

HEALTH ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3 – Miscellaneous

Tobacco

Section 20: Prohibition of advertising: exclusion for specialist tobacconists

270. **Section 20** amends section 6 of the Tobacco Advertising and Promotion Act 2002 (“the 2002 Act”) (specialist tobacconists) by inserting a new subsection (A1) at the beginning of that section. This new subsection gives the Secretary of State (in relation to England), the Welsh Ministers (in relation to Wales), and DHSSPSNI (in relation to Northern Ireland) power to provide that specialist tobacconists do not commit an offence under section 2 of the 2002 Act (prohibition of tobacco advertising) if a tobacco advertisement on their premises meets certain requirements (including those to be set out in regulations). This power replaces, except in relation to Scotland, an automatic exclusion for specialist tobacconists currently provided by section 6(1) of the 2002 Act. Accordingly, **paragraph 3** of Schedule 4 amends section 6(1) of the 2002 Act to limit its application to Scotland.

Section 21: Prohibition of tobacco displays etc.

271. Section 8 of the 2002 Act (displays) gives the Secretary of State power to impose requirements on the display in England, Wales and Northern Ireland of tobacco products or their prices in a place or on a website where such products are offered for sale. Section 21 inserts new sections 7A to 7D into the 2002 Act, which replace section 8 in so far as it relates to England, Wales and Northern Ireland (it will continue to have effect in its existing form for Scotland).
272. The new section 7A (prohibition of tobacco displays) makes it an offence for a person, in the course of a business, to display tobacco products, or cause tobacco products to be displayed, in a place in England, Wales, or Northern Ireland. It also provides powers for the appropriate Minister to provide by regulations for the meaning of “place” and whether a display, which also amounts to an advertisement, is to be treated as a display, or whether it is to be treated as an advertisement, for the purposes of offences under the 2002 Act. For the purposes of the new sections 7A to 7D, the “appropriate Minister” means the Secretary of State in relation to England, the Welsh Ministers in relation to Wales, and DHSSPSNI in relation to Northern Ireland.
273. The new section 7B (tobacco displays: exclusions and defence) provides for a number of exclusions from the new section 7A prohibition on tobacco displays. The exclusions cover: displays in the course of a business which is part of the tobacco trade which are for the purposes of that trade and are accessible only to persons engaged in, or employed in, the tobacco trade; and, displays made following a particular request by an individual of at least 18 years of age to purchase, or for information about, a tobacco product (a requested display). The appropriate Minister is also given a general power

to provide in regulations that no offence is committed under the new section 7A if the display complies with any requirements which are specified in the regulations. New section 7B(5) provides that for the purposes of the offence of making a display to an individual aged under 18 following a request by that individual, it is a defence that the person making the display believed the individual was 18 or over, and either that person had taken all reasonable steps to establish the individual's age or from the individual's appearance nobody could reasonably have suspected that the individual was aged under 18.. Section 7B(6) provides that a person is treated as having taken all reasonable steps to establish an individual's age only if they had asked the individual for evidence of their age and the evidence produced would have convinced a reasonable person. It is a defence for a person charged with causing a requested display to an individual aged under 18 that they exercised all due diligence to avoid committing the offence (new section 7B(7)).

274. The new section 7C (displays: prices of tobacco products) gives the appropriate Minister power by regulations to impose requirements in relation to the display, in England, Wales, or Northern Ireland (as the case may be) in the course of a business, of prices of tobacco products (subsection (1)). A person who displays or causes to be displayed, prices of tobacco products in breach of any such requirements is guilty of an offence (subsection (2)). New section 7C(3) provides that the regulations may in particular provide for the meaning of "place" and new section 7C(4) that the regulations may make provision for a display which is also an advertisement to be treated for the purposes of offences in England and Wales or Northern Ireland under the Act as an advertisement and not as a display of prices or as a display of prices and not an advertisement.
275. The new section 7D (displays on a website) replaces section 8(1) of the 2002 Act in relation to England and Wales and Northern Ireland, in so far as it applies to websites. It provides power for the Secretary of State by regulations to impose requirements in relation to the display in England and Wales, or Northern Ireland, in the course of a business of tobacco products or their prices on a website where tobacco products are offered for sale.
276. New section 7D makes it an offence to display, or cause to be displayed, tobacco products or their prices in breach of any requirements imposed by regulations (subsection (2)), except where this is in the course of providing information society services by a person established outside the United Kingdom (subsection (4)). A person established in England, Wales, or Northern Ireland who, in the course of providing information society services, does anything in another EEA state which would constitute an offence under new section 7D(2) is also guilty of an offence (new section 7D(3)). For these purposes "EEA state" includes member states of the European Union, as well as Norway, Iceland and Liechtenstein. New section 7D (5) provides that the regulations may provide for a relevant display of tobacco products or their prices which also amounts to an advertisement to be treated for the purposes of offences in England and Wales or Northern Ireland under this Act to be treated as an advertisement and not as a display or as a display and not an advertisement. Under new section 7D(5) a relevant display means a display on a website where tobacco products are offered for sale.

Section 22: Power to prohibit sales from vending machines

277. Subsection (1) of Section 22 inserts a new section 3A (sales from vending machines in England and Wales) into the Children and Young Persons (Protection from Tobacco) Act 1991 ("the 1991 Act). New section 3A provides power for the appropriate national authority (defined as the Secretary of State in relation to England, and the Welsh Ministers in relation to Wales) by regulations to prohibit the sale of tobacco from vending machines.

278. The regulations must include provision as to the persons who are liable for a breach of a prohibition. Where a prohibition contained in the regulations is breached, any person liable in accordance with the regulations is guilty of an offence punishable with a fine not exceeding level 4 on the standard scale (currently £2,500). Subsection (5) of the new section 3A applies sections 13 (enforcement), 14 (powers of entry, etc) and 15 (offences of obstruction, etc of officers) of the 2002 Act for the purposes of the new section. Section 13 of the 2002 Act sets out the authorities who will be responsible for enforcing any prohibition; section 14 sets out the powers of entry which enforcement officers may exercise; and section 15 makes obstructing an officer of an enforcement body, or making false statements to an officer, an offence.
279. Subsection (2) of section 22 inserts a new paragraph (c) into section 12D(1) of the Children and Young Persons Act 1933 (restricted premises orders and restricted sales orders: interpretation). This extends the definition of “tobacco offence” for the purposes of sections 12A and 12B of that Act to include an offence committed under the new section 3A of the 1991 Act. The effect of this is to enable a magistrates’ court to impose a restricted premises order or a restricted sales order in response to breaches of the new section 3A, where the conditions for imposing such orders are met. Under sections 12A and 12B if three “tobacco offences” are committed within a period of two years, and if the last of them led to a conviction, then the offender or the relevant premises may be banned from selling tobacco products for up to one year.

Section 23: Power to prohibit sales from vending machines: Northern Ireland

280. Section 23 inserts a new Article 4A into the Children and Young Persons (Protection from Tobacco) (Northern Ireland) Order 1991 (“the 1991 (NI) Order”). New Article 4A makes equivalent provision for Northern Ireland to that made for England and Wales by the new section 3A inserted in the 1991 Act by Section 22.

Section 24 and Schedule 4: Tobacco: minor and consequential amendments

281. **Section 24** gives effect to Schedule 4. Schedule 4 makes various minor and consequential amendments. These amendments include—
- limiting the application of sections 6(1) and 8 of the 2002 Act to Scotland;
 - limiting the power of the Secretary of State under section 13(5) of the 2002 Act to take over the conduct of proceedings to proceedings in relation to offences committed in England and giving power to the Welsh Ministers to take over the conduct of proceedings in relation to offences committed in Wales;
 - amending the definition of “appropriate Minister” for the purposes of the 2002 Act, to confer powers on the Welsh Ministers and DHSSPSNI to make regulations in relation to the new provisions about specialist tobacconists and displays and to transfer to them existing powers under section 4(3) of the 2002 Act (power to provide for exclusions from the section 2 prohibition on tobacco advertising); and
 - provision for the procedure to be adopted in relation to regulations made by the Welsh Ministers and DHSSPSNI under the provisions of the 2002 Act as amended by the Act.
282. **Schedule 4** also amends section 8 (displays), section 9 (prohibition of free distribution), section 11 (brandsharing) of, and the Schedule (information society providers) to, the 2002 Act to give full effect to Directive [2000/31/EC](#) of the European Parliament and Council of 8th June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce). It also repeals section 16(1A) of the 2002 Act (limitation of penalties for certain offences relating to information society services) to bring the penalties for offences covered by that provision into line with the penalties which apply generally for offences under the 2002 Act.

Pharmaceutical Services in England

283. Sections 25 to 29 introduce changes to the way in which PCTs determine applications by contractors to provide NHS pharmaceutical services [DN: Does this term need to be defined in the Glossary of Terms and Abbreviations?] and also introduce new provisions enabling PCTs to take action against contractors for breaches of the arrangements for providing those services.
284. In addition, the sections amend current legislation concerning the provision of local pharmaceutical services (LPS) contracts enabling PCTs to provide services under LPS schemes in prescribed circumstances. Under existing legislation, PCTs can only commission such services.
285. These measures follow a Department of Health consultation in the autumn of 2008 on a series of proposals to amend the structure and legislation of NHS pharmaceutical services, following publication of the Government's White Paper *Pharmacy in England: Building on strengths – delivering the future* published in April 2008. A report of the outcome of that consultation, which concerned the measures contained within this Act, was published on 16th January 2009 and is available on the Department of Health website.

Section 25: Pharmaceutical needs assessments

286. Section 25 inserts section 128A in the NHS Act which creates a new duty for all PCTs in England in respect of their assessments of pharmaceutical needs, commonly known as pharmaceutical needs assessments.
287. Section 128A(1) requires PCTs, in accordance with regulations, to undertake assessments of needs for pharmaceutical services in their respective areas and to publish a statement of their first assessment of those needs and any subsequent revised assessment.
288. Section 128A(2) requires regulations to make provision for certain matters relating to the procedures which PCTs must follow when undertaking their pharmaceutical needs assessments. Regulations must stipulate—
- the minimum information requirements which each pharmaceutical needs statement must contain;
 - the extent to which the pharmaceutical needs assessment is to take account of likely future needs for pharmaceutical services;
 - the date by which each PCT must publish their first assessment; and
 - the circumstances in which a PCT must undertake a new assessment.
289. For example, the regulations might stipulate that a pharmaceutical needs statement must contain information on the demography of the people in its area and any seasonal trends or variations as well as longer-term population projections and age profiles. It might also, for example, stipulate that PCTs must publish their first statement within six months of the regulations coming into force and that they must undertake a new assessment where important new health data, trends in disease or evidence of the effectiveness or ineffectiveness of certain types of service emerge.
290. Section 128A(3) enables regulations to provide for additional matters or make provision relating to pharmaceutical needs assessments. The additional matters may include the kinds of pharmaceutical services which the pharmaceutical needs assessment must relate to, for example, the provision of certain services such as reviews of patient medication, clinical support for patients starting medication to treat a long-term condition, advice and information to patients or other healthcare professionals. The regulations may also impose requirements on PCTs to consult specified persons about specified matters when undertaking their pharmaceutical needs assessment. The PCT

may for example, be required by the regulations to consult local authorities, patient and community groups and local professional representative committees. The regulations may also prescribe the manner in which an assessment is to be made. The regulations may require the PCT to show, when publishing its pharmaceutical needs statement, how it has consulted interested parties. The regulations may also include a range of matters which a PCT must have regard to when making an assessment of pharmaceutical needs. Such matters may include for example—

- data on future disease trends;
- population forecasts;
- information on health concerns which may be specific to the PCT (such as asbestosis in mining areas); and
- how the PCT has taken into account the views and comments received as a result of consultation, whether it has accepted or rejected those views and, if rejected, the reasons why.

Section 26: New arrangements for entry to pharmaceutical list

291. Section 129 of the NHS Act sets out various requirements under which regulations govern the provision of pharmaceutical services. Section 26 amends section 129 of the NHS Act.
292. **Section 129(2)(c)** sets out the legislative criteria which a PCT must apply when considering applications from pharmaceutical contractors to be included on a PCT's pharmaceutical list for the provision of NHS pharmaceutical services or for changes to a contractor's listing following admittance. These criteria are often referred to as the "control of entry" test. The section inserts new provisions regarding those criteria.
293. *Subsection (2)* of section 26 amends the criteria in section 129(2)(c) to provide for circumstances where an application must be granted by a PCT and circumstances where an application may be granted by a PCT.
294. *Subsection (3)* then sets out the circumstances—
- in which a PCT must grant an application; and
 - in which a PCT may grant an application.
295. Under new subsection (2A), a PCT must grant an application where it is satisfied, having first taken account of what is set out in the statement of its assessment of pharmaceutical needs, and any matters which are prescribed in regulations, that the need for the services or some of the services in the application is established and will be met through grant of the application.
296. Under new subsection (2B), a PCT may grant an application where it is satisfied, having first taken account of what is set out in the statement of its assessment of pharmaceutical needs, and any matters which are prescribed in regulations, that it would secure improvements or better access to pharmaceutical services in its area. The matters prescribed in regulations might include additional criteria such as improvements in access (for example through extended hours), in the choice and diversity of providers or of services in its area (for example, dedicated clinics at evenings or weekends to stop smoking or to review patients' medications), in innovation in the delivery of services or of services which meet the needs of specific groups of people in the PCT's area or local health conditions or diseases.
297. New subsection (2C) makes additional provision in cases where a PCT is satisfied that an application meets the criteria for grant of the application required under subsection (2B). First, new subsection (2C) provides that the regulations may set out the manner in which the PCT is to determine whether to grant the application.

For example, a PCT might first seek views from local patient representative bodies and other key interested parties where it is minded to grant an application under new subsection (2B). Second, new subsection (2C) provides that the regulations may stipulate certain matters which a PCT must or must not take into account when deciding whether or not to grant an application under new subsection (2B). For example, the regulations might make provision that a PCT must take account of the views of local patient representative bodies concerning the application in reaching its determination. Conversely, the regulations might make provision that a PCT must not take account of other matters in reaching its determination where such matters lead to the refusal of all applications (for example, on grounds of costs alone or of additional monitoring burdens for the PCT) where the criteria in new subsection (2B) are otherwise met.

298. *Subsections (4), (5) and (6)* of Section 26 modify the existing provisions which enable regulations to specify the circumstances in which two or more applications are considered together by the PCT.
299. *Subsection (4)* inserts a new subsection (3A) to provide that the regulations may prescribe the circumstances in which two or more such applications may be considered together by a PCT. *Subsection (5)* amends section 129(4) creating a general power to make provision for the case where two or more applications, taken individually, meet the test under new subsection (2A) or (2B), but taken together, do not.
300. *Subsection (6)* of section 26 inserts a new subsection (4A) which allows regulations under subsection (4) to include, in particular, the provision mentioned in subsection (5), with or without modification. This new subsection ensures the wording in subsection (5) can be tailored to apply to both parts of the two part test under subsection (2A) and (2B).
301. *Subsection (7)* introduces a new provision which enables regulations to specify the circumstances in which, and the manner in which, a PCT can invite applications to be included in its pharmaceutical list. For example, this might be appropriate where a PCT has identified, in its first or subsequent statement of needs, areas where there are gaps in provision or where the PCT wishes to secure improvements in access to, or in the choice or quality of, services provided and wishes to invite applications from pharmaceutical contractors.
302. *Subsection (8)* inserts a new provision which requires PCTs to give reasons for decisions made in relation to all applications received under section 129 and provides that references to a “needs statement” in the section are to the most recently published statement, which will be the statement in force at the time the application is decided.

Section 27: Pharmaceutical lists: minor amendment

303. **Section 27** corrects an apparent anomaly in section 129(6)(d) of the NHS Act. Section 129(6)(c) refers to a particular kind of application for inclusion in a pharmaceutical list and was not intended to affect the meaning of “such an application” in section 129(6)(d). The amendment makes clear that the provision in section 129(6)(d) for the inclusion of an applicant on a PCT’s list for a fixed period may apply to any application made under section 129.

Section 28: Breach of terms of arrangements: notices and penalties

304. Section 28 inserts in Part 7 of the NHS Act a new Chapter 5A, consisting of new section 150A, that concerns the issuing by PCTs of notices to contractors and the withholding of payments to contractors by PCTs.
305. New section 150A enables regulations to provide that where a contractor breaches a term of arrangements for providing NHS pharmaceutical services (for example, of a term of service, such as agreed quality standards or of performance in the provision of services) then PCTs will have the power to issue remedial notices, requiring corrective action to be taken or requiring the contractor to refrain from continuing with actions

which have led to the breach, within a specified period. The regulations may also enable PCTs to withhold all or part of any payments due to the contractor for a prescribed period in view of such a breach. Powers to withhold payments could be used on their own or in conjunction with the issue of remedial notices.

- 306. Section 150A(2) requires that any regulations under this section must include prescribed rights of appeal for the contractor against decisions made by the PCT under this section.
- 307. Section 150A(3) provides definitions for this section.

Section 29: LPS schemes: powers of Primary Care Trusts and Strategic Health Authorities

- 308. **Section 29** introduces changes to section 144 of, and Schedule 12 to, the NHS Act that remove the restrictions in NHS legislation on PCTs providing LPS or to other PCTs, in certain circumstances, for example, in the event of any emergency such as a flu pandemic or where there was no alternative provider. Where a PCT is a provider of LPS within its own area it is intended that the LPS commissioner would be the Strategic Health Authority.

Pharmaceutical services in Wales

- 309. **Sections 30 to 32** introduce new provisions enabling Local Health Boards (LHBs) to take action against certain NHS contractors for breaches of the arrangements for providing those services. The sections that relate to breaches of arrangements between LHBs and contractors relate to the providers of both pharmaceutical and ophthalmic services in Wales.
- 310. In addition, the sections amend legislation concerning the provision of LPS contracts enabling LHBs to provide LPS in prescribed circumstances. Under existing legislation, LHBs can only commission such services.

Section 30: Pharmaceutical lists - minor amendment

- 311. **Section 30** corrects an apparent anomaly in section 83(6)(d) of the NHS (Wales) Act 2006. Section 83(6)(c) refers to a particular kind of application for inclusion in a pharmaceutical list and was not intended to affect the meaning of “such an application” in section 83(6)(d). The amendment makes clear that the provision in section 83(6)(d) for the inclusion of an applicant on an LHB list for a fixed period of time may apply to any application made under section 83.

Section 31: Breach of terms of arrangements: notices and penalties

- 312. **Section 31** inserts before Chapter 2 of Part 8 of the NHS (Wales) Act a new Chapter 1A, consisting of new section 106A, that concerns the issuing by LHBs of notices to certain NHS contractors and the withholding of payments to such contractors by LHBs.
- 313. Section 106A enables regulations to provide that where a contractor breaches a term of arrangements for providing NHS pharmaceutical services or arrangements for providing general ophthalmic services (for example, of a term of service, such as agreed quality standards or of performance in the provision of services) then LHBs will have the power to issue remedial notices, requiring corrective action to be taken or requiring the contractor to refrain from continuing with actions which have led to the breach, within a specified period. The regulations may also enable LHBs to withhold all or part of any payments due to the contractor for a prescribed period in view of such a breach. Powers to withhold payments could be used on their own or in conjunction with the issue of remedial notices.
- 314. Section 106A(2) requires that any regulations under this section must include prescribed rights of appeal for the contractor against decisions made by the LHB under this section.

315. Section 106A(3) provides definitions for this section.

Section 32: LPS schemes: powers of Local Health Boards

316. [Section 32](#) introduces changes to Schedule 7 to the NHS (Wales) Act that will enable LHBs to provide LPS in certain circumstances, for example, in the event of a national emergency. The circumstances in which LHBs are able to provide LPS will be set out in regulations made by the Welsh Ministers.

Private patient income

Section 33: Private patient income of mental health foundation trusts

317. [Section 33](#) amends section 44 of the NHS Act (private health care). Section 44(1) provides for the authorisation of an NHS foundation trust to restrict the provision for purposes other than those of the health service of goods and services by the trust. In the case of a foundation trust that is a former NHS trust, section 44(2) requires the authorisation in particular to restrict the proportion of the trust's total income that may be derived from private charges (defined by section 44(4)). The effect of the amendment made by *subsection (2)* is that an NHS foundation trust designated as a mental health foundation trust may under section 44(2) be permitted to earn up to 1.5% of its total income in each financial year from income derived from private charges. The effect of new subsection (2A) of section 44 inserted by *subsection (3)* is that an authorisation containing a restriction under section 44(2) must designate the NHS foundation trust as a mental health foundation trust for the purposes of section 44 if it appears to Monitor that it provides goods or services relating to mental health as described in new subsection (2A).

Optical appliances

Section 34: Payments in respect of costs of optical appliances

318. [Section 34](#), with section 38 and Schedule 6, repeals paragraph (c) of section 180(2) of the NHS Act.
319. [Section 180\(2\)\(c\)](#) obliged the Secretary of State to make regulations to meet or to contribute to the cost of optical appliances (glasses or contact lenses) for all persons aged 60 or over. Paragraph (c) was introduced by provision in the [Health Act 2006 \(c. 28\)](#) that came into force on 1st August 2008. It was not the Government's intention to extend entitlement to all persons aged 60 or over, regardless of their income, in the Health Act 2006.
320. The existing regulations having effect under section 180 of the NHS Act provide for financial help with the cost of optical appliances by optical vouchers and cover principally children and people on low incomes. Help is also available to those in full time education aged between 16 and 18 and for people who need a complex appliance (meaning an appliance with a high prescription). The repeal does not affect the eligibility for sight tests of persons aged 60 or over under section 115(2)(d) of the NHS Act (to which section 180(2)(c) refers). Nor does it affect eligibility for optical vouchers as prescribed in the National Health Service (Optical Charges and Payments) Regulations 1997. Under these regulations people aged 60 and over who are in receipt of certain benefits, or for whom a prescription is issued for a complex appliance, are entitled to optical vouchers and will continue to be so entitled.
321. The Government never intended that a duty in the form of paragraph (c) of section 180(2) should be imposed. No provision in regulations has been made under that paragraph, and no changes are required to regulations as a result of the coming into force of section 34.

Adult social care

Section 35: Investigation of complaints about privately arranged or funded adult social care

322. **Section 35** introduces Schedule 5. Part 1 of Schedule 5 inserts a new Part 3A into the Local Government Act 1974 Act. Part 3A establishes a new scheme for the investigation by a Local Commissioner of complaints about adult social care which is privately arranged or privately funded. References below to section numbers are to the sections as they will be numbered in the 1974 Act.

Schedule 5: Investigation of complaints about privately arranged or funded adult social care

Section 34A: Interpretation: “adult social care provider” and “adult social care”

323. Section 34A defines the terms “adult social care” and “adult social care provider” for the purposes of delineating the matters subject to investigation under the new scheme (set out in section 34B). The meaning of “adult social care” is defined by reference to Part 1 of the Health and Social Care Act 2008 (the 2008 Act). Section 9 of that Act states that social care “includes all forms of personal care and other practical assistance provided for individuals who by reason of age, illness, disability, pregnancy, childbirth, dependence on alcohol or drugs, or any other similar circumstance, are in need of such care or other assistance”. Such care falls within the scope of the new scheme if it is provided to persons aged 18 or over.
324. “Adult social care provider” is defined in subsection (3). Only persons providing adult social care which is a regulated activity within the meaning of Part 1 of the 2008 Act will be “adult social care providers” for the purposes of the new scheme. Section 8 of the 2008 Act allows for regulated activities to be prescribed in regulations made under that Act. Only activities that are prescribed will be regulated by the Care Quality Commission. If a service is not regulated by the Care Quality Commission it will not fall within the Local Commissioners’ remit. It is the Government’s intention to prescribe, for example, that provision of care home accommodation and the care provided to residents in a home will be regulated by the Care Quality Commission. Therefore a provider of these types of activity would come within the Local Commissioners’ remit.
325. Subsections (4) and (5) provide that action taken on behalf of a provider will be treated as action by the service provider whether this is action taken by an employee, by a person with whom the provider has contracted to provide the service, or (subsection (5)) where the care is provided by means of a less formal arrangement with another person. The intention of these two subsections is to ensure that complaints about social care provided under any arrangements where the provider has delegated the service remain within the Local Commissioners’ remit.

Section 34B: Power to investigate and Schedule 5A: Matters not subject to investigation

326. Section 34B sets out the matters that a Local Commissioner may investigate and the conditions that need to be satisfied before an investigation can take place. A Local Commissioner may investigate any matter relating to action taken by an adult social care provider in connection with the provision of adult social care. So as explained above, the new scheme is limited to complaints about adult social care which is regulated by the Care Quality Commission.
327. Schedule 5A (inserted by paragraph 3 of Schedule 5) sets out matters which are not subject to investigation under the new scheme. Complaints about social care that already fall within the local authority statutory complaints procedure are excluded since these can be investigated by a Local Commissioner under the existing procedure in Part 3 of the 1974 Act. Complaints about NHS services (which may involve the provision of

social care) are also excluded since these are for investigation by the Health Service Commissioner under the 1993 Act.

328. Section 34B(1)(b) requires one of two conditions to be met before an investigation can take place. Either a complaint has to have been made by someone who can complain (see section 34C) and in accordance with the procedure for making a complaint (set out in section 34D) or the matter has come to the attention of a Local Commissioner and in accordance with section 34E may be treated as though a complaint about the matter had been made directly.
329. Before proceeding to investigate a matter, a Local Commissioner must be satisfied either that the provider has had notice of the matter complained about and an opportunity to investigate and respond, or that it is not reasonable in the circumstances to expect the matter to be brought to the notice of the provider (subsection (6)). A Local Commissioner is able to use discretion to take a flexible approach and proceed with an investigation, if satisfied that it is not reasonable to expect the matter complained about to have first been brought to the attention of the service provider or investigated by the provider. The Government expects that in the majority of cases the complainant would raise the complaint with the provider first, but the scheme allows a person to take the matter up directly with a Local Commissioner. This is because of the vulnerable nature of this group of service users, and allows for the possibility that a person might feel unable, through fear of reprisal or for some other reason, to take up the matter with the provider.

Section 34C: Who can complain and section 34D: Procedure for making complaints

330. Section 34C provides for the scheme to apply to members of the public who claim to have sustained injustice because of the service provider's action. It also allows someone to act on a person's behalf in making the complaint. Section 34D requires complaints to be made in writing. Complaints must be made within 12 months of the complainant first having notice of the matter in question, or, if the person affected has died without having notice of the matter, within 12 months of the person's representatives (or such other person who is making the complaint) having had notice of it. A Local Commissioner may disapply these requirements. For example, the requirement for the complaint to be made in writing may be disappplied where a complaint is made orally where the service user's particular circumstances make it difficult for them to put the complaint in writing. A Local Commissioner might also wish to disapply the 12-month time limit where the circumstances of the person affected have made it difficult for them or their representatives to raise the matter within that period.

Section 34E: Matters coming to attention of Local Commissioner

331. Under section 34E, matters that come to the attention of a Local Commissioner, without being raised by the person affected or his or her representatives, can be treated as though a complaint had been made about them directly. A Local Commissioner may investigate matters as though they had been raised by a complaint if they become aware of the matters either during an investigation under the existing scheme relating to local authorities (under Part 3 of the 1974 Act) or during an investigation of another matter under the new scheme. A Local Commissioner may only investigate a matter if it appears that a member of the public has or may have suffered injustice in consequence of the matter. The matter must also have come to the attention of the Local Commissioner before the person affected or their representatives have had notice of the matter, or within a permitted period of 12 months, although in the same way as in section 34D, the Local Commissioner may disapply the 12-month time limit.

Section 34F: Procedure in respect of investigations

332. Section 34F deals with the procedure for conducting an investigation. The adult social care provider concerned, and anyone alleged to have been responsible for taking or authorising the action complained about, must be allowed the opportunity to comment. This means that whoever carried out the action complained about, whether this is the provider, or someone else who has carried out the action on behalf of the provider, that person must be given an opportunity to comment. Investigations must be conducted in private. But otherwise it is for the Local Commissioner to decide how to conduct the investigation. The Local Commissioner may obtain information and make enquiries from any person as they see fit under subsection (4).

Section 34G: Investigations: further provisions

333. Section 34G gives a Local Commissioner various powers in order to facilitate their investigations. The Local Commissioner may require the adult social care provider, or any other person who in the Commissioner's opinion is able to provide information or documents relevant to the investigation, to provide such information or documents. For example, a local authority or the Care Quality Commission may have information or documents relevant to an investigation under Part 3A.
334. The Local Commissioner has the same powers as the High Court to compel the attendance and examination of witnesses and the production of documents. This means that anyone not complying with the Local Commissioner's requests may be in contempt of court and subject to the penalties associated with that. Subsection (9) provides that if any person obstructs an investigation, or is guilty of an act or omission in relation to an investigation which would constitute contempt of court in proceedings in the High Court, the Local Commissioner may certify this as an offence to the High Court. The High Court may then deal with the person charged under subsection (9) as though they had committed the same offence in relation to the High Court.

Section 34H: Statements about investigations

335. This section provides for statements to be issued by a Local Commissioner when he or she decides not to investigate or to discontinue an investigation, and when an investigation is completed. If the Commissioner decides not to investigate or to discontinue an investigation, the statement must set out the Commissioner's reasons for that decision.
336. When a Local Commissioner has completed an investigation, the statement must set out the Commissioner's conclusions and any recommendations. The Commissioner may make recommendations for action which, in the Commissioner's opinion, the adult social care provider needs to take to remedy any injustice sustained by the person affected. Recommendations may also be aimed at preventing injustice being caused in the future as a result of similar action of the provider. For example, the Commissioner might recommend an apology to the complainant, compensation to be paid, a refund of charges or changes to be made to the services provided (possibly relating to the service user's facilities, accommodation, equipment) or changes to how staff are managed or trained.
337. The Commissioner must send a copy of the statement to the complainant, the provider and, if someone else took the action complained of, to that person. The statement must identify the provider concerned unless the provider is an individual or doing so would identify an individual. It will then be for the Local Commissioner to decide whether it is appropriate for the individual to be identified. The statement must not identify the complainant or any other person (other than the provider) unless the Commissioner considers it necessary to identify that person.
338. The Local Commissioner may also send copies of the statement to the Care Quality Commission and any local authority. For example it is likely that this would occur in all

cases where the statement draws attention to failings in the safety of services, or where there are implications for many service users, not only the person who has complained.

Section 34I: Adverse findings notices

339. Section 34I requires providers to consider any statement containing recommendations by a Local Commissioner and notify the Commissioner within the “required period” – one month of receiving the statement (or any longer period agreed in writing by the Local Commissioner) – of the action which the provider has taken or proposes to take. If by the end of that period, the Local Commissioner has not received this notification, or is satisfied before the period expires that the provider has decided to take no action, the Local Commissioner may require a provider to publish an adverse findings notice. The Commissioner may also do this in two other circumstances: firstly, if not satisfied with the action which the provider has taken or proposes to take; or secondly, if, after a further month following the end of the “required period” (or any longer period agreed in writing by the Local Commissioner), the Commissioner has not received satisfactory confirmation that the provider has taken the proposed action.
340. Subsection (4) provides that an adverse findings notice, in a form agreed between the provider and a Local Commissioner, should include details of any action recommended in the Local Commissioner’s statement which the provider has not taken, any supporting material required by the Local Commissioner, and an explanation of the provider’s reasons for not having taken the recommended action (if the provider wishes). The adverse findings notice must be published by the provider in a manner directed by the Local Commissioner. The Local Commissioner might for example, require publication in a local newspaper or, if the provider has an internet site, on that site.
341. Under subsection (6), a Local Commissioner must publish an adverse findings notice if the provider fails to do so in accordance with subsections (4) and (5), or cannot agree the form of the notice with the Local Commissioner within one month of the date the notice was received (or longer if agreed in writing by the Local Commissioner). Subsection (7) requires the provider to reimburse the LGO on demand any reasonable expenses incurred by the Local Commissioner in performing the duty under subsection (6).

Section 34J: Publication of statements etc. by Local Commissioner

342. This section deals with the publication of statements or adverse findings notices. A Local Commissioner may publish all or part of a statement, further publish an adverse findings notice or publish a summary of a statement or adverse findings notice. In deciding whether to publish a statement the Commissioner must take into account the public interest as well as the interests of the complainant and of other persons. The Local Commissioner may also supply a copy of all or part of a statement or adverse findings notice to anyone who requests it, and charge a reasonable fee for this. Subsections (8) and (9) of section 34H apply to a Local Commissioner’s publication of a statement or supply of any copy under this section. That means that, for example, the summary must not identify the complainant or any other person (other than the provider) unless the Commissioner considers it necessary to identify that person.

Section 34K: Disclosure of information

343. Section 34K restricts the disclosure by a Local Commissioner of information obtained during the course of an investigation. Information obtained must not be disclosed except for the purposes specified. Particular exemptions allowing disclosure of information include, for example, disclosure for the purposes of investigations and statements related to investigations under Part 3 or 3A of the 1974 Act, or for the purposes of a complaint being investigated by the Parliamentary Commissioner or the Health Service Commissioner.

Section 34L: Law of defamation

344. Section 34L confers absolute privilege for the purposes of the law of defamation on certain communications between a Local Commissioner and other parties and certain publications by a Local Commissioner. This means that these communications and publications are not actionable for slander or libel.
345. Communications between a Local Commissioner and an adult social care provider will be privileged. The publication of any matter by a Local Commissioner in communications with a complainant, the Parliamentary Commissioner, the Health Service Commissioner, a local authority or the Care Quality Commission will also be privileged. Privilege will also apply to the publication of statements, adverse finding notices, summaries and reports by a Local Commissioner.

Section 34M: Consultation with other Commissioners

346. Under section 34M, if a Local Commissioner thinks that any matters which are the subject of the investigation include a matter that is potentially, or actually, the subject of another Ombudsman's investigation, the Commissioner is required to consult with that other Ombudsman. The other Ombudsmen this applies to are the Parliamentary Commissioner, the Health Service Commissioner, the Public Services Ombudsman for Wales, and the Scottish Public Services Ombudsman. Subsection (5) imposes a similar obligation on the Parliamentary Commissioner. If the Parliamentary Commissioner is conducting an investigation and considers that the complaint relates partly to a matter which could be the subject of investigation by a Local Commissioner, then they must consult with the Local Commissioner. (A similar obligation is placed on the Health Service Commissioner under the 1993 Act).

Section 34N: Collaborative working with other Commissioners

347. Section 34N applies if a Local Commissioner in conducting an investigation considers that the investigation raises a matter which could be the subject of investigation by the Parliamentary Commissioner or the Health Service Commissioner. A Local Commissioner may then, if the complainant consents, carry out a joint investigation with the Parliamentary Commissioner or the Health Service Commissioner, or both. Under subsection (3) a Local Commissioner may similarly collaborate in the investigation of a complaint being investigated by the Parliamentary Commissioner or Health Service Commissioner.

Section 34O: Disclosure of information by Local Commissioner to Information Commissioner and Section 34P: Disclosure of information by Local Commissioner to Care Quality Commission

348. Sections 34O and 34P allow a Local Commissioner to disclose to the Information Commissioner, or the Care Quality Commission, information that a Local Commissioner receives as result of an investigation that may be relevant to the carrying out of the functions of those organisations. The disclosure of information to the Care Quality Commission enables a direct link to be made between a Local Commissioner's investigation and the regulation of the provider whose services have been the subject of that investigation. Under section 20 of the 2008 Act, the Secretary of State may impose requirements on regulated activities (as carried out by service providers) through regulations. The Care Quality Commission will determine whether the regulatory requirements have been complied with, and information from a Local Commissioner would be an indicator of potential non-compliance on which the Care Quality Commission would be able to act.

Section 34R: Review, recommendations, advice and guidance and Section 34S: Annual reports

349. Section 34R provides that a Local Commissioner must review the operation of the provisions of Part 3A of the 1974 Act (the provisions of the new scheme). The review must be carried out in the same financial year as the Commission carries out a review of the provisions of Part 3 (already required under section 23(12) of the 1974 Act) so must happen every three years. A Local Commissioner may convey any recommendations or conclusions from this review to government departments or the Care Quality Commission. A Commissioner may also provide good practice advice or guidance to adult social care providers.
350. Section 34S provides that each Local Commissioner must prepare a report on the discharge of their functions for each financial year. The Commission must then prepare an annual report which must be laid before Parliament and which must be published along with the reports from the individual Commissioners.

Section 34T: Interpretation of Part 3A

351. Section 34T defines certain terms used in Part 3A.

Part 2 of Schedule 5

352. [Part 2](#) of Schedule 5 makes a number of minor and consequential amendments to Part 3 of the 1974 Act and other Acts.

Disclosure of Information

Section 36: Disclosure of information by Her Majesty's Revenue and Customs

353. [Section 36](#) applies to information held by HMRC in connection with its functions relating to income tax.
354. *Subsection (2)* allows HMRC to disclose certain information relating to GPs and dental practitioners to the persons defined in *subsection (3)*. The information disclosed will be a summary of anonymised information relating to the earnings and expenses of these practitioners and will not extend to other details disclosed to HMRC as part of the tax assessment process such as investment income. Earnings that are identified as unconnected with medical or dental activities will be excluded.
355. *Subsection (3)* defines those persons to whom HMRC may disclose information covered by this section. Those persons are the Secretary of State, Welsh Ministers, Scottish Ministers, the DHSSPSNI or persons providing services to them or exercising functions on their behalf.
356. *Subsection (4)* places restrictions on the format of the information disclosed by HMRC. The information must be summarised or presented as a collection of information. It must not be possible to identify, or link the information to, a particular individual.
357. *Subsection (5)* defines the terms dental practitioner and general medical practitioner for the purpose of this section.