020

> about when and how the information must be published. This could include requiring self-publication or publication in a central database. That ensures that we can adapt the system to improve reporting as necessary. To ensure that companies fulfil the obligation, requirements introduced by the regulations can be enforced using civil penalties.[167]

The Minister said the UK Government would need to obtain the consent of Scottish ministers, Welsh ministers and the Department of Health in Northern Ireland in taking a UK wide approach:

> There are benefits to this duty applying UK-wide, aligning with the approach taken by the pharmaceutical industry with its Disclosure UK system. (...) ...the clause contains a statutory consent requirement, so we will work closely with the devolved Governments to develop regulations following the passage of the Bill. We will also work with patients, industry and healthcare providers to create a system that enhances patient confidence while maintaining a collaborative, world-leading UK life sciences sector.[168]

9.10 Procurement and provider selection

Background

The February 2021 white paper, Integration and Innovation: working together to improve health and social care for all (PDF), included plans to reform procurement and competition rules applying to NHS commissioners when arranging healthcare services.

The Health and Care Act 2022 provides a power for the Secretary of State to create a separate procurement regime for these services. The Government has said this will include removing the procurement of health care services for the NHS from the scope of the Public Contracts Regulations 2015.

The 2022 Act repeals section 75 of the 2012 Act and the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013. The Government says a new procurement regime for NHS and public health services (also known as the 'provider selection regime') is being developed to reduce the need for unnecessary competitive tendering:

> The Provider Selection Regime is a proposed new set of rules which would govern the arrangement of healthcare services in England. Our aim for the Provider Selection Regime is to move away from the expectation of competition in all circumstances and towards collaboration across the health and care system. This is intended to remove unnecessary levels of competitive

167 HL Deb 9 February 2022, c1659

168 As above.

tendering, remove barriers to integrating care, and promote the development of stable collaborations.[169]

Consideration of Lords amendments

The Government introduced amendments in the Lords to provide more detail about what must be included in NHS procurement regulations aiming to increase transparency.[170] These amendments would require regulations to include "processes and objectives" and must specify "steps to be taken when following a competitive tendering process".

The amendments also require procurement regulations make provision "for the purposes of ensuring transparency and fairness and that compliance can be verified and managing conflicts of interest." They also require NHS England to issue guidance on the regulations.[171]

The Minister, Lord Kamall, said it was always the Government's intention to include these requirements in the guidance on the new provider selection regime, but said the amendments would add clarity and clearly signal intentions in the legislation. He also noted the Lords amendments made the regulations subject to the affirmative procedure, as advised by the Delegated Powers and Regulatory Reform Committee.[172]

Labour's spokesperson in the Lords, Baroness Thornton, noted this group of Government amendments contained several helpful changes. She said she welcomed the Government's constructive approach in response to discussions with the Opposition, which put "proposes transparency at the heart of procurement".[173] These amendments were agreed in the Commons.[174]

9.11 Medicine Information Systems

Section 101 of the Health and Care Act 2022 amends the Medicines and Medical Devices Act 2021 to enable NHS Digital to collect information about the use of medicines and their effects in the UK and hold this data in one or more information systems.

169 DHSC, Provider Selection Regime: supplementary consultation on the detail of proposals for regulations, February 2022, Executive summary. Further background can be found in the NHS England consultation the NHS Provider Selection Regime, published in February 2021.
170 HL Deb 3 March 2022, c1031
171 As above.
172 As above.
173 As above, c1026
174 HC Deb 30 March 2022, c901

The Government has said this information could be used to establish and maintain comprehensive UK-wide medicines registries to improve post-market surveillance on the use of medicines.[175]

A Government amendment was made during committee stage in the Lords with support from the Scottish Government, to clarify that powers conferred on Scottish ministers relating to their role in collecting information for medicine information systems can be delegated to health boards in Scotland.[176]

9.12 Transferring functions of arm's length bodies

Devolved functions

Government amendments were introduced in the Lords relating to the power to transfer the functions of arm's length bodies (ALBs) within the health and care sectors.

These clarify that the powers in part 3 of the Act, in respect of special health authorities, apply only to England and to cross-border special health authorities, and not to Wales-only special health authorities.

These amendments removed devolved ministers and Welsh NHS trusts from the list of appropriate persons to whom property, rights and liabilities can be transferred through a transfer scheme following a transfer of functions.[177]

Further Government amendments in the Lords created a requirement for the UK Government to get the consent of the devolved governments for any transfer of functions within the competence of their legislatures or which modify functions exercised by the Welsh ministers, Scottish ministers or a Northern Ireland Department.[178]

The Minister in the Commons, Edward Argar, noted that following "constructive engagement with the devolved governments, these amendments enable us to proceed on a UK-wide basis."[179]

Patient data protections

The Lords voted for an amendment introduced by Lord Hunt of King's Heath (Labour), which sought to prevent certain ALB functions being transferred, where these related to protected patient data.[180] Lord Hunt explained that his amendment addressed a concern arising from the proposed merger of NHS

175 HL Deb 9 February 2022, c1771
176 As above, c1773
177 As above, c1779
178 As above.
179 HC Deb 30 March 2022, c902
180 HL Deb 7 March 2022, c1150, Division on Amendment 116 (Content 207, Not Content 169)

Digital and NHS England. Noting that NHS Digital is currently the statutory 'safe haven' for patient data he questioned whether it is appropriate to place that responsibility within NHS England "in view of the inherent conflict of interest that might occur in its wider role".[181]

This amendment was later overturned by the Commons, with some commitments later provided from the Minister in the Lords about the Government's intention to protect sensitive data. The Minister, Lord Kamall said he hoped he had reassured the House of the intention to use regulations that transfer functions to NHS England to provide "as much statutory protection as possible for the continuation of a data safe haven in NHS England". He noted this was particularly important to retain the confidence of the public in how their data is used.[182]

9.13 Capital spending limits for NHS foundation trusts

Section 62 of the Act gives NHS England power to set a capital expenditure limit on an NHS foundation trust. Unlike NHS trusts, foundation trusts were not previously subject to the statutory annual capital expenditure limits applying to NHS trusts.[183]

The Government argued that because capital expenditure by foundation trusts still counts against the ICBs' capital limit and the Department of Health and Social Care's overall capital departmental expenditure limit (CDEL), there is a risk that a foundation trust's capital spending may affect the overall local system ICB capital envelope, or on the national capital budget. It therefore introduced a power for NHS England to set capital spending limits for foundation trusts.[184]

The Government has said that individual spending limits would be set for foundation trusts for a specified period (that it expects to be a financial year), and the limit would automatically cease at the end of that period. They also said guidance would show that the power would be used proportionately and in a limited way.[185]

At report stage in the Lords, the Minister, Baroness Penn, said the Government had listened carefully to debate on capital limits during the Bill's

181 HL Deb 5 April 2022, c2014

182 As above, c2023

183 NHS foundation Trusts are established through the Health and Social Care (Community Health and Standards) Act 2003, and have additional freedoms to borrow from commercial lenders and spend their own surpluses to fund capital projects.

184 DHSC, Health and Care Bill: capital spending limits for NHS foundation trusts, March 2022

185 As above.

committee stage. In particular, she responded to concerns that powers to set capital limits for foundation trusts should be limited and used only as a reserve power.

Baroness Penn introduced Government amendments to confirm that any limit on the capital expenditure of a foundation trust may only relate to a single financial year (rather than spanning more than one financial year).[186]

The Minister also confirmed that each use of the power would only apply to a single named foundation trust. She added that NHS England would continue to work with NHS trusts and foundation trusts to ensure sustainable capital expenditure and reaffirmed the Government's commitment to ensuring these powers are used only as a last resort, as NHS England agreed with NHS Providers in 2019.[187]

9.14 Restrictions on advertising foods high in fat, salt or sugar

The Health and Care Act 2022 amends the Communications Act 2003 to introduce new statutory controls on the advertising of less healthy food and drink products (ie products high in fat, sugar and salt (HFSS)) following two consultations in March 2019 and December 2020.

The Act introduces two measures to restrict children's exposure to advertising of HFSS products:

- The introduction of a 5.30am to 9pm watershed for television advertising of HFSS products subject to specific exceptions. All on-demand programme services subject to Part 4 of the Communications Act 2003 will be included in the television watershed.
- A prohibition on online paid-for advertising of HFSS products subject to specific exemptions.

The Government introduced amendments at committee stage in the Lords to allow the date the HFSS advertising restrictions begin to be adjusted.

Amendments 249, 252 and 254 introduced the power to delay implementation beyond 1 January 2023 via secondary legislation should the Government deem it necessary. The Lords Minister, Baroness Penn, said the Government had taken this decision to provide flexibility should emerging challenges mean implementation from 1 January 2023 proves unworkable.[188]

186 HL Deb 1 March 2022, c697-8
187 As above.
188 HL Deb 4 February 2022, c1217

On 14 May 2022, the Government announced restrictions would be delayed by a year.[189] They are now expected to come into force in January 2024 (See the Library briefing on advertising to children for further information.

[189] DHSC, Government delays restrictions on multibuy deals and advertising on TV and online, 14 May 2022

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