

# HEALTH AND SOCIAL CARE ACT 2008

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## EXPLANATORY NOTES

### TERRITORIAL EXTENT

#### *Interpretation*

### **Part 2 – Regulation of Health Professions and Health and Social Care Workforce**

#### **The Office of the Health Professions Adjudicator**

#### *Section 98: The Office of the Health Professions Adjudicator*

297. *Section 98* establishes the OHPA as a body corporate. It is to have functions relating to doctors, optometrists, dispensing opticians, student opticians and optical businesses (i.e. the professions regulated by the Medical Act 1983 and the Opticians Act 1989). *Section 98* also gives effect to *Schedule 6* which makes detailed provision for the constitution and membership of the OHPA. The establishment of this body requires a number of consequential amendments to other enactments. These are contained in *Schedule 10*.

#### *Schedule 6: The Office of the Health Professions Adjudicator*

298. *Schedule 6* makes detailed provision for the constitution and membership of the OHPA.
299. *Paragraphs 2* and *3* set out the status of the body and that it is to have the powers necessary to enable it to carry out its functions.
300. *Paragraphs 4* to *10* make provision about the membership of the body. The members are to be a legally qualified chair appointed by the Privy Council, at least one but no more than three non-executive members, also appointed by the Privy Council, and at least one but no more than three executive members, subject to the proviso that there are not more executive than non-executive members. Initially the executive members will be appointed by the Privy Council. Thereafter they will be appointed by the OHPA. The Privy Council must make regulations about the precise number of executive and non-executive members. *Paragraph 21* of *Schedule 10* contains provisions to allow the Privy Council to delegate their appointment functions in relation to the OHPA to the Appointments Commission. By virtue of *paragraph 22* of *Schedule 10*, the Appointments Commission will be able to assist the OHPA with its appointment of executive members. The chair and other members may be removed from office by the Privy Council on the grounds of incapacity or misbehaviour, but will otherwise hold and vacate office in accordance with the terms of their appointment.
301. *Paragraphs 11* and *12* deal with the procedure to be followed by the OHPA and provide that the OHPA may regulate its own procedure. Proceedings of the OHPA are not affected by circumstances such as vacancies in its membership or defects in the appointment of members.
302. *Paragraph 13* requires the OHPA to maintain a system for the declaration and registration of members' private interests and to publish entries recorded in the register.

303. Under *paragraph 14*, the Secretary of State is to determine the remuneration and allowances payable to the chair and other members. The Secretary of State may also require the OHPA to make provision for pensions and, in certain circumstances, to pay compensation to a person who has ceased to hold office as chair of the OHPA. Under *paragraphs 15 and 16*, amendments to the Superannuation Act 1972 will enable the OHPA to be included in the civil service pension scheme. Under *paragraph 17*, the OHPA may appoint such employees as it considers appropriate, on such terms as it determines (including as to pay, pensions etc.)
304. *Paragraph 18* provides that the Secretary of State and DHSSPSNI may make payments to the OHPA. The Secretary of State and DHSSPSNI can also make loans to the OHPA. Paragraph 18(4) requires Treasury consent to the amount and terms of loans made to the OHPA by the Secretary of State. Paragraph 18(6) requires the consent of the Department of Finance and Personnel in Northern Ireland to the amount and terms of loans made to the OHPA by DHSSPSNI. The OHPA will have no other powers to borrow money. Paragraph 18(8) and (9) provide that the Secretary of State and DHSSPSNI may give directions to the OHPA on the application of payments or loans made to it.
305. Under *paragraph 19*, the OHPA must keep accounts, and prepare annual accounts, in such form as determined by the Secretary of State. Copies of annual accounts must be sent to the Comptroller and Auditor General, who will lay copies of the accounts and of his report on them before Parliament. A copy of the accounts must also be sent to the Secretary of State and DHSSPSNI. DHSSPSNI will lay a copy of the accounts before the Northern Ireland Assembly. Under *paragraph 20*, the OHPA must also prepare an annual report for each financial year on how it has carried out its functions. The Privy Council may give directions as to the content of the report. The Secretary of State must lay it before Parliament. DHSSPSNI must lay it before the Northern Ireland Assembly.
306. *Paragraph 21* concerns the application of the seal of the OHPA. *Paragraph 22* concerns the receipt in evidence of documents purporting to be executed under the seal of the OHPA or signed on its behalf. *Paragraph 23* provides for public access to meetings of the OHPA in Northern Ireland. Equivalent provision in relation to meetings in England, Wales and Scotland is made by the amendment to the Public Bodies (Admission to Meetings) Act 1960 in Schedule 10.

### ***Section 99: Functions under Medical Act 1983 and Opticians Act 1989***

307. *Section 99* brings into effect Schedule 7.

#### ***Schedule 7***

308. *Schedule 7* is split into two parts. Part 1 makes amendments to the Medical Act 1983 and Part 2 makes amendments to the Opticians Act 1989. These have the effect of transferring to the OHPA the functions of the GMC and the GOC in relation to the adjudication of fitness to practise cases.
309. *Paragraph 4* inserts a new *section 35ZA* into the Medical Act 1983. This provides that the GMC may publish guidance on the factors that they consider to indicate:
- where a practitioner's fitness to practise is found to be impaired, what sanction would or would not be appropriate;
  - where a practitioner's fitness to practise is found not to be impaired, whether a warning should or should not be given regarding future conduct or performance;
  - and where a person has had his name erased from the register, whether their registration should be restored or not.
310. The GMC may also publish guidance on:

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- the type of conditions to be imposed, where a practitioner's registration is to be made conditional;
  - the period of time for which a person's registration should be suspended or made conditional.
311. *Paragraph 30* inserts a new *section 13AA* into the Opticians Act 1989, providing that the GOC may publish similar guidance in relation to types of sanctions available, in cases involving those regulated by the Opticians Act 1989.
312. *Undersubsection (3)* of each of the new sections described above, the OHPA must take account of any guidance published by the GMC and the GOC under these powers (in their capacity as the body responsible for setting and maintaining the standards required of their registrants) when making decisions on what sanctions to impose in any particular case.
313. *Paragraph 11* inserts a new *section 40A* into the Medical Act 1983, allowing the GMC to refer a case to the High Court, or in Scotland the Court of Session, where it thinks that the OHPA has reached a finding relating to fitness to practise that is unduly lenient, and that it is necessary in the interests of public protection for it to take action. The new section sets out the decisions which can be referred and the timescales for such referrals. The provision is in place of the CRHP's power under section 29 of the Health Care Professions Act 2002 to refer equivalent decisions of the GMC's fitness to practise panels to the court.
314. *Paragraph 46* inserts a new *section 23I* into the Opticians Act 1989, allowing the GOC similar rights of referral.

***Section 100: Fitness to practise panels***

315. *Section 100* provides that the OHPA's function of adjudication of fitness to practise cases is to be carried out by panels. The members are to be drawn from lists held by the OHPA and each panel must consist of at least 3 people - -- a chair, a lay member and a professionally qualified member. Other lay or professionally qualified members may be appointed to the panels provided they are on the OHPA's lists (see note on section 101 below). The chair can be a person who is legally qualified, a lay member or a professionally qualified member (see note on section 101 below). *Subsection (3)* empowers the OHPA to make further provision about the selection of fitness to practise panels through its rules. Rules may provide, for example, that professionally qualified panel members are selected from the professional list with due regard to the profession of the practitioner whose fitness to practise is being considered.
316. *Subsection (4)* provides that rules made under subsection (3) may require the selection of a legally qualified chair in specified circumstances. The rules may also provide for pilot schemes under which legally qualified chairs are, or are not, selected for certain proceedings.

***Section 101: Lists of persons eligible for membership of fitness to practise panels***

317. *Section 101* requires the OHPA to keep three lists:
- one of persons eligible to serve as chairs;
  - one of persons eligible to serve as lay members; and
  - one of persons eligible to serve as professionally qualified members.
318. *Subsection (2)* provides that the list of chairs is to consist of persons who are legally qualified and persons who are also included on the lists of lay and professionally qualified members.

319. Rules made by the OHPA under this section may set out further details of how the lists will be kept and the information relating to each individual appointed which will appear on the lists. Rules may also set out the requirements for appointment to any list. Rules made by the OHPA under this section must set out the qualifications a person must have in order to be considered 'legally qualified' and therefore eligible for appointment to the chairs list. They must also provide for the experience and training that any lay or professionally qualified member must have in order for them to be appointed to the chairs list.
320. This section provides that no member of the OHPA may be appointed to a list.

### ***Section 102: Further provisions about listed persons***

321. **Section 102** provides that the OHPA may pay fees, allowances and expenses to people it has appointed to its lists. It also provides that allowances and expenses may be paid to those persons that the OHPA proposes to appoint to its lists, but only in connection with the provision of training for them. The OHPA must provide, or arrange for the provision of, training for those included on a list and may provide, or arrange for the provision of, training for prospective appointees to a list.
322. The OHPA must establish and maintain a system for the declaration and registration of the private interests of a person included on any of the lists and publish entries recorded in the register.

### ***Section 103: Legal assessors***

323. Under section 103 the OHPA must appoint or arrange for the appointment of legal assessors to give advice on points of law to the OHPA's panels. To be eligible for appointment such assessors must meet the requirements set out in rules made by the OHPA. Rules made by the OHPA must set out the required qualifications, and may make further provision about the functions of legal assessors. The OHPA may pay such fees, allowances and expenses as it deems appropriate to these legal assessors. A legal assessor may be appointed either generally or for particular proceedings or a particular class of proceedings. Rules under this section may also provide that a panel is not to have a legal assessor, where the chair of the panel is legally qualified.

### ***Section 104: Clinical and other specialist advisers***

324. **Section 104** provides that the OHPA may appoint persons as clinical advisers who will advise its fitness to practise panels on issues relating to health. The OHPA may also appoint other specialist advisers who will advise the panels on issues falling within their specialty on which the OHPA considers that specialist knowledge is required. To be eligible for appointment such advisers must meet the requirements set out in rules made by the OHPA. The rules may also make provision about their functions. The OHPA may pay such fees, allowances and expenses as it deems appropriate to these advisers. Advisers may be appointed either generally or for particular proceedings or a particular class of proceedings.

### ***Section 105 Procedural rules***

325. **Section 105** requires the OHPA to make rules about the procedure to be followed in making referrals to it under the Medical Act 1983 or the Opticians Act 1989 and the procedure to be followed before its panels (including the rules of evidence). The rules will not apply to the conduct by the regulatory bodies of their investigations or the preparation of the case before it is referred to the OHPA.
326. The rules must include:
- provision for a practitioner to be notified that proceedings are being brought against them;

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- provision for notice of decisions of a fitness to practise panel to be given to the parties to the proceedings (i.e. the practitioner and the regulator) and the registrar of the relevant regulatory body;
- provision conferring the right on parties to the proceedings to put their case at a hearing;
- provision conferring the right on parties to the proceedings to be represented at any hearing by a person meeting criteria specified in the rules; and
- provision for hearings to be held in public except in circumstances that the rules state otherwise. For example, the rules could make provision for a hearing in private in some circumstances.

### ***Section 106: Administration of oaths and issuing of witness summonses etc.***

327. **Section 106** makes provision for fitness to practise panels to require persons giving evidence during a hearing to give the evidence under oath and for witnesses to be summoned. Similar provision is made in *subsection (1)* for hearings in England and Wales or in Northern Ireland to that made in *subsection (4)* for hearings in Scotland.

### ***Section 107: Duty to inform the public***

328. **Section 107** requires that the OHPA publish certain information about itself and the way it carries out its functions. This includes information about the decisions of its fitness to practise panels. The OHPA may withhold from publication confidential information about a person's health, and other information specified in rules. It is not required, or authorised, to publish information if publication is prohibited by any enactment or would be a contempt of court.

### ***Section 108: Duty to consult***

329. **Section 108** requires the OHPA to seek the views of the following on matters relevant to the exercise of its functions:
- members of the public;
  - bodies which appear to the OHPA to represent the interests of patients;
  - the GMC and the GOC;
  - any other bodies that appear to the OHPA to represent the professions regulated by the Medical Act 1983 and Opticians Act 1989.
330. The section is not restrictive and the OHPA may choose to consult more widely than this. It is likely that the Office for National Statistics will classify the OHPA as an Executive Non-Departmental Public Body. As such it would be expected to follow existing best practice in consulting. This would include the practice to be followed in relation to the manner in which it makes public the responses and the decisions it reaches in light of them.

### ***Section 109: OHPA rules: supplementary***

331. **Section 109** provides that before making rules, the OHPA must consult:
- the Council for Healthcare Regulatory Excellence;
  - the GMC, if the rules affect the profession regulated by the Medical Act 1983;
  - the GOC, if the rules affect the professions regulated by the Opticians Act 1989;

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- other bodies which appear to the OHPA to represent the professions regulated by the GMC or, as the case may be, the GOC, if the rules affect these regulated professions;
  - bodies that appear to the OHPA to represent the interests of patients;
  - any other persons the OHPA considers appropriate.
332. The rules come into force only if approved by the Privy Council by an Order of Council, subject to the negative resolution procedure (apart from any rules under section 100(4) containing provision for the piloting of legally qualified chairs, to which section 162(4) applies the affirmative procedure). The Privy Council may modify the rules before approving them but must first give the OHPA the opportunity to make observations on the proposed changes.

***Section 110: Fees payable by General Medical Council and General Optical Council***

333. **Section 110** introduces a fees charging regime from which the OHPA will secure the majority of its funding after the initial implementation period.
334. The section requires the Secretary of State to make regulations requiring each of the GMC and the GOC to pay to the OHPA a periodic fee in respect of the discharge of its functions (this is likely to be on an annual basis). Regulations made under this section will be subject to prior consultation with the two regulatory bodies and such other persons as the Secretary of State considers appropriate and will be subject to Treasury approval. The regulations will be subject to Parliamentary scrutiny under the negative resolution procedure.
335. The fee must be determined in accordance with the regulations. It is intended that the regulatory bodies will pay an amount linked to their forecasted use of the OHPA's services. The OHPA will be required to notify the regulatory bodies of the proposed fee level and to consider any representations made by the regulators on this before formally setting the fee by making a determination.
336. *Subsection (7)* enables the regulations to: provide for when the fees are to be paid; enable a fee determination to be varied, replaced or revoked in year; and make provisions about unpaid fees.