

**EXPLANATORY MEMORANDUM TO**  
**THE NATIONAL HEALTH SERVICE PRIMARY DENTAL SERVICES**  
**(MISCELLANEOUS AMENDMENTS) REGULATIONS 2014**

**2014 No. 443**

1. This explanatory memorandum has been prepared by The Department of Health and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments (JCSI).

2. **Purpose of the instrument**

2.1 This instrument amends:

a) The National Health Service (Functions of the First-tier Tribunal relating to Primary Medical, Dental and Ophthalmic Services) Regulations 2010 (S.I. 2010/76, as amended) (“the Tribunal Regulations”),

b) The National Health Service (Personal Dental Services Agreements) Regulations 2005 (S.I. 2005/3373, as amended) (“the PDS Regulations”),

c) The National Health Service (General Dental Services Contracts) Regulations 2005 (S.I. 2005/3361, as amended) (“the GDS Regulations”), and

d) The National Health Service (Dental Charges) Regulations 2005 (S.I. 2005/3477, as amended) (“the Dental Charges Regulations”).

2.2 The purpose of this instrument is to make changes to the standard terms of general dental services contracts (“GDS contracts”) and personal dental services agreements (“PDS agreements”) held by contractors providing primary dental services in England. The substantive changes take account of the abolition of the NHS Direct National Health Service Trust and new arrangements for the calculation of units of dental activity, but there are also corrections to drafting errors. It also directs the First-tier Tribunal to deal with specified types of contractual disputes relating to Limited Liability Partnerships (LLPs) on behalf of the Secretary of State.

Because these Regulations include provisions that correct errors in the GDS, PDS and Dental Charges Regulations, the Department has concluded it was appropriate in this instance to apply the free issue procedure.

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

3.1 This instrument includes amendments that relate to criticisms of the Department made by the Joint Committee on Statutory Instruments in its Fourth Report of Session 2013-14. In that Report, the Committee reported the definition of “course of treatment” inserted into the GDS, PDS and the Dental Charges Regulations by the National Health Service (Primary Dental Services) (Miscellaneous Amendments and Transitional Provisions Regulations 2013 (S.I. 2013/364) (the 2013 Regulations) for defective drafting. As a consequence, the Department has amended the definition to correct the defective drafting it acknowledged.

### **4. Legislative Context**

4.1 The NHS Commissioning Board (“the Board”) is required under section 99 of the National Health Service Act 2006 (the Act), to the extent that it considers necessary to meet all reasonable requirements, to exercise its powers so as to secure the provision of primary dental services throughout England. The Board secures the provision of NHS dental services by entering into either a general dental services contract (GDS contract) made under section 100 of the Act, or a personal dental services agreement (PDS agreement) made under section 107 of the Act, with a contractor.

4.2 These contracts and agreements are governed by the GDS and PDS Regulations respectively which set out the mandatory terms which must be included in a GDS contract or a PDS agreement, though parties are free to include any other terms provided they do not cut across the statutory mandatory terms. Any changes to the standard mandatory terms must be made by way of amendments to these Regulations.

4.3 Currently, those providing NHS primary dental services are remunerated under either GDS contracts or PDS agreements on the basis of being obliged to deliver a specified number of “units of dental activity” (UDAs) for a specified payment in a financial year, apart from a very small number of contractors who are piloting other remuneration models under a dental pilot scheme known as the Capitation and Quality Scheme 2, which was introduced in April 2013 for a period of two years.

4.4 The Dental Charges Regulations prescribe the NHS patient charges that may be levied for treatment provided as NHS primary dental services. The charges are levied as Band 1, Band 2 and Band 3 charges, and an additional charge, a Band 1A charge, applies to the pilot schemes for interim care courses of treatment. The components of Band 1, Band 1A, Band 2, and

Band 3 courses of treatment are set out in Schedules 1 – 3 to these Regulations.

4.5 The GDS and PDS Regulations provide that contractors entering into GDS contracts or PDS agreements may elect to be treated as health service bodies. Where a contractor elects to be treated as a health service body, it is entitled to use the NHS dispute resolution procedure referred to in Part 7 of Schedule 3 to both the GDS and PDS Regulations in the event of any contractual disputes. The vast majority of such disputes are delegated by the Secretary of State to the NHS Litigation Authority to deal with under Directions. Disputes dealing with the eligibility or fitness of contractors to provide services, which occur very rarely, are generally delegated to the First-tier Tribunal to deal with under the Tribunal Regulations.

## **5. Territorial Extent and Application**

5.1 This instrument applies to England.

## **6. European Convention on Human Rights**

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

## **7. Policy background**

- What is being done and why

7.1 The Tribunal Regulations already direct the First-tier Tribunal to deal with contractual disputes that relate to whether or not a contractor, a partner, or a member of a dental corporation is a dental practitioner for the purposes of the eligibility conditions for holding GDS contracts set out in sections 102 of the Act, on behalf of the Secretary of State. Following changes made by the Health and Social Care Act 2012, since April 2013 limited liability partnerships (LLPs) have been eligible to hold GDS contracts and PDS agreements. Up until now, in the event of a dispute relating to the continuing eligibility of an LLP to hold a GDS contract, the Secretary of State would have to have made a direction to an appointed body or person to deal with it. Regulation 2 of these Regulations amends regulation 5 of the Tribunal Regulations so as to include these disputes within the remit of the First-tier Tribunal, in line with the similar provision made in respect of other types of contractor. Similar changes have not been made in relation to PDS agreement disputes of a similar nature as such disputes would already be covered by the current wording of the Tribunal Regulations.

7.2 Amendments were made to the GDS, PDS and the Dental Charges Regulations by the 2013 Regulations to insert revised definitions of “course of

treatment”. Changes were made to reflect the introduction of interim care courses of treatment, which may be provided to patients receiving treatment under a Capitation and Quality Scheme 2 Agreement, mentioned in paragraph 4.3 above. In the light of the criticism of the defective drafting of those definitions by the Joint Committee for Statutory Instruments referred to in paragraph 3.1 above, the Department has made corrections, which essentially relate to numbering, formatting and drafting matters. No substantive changes have been made to these definitions.

7.3 NHS primary dental services, which are the usual 'high street' dental services such as fillings and extractions, are commissioned by the Board as UDAs (defined in para 4.3). Table A in Schedule 2 to the GDS and PDS Regulations sets out the numbers of UDAs that are attributed to each banded course of treatment provided by a contractor. So if a contractor provides a Band 1 course of treatment it provides one UDA, which is the specified number of units attributed to that Band. The Dental Charges Regulations set out the components of each banded course of treatment and the NHS charge that may be levied for each band charge. As part of a banded course of treatment, patients may be referred to a more specialised contractor for advanced mandatory treatment, which is treatment that requires a higher level of skill or experience. Currently, where patients are referred for advanced mandatory treatment, both contractors are allocated the UDAs that are attributable for the whole course of treatment, even though the referring contractor may only have carried out Band 1 components, such as the examination and diagnosis, and the specialist contractor may have provided the Band 2 or Band 3 components, such as a complex filling. Regulations 3(3) and 4(3) of these Regulations amend Schedule 2 in both the PDS and GDS Regulations to provide that where patients are referred for advanced mandatory treatment, the UDAs are distributed between both contractors commensurate with the components of the part of the course of treatment each has provided. This does not change the NHS charge payable by the patient, who will still pay a single charge, which will continue to be collected by the referring contractor.

7.4 Contractors providing NHS primary dental services are required by Schedule 4 to the PDS and GDS Regulations respectively to provide patient information leaflets in their practices containing specified information as a term of service. Currently these leaflets are required, as a term of service, to include details in respect of NHS Direct and NHS Direct online. As this body is to be abolished, regulations 3(4)(b) and 4(4) respectively amend the GDS and PDS Regulations to remove this term of service.

7.5 Regulation 3(4)(a) amends Schedule 4 to the PDS Regulations to correct a drafting error. Following changes made by the Health and Social

Care Act 2012, the reference to ‘qualifying body’ in paragraph 2 should now refer to ‘dental corporation’.

- Consolidation

The Department will keep the need to consolidate the GDS, PDS and the Tribunal Regulations under review. The Dental Charges Regulations were made in December 2005 and may be subject to further amendment in the light of experience with the operation of these powers, and to reflect inflationary increases. There are therefore no plans to consolidate the Dental Charges Regulations.

## **8. Consultation outcome**

8.1 The Department of Health has consulted the British Dental Association (BDA) and the Board. Both the BDA and the Board provided written confirmation that they are content with the proposed changes.

## **9. Guidance**

9.1 The Department of Health does not intend to issue guidance in respect of these Regulations. The Board will be issuing operating procedures on the new arrangements for distributing UDAs between contractors following patient referrals. This will be issued to its Area Teams and to contractors in advance of the Regulations coming into force. The Board will also be making Area Teams and contractors aware of the removal of the reference to NHS Direct and NHS Direct online in the required content of dental practice leaflets.

## **10. Impact**

10.1 The splitting of UDAs in cases of referrals, implemented by regulations 3(3) and 4(3), as explained in paragraph 7.3 above, is expected to generate a £1.1 million saving for the NHS. These savings were negotiated with the BDA as part of their fee negotiations. This policy forms part of the efficiency package associated with the 2013/14 pay and contract uplift package, which is negotiated with the BDA every year. Implementing these changes is not anticipated to generate any additional costs (or impact on the amount of patient charge revenue collected, as the patient charge for the course of treatment provided remains unchanged in cases of referrals). However, the policy is expected to generate approximately £1.1million in savings when implemented because the Regulations will provide that each contractor will only be remunerated for the components of the course of treatment actually provided rather than both contractors being paid for the highest banded course of treatment. The estimate provided above is a

conservative estimate of savings since there is no detailed data available on the treatment provided by the referrer and referee contractor.

10.2 Regulations 3(4)(b) and 4(4), as explained in paragraph 7.4 above, remove the requirement for contractors to include details of NHS Direct and NHS Direct online in their patient information leaflet as NHS Direct NHS Trust is to be abolished. Contractors are required to review their patient information leaflet at least once in every 12 month period to ensure the information is up-to-date, and will be able to remove references to NHS Direct and NHS Direct online when they next review their leaflets.

10.3 Aside from the impact mentioned in 10.1 and 10.2 above, no additional impact on business or the public sector has been identified as a result of these Regulations.

10.4 We have also considered whether the instrument has any impact on equality issues, and do not consider that it has any such impact. As referred to above, the changes to the allocation of UDAs amongst contractors in cases of referrals do not impact on the overall charges paid by the public for NHS dental services as the NHS dental charge paid by the patient for courses of treatment involving referrals remains unchanged.

10.5 NHS dental practices are exempt from the Small Firm Impact Test as they are considered part of the public sector due to their provision of primary dental services for the NHS. Public sector organisations are exempt under this test and as a result an Impact Assessment has not been prepared.

## **11. Regulating small business**

11.1 The Regulations apply to small businesses, including firms employing up to 20 people. As these Regulations concern the provision of NHS dental services in England on the basis of nationally determined terms of service, it is not possible to differentiate between contractors according to their operational turnover or size. This is to ensure the application of agreed nation-wide standards and practices in the provision of such services as part of the nationally determined contractual framework.

## **12. Monitoring & review**

12.1 Monitoring of GDS contracts and PDS agreements became the role of the Board from 1 April 2013. However, the Secretary of State retains responsibility for the terms and conditions of contractors contained in Regulations and for the consolidation of those Regulations.

12.2 The Secretary of State will keep the Board's performance under review in line with the Secretary of State's duties under the 2006 Act, as amended by the 2012 Act.

### **13. Contact**

Helen Miscampbell at the Department of Health Tel: 0207 972 5950 or e-mail: [Helen.miscampbell@dh.gsi.gov.uk](mailto:Helen.miscampbell@dh.gsi.gov.uk) can answer any queries regarding the instrument.