

**EXPLANATORY MEMORANDUM TO**  
**THE NATIONAL HEALTH SERVICE (PRE-CONSOLIDATION**  
**AMENDMENTS) ORDER 2006**

**2006 No. 1407**

1. This explanatory memorandum has been prepared by the Department for Health and is laid in draft before Parliament by Command of Her Majesty.
2. **Description**
  - 2.1 This Order makes minor amendments to the National Health Service Act 1977 (“the 1977 Act”) and other health service legislation prior to the consolidation of that Act and other health service legislation.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
  - 3.1 None.
4. **Legislative Background**
  - 4.1 This Pre-Consolidation Order is made under section 36 of the National Health Service Reform and Health Care Professions Act 2002. That provision enables the Secretary of State to make by Order amendments to legislation relating to the health service in England and Wales which in her opinion “facilitate, or are otherwise desirable in connection with the consolidation” of that legislation. The Department intends to introduce two National Health Service Consolidation Bills later in the session – one relating to England and one relating to Wales.
5. **Extent**
  - 5.1 This instrument extends to England and Wales.
6. **European Convention on Human Rights**
  - 6.1 Lord Warner, Minister for Health Reform, has made the following statement regarding Human Rights:

“In my view the provisions of the pre-consolidation order to the English and Welsh NHS Consolidation Bills are compatible with the Convention rights.”
7. **Policy background**
  - 7.1 Health legislation is a complex area that has required frequent amendments in order to keep policies in line with evolving circumstances. Health

legislation was last consolidated in 1977 and numerous subsequent statutory changes and the context of devolution require a further consolidation with separate Bills for England and Wales.

- 7.2 The consolidation of NHS law is a Law Commission exercise that began in January 2004. Hansard records calls for a consolidation of NHS legislation. For example, Lord Hunt of Kings Heath commented on the problems involved in following different legislation (Lords Hansard 11 April 2002, Column 536). Introducing the second reading of the National Health Service Reform and Health Care Professions Bill, he also pointed out that the 1977 Act, itself a consolidation of previous legislation, had been amended by some 57 further Acts (Lords Hansard 31 January 2002, Column 356). John Hutton MP, Minister of State for Health (1998-2005) in reply to a written Parliamentary Question on plans to amend the NHS Act 1977 gave a commitment to proceed with consolidation as soon as feasible (Commons Hansard Written Answers 11 July 2003, Column 1048W).
- 7.3 The Pre-Consolidation Order makes minor amendments to the 1977 Act and other health service legislation prior to the legislation being consolidated. The amendments can broadly be categorised as:
  - 7.3.1 desirable to clarify the legislation or remove an element of ambiguity from it;
  - 7.3.2 necessary to remedy a missed consequential provision in earlier legislation;
  - 7.3.3 removing certain requirements for Treasury consent before certain payments can be made;
  - 7.3.4 repealing provisions in the existing legislation that are either spent or now considered unnecessary to repeat;
  - 7.3.5 incorporating modifications (modifications not being the same as amendments); and
  - 7.3.6 consequential provisions relating to the provisions of this Order.
- 7.4 The Annex to this Memorandum sets out in more detail the effect of the provisions of the Order.
- 7.5 The Consolidation Bills themselves do no more than consolidate the law, whereas this Order allows changes to the law to be made prior to the law being consolidated.
- 7.6 The Department informed key stakeholders of the process of consolidation by a joint letter from the Department of Health and the Wales Office on 7 March. Stakeholders have access to the draft consolidation Bills for England and Wales through the internet sites of the Department of Health and the Wales Office.

7.7 The Department has to date not received any response from stakeholders other than one request to clarify the Parliamentary timetable for consolidation.

## **8. Impact**

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

## **9. Contact**

Paul Baker at the Department of Health, Tel: 020 7972 5676 or e-mail: [Paul.J.Baker@dh.gsi.gov.uk](mailto:Paul.J.Baker@dh.gsi.gov.uk), can answer any queries regarding the instrument.

## ANNEX

### EXPLANATORY NOTE TO THE SCHEDULES TO THE ORDER

#### **Part 1 of Schedule 1 to the Pre-Consolidation Amendments Order: 1977 Act amendments**

The numbered paragraphs below are references to the corresponding paragraph in Part 1 of Schedule 1 to the Pre-Consolidation Amendments Order.

1. Introductory.
2. The purpose of this amendment is to remove any possible ambiguity in section 3(1) about what may be provided as part of the health service. The words “services” and “facilities” are used throughout the National Health Service Act 1977 (“the 1977 Act”). But in some instances “facilities” is defined as including goods and materials, the use of premises and the use of any vehicle, plant or apparatus. This might suggest that facilities are tangible where clearly services are not. However, the provision of facilities in relation to, for example, the prevention of illness is not limited to the provision of tangible facilities. The use of the word “other” in both section 3(1)(d) and 3(1)(f) suggests that in section 3 the terms are used interchangeably. In a recent case, *R. v. Cardiff Local Health Board ex parte Keating* (2005) ALL ER 1000, the court was asked to construe section 3(1)(e). At first instance “facilities” was narrowly construed to exclude the provision of services for the prevention of illness. On appeal (in which the Department of Health intervened) the Court of Appeal held that the meaning of facility was derived from its context and in section 3(1)(e) meant “that which facilitates” so that it could and did include services. The amendments proposed here to section 3 are designed to clarify the provision and to avoid further unnecessary litigation on it.
3. The National Health Service (Local Pharmaceutical Services Etc) Regulations 2002 (S.I. 2002/2861) and the National Health Service (Local Pharmaceutical Services) Regulations 2006 (S.I. 2006/552) (together referred to as the “LPS regulations”) modified, in relation to England, various provisions of the 1977 Act to make provision in respect of local pharmaceutical services provided under the Health and Social Care Act 2001 (“the 2001 Act”) and under the 1977 Act. This amendment, together with amendments 11(a) and (c), 15, 17, 18, 20, 21, 31, 38(b) and (c) and 42(a), incorporate the modifications into the 1977 Act, so as to make it easier to incorporate the modifications into the consolidation. The majority of these amendments apply in relation to England only (see Article 1(3) of the Order). Those that apply also in relation to Wales are explained below
4. This amendment, together with amendments 6, 7 and 11(b) and (d), are necessary because of the fact that, under section 16BB of the 1977 Act, the National Assembly for Wales (“the Assembly”) has directed Local Health Boards to exercise functions (subject to some exceptions) of the Assembly which were transferred to the Assembly on the abolition of Health Authorities in Wales in April 2003 (see the Local Health Boards

(Functions) (Wales) Regulations 2003 (S.I. 2003/150) (the “Functions Regulations”). The consolidation is reflecting the effect of the Functions Regulations by substituting references to Local Health Boards for references to Health Authorities in all sections under which functions are now exercisable by Local Health Boards. Although the Functions Regulations are revocable, in practice it is intended that Local Health Boards will continue to exercise the functions under them for the foreseeable future. In most cases the substitutions are being made in the consolidation as a matter of construction. But in sections 16(1), 16D(1) and (2) and 17(2)(a), a simple substitution is inappropriate because of the transfer of functions in relation to Wales by the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672). In section 26(3)(b) and (c) and section 26(4)(b), an amendment is necessary because the existing legal situation is not entirely clear, given that amendments have already been made by the National Health Service Reform and Health Care Professions Act 2002 (“the 2002 Act”) to insert a reference to Local Health Boards in section 26(1)(b) but not elsewhere in the section. The consolidation will preserve the power of the Assembly to revoke the Functions Regulations.

5. The purpose of the amendment to section 16BC(1) is to ensure that this provision mirrors in respect of Local Health Boards in Wales the equivalent provision in relation to PCTs in England (section 16B) so that it includes in it all the functions that might be exercisable by Local Health Boards.
6. See paragraph 4 above.
7. See paragraph 4 above.
8. This amendment should be read with the amendments to section 126 (in paragraphs 35 and 36), and the amendment to section 38(11) of the 2002 Act (see paragraph 9 of Part 2 of Schedule 1 to this Order). It is part of a package necessary to ensure that all directions under the 1977 Act are given by instrument in writing and at the same time to remove additional references to that requirement which are superfluous. These amendments will allow the consolidation to contain more straightforward provisions about the ways in which directions are to be given.
9. The purpose of this amendment is to correct missed consequential amendments in both the National Health Service and Community Care Act 1990 (the “1990 Act”) and the Health and Social Care (Community Health and Standards) Act 2003 (the “2003 Act”). NHS trusts are constituted under the 1990 Act and Foundation Trusts are constituted under the 2003 Act. It was never intended that the power of a local social services authority to permit the use of premises, furniture or equipment for the purposes of the 1977 Act (the services described in section 21 of the 1977 Act) should not be applicable to those bodies.
10. The purpose of the amendments to sections 23(4) and 27(5) is to remove a power to modify certain road traffic legislation by order. This power is not now required and it is therefore not necessary to reproduce it in the consolidation.

11. Paragraphs (b) and (d) of amendment 11 are explained in paragraph 4 above. Paragraphs (a) and (c) of amendment 11 make a change arising from the LPS regulations. For an explanation see paragraph 3 above.
12. This amendment repeals a reference to the Residential Homes Act 1980 in section 28A. The Residential Homes Act 1980 is now repealed and therefore the reference to it is spent.
13. This amendment, together with amendment 16, makes changes consequential upon changes to the way in which dentistry is regulated, made by the Dentists Act 1984 (Amendment) Order 2005 (S.I. 2005/2011).
14. This amendment is necessary to insert a reference to primary dental services into section 28EE(2) so as to enable the Secretary of State to transfer rights and liabilities arising under arrangements for such services between a Strategic Health Authority and a PCT. This means that rights and liabilities under a personal dental services agreement will be treated in the same way as any such rights and liabilities in the case of arrangements for primary medical services. It is a missed consequential from the 2002 Act.
15. This amendment makes a change arising from the LPS regulations. For an explanation see paragraph 3 above. Section 28I allows the Secretary of State and the Assembly to make accommodation available to providers of primary care services. In the case of the Secretary of State, this amendment will allow the Secretary of State to make accommodation available also to providers of local pharmaceutical services.
16. See paragraph 13 above.
17. This amendment makes a change arising from the LPS regulations. For an explanation see paragraph 3 above. Section 28X relates to performers lists. The provision allows the Secretary of State to make regulations providing for a list of performers of local pharmaceutical services to be kept by PCTs.
18. This amendment makes a change arising from the LPS regulations. For an explanation see paragraph 3 above. Section 28Y allows PCTs or Local Health Boards to offer support and financial assistance to providers of primary medical or primary dental services. The provision adds in providers of local pharmaceutical services, in relation to PCTs
19. This amendment, together with various consequential repeals in Schedule 2, provides for determinations in relation to remuneration for services under Part 2 of the 1977 Act. Although sections 43A and 43B of the 1977 Act were inserted by section 7 of the Health and Social Security Act 1984 (“the 1984 Act”), substituted by section 10 of the Health Act 1999 (“the 1999 Act”) and subsequently amended by the 2003 Act, none of these insertions, substitutions or amendments have been commenced. Instead, determinations have been made under other powers, and by relying on “deeming” provisions in section 7(4) of the 1984 Act. The consolidation will be more comprehensible and straightforward if it is possible to reproduce sections 43A and 43B in a simple form, and this amendment, together with the consequential repeals, will enable

this to be done. Article 4 of the Order saves any determination made by virtue of the provisions being substituted or repealed.

20. This amendment makes changes arising from the LPS regulations. For an explanation see paragraph 3 above. Section 44 concerns the recognition of Local Pharmaceutical Committees. The provision allows a Local Pharmaceutical Committee in England to include providers of local pharmaceutical services.
21. This amendment makes changes arising from the LPS regulations. For an explanation see paragraph 3 above. Section 45 concerns functions of Local Pharmaceutical Committees. The amendment provides for regulations in relation to England to require PCTs to consult Local Pharmaceutical Committees in relation to functions relating to local pharmaceutical services.
22. Section 49F makes provision for a practitioner to be removed from a list of providers of pharmaceutical services on the ground of fraud or unsuitability. Where the practitioner is a body corporate, section 49H makes supplementary provision so that if a person controlling the body corporate fulfils the condition set out in section 49F(3) or (4), then the body corporate itself is to be treated as meeting the condition. The purpose of this amendment is to provide for a body corporate which supplies appliances, as well as a body corporate which carries on a retail pharmacy business, to fall within section 49H(1)(b).
23. The amendments to section 83A are both required to remedy missed consequential amendments. The insertion of "Local Health Board" was missed by the 2002 Act and the insertion of "NHS Foundation Trust" was missed by the 2003 Act.
24. This amendment, together with amendments 25 and 34, is required to enable the consolidation to make consistent provision about the Secretary of State's powers under the 1977 Act and certain provisions of the 1999 Act, the 2001 Act and the 2002 Act.
25. See paragraph 24 above.
26. Section 89 of the 1977 Act is not now required. There is no record of it ever having been relied upon, and the Department considers that in the event of the issue contemplated in the section arising, the Charity Commissioners have the necessary powers to transfer property on comparable terms.
27. This amendment is consequential on that made by paragraph 39(c) of Part 1 of Schedule 1.
28. Section 99 of the 1977 Act is not now required. It contains powers to make regulations and give directions which have never been exercised. It enables the Secretary of State and the Assembly to restrict the making of payments by and on behalf of health service bodies other than on such authorisation and subject to such conditions as may be specified. It dates from the Public Health Act 1968 and whilst it has consistently been amended to keep track of health service changes, it has never been used and there are no regulations made or directions

given under it. The Secretary of State's and Assembly's powers of direction over health service bodies, including in particular the powers of direction in relation to financial matters, are sufficient.

29. The amendments to section 100 and section 102 remove the requirement of Treasury consent to certain payments which may be made by the Secretary of State. This is in line with Treasury policy that such consents should be reviewed and repealed where appropriate. The Treasury has agreed these repeals. The payments in question are payments in respect of expenses incurred by any standing advisory committee or by the Family Health Services Appeal Authority (the FHSAA) and the payment of allowances and remuneration for members of such a committee or the FHSAA.
30. See paragraph 29 above.
31. This amendment makes changes arising from the LPS regulations. For an explanation see paragraph 3 above. The amendment will allow the Secretary of State under section 103 to make an order requiring a body to pay remuneration to providers of local pharmaceutical services.
32. This amendment is a further removal of a Treasury consent provision (see paragraph 27) Such consent will not now be required where payments are made to certain bodies (such as a housing authority) with which arrangements are made for the provision of accommodation for persons displaced by health service developments.
33. The purpose of this amendment is to bring the definition of a still-born child into line with that in the Still-Birth (Definition) Act 1992 (a missed consequential of that Act).
34. See paragraph 24 above.
35. See paragraph 8 above.
36. See paragraph 8 above.
37. Section 127(c) of the 1977 Act is spent and is being repealed.
38. In paragraph (a), the definition of disabled person is replaced with a view to consistency with the more recent definition in the Disability Discrimination Act 1995. In paragraphs (b) and (c), the amendments make changes arising from the LPS regulations. For an explanation see paragraph 3 above. Because paragraphs (b) and (c) relate to definitions, it is helpful for the purposes of the consolidation for them to apply also in relation to Wales, although the LPS regulations do not.
39. The purpose of the amendments in paragraphs (a) and (b) is to simplify the provision about payment of members of Special Health Authorities. The amendment in paragraph (c) enables the Secretary of State to appoint trustees for Special Health Authorities and Strategic Health Authorities and so ensures consistency in this respect with all other NHS bodies.



40. These amendments make changes relating to local pharmaceutical services. Paragraphs (a) and (c) are required because of the incorporation of provisions about local pharmaceutical services made by the LPS regulations (see paragraph 3 above). Because providers of local pharmaceutical services will now (as a result of changes made by the LPS regulations) be included in lists under section 28X, it is necessary to remove them from paragraph 6(a) and 10 of Schedule 9A to the 1977 Act, otherwise there would be duplication of provision about the representation of such providers on the Family Health Services Appeal Authority. Paragraph (b) makes a change in the references to the provision of pharmaceutical services and local pharmaceutical services, better to reflect the way in which these services are provided.
41. These amendments update references in Schedule 11 to the 1977 Act to various categories of citizenship. Although the references in Schedule 11 as it is currently drafted work as a matter of law, they are outdated and these amendments will enable the consolidation to reflect current terminology.
42. The amendment in paragraph (a) makes a change arising out of the LPS regulations. For an explanation see paragraph 3 above. The effect is that, in relation to England, a charge may be made for drugs, for treatment of sexually transmitted disease, which are provided as part of local pharmaceutical services. This amendment applies also in relation to Wales, even though the LPS regulations do not, because of a need to rectify a drafting error in the 2003 Act. The amendments in paragraph (b) and (c) rationalise the provisions on charging for optical appliances and will make the consolidated provisions more comprehensible. The amendments in paragraph (d) to (g) (together with amendment 15 in Part 2 of Schedule 1) reflect the fact that, since these provisions were drafted, the structure of the National Health Service has changed so that it is no longer appropriate to refer simply to a body established under the 1977 Act. These amendments will allow the consolidation to reflect more accurately the way in which services are now provided under the Act.

## **Part 2 of Schedule 1 to the Pre-Consolidation Amendments Order: Amendments to other legislation**

The numbered paragraphs below are references to the corresponding paragraph in Part 2 of Schedule 1 to the Pre-Consolidation Amendments Order.

1. The Ministry of Health Act 1919 is spent and is therefore repealed. This avoids the need to reproduce a spent enactment in the consolidation.
2. Section 3 of the 1990 Act is now redundant. Its purpose was to enable Health Authorities, before they were replaced by PCTs, to provide goods and services to other NHS bodies if they could provide such goods or services under their “primary functions” (functions in relation to the health service delegated to them under what is now section 16D of the 1977 Act). Section 18A of the 1977 Act contains provision to ensure that a PCT can enter into an NHS contract to provide goods and services for other NHS bodies only if the PCT is able to provide the goods or services in question to its own population. There is

therefore no life left in section 3. The question of whether it was required in respect of Special Health Authorities was considered and it was concluded that it was not. The functions of Special Health Authorities are effectively controlled through their establishment orders and directions. A Special Health Authority can be restricted by direction as to what it may do.

3. This amendment, together with amendments 6, 8, 12 and 13 bring into force provisions of legislation which are to be included in the consolidation and which are not currently in force. These provisions have not been commenced, either due to an oversight, or due to no immediate need for commencement (as in, for example, a power rather than a duty to do something). Where the consolidation is reproducing provisions which have not been commenced for a particular reason, those reproduced provisions will also not come into force until they are brought into force under the Acts from which they originate. But in the majority of cases this is not appropriate since there is no reason that the provisions have not been brought into force. Bringing these provisions into force will provide for a less complex consolidation.
4. This amendment rectifies a missed consequential from the 2003 Act. See also paragraph 10 below.
5. This amendment rectifies a missed consequential from the 2003 Act.
6. See paragraph 3 above.
7. The insertion of new subsection (2A) in section 41 of the 2001 Act clarifies the current power in section 41. This power has been used previously to make amendments of enactments, and the use of the power in this way has not been questioned (it was used in the National Health Service (Local Pharmaceutical Services Etc) Regulations 2002 (S.I. 2002/2861) and many of the amendments were subsequently amended by the 2003 Act), but it will be useful in the context of the consolidation for this power to be stated expressly.
8. See paragraph 3 above.
9. See paragraph 8 of Part 1 of Schedule 1.
10. See paragraph 4 above.
11. This amendment removes the requirement of Treasury consent where the Secretary of State makes a loan, out of money provided by Parliament, to the Commission for Patient and Public Involvement in Health. This is in line with Treasury policy that such consents should be reviewed and repealed where appropriate. The Treasury has agreed this repeal.
12. See paragraph 3 above.
13. See paragraph 3 above.

14. The amendment to section 195(2) of the 2003 Act will allow the consolidation to make consistent provision in relation to orders and regulations under Part 1 of the 2003 Act.

15. See paragraph 42(d) to (g) of Part 1 of Schedule 1.

## **Schedule 2**

The repeals in Schedule 2 are consequential upon the amendments made by Schedule 1.