

**EXPLANATORY MEMORANDUM TO
THE HEALTH AND SOCIAL CARE ACT 2008 (COMMENCEMENT NO. 15,
CONSEQUENTIAL AMENDMENTS AND TRANSITIONAL AND SAVINGS
PROVISIONS) ORDER 2010**

2010 No. 708 (C.46)

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 Health and Social Care Act 2008 (Commencement No. 15, Consequential Amendments and Transitional and Savings Provisions) Order 2010 (“the Order”) commences various provisions of the Health and Social Care Act 2008 (“the 2008 Act”). It also makes some consequential changes to secondary legislation as well as some transitional and savings provisions.
 - Part 1 commences provisions devolving certain funding for pharmaceutical services to Primary Care Trusts (PCTs).
 - Part 2 commences provisions enabling Regulations to be made in relation to responsible officers and cooperation between prescribed bodies in sharing information about health care workers.
 - Part 3 commences provisions relating to the dissolution of the Hearing Aid Council.
 - Part 4 commences provisions that update the legislative framework for public health protection and includes new regulation-making powers. It also puts in place transitional and savings provisions to enable a smooth transition to the new measures, makes some minor consequential amendments to secondary legislation and disapplies a provision of the Magistrates’ Courts Act 1980.
 - Part 5 commences provisions which make largely technical amendments to the statutory framework on ordinary residence in the National Assistance Act 1948 and the Chronically Sick and Disabled Persons Act 1970. Ordinary residence under these Acts relates to the responsibility of local authorities for the provision of social care accommodation and services to particular individuals.
 - Part 6 commences provisions which enable the Secretary of State to publish statements of standards, and which place a duty on PCTs in relation to improvement in the quality of healthcare. It also makes associated consequential amendments and repeals in respect of the Health and Social Care (Community Health and Standards) Act 2003 (“the 2003 Act”). It also amends transitory provisions in the Health and Social Care Act 2008 (Commencement No. 9, Consequential Amendments and Transitory, Transitional and Saving Provisions) Order 2009 (“the No.9 Order”) to extend provisions to 30 September 2010.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

Part 1 – Funding of expenditure in connection with the provision of pharmaceutical services

4.1 Part 1 commences Section 140 of the 2008 Act which has the effect of transferring the “Global Sum” – the centrally held funding for community pharmaceutical services, which is one of a number of sources of funding for the overall cost of pharmaceutical services - to PCT baseline allocations. Those allocations are the devolved funding provided by the Secretary of State to PCTs for primary care services generally.

4.2 The devolution of the pharmaceutical services “Global Sum” is achieved through amendments to section 228 to 230 of and Schedule 14 of the National Health Service Act 2006, which deal with public funding of Primary Care Trusts.

Part 2 – Responsible officers and cooperation between prescribed bodies in sharing information about health care workers

4.3 Part 2 of the Order commences sections 119 and 120 of the 2008 Act. This has the effect of enabling regulations to come into force in relation to responsible officers (a new role created by the 2008 Act) and their duties relating to the medical profession in England, Wales and Scotland (section 119), and in relation to additional responsibilities of responsible officers in England and Wales (section 120). It also enables regulations to come into force in relation to section 121 of the 2008 Act (cooperation between prescribed bodies). It also commences Section 122, which binds the Crown in respect of sections 120 and 121.

4.4 Regulations relating to responsible officers are planned to be laid later this year. Regulations on the duty of cooperation are planned to follow as soon as possible thereafter.

Part 3 – Dissolution of the Hearing Aid Council

4.3 The Order brings into force sections 123(1) and (2) of the 2008 Act, which provide for the abolition of the Hearing Aid Council and repeal of the Hearing Aid Council Act 1968 (“the 1968 Act”) and the Hearing Aid Council (Extension) Act 1975. Section 123 of the 2008 Act provides for the transfer of the Hearing Aid Council (HAC)’s regulatory functions in relation to private hearing aid dispensers to the Health Professions Council.

4.4 Sections 123(3) to 123(6), which make provision in relevant to the making of the Health Professions (Hearing Aid Dispensers) Order 2010, were commenced on 1st October 2008.

4.5 The Order repeals consequentially, from 1st August 2010, a provision of the Government Resources and Accounts Act 2000 (Audit of Public Bodies) Order 2004 which amended the 1968 Act.

Part 4 – Public Health Protection

- 4.7 The 2008 Act substantially updates the Public Health (Control of Disease) Act 1984 (“the 1984 Act”), which along with regulations made under it provides a legislative framework for health protection in England and Wales. This is achieved chiefly by repealing the existing Part 2 of the 1984 Act and inserting a new Part 2A, which requires much of the detailed provisions to be delivered through regulations.
- 4.8 Part 4 of this Order commences the remaining provisions of Part 2A, a mixture of substantive provision and regulation-making powers, on 6 April 2010. This coincides with the coming into force date of the three sets of health protection regulations to be made under the powers in Part 2A. Those regulations are the Health Protection (Part 2A Orders) Regulations 2010, the Health Protection (Local Authority Powers) Regulations 2010 and the Health Protection (Notification) Regulations 2010, which are the subject of separate Explanatory Memoranda. This Order also commences the repeal of Part 2 of the 1984 Act (with specified exceptions).
- 4.9 Schedule 1 to the Order makes minor amendments to the Public Health (Ships) Regulations 1979, the Public Health (International Trains) Regulations 1994 and the Immigration (European Economic Area) Regulations 2006 as a consequence of commencing the repeal of Part 2 of the 1984 Act.
- 4.10 Schedule 2 makes transitional and savings provisions which enable public health action taken under Part 2 to be completed after the repeal of that Part.

Part 5 – Ordinary residence for certain purposes of the National Assistance Act 1948 etc.

- 4.11 This Order commences section 148 of the 2008 Act. Under section 24 of the National Assistance Act 1948 (“the 1948 Act”), local authorities have a duty to provide residential accommodation to certain people who are ordinarily resident in their area. Section 24(6) sets out that where a person is a patient in an NHS hospital, they remain ordinarily resident in the area (and therefore the responsibility of the local authority for the area) in which they were ordinarily resident immediately before going into hospital. Section 148 of the 2008 Act extends this provision beyond hospitals to cover all settings in which NHS accommodation is provided.
- 4.12 The transitional provisions in relation to this amendment ensure that the amendment applies only to people who are provided with non-hospital NHS accommodation on or after 19th April 2010. This is so that the commencement does not upset the assumptions about ordinary residence which will have been made when people entered such accommodation. Local Health Board (LHB) hospitals in Wales were not included in section 24(6) of the 1984 Act following the reorganisation of NHS services in Wales in October 2009. People in LGB hospitals on 19 April 2010 will be subject to the extended rule. This ensures that the ordinary residence provisions apply in the normal way to all NHS hospital patients. It is anticipated that a commencement order for Wales, containing the same transitional provision, will also come into force on 19th April 2010.
- 4.13 The amendment to section 32 of the 1948 Act allows the Secretary of State and Welsh Ministers to publish arrangements setting out how cross-border ordinary residence disputes between local authorities in England and Wales are to be determined. The provision is currently confined to in-country disputes and there is no statutory mechanism

for determining cross-border disputes. These arrangements will be published shortly after this Order is laid before Parliament.

- 4.14 The Chronically Sick and Disabled Persons Act 1970 places a duty on local authorities to provide certain non-residential services to people who are ordinarily resident in their area. Section 148 of the 2008 Act makes an amendment to section 2 of that Act to enable local authorities to refer disputes occurring under this section to the Secretary of State or Welsh Ministers, rather than seeking resolution from the courts.
- 4.15 The transitional provision in relation to this amendment ensures that any disputes which have arisen before 19th April 2010 and which are already subject to court proceedings cannot be referred to the Secretary of State.

Part 6 – Healthcare Standards and the duty on PCTs in relation to the improvement in the quality of NHS care and amendment of the No.9 Order

- 4.16 The Order commences section 45 of the 2008 Act, which enables the Secretary of State to prepare and publish statements of standards in relation to the provision of NHS care. The equivalent provision (section 46) of the 2003 Act is repealed.
- 4.17 The 2003 Act places a duty on NHS bodies to put and keep in place arrangements to monitor and improve the quality of healthcare. This Order repeals that duty and replaces it with a duty on PCTs under the 2008 Act to make arrangements to secure continuous improvement in the quality of NHS healthcare provided by or for it. The new duty is not placed on NHS providers as they will, subject to approval of the draft Health and Social Care Act (Regulated Activities) Regulations 2010, be registered with the Care Quality Commission from 1st April 2010 and therefore held to account for ensuring that care meets essential safety and quality requirements through the new registration system.
- 4.18 The amendment in article 14 of the Order extends a transitory provision in the No.9 Order in relation to the Health Protection Agency (HPA) to 30 September 2010 when the HPA will, subject to parliamentary approval of the draft Health and Social Care Act 2008 (Regulated Activities) Regulations 2010, be brought into the new registration system for health and adult social care under the 2008 Act. It also changes the expiry date of the transitory and transitional provisions relating to functions of the Care Quality Commission under the Care Standards Act 2000 to 30th September 2010 (instead of linking the expiry of such provisions to the commencement of repeals contained in the 2008 Act).

5. Territorial Extent and Application

- 5.1 Part 1 extends to England and Wales but in practice the new arrangements only apply in relation to England (those for Wales are set out in the National Health Service (Wales) Act 2006).
- 5.2 Part 2 extends to England and Wales, except for one provision (which adds new responsible officer provisions into the Medical Act 1983) which extends to England, Scotland and Wales.
- 5.3 Part 3 applies in relation to all of the United Kingdom.

- 5.4 With the exception to the amendments to other legislation, Part 4 extends to England and Wales but apply in relation to England only. The amendments have the same extent as the legislation that they are amending, but do not apply in relation to Wales.
- 5.5 Part 5 extends to England and Wales but applies in relation to England only.
- 5.6 Part 6 extends to England and Wales only but only has any practical effect in relation to the NHS in England.

6. **European Convention on Human Rights**

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. **Policy background**

- ***What is being done and why***

Part 1 - Funding of expenditure in connection with the provision of pharmaceutical services

- 7.1 Until now, pharmaceutical services expenditure has been treated separately from PCTs' main expenditure and different accountability arrangements applied. Under the new arrangements, the starting principle will be that all pharmaceutical services expenditure will feature as part of PCTs' baseline funding allocation for primary care services generally.
- 7.2 These changes in funding for the provision of pharmaceutical services will bring the funding of pharmaceutical services in line with other services provided in primary care, that is, primary medical services, primary dental services and primary ophthalmic services. PCTs already meet the costs of NHS medicines and other products provided under NHS prescription (reimbursement) and these changes will also bring the cost of service provision (remuneration) in line with this.
- 7.3 Under the new arrangements, the Secretary of State will be able to designate particular elements of pharmaceutical services expenditure as a mechanism for ensuring that PCTs are only accountable for certain items of expenditure that should be directly attributable to them. So, for example, if a prescription is written by a GP in the area of one PCT, it is anticipated a designation will be made as a consequence of which the GP's own PCT will be accountable for the professional fee associated with that prescription, even if the prescription is dispensed in the area of another PCT. There will also be arrangements in place to ensure that all PCTs shoulder some costs on a "fair share" basis. The intention is to provide for a framework that will allow for a fairer allocation of resources, but will also enable PCTs to consider pharmaceutical services provision locally in its totality, to respond to needs and help ensure high quality, value for money services.

Part 2 - Responsible officers and cooperation between prescribed bodies in sharing information about health care workers

- 7.4 The Order brings into force sections of the 2008 Act which enable regulations to be made in relation to responsible officers and their duties relating to the medical profession in

England, Wales and Scotland (section 119), and in relation to additional responsibilities in England and Wales (section 120). The role of “responsible officer” is a new one, created by the 2008 Act. Certain health care organisations will be required to appoint or nominate persons who will have specified responsibilities in relation to doctors. Responsible officers will be senior doctors with responsibilities relating to (i) the evaluation of fitness to practise (in England, Wales and Scotland) and (ii) monitoring of conduct and performance of doctors (in England and Wales). The changes also enable regulations to be made (section 121) requiring cooperation between prescribed bodies in sharing information about health care workers’ conduct or performance where there is a threat to patient safety.

- 7.5 The responsible officer regulations are planned to be laid later in the year. This whole package of measures takes forward further aspects of the reform programme outlined in the White Paper “*Trust, Assurance and Safety – The Regulation of Health Professionals in the 21st Century*”, which set out the Government’s intention with regard to a number of improvements to the way in which health professionals are regulated and concerns about their performance are monitored and tackled.

Part 3 - Dissolution of the Hearing Aid Council (HAC)

- 7.6 The Hampton Report on Regulatory Inspections and Enforcement recommended in 2005 that the overall number of regulating authorities be rationalised. As part of its recommendations, it called for the merger of the Hearing Aid Council (HAC) into a new body, the Consumer and Trading Standards Agency (CTSA). The plan to set up the CTSA was later amended in order to create the Local Better Regulation Office. Further consideration was then given as to what should happen to the HAC and how hearing aid dispensers should be regulated.
- 7.7 After deliberations, the Government decided that the Health Professions Council should regulate hearing aid dispensers operating in the private sector. At the same time, it also decided that the requirement for employers of private hearing aid dispensers to be registered would cease as their activities could be regulated under consumer protection legislation.
- 7.8 The Health Professions (Hearing Aid Dispensers) Order 2010 has made such provision so it is now therefore appropriate to bring into force the provisions of the 2008 Act which both abolish the HAC and repeal the Hearing Aid Council Act 1968.

Part 4 - Public Health Protection

- 7.9 The health protection provisions in the 1984 Act (and regulations made under it) were substantially out of date prior to their amendment by the 2008 Act. They applied only to specific infectious diseases (and not new and emerging infections or contamination) and the requirements for notification were inadequate. The powers of Justices of the Peace (JPs) to make orders were inflexible and limited, and many of the local authority powers failed to meet the needs of the modern world. In addition, there were insufficient safeguards for people who might be affected by the use of the powers.
- 7.10 The amendments to the 1984 Act introduced in 2008 comprehensively modernised the legal framework for health protection. It includes revised and expanded powers to make health protection regulations, relating to both international and in-country arrangements. The new Part 2A revises the powers of JPs and local authorities to apply health protection

measures. It takes an “all hazards” approach whereby an appropriate response can be made to an infection or contamination of any kind that could result in significant harm to human health. Local authorities must in most cases apply to a JP for an order to impose restrictions or requirements, thereby better protecting individual rights. JPs’ order-making powers can be used in a range of situations and can be applied to people, things or premises. The powers are therefore more flexible, allowing orders to be better targeted to the problem at hand.

- 7.11 Part 2A requires regulations to be made relating to some aspects of JP orders, and also provides powers to make regulations concerning duties on registered medical practitioners and others to notify cases of infection or contamination; various other matters relating to JP orders; and the functions of local authorities relevant to their health protection role. The Health Protection (Part 2A Orders) Regulations 2010, the Health Protection (Local Authority Powers) Regulations 2010 and the Health Protection (Notification) Regulations 2010 were drawn up following a formal consultation. There were 68 responses to this consultation, the Department’s response to which can be found at: http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_111046
- 7.12 It is therefore now appropriate to bring into force the provisions in the Act which update the public health protection framework so that these regulations can also come into force. Further regulations relating to health protection at England’s international borders are planned to be brought forward in due course.
- 7.13 Under section 67 of the 1984 Act, applications to a magistrates’ court¹ are to be heard as complaints. Section 121(4) of the Magistrates’ Courts Act 1980 requires complaints to be heard in “open court”. Article 10 of this Order disapplies that requirement from applications for Part 2A orders. This enables urgent applications to be heard out of hours, and possibly in a JP’s home, where necessary; and puts it beyond doubt that, where appropriate, patient confidentiality can be maintained during the hearing of the application.
- 7.14 The transitional provisions in Schedule 2 aim to enable a smooth transition to the updated health protection framework. They ensure that health protection duties or powers initiated under the current regime before 6 April 2010 can be fully met or exercised as appropriate from that date.

Part 5 - Ordinary residence for certain purposes of the National Assistance Act 1948 etc.

- 7.15 The amendments to the 1948 Act and 1970 Act are technical in nature and amend existing inconsistencies.
- 7.16 Sections 21-35 of the 1948 Act, together with section 2 of the 1970 Act, provide the statutory framework for the provision of social care accommodation and services. Under this framework local authorities have powers and duties to provide accommodation and services to eligible people (aged 18 or over) who are ‘ordinarily resident’ in their local authority area. The term ‘ordinary residence’ is not defined in legislation but court judgements have interpreted it to mean (broadly) the place a person has chosen to live voluntarily and for settled purposes.

¹By virtue of the Interpretation Act 1978, the term “magistrates’ court” can be read as a single JP.

- 7.17 The policy intention is ensure the same rules apply in all situations where questions of ordinary residence arise.

Part 6 - Healthcare Standards and the duty on PCTs in relation to the improvement in the quality of NHS care and amendment of the No.9 Order

- 7.18 In relation to article 13, the provisions in respect of healthcare standards and the duty in relation to improving the quality of healthcare in the 2003 Act are being replaced by provisions in the 2008 Act.
- 7.19 In relation to article 14, the No.9 Order put in place a transitory provision to enable a smooth transition from the Commission for Healthcare, Audit and Inspection (known as the Healthcare Commission) to the Care Quality Commission in relation to the Health Protection Agency. These provisions covered the period 1st April 2009 to 31st March 2010 but need to be extended to 30 September 2010 when the Health Protection Agency will, subject to approval of the Regulations, be brought into the new registration system under the Health and Social Care Act 2008. The expiry date of the transitory and transitional provisions relating to functions of the Care Quality Commission under the Care Standards Act 2000 in Schedule 2 to the No.9 Order is being changed to 30th September 2010 instead of linking the expiry of such provisions to the commencement of repeals contained in the 2008 Act.

• ***Consolidation***

- 7.20 There are no plans to consolidate the Regulations amended by articles 7, 8 or 15.

8. Consultation outcome

- 8.1 Not applicable. Reference is made to the consultation on the new Regulations under Part 2A of the 1984 Act in paragraph 7.11 above.

9. Guidance

- 9.1 The Department's intentions with regard to guidance relating to the new transitional and savings provisions set out in this Order is as follows.
- 9.2 *Part 4:* Guidance on the updated public health protection legislation, including the transitional provisions set out in Schedule 2 of this Order, is under development and will be made available on the Department of Health website shortly.
- 9.3 *Part 5:* Updated guidance on ordinary residence is being published to coincide with the commencement of section 148 of the 2008 Act. Guidance on the effect of the transitional provisions in Part 5 of this Order will be published alongside this guidance. It will be available on the Department of Health website shortly after this Order is laid before Parliament.

10. Impact

- 10.1 An Impact Assessment has not been prepared for this instrument, as the consequential amendments, transitional provisions and savings provisions in the Order have a negligible impact on business, charities, voluntary bodies and the public sector.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Department's intentions with regard to the monitoring and review of the new transitional and savings provisions set out in this Order is as follows.

12.2 *Part 4:* The transitional and savings provisions relating to Part 4 aim to achieve a smooth transition from the current to the updated health protection framework. The updated health protection legislation will be reviewed against its objectives in April 2015, in line with the timing for the review of relevant provisions of the Health and Social Care Act 2008.

12.3 *Part 5:* The transitional provisions relating to Part 5 aim to achieve a smooth transition from the current to the updated ordinary residence statutory framework. The transitional provisions in this Part of the instrument will be reviewed on an ongoing basis, as will the statutory framework on ordinary residence.

13. Contacts

Theresa Prendergast at the Department of Health, tel: 020 797 21118 or email: theresa.prendergast@dh.gsi.gov.uk, can answer any queries regarding provisions regarding Part 1 of this instrument.

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Janet Whybrow at the Department of Health, tel: 020 7972 4358 or email: janet.whybrow@dh.gsi.gov.uk, can answer any queries regarding Part 4 of this instrument.

Helene Shaw at the Department of Health, tel: 020 7972 4958 or email: helene.shaw@dh.gsi.gov.uk, can answer any queries regarding Part 5 of this instrument.

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