HEALTH AND PERSONAL SOCIAL SERVICES (QUALITY, IMPROVEMENT AND REGULATION) (NORTHERN IRELAND) ORDER 2003

S.I. 2003 No. 431 (N.I. 9)

EXPLANATORY MEMORANDUM

INTRODUCTION

The Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003 ("the Order") was made on 27 February 2003.

This Explanatory Memorandum has been prepared by the Department of Health, Social Services and Public Safety (DHSSPS) in order to assist the reader of the Order. The Memorandum does not form part of the Order.

The Memorandum needs to be read in conjunction with the Order. It does not give, and is not meant to be, a comprehensive description of the Order. So where an Article or part of an Article does not seem to require any explanation or comment, none is given.

PURPOSE

In summary the Order –

establishes a new, independent body, the Northern Ireland Health and Personal Social Services Regulation and Improvement Authority (the Regulation and Improvement Authority) with overall responsibility for monitoring and regulating the quality of health and care services delivered in Northern Ireland;

introduces a statutory duty of quality to be placed on Health and Social Services (HSS) Boards, HSS Trusts and some special agencies with regard to services which they provide;

gives the Regulation and Improvement Authority powers to review and inspect the quality of services provided by the HPSS including evaluating clinical and social care governance arrangements within HPSS bodies designed to underpin the statutory duty of quality placed on HSS Boards, HSS Trusts etc;

gives the new Authority responsibility for and powers to regulate a wide range of care services including many services (establishments and agencies) which have previously been unregulated and many services delivered by the HPSS as well as services delivered by the independent sector;

introduces a common system of regulation based on minimum standards set out by the Department;

gives the Regulation and Improvement Authority powers to assess the quality of some unregulated services provided by HSS Trusts i.e. fostering, adoption and regulation of services provided to children under 12;

reconstitutes the main appeals tribunal used by this and other legislation; and

transfers responsibility for the inspection of care provided in schools which provide accommodation to children from HSS Boards to the new Authority.

BACKGROUND AND POLICY OBJECTIVES

The chapter on "Working for Healthier People" in the Executive's first Programme for Government, included a commitment to put in place a framework to raise the quality of services

provided to the community and tackle issues of poor performance across the HPSS. As a first step in fulfilling this commitment, DHSSPS issued a consultation paper entitled "Best Practice – Best Care" in April 2001. The results of this consultation were published in June 2002. The purpose of this Order is to put into effect those decisions, made following the conclusion of the consultation process, which require legislation.
The relevant documents are listed below –
"Programme for Government" published in March 2001.
"Best Practice – Best Care, A Consultation Paper", published in April 2001.
"Best Practice – Best Care, Responses to the Consultation", published in June 2002.
The "Best Practice – Best Care" documents are available on the DHSSPS website at www.dhsspsni.gov.uk/publications.
The proposals contained in "Best Practice – Best Care" focused on:

(a) developing and disseminating clear service standards for the HPSS;

(b) *securing accountability at local level for the delivery of services; and*

(c) *improving monitoring & regulation of the services.*

The main focus of this Order is on the implementation of arrangements covering (b) and (c) which require legislation although this legislation is linked in to other arrangements, for the development of standards and guidelines (a), which do not require primary legislation.

CONSULTATION
The Department consulted widely on these proposals in the "Best Practice – Best Care" consultation document. The results of this consultation exercise, published in June 2002, showed widespread support for the introduction of a statutory duty of quality, clinical and social care governance arrangements for the HPSS and a new system of regulation of care services extended to cover a much wider range of services. The consultation showed different views on which body or bodies should inspect and regulate services and raised concerns about the cost of creating multiple new bodies. As a result the proposal in the consultation document to create two new Non-Departmental Bodies was replaced with a new proposal to create a single, integrated, authority.
As part of this consultation DHSSPS invited consultees to put forward their views on the equality impact of the proposals, and also invited any further comment on the major policy objectives that have been brought forward in this Order. The responses indicated almost universal support for the proposals and the equality aims of the Order were broadly welcomed.

OPTIONS
The "Best Practice – Best Care" consultation document put forward different options for standards setting, for extending regulation to a wider range of services and for the inspection of quality in the HPSS. Consultees were also invited to put forward their own proposals if they had alternatives. The measures proposed in this Order have been developed to take account of the original options in the consultation document, responses from consultees and subsequent developments with equivalent arrangements elsewhere.

CONSULTATION ON THE ORDER IN COUNCIL
The draft Order in Council and Explanatory Memorandum were issued for a short period of consultation from 18th November to 16thDecember to provide an opportunity for interested parties to further consider the proposals as defined within legislation and to recommend for consideration any changes or amendments.
Respondents to the consultation were supportive of the principles contained within the proposed legislation. Suggested amendments included:

Adult Placements with Families
"Adult Placements" are cases involving the placement of up to three adults, aged 18 or more and who are usually learning disabled, to live with a family in a domestic residence. A number of respondents were concerned about categorizing "adult placements" as residential care homes on the grounds that the same standards should not be applied to family settings as are applied to residential care homes. The Order was amended so that the Department may in the future prescribe further establishments and agencies. This provision can be used to regulate adult placements as entities separate from residential care homes.

Improvement Notices - Article 39
Responses to the consultation suggested that the article relating to Improvement notices should be strengthened so that the Regulation and Improvement Authority can "specify" rather than "recommend" improvements. Such a change strengthens this provision and is appropriate, and this change has been included into the Order.

Personal Care - Article 10(3)
Responses suggested that the definition of "Personal Care" in Article 2 should be amended to ensure full consistency with the definition used in the Health and Personal Social Services Act (Northern Ireland) 2001. This change has been inserted into the Order.

OTHER CHANGES TO THE ORDER
A number of additional changes were included to address issues identified by the Department during consultation in discussions with Health and Social Services Boards,
Regional Inspection teams and the Department's professional and policy advisers. These were:

— Changes to Schedule 1 to add provisions giving powers to the Department to take action, should HSSRIA fail to fulfil its functions and to arrange for the transfer of staff, assets and liabilities from HSS Boards to HSSRIA; and

— Miscellaneous changes to other provisions contained in articles 45 to 47.

RELATED LEGISLATION
The provisions within this order bring into effect arrangements which are equivalent to those already in place in Scotland and in England & Wales. The relevant pieces of equivalent legislation for the regulation of services are:

— the Care Standards Act 2000 (c.14); and

— the Regulation of Care (Scotland) Act 2001 (asp 8).

— The relevant equivalent piece of legislation for the duty of quality and the inspection of the quality of services delivered by the NHS in England & Wales and in Scotland is:

— the Health Act 1999 (c.8) as amended by the NHS Reform and Health Care Professions Act 2002 (c.17).

OVERVIEW
The Order is in six Parts:
Part I (Articles 1 – 2) provides for the title and commencement and also provides for the interpretation of certain terms and references;
Part II (Articles 3 - 7) provides for the establishment of the Regulation and Improvement Authority and sets out its general responsibility with regard to the monitoring of the quality of health and care services;
Part III (Articles 8 - 33) makes provision for the regulatory procedures to be followed by the Regulation and Improvement Authority;
Part IV (Articles 34 - 35) introduces the statutory duty of quality and the responsibilities of the new Authority with regard to services delivered by HSS Boards, HSS Trusts and special agencies;
Part V (Articles 36 - 37) sets out the functions of the new Authority with regard to Boards and Trusts adoption and fostering services as well as the delivery of their functions with regard to the regulation of day care and childminding for children aged under 12;
Part VI (Articles 38 - 44) sets out the powers of inspection and review of the new Authority. It confers power on the Department to introduce minimum standards applicable to regulated and other services. It also covers the concept of improvement notices linked to minimum standards. Part VI also sets out the powers of a Tribunal with the role of hearing appeals against the decisions of the new Authority.; and
Part VI (Articles 45 - 50) deal with various miscellaneous provisions.

COMMENTARY ON ARTICLES

A More Detailed Commentary on Certain Individual Articles is Shown at Annex 1.

Schedules
Schedule 1 – The Northern Ireland Health and Personal Social Services Regulation and Improvement Authority.
Schedule 2 – The Care Tribunal.
Schedule 3 – Transitional Provisions and Savings.
Schedule 4 – Amendments.
Schedule 5 – Repeals.

ANNEX 1 – EXPLANATION OF INDIVIDUAL ARTICLES: PART II

ARTICLE 3 - THE REGULATION AND IMPROVEMENT AUTHORITY

Article 3 establishes the Regulation and Improvement Authority. Schedule 1 sets out detailed provisions regarding the Regulation and Improvement Authority.

ARTICLE 4 - GENERAL DUTIES IN RELATION TO PROVISION OF SERVICES

Article 4 specifies the remit of the Regulation and Improvement Authority with regard to regulated services and with regard to the HPSS and its general duties with regard to quality. Paragraph (1) links the main role of the Regulation and Improvement Authority to services regulated under Part III and to services provided by HSS Boards, HSS Trusts and special agencies. Paragraph (2) sets out the Regulation and Improvement Authority's main functions of keeping the Department informed about the availability and quality of services. This will include reporting on trends in the provision of long term health and care services. The Authority's other main function is of encouraging improvement in the quality of these services. It will do this by, for example, disseminating examples of good practice and giving advice to service providers on how to meet minimum standards (see Article 38), the requirements of clinical and social care governance guidelines and the requirements arising from any other standards, guidance or guidelines which the Department may endorse as applying to the HPSS bodies and regulated services.

PART III

Article 8

Article 8 groups all of the regulated services as either establishments or agencies. Establishments are places at which services are delivered. Agencies are organisations which deliver services at different locales. Throughout the Order this enables various articles dealing with regulation to refer to "establishments" and "agencies" and thereby apply to all of the services under that generic list. This article also gives the Department powers to prescribe additional establishments and agencies.

Article 9 - Children's Homes

Paragraph (2) defines a children's home as an establishment which provides care and accommodation wholly or mainly for children. This will include statutory homes, voluntary homes and registered children's homes (including small private children's homes) as defined in the Children (NI) Order 1995 (the Children Order), and homes for disabled children. Paragraph (3) excludes a place where a child is cared for by his parents, a relative, a person with parental responsibility for him or a foster parent. Paragraph (4) excludes hospitals, schools and other institutions and gives the Department the power to make other exceptions in regulations. It is intended that regulations will be made to exempt, for example, homes where children take holidays or certain hostels set up by professionals to accommodate apprentices (such as footballers or jockeys). Paragraph (5) clarifies the definition of foster parent for the purposes of this Article.

Article 10 - Residential Care Homes

Article 10 defines the various types of residential care homes which are to be regulated as providing board and personal care. This definition follows on from the definition in Part II of the Registered Homes (NI) Order 1992 except that some exceptions e.g. Trust homes and small homes are no longer exempted.

Paragraph (3) defines disablement and personal care. "Personal care" may include, for instance, assistance with washing, bathing, toileting, dressing and eating for people who are unable to do these things without help. This means that an establishment is not defined as a residential care home unless that type of assistance is provided where required.

Homes which provide personal care and accommodation for disabled children are to be treated as children's homes and not care homes.

Article 11 - Nursing Homes

Article 11 defines nursing homes. This definition follows on from the definition in Part III of the Registered Homes (NI) Order 1992 except that some exemptions e.g. Trust homes are removed.

Article 12 - Requirement to Register
Paragraph (1) provides that any person who carries on or manages an establishment or agency of any description must be registered, and it will be an offence to carry on or manage such an establishment without being registered in respect of it. The principle is that each establishment or agency should have a registered owner or proprietor (person who 'carries on' the business). If the person who carries on the business is not in day-to-day control of it, it is intended that the regulations will require the appointment of a manager who must also be registered by the Regulation and Improvement Authority (see Article 23).
Paragraphs (4) and (5) relate to offences. A person who carries on or manages an establishment or agency without being registered will be guilty of an offence and liable to a fine up to level 5 on the standard scale (£5,000). If the person continues to run an unregistered establishment or agency after having been convicted of this offence, or after their registration has been cancelled, then they will be guilty of an offence and liable to six months' imprisonment, or a fine, or both.

Article 15 - Cancellation of Registration
Relevant offences for the purposes of Article 15 include offences under legislation, such as the Registered Homes (NI) Order 1992, which is being repealed or amended by this Order. This allows for the continued possibility that offences which occurred prior to the commencement of this Order may not come to light or may not be dealt with until a date after this Order comes into effect and previous legislation is repealed or amended. The other offences relevant to this Part are set out in articles 24 to 28 and in article 42. There are other offences. These are:

in the case of a voluntary adoption agency the offence of contravening regulations under Article 10(2) of the Adoption (Northern Ireland) Order 1987 (NI 22) or section 1(3) of the Adoption (Intercountry Aspects) Act (Northern Ireland) 2001 (c. 11);

an offence under the Children Order or any regulations made under it;

an offence under the Mental Health (Northern Ireland) Order 1986 (NI 4); and

an offence under any statutory provision repealed by this proposed Order or regulations made under it.

Cancellation of registration would not normally be the first step in a formal enforcement action. It is more likely to be used where other actions such as prosecution have failed to ensure compliance by the establishment or agency. If a registered person is convicted of a relevant offence, such as breaching a condition of registration (an offence under Article 24), and still fails to remedy the breach, the Regulation and Improvement Authority will be able to consider cancellation of the person's registration.

Article 16 - Applications by Registered Persons
Paragraph (1) enables the registered person to apply for a change to his conditions of registration (for example to change the number of people accommodated in the home) or to apply voluntarily for the cancellation of registration, for example, if he plans to close or sell the business. Paragraph (2) prevents a person voluntarily cancelling his registration if the Regulation and Improvement Authority has given notice of intention to, or decided to, cancel registration. Paragraph (3) enables the Department to make regulations specifying the particulars to accompany an application for registration. Paragraph (4) provides that if the Regulation and Improvement Authority grants the application it must give notice in writing and issue a new certificate of registration.

Article 17 - Regulations about Registration
Article 17 provides for regulation-making powers with respect to registration. Regulations covering applications for registration (paragraph (1)(a)) will deal with matters such as the information that should be provided in the application. Regulations made under paragraph (1)(b) may require certificates of registration to include, for example, the conditions of registration for that person in respect of that establishment or agency e.g. the categories of person which a home may accommodate.
Paragraph (2) concerns fostering and voluntary adoption agencies. The Department will be able to make regulations to provide that fostering agencies or voluntary adoption agencies which are unincorporated bodies are ineligible to apply to be registered.

Paragraph (3) enables regulations to be made requiring registered persons to pay an annual fee. Decisions will be made about the level and structuring of fees at a later date. Paragraph (4) provides that unpaid fees may be recovered as a civil debt.

Article 18 - Notice of Proposals
This Article provides for the Regulation and Improvement Authority to give notice of decisions it intends to take ("notice of proposal") with respect to applications for registration, cancellation of registration or any change to the conditions of registration. Notice must be given to the applicant or registered person and must set out the reasons (Paragraph (6)). For example, in the case of a person applying for registration for the first time, the notice of proposal will state whether or not the Regulation and Improvement Authority proposes to register them, and if so, the conditions subject to which they propose to grant the application. Article 18 does not apply where the Regulation and Improvement Authority decides to grant an application for registration unconditionally, or subject to agreed conditions.

Article 22 - Appeals to the Care Tribunal
Article 22 provides for an appeal against a decision of the Regulation and Improvement Authority under Part III. The appeal is to a new "Care Tribunal" established under this Order (Schedule 2). This Tribunal replaces the Registered Homes Tribunals which were established under the Registered Homes Order. Paragraphs (3), (4) and (5) set out the powers and decision making ability of the Tribunal hearing the appeal.

Article 23 - Regulations Relating to Establishments and Agencies
This Article provides for regulation-making powers which will cover the management, staff, premises and conduct of establishments and agencies (other than voluntary adoption agencies). It also provides for regulations to be made regarding the health and welfare of service users.

PART IV

Article 34 – Duty of Quality
Article 34 introduces a statutory duty of quality which will apply to Boards and Trusts with regard to the services which they provide (paragraph (1)) including arrangements relating to the environment in which health and care services are provided.
Paragraph (2) enables the Department to extend the duty of quality to special agencies.
The "Duty of Quality" will place a statutory requirement on all HPSS providers to put and keep in place arrangements for improving and monitoring the quality of health and social care services that they provide directly to individuals. That is, they will have to put and keep in place a system of clinical and social care governance.

PART V

Article 36 - Provision of Information & Article 37 - Annual Returns
HSS Boards and Trusts currently have responsibilities, set out in the Children Order 1995 and the Adoption (NI) Order 1987 (as amended by the Children Order 1995) to deliver a range of fostering and adoption services. A different approach is therefore needed to the regulation of these services. The approach to the regulation of these services (delivered by Local Authorities) in Scotland and in England and Wales under equivalent legislation has also been handled separately for similar reasons.
Part XI of the Children Order sets out a system for the regulation of a range of child minding and day care services by Boards and Trusts. These functions will not transfer to the Regulation and Improvement Authority.
The provisions at Article 36 and 37 will require HSS Boards and Trusts to provide information and annual returns to the Regulation and Improvement Authority covering the way in which they exercise their functions and responsibilities with regard to delivering fostering and adoption services and also covering the way HSS Boards and Trusts exercise their functions with regard to the regulation of day care and child minding. It is the intention that this information and these returns should be such that they will involve HSS Boards and Trusts providing the same type of information as would be the case if these services were regulated under Part III of this Order. It is

also intended that the new Authority will inspect the way in which fostering and adoption services and the regulation of day care and child minding are undertaken by Boards and Trusts under the powers set out at Article 35 (1)(d).

PART VI

Article 38 – Statements of Minimum Standards

Article 38 enables the Department to issue minimum standards for Northern Ireland applicable to all services including regulated services (paragraph (1)). These minimum standards are essential to the arrangements for regulating and inspecting these services. However the Department will also be able to issue minimum standards for non-regulated services.

The Department is establishing a Standards and Guidelines Unit which will have a key role in the development and dissemination of standards and guidelines both for regulated and non-regulated services. The Unit will itself lead the work of developing many standards and guidelines, however, much of the work may be undertaken by arrangement with existing standards and guidelines setting bodies.

Any breach of these standards will not, of itself, be a breach of regulatory requirements, but the standards shall be taken into account when determining whether a breach of the regulations has occurred. For example, a regulation might state that suitable and nutritious food should be provided to all residents in a home. The minimum standards would set out what registered providers are expected to provide in terms of the number of meals per day and their nutritional content.

Different services will have different sets of regulations and standards which will be appropriate to the type of service. Standards will also be developed to apply to non-regulated HPSS services.

Article 39 - Improvement Notices

Article 39 applies to all services at Part III, and all HPSS bodies in respect of any service for which the Department issues a statement of minimum standards.

The Authority can issue an improvement notice to an establishment, agency or HPSS body which the Regulation and Improvement Authority judges is failing to meet a minimum standard. As part of this improvement notice the Regulation and Improvement Authority can specify what improvements it considers necessary (paragraph (2)(b)).

Article 44 - the Care Tribunal

This Article along with Schedule 2 sets out provisions for the right of appeal to a tribunal. Under Article 22 there is a right of appeal against decisions by the Regulation and Improvement Authority, in respect of registration, (for example, a decision not to register an establishment or agency or to remove it from the register or to impose conditions on registration). Such decisions could affect an individual's ability to secure employment or the agency or establishment’s ability to operate as a profitable business.

The Tribunal replaces Registered Homes Tribunals which were set up by the Registered Homes (Northern Ireland) Order 1992, and renamed by section 15 of the Health and Personal Social Services Act (Northern Ireland) 2001 as Social Care Tribunals. This Tribunal is to be known as the Care Tribunal reflecting the wider range of services for which a tribunal panel may be required to hear an appeal. This new Tribunal will also hear appeals under the terms of the HPSS Act (Northern Ireland) 2001.

The Department will have the power to make regulations covering the work of the Tribunal (paragraph (3)). Under paragraph (5) it is an offence to fail to co-operate with the Tribunal (Level 3 fines). Appeals against the findings of the Tribunal may be made to the High Court on a point of law (paragraph (6)).

Schedule 2 sets out provisions for appointments to the Tribunal and to individual panels. These are similar to the existing provisions covering Registered Homes Tribunals. A panel of persons who may serve as chairmen of the Care Tribunal will be appointed by the Lord Chancellor. Chairmen must be barristers or solicitors of at least ten years standing. The Lord Chancellor will also select the chairman for each panel from this list of panel members. [Note: Schedule 2 paragraph 7 of the Order will enable the Lord Chancellor to carry out the functions of the First and Deputy First Ministers until such time as section 5(1) of the Justice (Northern Ireland) Act 2002 comes into force.]

The Department will select members of a lay (non-legal) persons panel. The Department will also appoint from this panel the two remaining members of each Tribunal.
The remaining provisions of Schedule 2 cover staff support to the Tribunal as well as remuneration, expenses and allowances payable to the tribunal members.

Articles 45 –47
During the consultation period, officials within the Department identified three changes to legislation, each of which is required in order to address outstanding issues for the HPSS. These changes are included within this legislation:

- Article 36 (1) and (2) of the Health and Personal Social Services (Northern Ireland) Order 1972, empowers Trusts to make care home placements only in accommodation registered under the Registered Homes Order (NI) 1992. This has the unintentional effect of preventing Trusts placing people in residential care or nursing homes located in other parts of the UK. The amendment to the draft Order (Article 45) will enable the Department to make arrangements, through regulation, for HSS Trusts to place persons from NI into residential homes in England, Scotland, Wales, the Channel Islands and the Isle of Man. This will bring the position in NI into line with the rest of the UK;
- An amendment to the HPSS (NI) Act 2001 giving the NI Social Care Council additional powers so that universities/Trusts etc wishing to offer social work education and training 'programmes' will need to meet the requirements of the Council. The Council will be able to include a requirement for partnership and set standards such as that personal tutors should be qualified social workers (Article 46). This amendment will give effect to the original intention which lay behind the HPSS 2001 Act and was widely consulted on receiving full endorsement from all interests. It will allow improvements to social work training to meet the same timeframe as in the rest of the UK; and
    - Article 63 of the 1972 Health and Personal Social Services Order, as amended by Article 3 of the Pharmaceutical Services (NI) Order 1992, places a duty on Boards to arrange for the provision of drugs and medicines etc., ordered by medical and dental practitioners and by a prescribed description of registered nurse, midwife or health visitor. The amendment (at Article 47) extends the range of persons who can order these drugs and medicines to include pharmacists, bringing NI into line with GB.