EXPLANATORY MEMORANDUM

THE GENERAL MEDICAL SERVICES (TRANSITIONAL MEASURE RELATING TO NON-CLINICAL PARTNERS) ORDER 2004

SI 2004 No. 1772

Laying Authority and Purpose

1. This explanatory memorandum is laid before Parliament by Command of her Majesty.

2. The Order is made under section 200 of the Health and Social Care (Community Health and Standards) Act 2003 (the 2003 Act).

Responsible Department

3. The Department of Health.

Commentary on the Order

4. The Order makes provision for the circumstances in which certain non-clinical individuals who were working for General Practitioner (GP) practices before 1st April 2004 may be parties to general medical services (GMS) contracts, notwithstanding that they are not in the statutory list of individuals who may be parties to GMS contracts (GMS contracts were introduced on 1st April 2004 and are one of the forms of contractual arrangements under which primary medical services may now be provided by GP practices).

5. The Order has three main provisions:-

   i. Article 2 defines what we mean by a non-clinical partner in this context: in straightforward terms, we mean a person who is neither a registered medical practitioner nor a health care professional who, prior to 1st April 2004, was already in partnership with a GP (or a number of GPs) – or a person who was already working for a GP (or a number of GPs) and who was made into a partner with effect from 1 April 2004;

   ii. Article 3 provides that where a GMS contract is entered into after the Order comes into force (i.e. following a default contract, which is a form of transitional agreement for GP practices that were unable to agree their GMS contract by 1st April 2004) the individuals defined in Article 2 are deemed to be NHS employees thus allowing them to sign the new GMS contract;

iii. Article 4 provides that where there is an existing GMS contract to which a non-clinical partner is a party then, from the date the Order comes into force, the contract shall be considered validly entered into and the non-clinical partners shall be treated in the same way as individuals on the statutory list of individuals who may be parties to GMS contracts (although they lose this status if they cease to be a "provider" of relevant services for a continuous period of six months).

Matters of Special Interest to the Joint Committee on Statutory Instruments

6. There are no matters to raise.

Legislative Context

7. The 2003 Act made a number of changes to the arrangements for the provision of primary medical services under the NHS Act 1977 (the relevant changes are explained under 'policy background' below), and to facilitate the movement to the new regulatory regime, a number of transitional provisions and consequential amendments were necessary. The principal transitional provisions Orders were:-

   i. the General Medical Services Transitional and Consequential Provisions Order 2004 (SI 2004/433);
   ii. the General Medical Services and Personal Medical Services Transitional and Consequential Provisions Order 2004 (SI 2004/865).

8. The General Medical Services (Transitional Measure Relating to Non-Clinical Partners) Order 2004 deals with a single matter that was omitted in error from the first transitional Order (SI 2004/433). It relates exclusively to GMS providers of primary medical services.

Extent of the Provisions

9. These Regulations apply in relation to England only.

Convention Rights

10. The Order is compatible with Convention Rights.

Policy Background

11. Under the previous GMS regime prior to 1st April 2004, GPs had a statutory arrangement with their Primary Care Trust (PCT) to deliver general medical services in accordance with statutory terms of service.

This arrangement could only be between a medical practitioner and the PCT. Notwithstanding this individual arrangement, medical practitioners frequently (but not exclusively) formed themselves into partnerships to deliver patient services. Increasingly, in recent years, some of these arrangements have been broadened to include practice nurses and other staff such as practice managers.

12. In early discussions on the scope of the primary and secondary legislation to introduce the new GMS contract (which is between PCTs and "contractors", i.e. most often a partnership), the General Practitioners Committee of the British Medical Association were given assurances that the new GMS contractual provisions would allow such non-GP partners to be recognised as full members of the partnership with associated rights to be a party to the new GMS contract. Practice nurses presented no issues of difficulty as they were fully covered by our wider proposals on healthcare professionals becoming GMS providers (Section 28S(2)(b) of the 1977 Act). The position of non-clinicians was more complex and it was decided that their position would best be dealt with as a transitional measure.

13. This measure should have been included in the first transitional Order (SI 2004/433) but it was inadvertently overlooked. The Department apologises for that omission.

14. Once the Department discovered this lacuna the immediate concern was whether GMS contracts signed (in the light of the assurances given) before 1st April 2004 by non-clinical partners, to take effect on that date, were voidable or void – the worst case scenario being that both the partnership arrangements and the GMS contract automatically dissolve. The Department does not believe that to be the case, but does consider that the GMS contracts signed by non-clinical partners would be voidable. Furthermore, contract sanctions would now need to be considered for breach of, in effect, paragraph 113(2)(a) of Schedule 6 to the NHS (GMS Contracts) Regulations 2004 (S.I. 2004/291), which are the Regulations that set the general conditions under which GMS contracts take effect. These sanctions include termination, suspension and financial penalties. Unless there is a change to the legislative scheme, PCTs will therefore be duty bound to enforce the scheme as it stands, and require contractors to regularise the position or potentially face contract termination.

15. In the absence of further legislation, this would require self-employed non-clinical partners to resign from the partnership, serve a period as an NHS employee (presumably working for the partnership) and then rejoin the partnership as a self-employed partner. From a tax and benefits point of view, this would be something of a bureaucratic nightmare, and might also be expensive for the practice in terms of legal fees. It would also be a

significant and unnecessary diversion for all concerned from their real business of providing general medical services to the public.

16. It is difficult to assess the number of contracts affected without seeking the information directly from individual practices: the GMS contract only requires the names of the partners, and whether they are a limited or a general partner, to be recorded. The Department estimates that around 50 GMS contracts (out of circa 5000) could be affected. However, even if the numbers are low the impact on the individuals caught by the omission is significant.

17. The Order seeks to avoid the scenario set out in paragraph 15. It does, however, recognise clear boundaries – principally, the Order will only operate prospectively. It will not regularise the position for the window period between 1st April 2004 and the date on which the Order comes into force. PCTs will be entitled to take action against practices during this window period, provided that action is proportionate. The Department's view is that it would be very hard to justify imposing sanctions for breach once the Order is made and publicised.

Regulatory Impacts

18. The Order is drafted in such a way that there is no requirement for any action to be taken by PCTs or GMS Practices – the GMS contracts will, prospectively, comply with the legislation and will simply continue.

19. No significant regulatory impacts have been identified. Conversely, without the Order all affected GMS providers would have incurred costs in dismantling partnerships and varying GMS contracts to exclude any affected non-clinical partners. Those former partners would then have had to arrange contracts of employment with their former partners. Further costs would then be incurred if the non-clinician were subsequently assimilated back into the partnership.

Costs to the Exchequer

20. There are no identifiable costs to the Exchequer.

Contact

21. Please address any queries in the first instance to:-

Mr. Stephen Rowlands
Department of Health
Workforce Directorate (PMCC)
Room 3E46

Quarry House
Leeds
Tel: 0113-2545192