

**EXPLANATORY MEMORANDUM TO
THE NHS COMMISSIONING BOARD AUTHORITY (ESTABLISHMENT
AND CONSTITUTION) ORDER 2011**

2011 No. 2237

THE NHS COMMISSIONING BOARD AUTHORITY REGULATIONS 2011

2011 No. 2250

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
 - 2.1 The NHS Commissioning Board Authority (Establishment and Constitution) Order 2011 provides for the establishment and constitution of the NHS Commissioning Board Authority (“the Authority”). The NHS Commissioning Board Authority Regulations 2011 makes provision for the membership and procedure of the Authority, a Special Health Authority that will exercise functions of the Secretary of State in preparation for the establishment and operation of a NHS Commissioning Board (“NHS CB”). The establishment of a NHS CB is subject to the passage of the current Health and Social Care Bill 2011 and is a central part of the Government’s reform agenda for the NHS. The Authority would act as a preparatory body – facilitating the appointment of the senior team for the NHS CB; as well as the development of governance, strategic and other essential processes for the operation of the NHS CB. This will ensure that at the time the NHS CB is established, it is focused and fully able to function.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None
4. **Legislative Context**
 - 4.1 The Health and Social Care Bill 2011 (“the Bill”) makes provision for the abolition of a number of existing health related Arm’s-Length Bodies; as well as changes in functions of others and the creation of some new bodies. The NHS CB is an entirely new entity intended to redefine the way in which health care is commissioned for patients. These instruments deal only with the establishment of the Authority – which is a preparatory body for the statutory NHS CB provided for in the Bill – and make provision concerning membership and procedure of the Authority. Our intention is to establish the statutory NHS CB by October 2012, after the Bill has received Royal Assent.
5. **Territorial Extent and Application**
 - 5.1 These instruments apply to England.
6. **European Convention on Human Rights**

6.1 As the instruments are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

7.1 The Government intends to create a more autonomous and accountable NHS – with greater clarity about the roles and responsibilities of different organisations for provision and commissioning. An independent and accountable NHS CB is a key component of these new arrangements.

7.2 The Department of Health’s White Paper ‘Equity and excellence: Liberating the NHS’ stated that ‘We will establish an independent and accountable NHS Commissioning Board. The Board will lead on the achievement of health outcomes, allocate and account for NHS resources, lead on quality improvement and promoting patient involvement and choice. The Board will have an explicit duty to promote equality and tackle inequalities in access to healthcare. We will limit the powers of Ministers over day-to-day NHS decisions.’

7.3 Subject to the Health and Social Care Bill receiving Royal Assent, the NHS CB will be established as an independent statutory body, by October 2012. It will allocate resources to clinical commissioning groups (“CCGs”) and support them to commission services on behalf of their populations according to evidence-based quality standards. It will have direct responsibility for commissioning primary care and specialised services, which it would be less appropriate for CCGs to commission. The NHS CB will be free to take decisions about how best to allocate commissioning resources without Ministerial interference but will be accountable for ensuring expenditure, use of resources and administration costs remain within limits set by the Secretary of State. It will have a number of duties, such as reducing inequalities, and will be held to account for delivering improved patient outcomes.

7.4 It has the backing of the NHS Future Forum. In their report, it states ‘To ensure focused leadership for quality, safety and the financial challenge, the NHS Commissioning Board should be established as soon as possible.’ In response, the Government has committed to establishing a preparatory NHS Commissioning Board as a Special Health Authority by October 2011.

7.5 The Authority is a preparatory vehicle which will allow the organisation to recruit a senior team; set strategic goals and direction; establish governance processes; and take on some limited functions with regard to the health system. This will ensure that the NHS CB is able to function as intended as soon as it is established as an executive non-departmental public body. It will help the NHS to manage some of the challenges of the transition from the current system to the new one.

8. Consultation outcome

8.1 The principle of establishing a NHS CB was first set out in the NHS white paper. *Liberating the NHS: Commissioning for patients* then sought views on more detailed proposals around the work of the NHS CB.

8.2 The Government response to both these consultations was published in December 2010, outlining a number of policy changes (for example, that maternity services would be commissioned by clinical commissioning groups rather than nationally by the NHS CB).

8.3 The need for an independent NHS CB, and its functions, was tested further through the recent Listening Exercise on the Government's NHS modernisation plans. The NHS Future Forum recommended in their report that the NHS CB should be established as soon as possible "to ensure focused leadership for quality, safety and the financial challenge"

8.4 Representatives of staff that will be transferred to the Authority on the date of establishment have also been consulted, under section 28 of the NHS Act 2006, on the proposed functions of the Authority, whether the appropriate staff have been identified to transfer on establishment, and the potential implications for those affected by the transfer. Union leaders were sent a letter on 5 July 2011. The consultation period closed on 16 August 2011.

8.5 Three responses were received, one from Christina McAnea on behalf of the Social Partnership Forum, one from U L Udeshi of the Hospital Consultants & Specialists Association and one from Jon Ford of the British Medical Association.

8.6 Comments included the desire to have greater detail about the staff that would transfer to the new bodies and for us to allow enough time to consult appropriately about those transfers. There was also a desire to ensure that functions of bodies being abolished would be reflected appropriately and successfully transferred to proposed special health authorities bodies.

8.7 [A summary of the consultation can be found on the DH website: http://www.dh.gov.uk/en/Publicationsandstatistics/Lettersandcirculars/Dearcolleagueletters/DH_128703](http://www.dh.gov.uk/en/Publicationsandstatistics/Lettersandcirculars/Dearcolleagueletters/DH_128703)

9. Guidance

9.1 None.

10. Impact

10.1 The impact on business, charities or voluntary bodies is negligible.

10.2 The NHS CB will not be taking functions from Strategic Health Authorities on a one to one basis, just as Primary Care Trust functions will not be solely transferred to CCGs. Therefore, it is more appropriate that the Impact Assessment for the Health and Social Care Bill 2011 looked at the impact of the changes to commissioning across the whole system, rather than specifically looking at the Board.

10.3 An Impact Assessment has not been prepared for these instruments as no impact on the private or voluntary sector is foreseen.

10.4 The Authority forms part of the transition arrangements to the new commissioning system. Annex A (pages 3 to 29) of the combined Health and Social Care Bill Impact Assessment contains a section on the transition to the new commissioning system, and therefore contains relevant information. The combined Health and Social Care Bill Impact Assessment and coordinating document can be found on the Department of Health website:

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_123583

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Authority is intended to exist only until the statutory NHS CB is established (by October 2012). In this time it should have recruited the senior team (who will transfer to the statutory body); and put in place robust organisational and operational processes to allow for a smooth transition.

13. Contact

Jason Yiannikou at the Department of Health Tel: 0207 210 4358 or email: Jason.Yiannikou@dh.gsi.gov.uk can answer any queries regarding the instrument.