

# HEALTH ACT 1999

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part III – Miscellaneous and Supplementary

##### *Section 60 and Schedule 3: Regulation of health care and associated professions*

333. Parliament has intervened in the regulation of health care professions for nearly 150 years. It has established statutory frameworks for a number of health care professions within which the professions regulate themselves. The purpose of professional regulation is to establish a countrywide, professionally set, independent standard of training, conduct and competence for each profession for the protection of the public and the guidance of employers. This is underpinned by personal accountability of practitioners for maintaining safe and effective practice, wherever they are employed and to include effective measures to deal with individuals whose continuing practice presents an unacceptable risk to the public or otherwise renders them unfit to be a registered member of the profession. For the most part there are separate enactments for each health care profession (doctors; dentists; nurses, midwives and health visitors; opticians; pharmacists; osteopaths; chiropractors; and the nine professions coming within the remit of the Council for Professions Supplementary to Medicine).
334. These enactments make provisions which, with very few exceptions, may only be changed by means of primary legislation, and it has hitherto not proved possible to make amendments as promptly as the professions would like. The Act provides for a procedure that will enable such enactments to be amended and new professions to be regulated, without the need for an Act of Parliament each time.
335. [Section 60](#) provides for Her Majesty by Order in Council to modify the regulation of pharmacists, doctors, dentists, opticians, osteopaths, chiropractors, nurses, midwives and health visitors and those professions regulated by the Professions Supplementary to Medicine Act 1960; and to regulate any other health care profession. This would cover health care professions not already brought within statutory regulation. An Order may repeal or revoke any enactment, amend it, or replace it (subject to such provisions as paragraphs 7 and 8 of Schedule 3).
336. Subsection (3) makes provision for the repeal of the Professions Supplementary to Medicine Act 1960 and the Nurses, Midwives and Health Visitors Act 1997.
337. The independent review of the Professions Supplementary to Medicine Act, which reported in July 1996, concluded that completely new legislation is needed to streamline existing arrangements. The Government broadly accepted the key recommendations of the review. It is intended that (with the exception of section 10 of the 1960 Act) the repeal will be brought into force when the replacement Order comes into effect. Section 67(3) provides for the repeal of section 10 of the 1960 Act to come into force on 1 July 1999. Section 10 provides for professions to be added to or removed from regulation under the 1960 Act; for the establishment of a single board for amalgamated professions; and for changes to be made to a board's functions. Henceforth, any such changes will be made by Orders under section 60 of this Act.

338. A review of the Nurses, Midwives and Health Visitors Act 1997 was published on 9 February 1999. It recommended new legislation to establish a single UK-wide regulatory body in place of the existing statutory bodies. The Government accepted the key recommendations, except those relating to health visitors who will continue to have separate representation on the new Council. It is intended that the repeal of that Act will be brought into force when the replacement Order comes into effect.
339. The Order-making power covers the professions regulated by the Pharmacy Act 1954, the Professions Supplementary to Medicine Act 1960, the Medical Act 1983, the Dentists Act 1984, the Opticians Act 1989, the Osteopaths Act 1993, the Chiropractors Act 1994 and the Nurses, Midwives and Health Visitors Act 1997. However, the scope of the Order-making power is not limited to those Acts. In particular, it extends to the regulation under the Medicines Act 1968 of persons who are not pharmacists carrying on a retail pharmacy business by the Statutory Committees of the Royal Pharmaceutical Society of Great Britain and the Pharmaceutical Society of Northern Ireland.
340. It is intended that Orders will be made to improve the services provided to patients or to improve the regulation of the professions by enabling the legislative framework to be kept up to date and taking account of changing public expectations of the professions and the professions' own views about the development of their regulation. New responsibilities can be given to existing bodies or new professional regulatory bodies established to carry out new or existing regulatory responsibilities (subject to the provisions in paragraphs 7 and 8 of Schedule 3).

### **Schedule 3**

341. *Paragraph 1* of the Schedule gives examples of the matters for which provision may be made by Order. Orders may make changes to any aspect of professional regulation, subject to the limitations in paragraphs 7 and 8.
342. *Paragraph 2(2)* prevents the amendment by Order of the Medicines Act 1968, except in respect of sections 80 to 83 and such other associated amendments to Part IV of the 1968 Act. This makes clear that an Order may amend those limited parts of the Medicines Act which deal with the professional regulation of retail pharmacy businesses.
343. *Paragraph 5* will enable functions to be conferred on Ministers of the Crown, Scottish Ministers or the National Assembly for Wales. An Order could be made, for example, enabling a Minister to pay grants to a body, or setting up bodies for different parts of the United Kingdom to deal with matters in connection with professional regulation. Any conferment of functions would be subject to paragraph 8.
344. *Paragraph 7(1)* makes it clear that an existing regulatory body, or, where there is more than one, the main one, of the health care professions referred to in subsection (2)(a) of section 60, may not be abolished by an Order. This will also apply to the bodies established to succeed the Council for Professions Supplementary to Medicine and the United Kingdom Central Council for Nursing, Midwifery and Health Visiting, and new regulatory bodies created by Order under section 60(1)(b). Paragraph 7(2) ensures that an Order may not impose a lay majority on the membership of a statutory regulatory body. Paragraph 7(3) provides that functions conferred on the Privy Council in respect of the professions to which section 60(2)(a) applies may not be transferred to another person or body.
345. *Paragraph 8* provides that, where legislation provides for certain specified functions to be exercised by a regulatory body, or any of its committees or officers, an Order may not transfer those functions from that regulatory body. Those functions are: the keeping of the register; the setting of standards of education for entry to the profession; provision of guidance on standards of conduct and performance expected of the profession; and the administration of procedures relating to fitness to practice. Paragraph 8(3) is a transitional measure which ensures that the functions listed in paragraph 8(2) may be

transferred from the CPSM and UKCC, when they are abolished by the repeal of the 1960 Act and the 1997 Act, to their successor bodies.

346. It is proposed that the 1960 Act, when repealed, will be replaced by an Order setting up a health professions council with powers to recommend the bringing of further professional groups within the council's remit and provide for such matters as their registration, disciplinary and health procedures, protection of common title and the linkage of remaining on the register with the demonstration of continued competence.
347. Some health care professions not currently regulated by statute may not wish to be regulated by a new health professions council. For example, part of a profession might not provide health care services to patients. In such cases free-standing regulatory schemes can be provided for by Order including the responsibilities referred to in paragraph 1 of the Schedule.
348. *Paragraph 9* provides that before an Order can be made the Secretary of State must consult persons representing the relevant professions, patient interest groups and other persons or bodies that he considers it appropriate to consult. The consultation will be on the basis of the draft. He must publish the proposed Order in draft three months before it is laid before Parliament. Following consultation a draft Order will be laid before Parliament (as originally drafted or with appropriate amendments) and must be accompanied by a report about the consultation. Draft Orders will be subject to parliamentary scrutiny under affirmative procedures (see section 62(9)).
349. Regulation of those health professions currently regulated by Act of Parliament is a matter reserved to the UK Parliament under the Scotland Act 1998 (see Schedule 5 to the Scotland Act at Head G section G2). The regulation of any other health profession, however, is not a reserved matter. An Order could be made under section 30 of the Scotland Act to provide for the reservation of other professions. If such an Order were not made, regulation of those professions would be within the legislative competence of the Scottish Parliament. Paragraph 9(3) sets out the procedures which will apply where a draft Order deals with matters within the legislative competence of the Scottish Parliament. In particular, the draft Order, together with the report on the consultation, must be laid before the Scottish Parliament as well as the UK Parliament. It must be approved by resolution of the Scottish Parliament (under section 62(10)), as well as each House of the UK Parliament, before the Secretary of State can recommend to Her Majesty that the Order be made for the United Kingdom.
350. *Paragraph 11* clarifies whether certain matters are within the scope of an Order under section 60. Paragraph 12(1) recognises that the regulation of the Pharmacy profession in Northern Ireland is already covered by separate legislation for [Northern Ireland \(Pharmacy \(Northern Ireland\) Order 1976 \(SI 1976/1213 \(N.I. 22\)\)\)](#). An Order will not be able to change this legislation. Orders may, however, be made on a UK-wide basis to regulate certain aspects of retail pharmacy business relating to misconduct and offences, but paragraph 12(2) ensures that the body responsible for such regulation in Northern Ireland may not be changed by Order.

### ***Section 61: English and Scottish border provisions***

351. This section enables Her Majesty to make an Order in Council, approved by both the Scottish and Westminster Parliaments, which would make provision for:
- the Secretary of State in England (or Health Authorities or Primary Care Trusts) to exercise NHS functions in respect of the provision of services for NHS patients who are resident in Scotland, instead of Scottish Ministers or Health Board exercising equivalent functions under the 1978 Act; and
  - similar arrangements under which Scottish Ministers (or Health Boards or Scottish NHS trusts) would exercise NHS functions in relation to NHS patients who are

resident in England, instead of the Secretary of State or Health Authorities or Primary Care Trusts exercising equivalent functions under the 1977 Act.

352. The functions which are to be exercisable across the border, and the persons to which these arrangements are to apply will be set out in the Order.
353. [Section 61](#) only applies to the provision of NHS services to persons living in the area of any Health Authority or Health Board next to the English/Scottish border, i.e. North Cumbria and Northumberland Health Authorities; and Dumfries & Galloway and Borders Health Boards. The intention is to use section 61 to simplify the arrangements for the planning and commissioning of health care services for patients registered with GP practices that have patients on both sides of the English/Scottish border.

***Section 63: Supplementary and consequential provision etc.***

354. This section enables the Secretary of State to make any transitional, supplementary and consequential provisions necessary to give effect to the Act. For example, it will be used to make amendments consequent upon the introduction of Primary Care Trusts.
355. [Sections 1](#) and [45](#) will bring the GP fund-holding system to an end in England and Wales and in Scotland respectively. It is the intention to use the provisions of section 63 to make an order or orders setting out arrangements for the transition from GP fund-holding. The transitional provisions will cover arrangements for closing the fund-holding accounts of residual fund-holders; the transfer of those assets, rights and liabilities that need to be transferred to the Health Authority (in England and Wales) or Health Board (in Scotland); and any provision for those that are to remain with the former fund-holders.

***Section 65 and Schedules 4 and 5: Amendments and repeals***

356. [Section 65](#) introduces Schedule 4, which makes amendments to various Acts, and Schedule 5, which sets out the various repeals made by the Act.
357. Many of the amendments in Schedule 4 are consequent upon the provisions of the Act relating to Primary Care Trusts. Some of the other amendments have been referred to above in the context of the sections to which they relate. The following amendments are of particular note.
358. [Paragraph 5](#) amends section 8 of the 1977 Act, which provides for the establishment of Health Authorities. In particular the amendment provides that Health Authorities are to “be established for” their area, rather than “act for” their area. This is to make it clearer that Health Authorities may exercise certain functions in respect of patients who are not resident or present in their area. In addition, section 8 is amended so that the Secretary of State is able to change the name of a Health Authority without changing its boundaries.
359. [Paragraphs 6 and 10](#) have the effect of replacing the existing section 12(1) of the 1977 Act (duty on Health Authorities to make arrangements to secure advice from persons with professional expertise in and experience of health care) with a new provision (section 16C) which places a duty on both Health Authorities and Primary Care Trusts to make arrangements with a view to securing appropriate advice from health care professionals in order to exercise their functions effectively.
360. [Paragraph 84\(6\)](#) repeals the provisions in Schedule 2 to the 1990 Act which provide for the re-imburement of NHS trusts in respect of the provision of goods and services otherwise than under NHS contract. These arrangements became known as extra-contractual referrals (or ECRs). The term extra-contractual referral is also used to describe one-off contracts that arise where an NHS trust provides care for someone which is not covered by an NHS contract with the patient's Health Authority. The system of extra-contractual referrals has been abolished. From April 1999 patients will always be treated under NHS contracts. A new system of comprehensive contract

coverage, to be known as Out of Area Treatments, has been established through secondary legislation.

### ***Section 66: Devolution***

361. This section sets out how the provisions of the Act are to be treated for devolution purposes.
362. Subsection (1) provides that the provisions in the Act that extend to Scotland (except section 22) are to be taken to be a “pre-commencement enactment”, the meaning of which is set out in section 53 of the Scotland Act 1998. Section 53 (inter alia) provides for the transfer of functions, which are conferred in any Act of Parliament upon the Secretary of State, to the Scottish Ministers in so far as they relate to matters devolved to the Scottish Parliament. By treating the provisions under sections 45 to 59 as a pre-commencement enactment any new Secretary of State function conferred by those sections automatically transfers to the Scottish Ministers by virtue of section 53 of the 1998 Act.
363. **Section 22** of the Act (arrangements with Ministers and the Commission for Health Improvement) is excluded from section 66(1). The effect is that the power to enter into arrangements with the Commission in respect of Scotland will be retained by Ministers of the Crown, and Scottish Ministers will not be able to enter into such arrangements. The Commission will not be exercising functions in relation to the NHS in Scotland; it may however enter into arrangements to exercise functions in relation to the health care provided to prisoners and the Armed Forces in Scotland (such care remains the responsibility of the Home Secretary and the Secretary of State respectively). The provisions of section 22 are explained in more detail in paragraph 206 above.
364. Subsection (2) confers on the National Assembly for Wales the power to commence in relation to Wales certain provisions in the Act which confer new functions on the Secretary of State.
365. Subsection (3) adds the Commission for Health Improvement to the list of bodies whose members or staff can be required to attend the National Assembly for Wales, or its committees, to give evidence or produce documents.
366. Subsections (4) to (5) make textual amendments to Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999. In particular, subsection (5) inserts an entry for the "Health Act 1999". The effect of these provisions is that the functions conferred on the Secretary of State by the provisions of the Act listed in subsection (5) (c) are, in relation to Wales, exercisable by the Assembly. This does not include functions in respect of the control of prices of medicines and profits or the regulation of health care and associated professions, which will be exercisable by the Secretary of State for Health.
367. The secondary legislation made by the Assembly pursuant to these new functions will generally be subject to the Assembly's own secondary legislation scrutiny procedures, rather than the Westminster procedures set out in section 62 of the Act.
368. Subsection (6) amends Schedule 2 to the National Assembly for Wales (Transfer of Functions) Order 1999 and provides that some functions in relation to the Commission for Health Improvement are to be exercisable only with the agreement of the Assembly or, in some cases, after consultation with the Assembly.