EXECUTIVE NOTE

The National Health Service (Discipline Committees) (Scotland) Regulations 2006
SSI/2006/330

1. The above Instrument was made in exercise of the powers conferred by sections 17P, 25(2), 26(2), 27(2), 29(1), 105(7), 106(a) and 108(1) of the National Health Services (Scotland) Act 1978, and section 17 of the Health and Medicines Act 1988. The Instrument is subject to negative resolution procedure.

Policy Objectives

2. The purposes of this Instrument are to:

- consolidate the provisions relating to Discipline Committees in the National Health Service (Service Committees and Tribunal) (Scotland) Regulations 1992;

- streamline the constitution of Discipline Committees and make amendments regarding those persons who may participate in proceedings;

- provide that an inter-linked series of events may be referred to a Discipline Committee at the same time;

- make amendments to the Discipline Committee regime in consequence of the introduction of NHS eye examinations in place of NHS sight tests;

- amend timescales relating to the Discipline Committee regime;

- update the provisions relating to recoveries from practitioners; and

- make some minor consequential amendments and amendments for purposes of clarification.

3. The National Health Service (Discipline Committees) (Scotland) Regulations 2006 ("the 2006 Regulations") consolidate those provisions relating to NHS Discipline Committees in the National Health Service (Service Committees and Tribunal) (Scotland) Regulations 1992 ("the 1992 Regulations"). The NHS Tribunal provisions in the 1992 Regulations have already been consolidated in The National Health Service (Tribunal) (Scotland) Regulations 2004.

4. Under the 2006 Regulations, where a potential breach of terms has been identified, a Health Board may continue to opt for one of the following choices - take no disciplinary action, refer the family health service (FHS) practitioner to an NHS Discipline Committee or instead or additionally make a referral to the NHS Tribunal, the professional regulatory body or the police. Three or more Boards may continue to appoint Discipline Committees jointly. The decision to refer may continue to be made by a reference committee established by the relevant Health Board, with at least one member of the reference committee being an executive member of that Board. Where a Board on whose list the FHS practitioner appears believes a referral to an NHS Discipline Committee is appropriate, it will continue to be a requirement that the Board in question refers the case to the Discipline Committee of another

Board. It will also continue to be a requirement that a Board cannot refer a case to another Board which has appointed any discipline committee jointly with the referring Board. There will also continue to be a power for Joint Discipline Committees to be established to hear an allegation involving practitioners from more than 1 profession.

5. The 2006 Regulations set out the procedures relating to the process of referral to a Discipline Committee, including time limits, documents and reports by the ophthalmic officer of the Common Services Agency; the membership and constitution of Discipline Committees, preparation for, attendance and procedure at a hearing of, and investigation by a Discipline Committee; action by the Health Board on the Discipline Committee report, including the sanction recommended; appeals to Scottish Ministers, recovery of amounts from practitioners following appeal; and the role of advisory committees. Additionally, the 2006 Regulations continue to provide that a member of the Council on Tribunals or of its Scottish Committee may attend a hearing of a Discipline Committee, a meeting of a Health Board when considering the recommendations of a Discipline Committee or an appeal hearing.

6. There have been amendments to the provisions relating to the start of disciplinary proceedings. These now provide that a Board may refer a case for discipline concerning payments made in circumstances where they were not due whilst allowing civil recoveries to proceed and ensure that cases can proceed timeously where there has been complaint by a patient.

7. The provisions relating to time limits for referral to a Discipline Committee have been amended to ensure that cases are not halted by a procedural flaw with respect to time limits. The amendments now provide that these time limits will not begin until after certain inquiries or investigations have been completed. These include a fatal accident inquiry or an investigation, including into fraud or other irregularities, by the Common Services Agency or by the police. Further amendments ensure that all events which can be reasonably regarded as a series may be referred together if the last is within a specified time limit which helps to ensure that all relevant matters may be referred within time limits and that Discipline Committees have a more complete picture on which to judge a case.

8. There have been amendments to the provisions relating to determination by the appropriate Health Board on receipt of the report from a Discipline Committee. The 1992 Regulations provided that, where a practitioner had failed to comply with his or her terms of service, a Board might determine that a sum should be recovered from the practitioner by way of deduction from his or her remuneration, or otherwise, in respect of any expenses, save for those relating to the investigation by the Discipline Committee, which had been reasonably and necessarily incurred by such failure. The 2006 Regulations amend this provision to make clear that, in relation to a dentist, the recovery may include expenses likely to be incurred by any person in obtaining further, remedial, dental treatment. A further amendment to these provisions inserts a time limit of 13 weeks after receipt of a Discipline Committee's report by which time a Health Board must make a determination. This should be fairer to the practitioner since there have been previous cases where the Board's decision has not been made for a number of months.

9. When the 1992 Regulations came into force, where the Secretary of State and, subsequently, the Scottish Ministers determined following an appeal that an amount should be recovered from a practitioner, before considering the question of recovery, they were

placed under a duty to consult the appropriate advisory committee for a recovery in excess of £500. Fourteen years on, the 2006 Regulations have increased this figure to £1,000.

10. In consequence of the introduction of the new NHS eye examination in place of the testing of sight, the ophthalmic officer of the Common Services Agency may now examine the payment claims relating to eye examinations and optical vouchers and compile reports for submission to the relevant Boards indicating whether the undertaking of eye examinations, the issuing of optical vouchers or the prescribing of supplements by an optician or ophthalmic medical practitioner was in excess of what was clinically necessary. Appropriate amendments have been made.

11. Proportionality has been applied to the constitution of Discipline Committees which are reduced in size from up to 7 persons (1 legally qualified chair person, up to 3 lay persons and up to 3 practitioners) to 3 (1 legally qualified chair person, 1 lay person and 1 practitioner). This mirrors the membership of the NHS Tribunal which is the ultimate disciplinary body for FHS practitioners, it will be less intimidating to practitioners who are the subject of referral and it will reduce Boards' problems in identifying suitable dates and times for Discipline Committee hearings. Joint committees are proportionately reduced from 11 persons (1 chair person, 2 lay persons, 2 GPs, 2 dentists, 2 pharmacists, 2 opticians or ophthalmic medical practitioners) to 5 (1 chair person, 1 lay person, 1 GP, 1 dentist, 1 pharmacist, 1 optician or ophthalmic medical practitioner).

12. The chair of a Discipline Committee may now be a solicitor or advocate, rather than a practising solicitor or advocate as previously, to widen the field to those who are retired which may help with timescales for completion of the report of the Discipline Committee. In the 2006 Regulations, where a practitioner is accompanied to a hearing by an advocate or solicitor, there is no bar as in the 1992 Regulations to that solicitor or advocate addressing the Committee or putting questions to witnesses. Additionally, to establish a level playing field, a Board as well as practitioners may now introduce in evidence documents relating to complaints.

13. With respect to the procedure for investigation by Discipline Committees, an amendment has been made to clarify that a practitioner should first be told that they have been referred and will, at a later date, receive the full statement of case.

14. Transitional provisions ensure that cases referred before the 2006 Regulations come into force will continue to a conclusion and that Boards may consider reports from the Common Services Agency's ophthalmic officer relating to excessive testing of sight.

Consultation

15. The statutory consultee, the Scottish Committee of the Council on Tribunals, has been consulted on the Instrument and a number of the changes have been made at the Committee's specific request from their experience of the system over recent years. These include reducing the number of members on a Discipline Committee to 3 which is the same as for the NHS Tribunal and reducing the membership of joint Discipline Committees proportionately; removing the restriction on a solicitor or advocate who accompanies a practitioner to a hearing putting questions to witnesses or addressing the Discipline Committee and placing a time limit by which an NHS Board must consider the report of a Discipline Committee after

receipt. The representative bodies for optometrists, GPs, pharmacists and dentists have been made aware of the Regulations.

Financial Effects

16. It is possible that there may be more referrals to NHS Discipline Committees due to the introduction of these Regulations for example, the provisions allowing a series of inter-linked events to be referred as one case. Health Boards will pay the costs of case preparation and legal representation from their financial allocations. The Executive Health Department will continue to cover the costs of the Tribunal Chair, Clerk and members. Practitioners in general pay an annual fee for indemnity to cover the costs of defence.

Scottish Executive Health Department
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