National Assembly for Wales

Health and Social Care Bill: Provisions relevant to Wales

February 2011

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This paper provides a brief overview of the provisions relevant to Wales. None of the provisions in Bill contain framework powers in respect of the legislative competence of the National Assembly for Wales.

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February 2011

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1. Introduction

The *Health and Social Care Bill*[1] received its First Reading at Westminster on 19 January 2011. It introduces far reaching changes to the organisation of the National Health Service (NHS) in England. However, it also contains some provisions that relate to Wales, Scotland and Northern Ireland.

This paper provides a brief overview of the provisions relevant to Wales. None of the provisions in Bill contain framework powers in respect of the legislative competence of the National Assembly for Wales.

The Bill is long and complex and this paper, therefore, only highlights provisions relating to Wales which are given relative prominence in the Bill. Most of the provisions contained in the Bill extend to England and Wales only, but apply only to England. Some provisions apply only to Wales, others extend to the whole of the UK.

The House of Commons Library prepared a Bill Paper for the Second Reading debate which was held on 31 January 2011.

[1] *Health and Social Care Bill*, Bill 132 2010-2011

2. The Bill

The Bill's key proposals includes measures to :

- Give new consortiums of GPs across England the task of commissioning the healthcare they deem appropriate for their patients, and control over the budget of £80bn.
- Make the NHS in England more accountable to patients and the public by establishing Healthwatch, a new independent body that can look into complaints and scrutinise the performance of local health providers.
- Compel all hospitals in England to become foundation trust hospitals. This would make them semi-independent of Whitehall control. Around half of English hospitals already have this status
- Establishes a new body, called Public Health England, to improve public health and reduce health inequalities between the richest and poorest.
- Abolition of the 150 or so primary care trusts (PCTs) and ten strategic health authorities by 2013 and reducing the number of arm's length bodies such as the Health Protection Agency and Human Fertilisation and Embryology Authority.

3. Clauses relating to Wales

A number of the provisions in the Bill apply in Wales as well as England, or apply in Wales only. Explanatory Notes to the Bill[2] state that the Welsh Government have been consulted on these provisions and have provided their consent where necessary.

Clause 21 of the Bill provides for the *National Health Service Act 2006* to be amended so that the Secretary of State can make Regulations to allow any prescribed functions of a **Commissioning Consortium in England to be exercised jointly with a Local Health Board in Wales**.

Regulations may make provision for any such functions to be exercised by a joint committee of the consortium and the Local Health Board. They would be subject to the negative procedure in Parliament.[3]

Provisions in **Part 1** of the Bill amend several sections of the *Mental Health Act 1983* ("the 1983 Act"*)* that apply to England and Wales.

Clause 31 - Discharge of patients amends sections 23 and 24 of the 1983 Act, which deal with the **discharge of patients from detention, supervised community treatment and other compulsory measures** under that Act. It **removes certain powers from Welsh Ministers** and some NHS bodies in respect of patients of independent hospitals.

Clause 33 - Provision of pocket money for in-patients - amends section 122 of the 1983 Act to make **payments to in-patients in mental health hospitals** in respect of their occasional personal expenses, where they cannot meet those expenses themselves. The clause amends section 122 to confer the **power directly on the Welsh Ministers**.

Clause 34 - Transfers to and from special hospitals - this **clause abolishes the powers of Welsh Ministers under section 123 of the 1983 Act to direct that a patient detained in a high secure psychiatric hospital be transferred to another high secure hospital**, or to any other hospital. This power is rarely used. This change would not affect the power of the managers of high secure hospitals themselves to arrange the transfer of patients by agreement with the managers of the receiving hospital.

Clause 36 - Patients' correspondence amends section 134 of the 1983 Act, which deals with the correspondence of patients detained in hospital under that Act. Section 134(1)(a) allows the managers of a hospital to refuse to put a

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[2] *Health and Social Care Bill*, Bill 132 2010-2011, Explanatory Notes
[3] DoH, Health and Social Care Bill 2011, Memorandum for the House of Lords Delegated Powers and Regulatory Reform Committee.

detained patient's correspondence in the post if the intended recipient has made a written request not to receive correspondence from the patient in question. This clause amends that section so that it will no longer be possible for such a request to be made to Welsh Ministers.

Provisions in **Part 2** that extend and apply to England and Wales;

- **abolish the Health Protection Agency** (a body with a UK wide remit) and repeal the Health Protection Agency Act 2004 (**clause 46**);
- make provision for the Secretary of State to exercise biological substances and radiation protection functions in relation to Wales and England (**clause 47**); and
- provide for a UK wide duty of co-operation between bodies exercising functions in relation to health protection (**clause 50**).

Clause 49 repeals the *AIDS (Control) Act 1987*. Explanatory notes state that the Act allows the collection of information about numbers of HIV cases and deaths.

All the Ministerial functions under the *AIDS (Control) Act 1987* are currently exercisable solely by the Welsh Ministers in relation to Wales.

Clauses 114 to 119 in **Chapter 6** of **Part 3**, concerning special administration apply to companies in Wales which provide services to the health service in England.

Clauses 198 (1), 206 (1) and **clause 215** in **Part 7**, concerning regulation of health and social care workers extend and apply to England and Wales (as well as Northern Ireland and Scotland) as they relate to bodies with functions in relation to Wales.

Clause 196 abolishes the General Social Care Council by means of amending section 54 of the *Care Standards Act 2000*, which established the General Social Care Council and the Care Council for Wales. **The Care Council for Wales will continue in existence and will continue to regulate social workers and social care workers in Wales. Its legislative framework will be unchanged** except for amendments consequential on the abolition of the General Social Care Council.

Provisions in **Parts 8 and 10**, regarding changes to the Department of Health's Arm's Length Bodies, extend and apply to England and Wales. **Part 8 establishes the National Institute for Health and Care Excellence (NICE) as a body corporate**. It will encompass social care, as well as health matters into its work on assessing the quality and effectiveness of medicines, treatments and procedures; preventative work; and guidance around specific conditions. **Clause 232** allows for the dissolution of the predecessor body to the National Institute for Health and Clinical Excellence, **and this and related minor and consequential amendments to legislation in Schedule 16 apply to Wales**.

In **Part 10**, the abolition of the Appointments Commission applies to Wales.

Clause 271 and **Schedule 20** in **Part 11** amend legislation relating to the health service in Wales, (the *National Health Service (Wales) Act 2006*) to make consequential and other amendments, including provision for arrangements between health bodies in Wales and health bodies in England.

The Minister for Health and Social Services, Edwina Hart AM responded to a question in Plenary about the proposed reforms:

> ***Brian Gibbons:*** *What are the implications of English NHS changes for the NHS in Wales. OAQ(3)1900(HSS)*
>
> **Edwina Hart:** We are, of course, pursuing our own agenda in terms of the NHS in Wales and, fortunately, very few of the English structural changes will directly impact on our arrangements and policy direction in Wales. However, some patients inevitably have to cross between countries to access treatment. LHBs and the Government are, therefore, working to ensure that there is no adverse impact on patient care.
>
> **Brian Gibbons:** Thank you, Minister, for that answer. You will be aware that the previous UK Labour Government was very active in securing continuing recognition of our health services as public services, at the level of the EU and the World Trade Organization. However, in the medical literature and the medical press over the past few months, there have been concerns that the changes to the English NHS could undermine the public service nature of the health service in the United Kingdom and that, consequently, our health service and the English health service could be open to the market competition rules of the EU and the World Trade Organization. Has the Welsh Assembly Government undertaken any evaluation of that risk and its possible implications for Wales?
>
> **Edwina Hart:** The changes to the NHS in England will not affect the status of services in Wales, as healthcare is devolved, other than with regard to what I indicated in relation to cross-border arrangements. These issues are not straightforward, and you rightly point out that matters of EU law could be at stake. However, I can assure you that I have had discussions with Andrew Lansley and my officials are in close contact with their counterparts in the Department of Health.[4]

[4] RoP. 16 February 2011

4. Bodies subject to abolition

The Bill includes provisions to abolish certain NHS bodies, some of which will have an impact on Wales where these bodies operate in the NHS outside England.

A UK Government paper, published in July 2010, *Liberating the NHS: Report of the arms-length bodies review* set out the UK Government's proposals for reforming or abolishing arms-length bodies in health and social care[5]. In respect of bodies operating in Wales, the report acknowledged:

> 5.2 Much work now needs to be undertaken to implement the changes described in the document. We will engage with the arm's-length bodies and key stakeholders, including the Devolved Administrations and other government departments, to flesh out the detail of each recommendation and will draw on the expertise of the arm's-length bodies sector and others to develop detailed implementation plans.
>
> 5.3 We expect that implementation of the proposals will be completed by 2014 in line with the wider system changes.

The Minister for Health and Social Services, Edwina Hart AM, responded to a Written Assembly Question on this subject in August 2010:

> **Chris Franks (South Wales Central):** What discussions has the minister had regarding the abolition of the Health Promotion Agency? (WAQ56309)
> ***Answer issued on 06 August 2010***
> I am aware of the Department of Health's review of Arm's Length Bodies including the proposal to transfer the Health Protection Agency into a new Public Health Service for England. My officials are in discussion with the Department of Health.

The UK Government undertook to engage on implementation of abolishing and merging bodies with key stakeholders, including Devolved Administrations, in the summer and autumn of 2010.[6]

Provisions in the Bill abolish arms-length bodies which are established by Acts of Parliament by repealing the legislation or parts of the legislation. Several bodies – for example, the **Appointments Commission,** are nominally England and Wales bodies but operate as *de facto* English only bodies.

The Secretary of State for Health wishes to take a more direct role in health protection in England and, to this end, the **Health Protection Agency (HPA)** is to be abolished in its current form and become part of the new Public Health Service (PHS) for England.

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[5] A list of the arm's-length bodies that have been reviewed can be found in *Liberating the NHS: Report of the arms-length bodies review* Annex A, Department of Health, 2010
[6] Ibid., p.43

The HPA was established as a Non-Departmental Public Body (NDPB) under the *Health Protection Agency Act 2004*. This Act gives functions to the HPA, including health functions and radiation protection functions. Welsh Ministers currently have powers under this Act.

Section 258 provides for the abolition of the **Alcohol Education and Research Council** (AERC) whose remit extends to Wales. This body:

- generates and disseminates research based evidence to inform and influence policy and practice, and
- aims to develop the capacity of people and organisations to address alcohol issues.

AERC was established as an Executive Non-Departmental Public Body (NDPB) via the *Licensing (Alcohol Education and Research) Act 1981*.

Since July AERC have been working with the Department of Health (DoH) and has decided to re-constitute itself as a new charity that is entirely independent of Government. All of the AERC's functions, including its endowment fund, staff, grant programmes and its future plans and strategies would then move to the new charity. In September, the AERC's trustees voted unanimously in favour of this option. Once the transfer has been completed, the Secretary of State for Health can use existing powers to wind up the AERC.[7]

Section 260 provides for the abolition of the **National Information Governance Board for Health and Social Care** (NIGB). The National Information Governance Board for Health and Social Care (NIGB) is a statutory body established as part of the Health and Social Care Act 2008 to provide advice and guidance on, and support improvements in, information governance practice in health and social care in England. It also administers applications under section 251 of the *NHS Act 2006*, which allows the Secretary of State for Health to set aside the common law of confidentiality in specific circumstances which extend to England and Wales.

Section 261 provides for the abolition of **National Patient Safety Agency** (NPSA) which was established as a Special Health Authority in 2001. Its core function is to improve the safety of NHS care by promoting a culture of reporting and learning from adverse events. The UK Government feels that:

> The functions of the organisation, whilst necessary within a system supporting wider quality and safety improvement, do not of themselves need to be performed at arm's-length of the Department and could be delivered elsewhere in the system.[8]

NPSA currently operates a service level agreement with the Welsh Government for aspects of its work.

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[7] AERC website [accessed 19 January 2010]
[8] Op.Cit. DoH, July 2010

S.262 provides for the abolition of the **NHS Institute for Innovation and Improvement** which was established as a Special Health Authority under the *National Health Service Act 2006* and is an arm's-length body sponsored by the DoH to act as the NHS' "in house improvement organisation". It is currently funded largely through grant in aid from the DoH; in addition it has been developing a commercial model selling additional services to the NHS and international organisations to generate revenue that can be reinvested in further NHS work. This operates a service level agreement with the Welsh Government.

5. Changes to the National Institute for Health and Clinical Excellence (NICE)

The National Institute for Health and Clinical Excellence (NICE) provides evidence-based information for the NHS on the cost and effectiveness of drugs and treatments for England and Wales (although Scotland and Northern Ireland may make use of NICE guidance). Part 8 of the Bill is intended to re-establish the National Institute for Health and Clinical Excellence (NICE) as a non-departmental public body (it is currently a Special Health Authority) and re-name it the 'National Institute for Health and Care Excellence', reflecting the extension of its remit to social care (it will still be known as NICE).[9] The UK Government is currently consulting on its proposals for a new value-based approach to the pricing of branded medicines which may lead to change in NICE's role. The Department of Health's website states, in respect of policy in England:

> GP commissioning consortia will, as PCTs do now, ultimately take responsibility for the resources used to commission healthcare services. However, like PCTs now, GP commissioning consortia will be expected to fund services and interventions which are clinically and cost effective. Our plans for value- based pricing aim to ensure that clinically-effective drugs are cost-effective – and that funding should therefore be made available for them – because the price the NHS pays for them will reflect the value they bring patients.
>
> Doctors already decide what they see as the most appropriate treatment for their patient: NICE guidance does not replace that judgement. If NICE has not recommended use of a particular treatment on the NHS, the local PCT can still make its own decision on whether to fund it, either generally or in specific cases. We have been clear that we want clinicians to be able to prescribe the drugs they believe will benefit their patients, and for patients to have a say in decisions about their care. Value-based pricing will enable this.[10]

However, the proposals in England have raised questions about the future role of NICE in Wales. The First Minister responded to an oral question in Plenary on 2 November 2010:

> **Helen Mary Jones:** First Minister, do you agree that one potentially serious threat to the health budget in Wales and over the border—although, of course, that is not a matter for us— is the decision that the Westminster Government has taken effectively to deregulate medicines? It has decided to remove from the National Institute for Health and Clinical Excellence its right to determine value for money, and that could potentially lead to a complete free-for-all. While it might have some benefits for some individual patients, it will overall benefit the wealthy pharmaceutical companies much more. Will you undertake to discuss with the Minister for Health and Social Services how we can ensure that whatever is done to deregulate the provision of medicines in England, we are not forced down the same path here in Wales?

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[9] HC Library, *The Health and Social Care Bill*, Bill 132 of 2010-11, Research Paper, 11/11 27 January 2011
[10] DoH, NICE, Frequently Asked Questions [accessed 2 February 2011]

> **The First Minister:** We were not aware of what was happening with NICE, even though it is an England-and-Wales body, and that raises several issues. First, the idea behind NICE was that it would approve drugs that, in a way, went beyond the marketing of those drugs by the drug companies. As someone who knows many GPs, I know full well that the marketing was pretty generous to GPs at one time. The idea behind NICE was to take that element away. The difficulty for GPs in England now is that they will not be able to refer to an independent body that has approved a particular drug or not, and they will get the blame if they are not able to prescribe certain drugs. I do not think that GPs in Wales would welcome being put in that position.[11]

On the 3 November 2010 the *Western Mail* reported that the Minister for Health and Social Services, Edwina Hart AM had said "all the options are on the table" for a Welsh replacement for NICE. The article said:

> Mrs Hart has said she will examine what is happening in Scotland and Northern Ireland.
> "I have always respected the [Nice] process because, at the end of the day, they had the wherewithal to do the proper assessments," she said.
> "I think all options must be on the table for us now. Nice might have seemed quite a blunt instrument but at least it was an instrument that had scientific back-up in terms of the decisions they made."[12]

[11] RoP, 2 November 2010
[12] *Western Mail*, 'Edwina says 'all options open' as NICE loses powers', 3 November 2010.

6. Cross Border Issues

The Bill makes several non-consequential amendments to the *National Health Service (Scotland) Act 1978*, *National Health Service (Wales) Act 2006*, *The Health and Personal Social Services (Northern Ireland) Order 1991* and *National Health Service Act 2006* in order to rectify devolution anomalies or uncertainties. A full list of amendments is in Schedule 20 to the Bill and can be seen in Annex 1 to this paper.

In addition, these amendments will include provisions for joint dispute determination of NHS contracts to which English, Welsh, Scottish or Northern Irish health bodies are parties, in a similar manner to those already provided for dispute determination of Scottish NHS contracts to which Northern Irish health bodies are parties in Section 17(10) of the *National Health Service (Scotland) Act 1978*.[13]

Mark Isherwood AM put a question in a recent plenary session to the Social Services Deputy Minister, Gwenda Thomas AM, about how cross-border issues were to be accounted for in light of the English reforms:

> **Mark Isherwood:** You will be aware that there was reporting for a little while last month that Liverpool Heart and Chest Hospital was to stop treating north Wales patients. Thankfully, we heard from the health board the following week that that matter had been resolved, but that was the latest manifestation of a long-standing problem. Three years ago, the Welsh Affairs Committee reported tensions over the different way that healthcare was funded on either side of the border and called for fair and equal treatment for patients on either side of the English and Welsh border. What actions, therefore, is the Welsh Government taking to ensure through cross-border collaboration and planning in advance that the likelihood of these sorts of incidents arising in the future is minimised? I am aware not only of concerns involving that institution, but of periodic concerns involving Gobowen, the Countess of Chester, Liverpool Walton and others. This is a big issue that potentially affects a large number of people in north Wales.
>
> **Gwenda Thomas:** As the nature of the policies of the London Government on the NHS become clearer, we will need to ensure that patients living on the England-Wales border are protected and that any adverse impact on them is minimised. The Minister has had discussions with Andrew Lansley on this matter and secured appropriate safeguards in the NHS Bill. She wrote to all AMs on 8 June last year, clarifying her expectations and policies in this matter. There has been recent press coverage, as you said, about Merseyside hospitals not treating north Wales patients for non-emergency heart and chest problems. Negotiations have concluded, as you know, between Liverpool Heart and Chest Hospital and Betsi Cadwaladr University LHB, and services to patients will continue as previously provided. The Minister wishes to minimise the friction caused by differing cross-border policies, which may interfere with patient care.[14]

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[13] Scottish Government, Legislative Consent Memorandum, Health and Social Care Bill, January 2011

[14] RoP, 19 January 2011,

Further clarfication was provided by the Minister on the 16 February 2011:

> **Helen Mary Jones:** Minister, as you mentioned in an earlier answer, many people living on the Welsh border are currently receiving secondary healthcare services in hospitals in England. The proposed changes in England will have no immediate effect on those hospital services, but there may be longer-term effects due to the possible fragmentation of the service as a result of GP commissioning. Will you undertake to keep the situation under review to ensure that if, for example, services are moved from a hospital that is close to Wales to one that is much further away, we find an alternative way for those patients to get the services that they need?
>
> **Edwina Hart:** It is very opportune that you have asked that question. I would like to put on record the issues around the protocol for cross-border healthcare commissioning. I believe that this point was raised by the leader of the Liberal Democrats. We have been having discussions with the Department of Health at official level, and work is ongoing between the parties to develop the protocol for 2011-12. Obviously, there will have to be far more detailed discussions about what happens after that year, because of some of the issues that you raise. We use specialist tertiary services across the border and will continue to do so. I can assure you that, when I had my meeting with Andrew Lansley, he understood the issues around this. He said to me that if there is any issue that impacts on Wales in relation to those services, he or his officials will speak to us. He has been as good as his word, because his officials have been looking at issues around children's centres, and we have had the appropriate discussions with him around how that might impact on Wales. The English reforms have started, but they have not yet been finalised. We have to take this a day at a time and ensure that Welsh patients do not lose out, but we must recognise that the reforms are taking place. They might not be to my taste, or yours, but they are going ahead.[15]

[15] RoP, 16 February 2010

Annex 1 Schedule 20

Act	Amendment
National Health Service (Scotland) Act 1978 (c.29)	The Schedule removes references to Strategic Health Authorities and Primary Care Trusts, and adds references to commissioning consortia and the NHS Commissioning Board. It makes certain other adjustments in consequence of the changes made by the Bill. The Schedule adds NICE and the Health and Social Care Information Centre, to Section 17A of the Act so that arrangements with these bodies will be NHS Contracts for the purposes of the NHS (Scotland) Act 1978.
NHS Act 2006 (c.41)	The Schedule adds Healthcare Improvement Scotland, to Section 9 of the Act so that arrangements by certain bodies with Healthcare Improvement Scotland will be NHS contracts for the purposes of the NHS Act . The amendment adopts the existing dispute resolution mechanism which applies when an agreement is an NHS contract under the NHS Act and a Health and Social Services contract under the NHS Act and the NHS (Scotland) Act 1978. Paragraphs 8 – 11 of the schedule are related to changes made by the Bill which impact upon certain bodies in Wales.
National Health Service (Wales) Act 2006 (c.42)	The Schedule removes references to Strategic Health Authorities and Primary Care Trusts, and adds references to commissioning consortia and the NHS Commissioning Board. **The amendments to the rest of the NHS (Wales) Act 2006 made in this schedule are either consequential on the changes made elsewhere in the Bill, or are designed to ensure that provisions which are parallel in the NHS (Wales) Act 2006 and the NHS Act continue to work in parallel.**
Health and Personal Social Services (Northern Ireland) Order 1991	The Schedule adds health bodies, for example, Healthcare Improvement Scotland, NICE and the Health and Social Care Information Centre, to Article 8 of the Order so that arrangements by these bodies will be HSS contracts for the purposes of the Health and Personal Social Service (Northern Ireland) order 1991. Certain amendments to this order are consequential to changes made elsewhere in the Bill.