

# **PRIMARY MEDICAL SERVICES (SCOTLAND) ACT 2004**

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## **EXPLANATORY NOTES**

### **THE ACT – AN OVERVIEW**

3. The purpose of the Act is to make the necessary legislative changes to allow implementation of the new general medical services contract (GMS contract) for providers of primary medical services. These changes involve restructuring the existing regime under the National Health Service (Scotland) Act (“the 1978 Act”) and the National Health Service (Primary Care) Act 1997 (“the 1997 Act”) for the provision of personal and general medical services by Health Boards. Although these services are in substance the same, they are given different labels at present in the legislation according to what arrangements are made to provide them. Arrangements for the provision of personal medical services (PMS) are made under section 17C of the 1978 Act or, in the case of pilot PMS schemes, under section 1 of the 1997 Act. Arrangements for the provision of general medical services (GMS) are made under section 19 of the 1978 Act. The Act abolishes personal medical services provided under section 1 of the 1997 Act and brings all of the other services under a single label – primary medical services. (The restructuring of the existing regime is achieved by textual amendment of the 1978 Act. Accordingly, references in the new sections of that Act to anything being “prescribed” mean prescribed by regulations made by the Scottish Ministers, which will be subject to annulment in pursuance of a resolution of the Parliament. Where changes may be anticipated prospectively to the text of relevant sections of the 1978 Act, the reader should, for the purposes of this Act, assume that the changes are in force. These changes are made by the [National Health Service \(Primary Care\) Act 1997 \(c.46\)](#); the [Health Act 1999 \(c.8\)](#); the [Community Care and Health \(Scotland\) Act 2002 \(asp 5\)](#); the [Public Appointments and Public Bodies etc. \(Scotland\) Act 2003 \(asp 4\)](#); and Article 10(4) of [The General and Specialist Medical Practice \(Education, Training and Qualifications\) Order 2003 \(S.I. 2003/1250\)](#)).
4. The Act is in two main parts (Provision of primary medical services and General) and 9 sections with a schedule. The sections deal with—
  - Health Board functions;
  - Section 17C arrangements;
  - Pilot schemes;
  - General medical services contracts;
  - Persons performing primary medical services;
  - Assistance and support;
  - Ancillary provision;
  - Modification of enactments;

- Commencement and short title.

## **Part 1: Provision of Primary Medical Services**

### ***Section 1 – Health Boards’ functions: provision of primary medical services***

5. This section inserts a new section 2C into the 1978 Act. .
6. Subsection (1) of the new section requires Health Boards to provide primary medical services or to secure the provision of those services by others. This gives Boards a new ability to provide services themselves, in contrast to current legislation which only permits them to secure provision by others.
7. The subsection also creates a power for Health Boards to provide or secure the provision of primary medical services for persons for whom they would not be under a duty to provide. This makes it possible for Health Boards to deliver primary medical services in a location which is outwith the geographical area of the Health Board which is responsible for providing or securing the provision of these services. For instance, where patients living near the boundary between two Health Boards request to register at a practice in the neighbouring Health Board area because it is more convenient for them, the neighbouring Health Board has power to provide or secure primary medical services for them.
8. Subsection (2) of the new section enables a Health Board securing the provision of primary medical services by others to do so by means of such arrangements as they think fit. The main arrangements available will be arrangements under section 17C, or GMS contracts under new section 17J which replaces the current section 19 GMS arrangements. An alternative option would be for a Health Board to contract with a private provider. Such a contract would not be a contract under section 17C or new section 17J. The Scottish Ministers have powers of direction which could be used to ensure that money allocated to Health Boards for GMS contracts and section 17C arrangements is not used to fund contracts with private providers.
9. Subsection (3) of the new section places a duty on Health Boards to publish prescribed information about the primary medical services which they secure the provision of by others or provide themselves. The information that can be prescribed is in relation to the provision of primary medical services under Part I of the 1978 Act and not just section 2C(1).
10. Subsection (4) of the new section creates an obligation on Health Boards to co-operate with each other in discharging their functions connected with every aspect of the provision of primary medical services. This has particular relevance when considering patients who may live in one Health Board’s area but seek services from a practice based in a neighbouring Health Board’s area. This specific duty of co-operation is in addition to the existing general duty on Health Boards and others under section 13 of the 1978 Act to co-operate with one another in exercising their functions in order to secure and advance the health of the people of Scotland.
11. Subsection (5) of the new section allows regulations to be made that will define “primary medical services” for the purposes of the 1978 Act. The regulations will set out types of services which are and which are not primary medical services for this purpose.
12. Subsection (6) of the new section allows the regulations made under subsection (5) to describe services by reference to the manner or circumstances in which they are delivered. This would include, for example, categorising services by the times of day during which they are to be provided.
13. Subsection (7) makes it clear that arrangements which a Health Board may make for the provision of primary medical services may provide for delivery of those services

at a location outside Scotland. For instance, this would allow a Health Board to send a patient outside Scotland to receive a primary medical service should this be deemed to be in the best interests of the patient.

14. Subsection (8) of the new section provides that while Health Boards are exercising their own statutory functions to provide or secure the provision of primary medical services, they are to be regarded in law as exercising functions of the Scottish Ministers conferred on the Health Boards. This (along with subsection (3) of section 1 of the Act) restates the existing link to the Scottish Ministers previously in section 18 of the 1978 Act.

## ***Section 2 – Provision of primary medical services: section 17C arrangements***

15. This section makes the changes which are necessary to the main sections in the 1978 Act on section 17C arrangements - sections 17C, 17D, 17E and 17H. (The schedule repeals sections 17EA, 17EB and 17F and makes minor changes to section 17I, and related pilot schemes under the 1997 Act for personal medical services are dealt with in section 3 and the schedule and may be dealt with in an order made under section 7 of the Act).
16. Subsection (2) continues the re-labelling of “personal medical services” as “primary medical services”. It also repeals section 17C(3)(a) of the 1978 Act which provides that a Health Board’s duty to make GMS arrangements under section 19 does not apply to a person who is covered by section 17C arrangements. This express exclusion from the duty is no longer needed in light of new section 2C.
17. Subsection (2) also inserts a new subsection (2A) in section 17C permitting a section 17C arrangement under which primary medical services are provided to include arrangements for the provision of other services. It also makes clear that where services which are not primary medical services are included in any section 17C arrangement, these services may be performed at any location where primary medical services might be performed. There is an equivalent provision in relation to GMS services in section 17J(4), inserted by section 4 of the Act.
18. Subsection (3) amends section 17D of the 1978 Act. It sets out the categories of persons (including partnerships and companies) who are eligible to enter into section 17C arrangements. The amendments reflect the need to be consistent with the terminology in other new sections of the 1978 Act inserted by the Act, including the creation in section 2C of the “primary medical services” duty on Health Boards and the descriptions in section 17J to 17O of new GMS contracts. It also inserts appropriate definitions for these persons and ensures that the persons eligible include those providing corresponding services in other parts of the UK.
19. Subsection (4) expands the regulation-making powers contained in section 17E of the 1978 Act. It is intended that under section 17E regulations, performers of primary medical services under section 17C arrangements will have to demonstrate that they have a prescribed level of qualification and experience as part of their eligibility to provide such services. It is also intended that the regulations will set out the circumstances in which a provider of primary medical services under such arrangements can or must accept a patient and end the provider’s responsibility to a patient. These new regulation-making powers bring section 17C arrangements into line with those governing the new GMS contract.
20. New section 17E(3A) enables the regulations to require that payments made under section 17C arrangements for primary medical services are made in accordance with directions of the Scottish Ministers.
21. New section 17E(3C) enables the regulations to set out circumstances under which a person who is a party to section 17C arrangements will be able to request a Health Board to replace those arrangements with a new GMS contract.

22. New section 17E(3D) enables the regulations to set out the process for pre-contract dispute resolution for section 17C arrangements, including provision for disputes to be determined by the Scottish Ministers or by a panel of persons appointed by them.
23. Subsection (5) repeals section 17H of the 1978 Act. That section ensures that all GPs have the opportunity to participate in the arrangements for vaccinations and immunisations. Under the new arrangements, the provision of immunisations and vaccinations will be part of the services to be provided in the section 17C arrangements themselves.

### ***Section 3 – Revocation of power to make pilot schemes***

24. Under current powers, personal medical services can either be provided through pilot schemes under the 1997 Act or as permanent schemes under section 17C of the 1978 Act. For pilot schemes a business case must be approved by the local Health Board, then approved by the Scottish Ministers. Permanent schemes are approved at Health Board level only. This section prevents the creation of new pilot schemes for the provision of personal medical services after the date on which it comes into force. (Existing pilot schemes for the provision of such services are not affected by the section. An order made under section 7 of the Act may make appropriate provision for such schemes.)

### ***Section 4 – Provision of primary medical services: general medical services contracts***

25. This section inserts new sections 17J to 17O into the 1978 Act (in place of the existing sections on GMS arrangements). The new sections govern the terms and content of the new GMS contracts and who may provide or perform primary medical services under the contracts. They contain broad regulation-making powers which will be used to set out the detail of the rights and obligations under the new contracts.
26. New section 17J refers to the general content of the contract.
27. Subsection (1) allows a Health Board to enter into a GMS contract with a contractor to provide primary medical services in accordance with the provisions of Part I of the 1978 Act.
28. Subsection (3) sets out broad parameters for services to be provided under the contract, the remuneration for their provision and other matters. Health Boards and contractors are free to agree the terms of the contract – subject to any restrictions on this freedom contained in Part I of the 1978 Act (restrictions set out in new sections 17K to 17O and in regulations under new section 17J and those sections).
29. Subsection (4) allows the contract to cover a wide range of services, such as those which have previously been provided in an acute care setting and for the services to be delivered at a location outside the Health Board's geographical area.
30. New section 17K makes it compulsory for a GMS contract to require the contractor to provide primary medical services of such descriptions as may be set out in regulations under the section. The regulations may describe services by reference to the manner or circumstances in which they are provided. The intention is to set out in the regulations those services referred to in the new GMS contract as essential services.
31. New section 17L sets out the persons with whom a Health Board may enter into a GMS contract. Subsection (1) allows a Health Board to enter into a GMS contract with a medical practitioner or, where statutory conditions are satisfied, a partnership or a company limited by shares. Those conditions are set out in subsections (2) and (3). There may be a change in the membership of a partnership, and subsection (4) enables regulations to set out what effect such a change is to have on the GMS contract. The intention is to allow the membership of the partnership to change without requiring a new contract to be entered into merely because such a change in membership has taken place.

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2004 (asp 1) which received Royal Assent on 27 January 2004*

32. Subsection (5) defines health care professional and other expressions used in section 17L.
33. Subsection (6) allows the Scottish Ministers to specify a period within which someone who has previously provided services will be treated as someone who is referred to in subsection 2(c)(iv) to (xi).
34. New section 17M deals with payments to be made under GMS contracts.
35. Subsection (1) enables the Scottish Ministers to give directions as to payments to be made under the contracts. This follows current practice of using direction-making powers to ensure that Health Boards make payments which adhere to Scotland-wide rates and levels.
36. Subsection (2) makes it compulsory for a GMS contract to require payments to be made under it in accordance with the directions then in force.
37. Subsection (3) gives examples of the matters for which directions may provide.
38. Subsection (4) requires the Scottish Ministers to consult before giving any direction under subsection (1).
39. New section 17N provides a broad regulation-making power to impose further requirements that must be included in all GMS contracts. The regulations can cover such issues as: the manner in which and the standards to which services are to be provided; the persons who may perform services; contract variation and enforcement; and the adjudication of disputes.
40. Subsection (3) provides for regulations made under subsection (2)(c) to set out prescribed circumstances in which a contractor must accept a person as a patient to whom services are to be provided and in which a contractor may decline to accept a person as a patient or may terminate responsibility under the GMS contract for the patient.
41. Subsection (4) provides for regulations made under subsection (2)(e) to include provision as to the circumstances in which a Health Board may vary the terms of a GMS contract and for suspension or termination of any duty under the contract to provide services of a prescribed description.
42. Subsection (5) provides for regulations made under subsection (4)(b) to prescribe services by reference to the manner or circumstances in which they are provided.
43. Subsection (6) provides for all GMS contracts to require the contractors under them to comply with any directions given by the Scottish Ministers for the purposes of section 17N as to the drugs, medicines or other substances which may or may not be ordered for patients in the provision of primary medical services under the contracts.
44. New section 17O essentially does two things.
45. Subsection (1) creates a regulation-making power to set national procedures for internal dispute resolution for the terms of proposed GMS contracts. The regulations may provide for the proposed terms to be referred to the Scottish Ministers and for the Scottish Ministers, or a person or panel of persons appointed by them, to determine what the terms of the contract should be.
46. Subsection (2) creates a regulation-making power to enable the parties to a GMS contract and parties who are already providing primary medical services under a GMS contract to opt to be treated as a health service body for any of the purposes in the existing section 17A of the 1978 Act. Section 17A allows health service bodies to enter into contracts with other health service bodies for the supply of goods and services. Such contracts are NHS contracts, and are not regarded for any purpose as giving rise to contractual rights and liabilities, and they are not enforceable in the courts. Section

17A instead provides for either party to an NHS contract to refer any matter in dispute to the Scottish Ministers for determination. It also provides for any determination made by the Scottish Ministers to contain directions (including directions about payments) and places a duty on the parties to the NHS contract to comply with any such directions

47. Subsection (3) provides that if a GMS provider or potential provider elects to become a health service body under subsection (2), section 17A of the 1978 Act applies with appropriate modifications.
48. Where a practice opts for its GMS contract to be an ordinary contract at law, it will have the option of asking the courts to resolve any resultant contractual disputes.

### ***Section 5 – Persons performing primary medical services***

49. This section inserts new section 17P into the 1978 Act. The new section inserts into the 1978 Act regulation-making powers governing the ways in which persons performing primary medical services are listed. The regulations will prevent health care professionals of a prescribed description from performing primary medical services for Health Boards unless their name appears on a list held by the Health Board which has the duty to provide those services. (Health care professionals will not have to be included in these lists to perform services privately). For example, where a Health Board employs a salaried GP to perform primary medical services directly by the Board (A) or where a practice (which includes a GP) undertakes to provide primary medical services under a GMS contract, section 17C arrangements or any other arrangement for the provision of primary medical services (B), the doctors performing primary medical services in both (A) and (B) will need to have their name included on that Health Board's list. The obligation to be on the list of a Health Board before performing services in that Health Board's area remains even if the services are carried out as part of a contract with a neighbouring Health Board which is using its powers under section 2C(1)(b) of the Act to provide or secure the provision of primary medical services as respects the area of another Health Board.
50. The new section (taken with the repeal by the schedule of the relevant sections of the 1978 Act) replaces the existing system of listing which created three lists in each Health Board area: the medical list for principal GPs; the supplementary list for non-principal GPs; and the services lists for providers under section 17C arrangements and pilot schemes.
51. The amalgamation of the lists into a single list for each Health Board area is a technical consequence of the creation in new section 2C of a duty on Health Boards to provide or secure the provision of primary medical services and of new section 17L which allows Health Boards to enter into GMS contracts with a partnership or company.
52. Under new section 2C, GMS contracts and section 17C arrangements will be two of the ways in which Health Boards will be able to discharge their duty to provide or secure the provision of primary medical services. Bringing the two options together under one duty ends the need to have separate listing arrangements for those who provide these services.
53. Section 17L ends the distinction between GP principals (those GPs who make direct arrangements with Health Boards to provide GMS) and non-principals (those GPs who assist principal practitioners but do not have their own arrangement with the Health Board), and it is therefore no longer appropriate to distinguish between them for listing purposes.
54. Section 17P also sets out the particular issues that may be included in the regulations (subsection (3)). These include, for example, how the list will be drawn up and maintained; what criteria an individual will have to meet to qualify to be on the list; the process by which decisions on applications will be made; mandatory grounds under which a Health Board would have to reject an application and discretionary

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grounds under which they may reject an application. Subsection (3) of section 5 amends section 29 of the 1978 Act so that the NHS Tribunal may inquire into representations that individuals on a list under section 17P should be disqualified for inclusion on that list.

***Section 6 – Assistance and support***

55. This section inserts new section 17Q into the 1978 Act. The new section enables a Health Board to provide assistance and support (including financial assistance) to those providing, or proposing to provide, primary medical services under a GMS contract or section 17C arrangements. The terms on which such assistance and support are given, including terms as to payment, are a matter for the Health Board.

**Part 2: General**

***Section 7 – Ancillary provision***

56. This section enables the Scottish Ministers by order to make incidental and other ancillary provision for the purposes of the Act or in consequence of it. The power can, for instance, be used to make an express saving provision for existing pilot schemes under the 1997 Act for personal medical services, and to make appropriate provision to secure that such schemes continue to work. (See the entry above for section 3 of the Act.) The power also enables appropriate provision to be made to ensure that existing GP practices providing general medical services under section 19 arrangements have an automatic right to transfer to a new general medical services contract. The power can also be used to take account of any changes to the Act's references to Northern Ireland that may be required as a consequence of changes to the law in Northern Ireland which correspond to the changes set out in the Act.

***Section 8 and the schedule – Modification of enactments***

57. The amendments and repeals in the schedule which is introduced by this section are consequential on the provisions of the Act.

***Section 9 – Commencement and short title***

58. This section allows the Scottish Ministers to bring the provisions of the Act (apart from sections 7 and 9, which come into force on Royal Assent) into force by commencement order. Different dates may be appointed in the order for different provisions. The section is in the usual terms.