Health & Social Care Bill 2011
House of Lords Committee stage

Clause 22, Schedule 2 and GP commissioning

Briefing Note 8

Clause 22 and Schedule 2 of the Bill deal with the establishment, constitution, membership and operation of clinical commissioning groups (CCGs). Amendments 154 – 175CC, and 175D – 176AD, relate to Clause 22 and Schedule 2 of the Bill, respectively.

In our view, there are two straightforward commissioning positions: commissioning by accountants, lawyers and private companies, or commissioning by NHS staff in PCTs. Currently, we have the latter. The Bill would give us the former. The government continues to misrepresent the former position to the public as "GP commissioning".

Because none of the tabled amendments addresses the concern that GPs will not actually commission health services (though see discussion of Amendment 175D below), this Briefing Note has been prepared to inform peers of the problem, rather than to make recommendations on whether certain amendments should or should not be supported.

Why GP commissioning is not GP commissioning

Building on the removal of the Secretary of State's duty in Clauses 1 and 10 of the Bill to provide the NHS, **Clause 22 and Schedule 2 would set the legal basis for private companies, law and accounting firms to commission services instead of the Secretary of State providing them.**

This would be achieved under the guise of what the government has termed "GP commissioning", but a careful analysis of the provisions of Clause 22 and Schedule 2 demonstrates how GPs will not be required to do any commissioning, and how the supposed commissioning role of GPs will almost always, and perhaps always, in fact to be undertaken by others.

If the Bill were to be enacted, GPs would be able *in theory* to commission health services. If Clause 10 were enacted, each CCG would be under a duty to arrange provision of the services listed in section 3 of the NHS Act 2006 to meet the reasonable requirements of persons for whom they would be responsible; and only providers of primary medical services (which include traditional GPs, but also companies employing doctors) would be able to be members of a CCG. Therefore, if

a CCG had no other persons associated with it, then GPs or the companies employing doctors would, it seems, *have to* do the commissioning.

However, under Clause 22: new section 14C(2), if an application is made to establish a CCG, the NHS Commissioning Board would not be allowed to grant the application unless it was satisfied that (amongst other things) "appropriate arrangements" had been made by the applicants to ensure that the group would be able to discharge its functions.

Clearly, if GPs can show they have been trained and/or have experience of commissioning and the requirements of procurement and competition law, then it is reasonable to assume that they might pass this test.

However, this will rarely be the case because the vast majority of GPs are not trained to commission services, and do not have expertise in procurement and competition law. This means that they will not be able to demonstrate that they have made "appropriate arrangements" to discharge their commissioning functions unless they engage those who are so trained and who have such expertise – such as the employees of private health companies, management consultancies, solicitors' firms and accountants. Such combinations are routinely provided by the US health care insurance industry and US health maintenance organisations, such as Kaiser and UnitedHealth.

Clause 22 and Schedule 2 are therefore drafted so as not to require the GP members of a CCG to do the actual commissioning, but rather to allow for private companies, accountants and the like to be a part of a CCG and for them to do the commissioning.

This is achieved by a combination of:

> ***Clause 22: new section 14C(2),*** which allows the GPs applying to establish a CCG to show that they have made "appropriate arrangements" for discharging their functions: in other words, the GPs themselves are not required to discharge the functions;
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> ***Schedule 2: new Schedule 1A, paragraph 3(1) and (2),*** which requires a CCG constitution to specify the arrangements for discharging its functions, and these arrangements may include the appointment of committees or sub-committees, and for any such committees to consist of or include persons *other than* members or employees of the CCG: in other words, anybody can sit on a committee or sub-committee of a CCG and such committees can consist *only* of non-GPs; and
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> ***Schedule 2: new Schedule 1A, paragraph 3(3),*** which states that the arrangements may provide for any CCG function to be exercised on its behalf by any CCG member or employee, its governing body, or a CCG committee or

sub-committee: in other words, private companies, law firms and accountants can sit on committees of CCGs and be given the power to do the commissioning for the CCG.

We have considered, but have not been able to conceive of, possible amendments to these provisions that would have the effect of requiring GPs to do the commissioning. The problem however is that the vast majority of GPs are not qualified to do so, and so we can see no sense in tabling such amendments.

Moreover, even if such amendments were tabled, because GPs are not generally qualified to commission, it would be necessary to permit them to contract with private companies, accountants and such like to carry out the commissioning (and legally for this to be done on behalf of the GPs). Again, there seems little point in tabling such amendments to achieve what would in effect be the same outcome.

The inexorable logic is that few GPs will be able to demonstrate that they themselves are competent to commission, and so CCG commissioning will not be GP-led. This runs contrary to government claims.

Amendment 175D, tabled by Lord Hunt of Kings Heath and Baroness Thornton, would insert a new Schedule before Schedule 2 of the Bill. Under this new Schedule, amongst other things, CCG powers would have to be exercised by a board of directors, or delegated to a committee of directors or to an executive director. It would also provide for the board of directors to consist (only) of an unspecified number of executive directors, amongst whom would be the chief executive (and accounting officer), the finance director, a "registered medical director" (*sic - ? registered medical practitioner?*) and a registered nurse or midwife; and an unspecified number of non-executive directors, one of whom would chair the board. This amendment would have the effect of expressly providing for non-commercial representation on the body that would have to exercise CCG powers, and so it would seem to prevent a CCG committee of (say) lawyers, accountants and management consultants from exercising commissioning functions. It would not, however, require GPs to commission services. Moreover, it does not include public health which is the profession with the expertise and training in information, needs assessment, service planning and inequalities monitoring.

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A Note on conflict of interest has also been prepared at the same time as this Note.

28th November 2011