

**HEALTH AND SOCIAL CARE BILL
CLAUSE 22
CONFLICTS OF INTEREST**

Background Note 1

This note shows the inadequacy of provisions regarding conflicts of interest for CCGs compared with those currently applying to Primary Care Trusts and the provisions for local government. The Localism Act 2011, which received Royal Assent on November 15th 2011, makes further revisions to provisions governing local government.

A number of amendments have been tabled to improve existing provisions in the Bill on conflicts of interest in relation to clinical commissioning groups. Amendments 156, 161, 175CC, 175E 176AD and 213C (see Appendix 'B') all improve on the existing provisions. However conflicts of interest are not defined or explained.

SUMMARY

- Each CCG will have a separate constitution, centrally approved by the NHS Commissioning Board. Each CCG must make provision for conflicts of interest in its constitution but these provisions may vary between and across CCGs.
- There is currently one set of regulations governing conflicts of interest within PCTs. The Bill makes no provision for such regulations. Constitutions and provisions regarding conflicts of interest of CCGs can vary after PCTs are abolished.
- The Localism Act 2011, which will apply to health service budgets, transferred to local authorities, subjects local authority councillors to a rigorous regime that includes several criminal offences; this is not the case for CCG members.
- There is no clear provision for regulations and apparently little direction regarding conflicts of interest, yet members of a CCG may commission, provide commissioning services and/ or invest, own or operate health services and health care companies.

What the Bill says:

Clause 22 and schedule 2 - New section 14A to N and new schedule 1 A inserted into the 2006 Act

Clause 22 (Clinical commissioning groups: establishment etc) inserts new sections 14A to N into the National Health Service Act 2006.

Section 14B (Applications for the establishment of clinical commissioning groups) sets out a procedure for applications to be established as a CCG to be made to the Board (subsection (1)). Under subsection (2), an application may be made by two or more persons, provided that each of them is either a provider of primary medical services (a

GP contract holder) or wishes to be so and they wish to be a member of the proposed CCG . Under subsection (3), applications must include a copy of the CCG 's proposed constitution, the name of the person whom the CCG wishes the Board to appoint as its accountable officer and such other information that the Board may specify.

New section 14D2 gives effect to schedule 1, which inserts a new schedule 1A into the 2006 Act. A CCG must have a constitution (para 1). By para 4(1) of schedule 1A, the constitution must specify the procedure to be followed by the clinical commissioning group in making decisions. By para 4 (2), the constitution must in particular merely 'make provision' for dealing with conflicts of interests of members or employees of the clinical commissioning group. The constitution must also specify the arrangements made by the clinical commissioning group for securing that there is 'transparency' (whatever that may mean) about the decisions of the group and the manner in which they are made (para 4(3)).

Paragraph 5 of new schedule 1A states that 'the provision made by virtue of paragraphs 3 and 4 must secure that there is effective participation by each member of the clinical commissioning group in the exercise of the group's functions'.

Other provisions of schedule 1A illustrate how conflicts might arise. Paragraph 3 (1) provides that the constitution of a CCG must specify the arrangements made by the clinical commissioning group for the discharge of its functions (including its functions in determining the terms and conditions of its employees). Under paragraph 3(2), the arrangements may include provision (a) for the appointment of committees or sub-committees of the clinical commissioning group, and (b) for any such committees to consist of or include persons other than members or employees of the clinical commissioning group.

Para 3(3) provides that the arrangements may include provision for any functions of the clinical commissioning group to be exercised on its behalf by—

- (a) any of its members or employees,
- (b) its governing body, or
- (c) a committee or sub-committee of the group.

Local government law also allows for functions to be exercised in a similar way – but underpinned by a rigorous statutory framework that requires the registration and declaration of councillors' interests.

Paragraph 7 makes similar provisions for governing bodies of CCGs.

The existing arrangements

The existing arrangements involve regulation and guidance from the centre. The Primary Care Trusts (Membership, Procedure and Administration Arrangements) Regulations 2000¹ were made under the National Health Service Act 1977 – see now paragraph 4 (1) of Schedule 3 of the National Health Service Act 2006. The provisions in the 2006 Act provide the Secretary of State with a power to make regulations about various matters, including

- (b) the tenure of office of the chairman and other members of a Primary Care Trust (including the circumstances in which they cease to hold office or may be removed or suspended from office),
- (c) how many persons may be appointed as members of a Primary Care Trust and how many of those members may be officers (a minimum and maximum number may be specified for both purposes),
- (d) the appointment and constitution of any committees of a Primary Care Trust (which may include or consist of persons who are not members of the Primary Care Trust),
- (e) the appointment and tenure of office of the members of any committees of a Primary Care Trust,
- (f) the procedure to be followed by a Primary Care Trust, and by any committee of the Primary Care Trust, in the exercise of its functions,
- (g) the circumstances in which a person who is not an officer of the Primary Care Trust must be treated as if he were such an officer.

The original 2000 regulations contain extensive provisions on the ‘disability of chairman and members in proceedings on account of pecuniary interest’. The meaning of pecuniary interest is defined in reg 11 (5). See Annex ‘B’ below. The regulations also cover similar ground to schedule 2 of the Bill in that they make provision for the discharge of functions of PCTs. But the provisions for pecuniary interests are far more extensive.

Guidance

Current regulations are supported by guidance: the code of accountability in the NHS - 2nd rev ed, July 2004². This states, for example, at page 2

Public Business and Private Gain

Chairs and board directors should act impartially and should not be influenced by social or business relationships. No one should use their public position to further their private interests. Where there is a potential for private interests to be material and relevant to NHS business, the relevant interests should be declared and recorded in the board minutes, and entered into a register, which is available to the public. When a conflict of interest is established, the board director should withdraw and play no part in the relevant discussion or decision.

Local government and the Localism Act 2011³

Local authority councillors have been accustomed to the registration and declaration of interests for some time. Chapters 6 and 7 of part 1 the Localism Act 2011 build on

¹ <http://www.legislation.gov.uk/uksi/2000/89/contents/made>

² http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4116282.pdf

³ <http://www.legislation.gov.uk/ukpga/2011/20/introduction/enacted>

existing legislation and case law and make extensive provisions on predetermination and on the conduct and interests of members of local authorities.

Section 30 makes rather lengthy provisions for 'disclosable pecuniary interests – that is, pecuniary interests of a description specified in regulations made by the Secretary of State. Schedule 4 amends the existing standards regime.

Section 34 creates offences of failing to register or disclose pecuniary interests and of participating in a discussion or voting where a member as a disclosable pecuniary interest in any matter to be considered, or being considered, at the meeting.

An analysis of the history, or of the merits and scope of these provisions is outside the scope of this note. Suffice it to say that the Localism Act 2011 is more onerous than the provisions in the Bill. Elected councillors exercising public health functions will be subject to its provisions. Members of Clinical Commissioning Groups on the other hand will not be subject to this regime, but will have considerable freedom to define conflicts of interest, notwithstanding any supervision by the NHS Commissioning Board.

Tim Treuherz
Allyson Pollock
David Price
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Tim Treuherz was formerly Head of Legal Services, Vale of White Horse District Council.

Professor Allyson Pollock is Professor of Public Health Research and Policy at Queen Mary University of London.

David Price is Senior Research Fellow at Queen Mary University of London.

Appendix A: Amendments

Amendment 156 (Baroness Thornton, Lord Hunt Of Kings Heath)

This appears to be aimed at preventing a particular conflict of interest arising, by not allowing providers who have direct or indirect financial interests in the provision of services that a CCG has a duty to commission to be CCG members. **This would not extend to discretionary services that a CCG might provide under Clause 11; new section 3A, and would not prevent such providers from sitting on the governing body or a committee of the CCG, or from exercising the CCG's functions (if the CCG constitution so states).**

Amendment 161 (Baroness Finlay of Llandaff, Baroness Thornton and Baroness Wheeler. This inserts a new section 14BA to impose a duty on the Secretary of State to issue guidance and a duty on CCGs to have regard to that guidance. This, together with amendment 176A would certainly be an improvement on the existing provisions.

Amendment 175CC (Lord Hunt of Kings Heath and Baroness Thornton)

New section 14N provides a number of regulation-making powers. The Explanatory Notes state (para 258 'It is intended that regulations made under these powers will, without being overly prescriptive, set out some of the detail needed for the set-up of CCGs' governing bodies and their statutory committees.' Amendment 175CC amends new section 14N which makes provision for regulations as to how clinical commissioning groups will deal with conflicts of interests of members or employees of the clinical commissioning group. This amendment would include a power to make regulations to ensure that a clinical commissioning group cannot commission services from a member of the clinical commissioning group nor promote the services of private sector.

Amendment 176A (Baroness Finlay of Llandaff and Baroness Thornton) is to new schedule 1A. It requires CCGs to maintain a publicly accessible register of all potential conflicts of interest of those individuals involved in any part of the commissioning process. This would be similar to the requirements imposed on local authorities to maintain a register. This amendment is similar to amendment 161 in that it also imposes on the Secretary of State to issue guidance on how conflicts of interest should be dealt with by commissioning consortia as part of their decision making and a duty on Clinical commissioning groups to have regard to that guidance.

Amendments 175E and 176AD (Baroness Williams of Crosby, Lord Marks of Henley-On-Thames and Lord Patel) amend schedule 2 to make provision for a register of interests and for a new section 14Z8A to provide for the Guidelines on Conflict of Interest for Members of Clinical Commissioning Groups similar to the Nolan Principles. Amendment 231C, proposed by the same peers, would place the Board under a duty to his or her relevant professional body any member of a clinical commissioning group whom it reasonably believes to have been in material breach of provision.

Appendix B

Extract from the Primary Care Trusts (Membership, Procedure and Administration Arrangements) Regulations 2000. This is the original text of reg 11; the regulations have been amended several times and only one amendment is shown. The point remains that regulations are stronger than the proposals in the Bill.

Disability of chairman and members in proceedings on account of pecuniary interest

11.—(1) Subject to the following provisions of this regulation, if the chairman or a member of a Primary Care Trust has any pecuniary interest, direct or indirect, in any contract, proposed contract or other matter and is present at a meeting of the trust at which the contract, proposed contract or other matter is the subject of consideration, he shall at the meeting and as soon as practicable after its commencement disclose the fact and shall not take part in the consideration or discussion of the contract, proposed contract or other matter or vote on any question with respect to it.

(2) The Secretary of State may, subject to such conditions as he may think fit to impose, remove any disability imposed by this regulation in any case in which it appears to him in the interests of the health service that the disability should be removed.

(3) A trust may, by Standing Orders made under regulation 10(2), provide for the exclusion of the chairman or a member from a meeting of the trust while any contract, proposed contract or other matter in which he has a pecuniary interest, direct or indirect, is under consideration.

(4) Any remuneration, compensation or allowances payable to the chairman or a member by virtue of paragraph 11 of Schedule 5A to the Act shall not be treated as a pecuniary interest for the purpose of this regulation.

(5) Subject to paragraphs (2) and (6), the chairman or a member shall be treated for the purposes of this regulation as having an indirect pecuniary interest in a contract, proposed contract or other matter if—

(a) he, or a nominee of his, is a director of a company or other body, not being a public body, with which the contract was made or is proposed to be made or which has a direct pecuniary interest in the other matter under consideration; or

(b) he is a partner of, or in the employment of, a person with whom the contract was made or is proposed to be made or who has a direct pecuniary interest in the other matter under consideration;

and in the case of married persons living together the interest of one spouse shall, if known to the other, be deemed for the purpose of this regulation to be also an interest of the other.

(6) The chairman or a member shall not be treated as having a pecuniary interest in any contract, proposed contract or other matter by reason only—

(a) of his membership of a company or other body if he has no beneficial interest in any securities of that company or other body; or

(b) of an interest in any company, body or person with which he is connected as mentioned in paragraph (5) which is so remote or insignificant that it cannot reasonably be regarded as likely to influence a member in the consideration or discussion of or in voting on, any question with respect to that contract, proposed contract or matter.

(7) Where the chairman or a member has an indirect pecuniary interest in a contract, proposed contract or other matter by reason only of a beneficial interest in securities of a company or other body, and the total nominal value of those securities does not exceed £5,000 or one-hundredth of the total nominal value of the issued share capital of the company or body, whichever is the less, and if the share capital is of more than one class, the total nominal value of shares of any one class in which he has a beneficial interest does not exceed one-hundredth of the total issued share capital of that class, this regulation shall not prohibit him from taking part in the consideration or discussion of the contract, proposed contract or other matter or from voting on any question with respect to it, without prejudice however to his duty to disclose his interest

(8) This regulation applies in relation to a committee or sub-committee and to a joint committee or sub-committee as it applies in relation to a trust and applies to a member of any such committee or sub-committee (whether or not he is also a member of a trust) as it applies to a member of a trust.

(9) In this regulation—

“public body” includes any body established for the purpose of carrying on, under national ownership, any industry or part of any industry or undertaking, the governing body of any university, university college or college, school or hall of a university and the National Trust for Places of Historic Interest or Natural Beauty incorporated by the National Trust Act 1907(1);

“securities” means—

(a) shares or debentures, whether or not constituting a charge on the assets of a company or other body, or rights or interests in any share or such debentures; or

(b) rights (whether actual or contingent) in respect of money lent to, or deposited with, any industrial or provident society or building society;

“shares” means shares in the share capital of a company or other body or the stock of a company or other body.

Primary Care Trusts (Membership, Procedure and Administration Arrangements) (amendment) Regulations 2003

In regulation 11 of the principal Regulations (disability of chairman and members in proceedings on account of pecuniary interest), in paragraph (5)—persons living together as a couple (whether married or not)”; and

(b) “spouse” shall be omitted.