These notes refer to the National Health Service Reform and Health Care Professions Act 2002 (c.17) which received Royal Assent on 25 June 2002

NATIONAL HEALTH SERVICE REFORM AND HEALTH CARE PROFESSIONS ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Health care professions

The Council for the Regulation of Health Care Professionals

Sections 25 to 29: The Council for the Regulation of Health Care Professionals

132. Parliament has established statutory frameworks for a number of health care professions within which the professions regulate themselves. For the most part there are separate enactments for each professional group (doctors; dentists; nurses, midwives and health visitors; opticians; pharmacists; osteopaths; chiropractors and the twelve professions coming within the remit of the Health Professions Council). Each of these groups has its own regulatory body operating within its own legal framework:

- The General Medical Council – Medical Act 1983
- The General Dental Council – Dentists Act 1984
- The Nursing and Midwifery Council – Nursing and Midwifery Order 2001
- The General Optical Council – Opticians Act 1989
- The Royal Pharmaceutical Society of Great Britain – Pharmacy Act 1954, Medicines Act 1968 (and in Northern Ireland, The Pharmaceutical Society of Northern Ireland – Pharmacy (Northern Ireland) Order 1976
- The General Osteopaths Council – Osteopaths Act 1993
- The General Chiropractic Council – Chiropractors Act 1994
- The Health Professions Council – Health Professions Order 2001

133. The different enactments make provisions which, with very few exceptions, could until recently only be changed by means of primary legislation. Section 60 and Schedule 3 of the Health Act, therefore provided a framework within which Her Majesty by Order in Council can modify the enactments affecting professional regulation and regulate any other health care profession.

Section 25: The Council for the Regulation of Health Care Professionals

134. *Section 25* provides for the establishment of a Council for the Regulation of Health Care Professionals ("the Council"). It gives the Council the functions of promoting the interests of patients and other members of the public in the way that the existing (and any future) statutory regulatory bodies carry out their work, and promoting co-operation between them.

135. *Subsection (3)* lists the bodies within the Council's remit. The bodies referred to in *subsection (3)(h)* have now been abolished and replaced from 1st April 2002 by 2 successor bodies – the Nursing and Midwifery Council and the Health Professions Council – which are therefore brought within the remit of the Council by *subsection (3)(i)*. *Subsection (3)(j)* provides that if in future other health care professions are regulated by a new body set up by an Order under section 60 of the Act, they would also be covered by the Council.

136. *Schedule 7* makes more detailed provisions about the constitution of the Council. The constitution given to the Council is designed to enable it to operate independently from the Government, amongst other standard provisions.

137. *Paragraph 4* sets out the membership of the Council which will consist of one appointee each from the regulatory bodies and the relevant authorities in Scotland, Wales and Northern Ireland; and a number appointed by the Secretary of State (but see paragraph 5 of the Schedule). The combined number of members appointed by the Secretary of State and the devolved administrations will exceed the number of regulatory body members by one. Some of the members appointed by the regulatory bodies might also come from Scotland, Wales and Northern Ireland.

138. *Paragraph 4* also deals with the appointment of the Chairman. The Secretary of State will appoint the first chairman, in order to allow the new body to begin establishing itself more rapidly, for example by finding premises. Similar arrangements have been made in the past on the establishment of other new bodies. Subsequent chairmen will be appointed by the Council from among their own number.

139. *Paragraph 5* allows the Secretary of State to delegate his power of appointment of members to a Special Health Authority. The Government gave a commitment in the Commons that this power would be delegated to the NHS Appointments Commission. The intention is for the NHS Appointments Commission to appoint two kinds of members; a small number who will speak for the interests of health care providers and a larger number who will speak for the interests of patients and the wider public.

140. *Paragraph 6* provides for the Secretary of State to make regulations providing for the appointment of the chairman and other members of the Council. The intention is that these should ensure the independence of the Council from Government, for example in the provision they make for tenure of office and removal from office.

141. *Paragraphs, 7-13, 16, 17 and 18* are routine provisions relating to the establishment of a new public body which provide the Council with the necessary legal structure for its effective operation including the power to take its own decisions about its internal procedures and to appoint staff.

142. *Paragraph 14* makes provisions for the financing of the Council. It is the intention that the Council's work should be financed out of money provided by Parliament and paid to it by the Secretary of State. The paragraph also allows for the future possibility that money provided by Parliament might be loaned to the Council, and that authorities in Scotland, Wales and Northern Ireland might, if they so decide, provide grants or loans to the Council.

143. *Paragraphs 14(7)* and*14(8)*give the Secretary of State, and, if they make grants or loans, the Assembly, Scottish Ministers or the Department of Health, Social Services and Public Safety in Northern Ireland, a power to direct the Council on the application of grants and loans. Such directions might relate, for example, to the way the Council secures value for money in its expenditure. The Council will be financed by monies voted by Parliament for the Health Vote, and the Secretary of State and the Department of Health's Accounting Officer are therefore accountable to Parliament for this. These sub-paragraphs therefore allow the Secretary of State to fulfil his financial responsibilities to Parliament. They do not confer a wider power on him to direct the

Council more generally as to how it should exercise its business. He cannot for example direct it to direct a regulatory body using its powers under *section 27*.

144. *Paragraph 15* makes provision for annual accounts and requires that they be laid before (or published) by Parliament, the Scottish Parliament, the Assembly and the Northern Ireland Assembly.

145. *Paragraph 16* provides for the Council to make an annual report to Parliament on its work. This report will also be laid before the devolved assemblies. The Council will be accountable to Parliament rather than to the Secretary of State. The Council will also be accountable to the Scottish Parliament and the Northern Ireland Assembly in so far as its activities relate to devolved matters.

146. *Paragraph 19* provides that if the Council holds a meeting in Northern Ireland, it will be open to the public on the same basis as District Council meetings are there at present. This is mirrored for Great Britain by *paragraph 21*, which applies the provisions of the Public Bodies (Admission to Meetings) Act 1960, to the Council.

147. The effect of *paragraph 20* is that the records of the Council are public records for the purposes of the Public Records Act 1958.

148. The effect of *paragraph 24* is that the Council is a public authority for the purposes of the Freedom of Information Act 2000.

Section 26: Powers and duties of the Council: general

149. *Section 26* sets out the powers and duties to be exercised by the Council in carrying out the functions given to it by *section 25*. The Council is given the power to do what is necessary or expedient in carrying out its functions. It can investigate and report on the performance of a regulatory body and make recommendations to a regulatory body about they way the regulatory body performs its functions.

150. *Subsections (3)* and *(4)* provide that the Council may not intervene in the determination of 'fitness to practise' cases or allegations made to regulatory bodies which could become fitness to practise cases. An exception to this rule is provided by *section 28*, which deals with complaints about regulatory bodies. At the conclusion of a fitness to practise case, the Council would only be able to intervene by referring the case to the High Court (or its Scottish or Northern Irish equivalent) if it felt that this was desirable for the protection of members of the public (this is provided for in *section 29(4)*).

151. *Subsection (5)* limits the range of the functions of the Royal Pharmaceutical Society of Great Britain in which the Council can take an interest to those which have to do with professional regulation. This reflects the unique nature of the Royal Pharmaceutical Society of Great Britain, which is the professional body for pharmacists as well as their regulator. *Subsection (6)* reflects the parallel situation in Northern Ireland with the Pharmaceutical Society of Northern Ireland.

152. *Subsection (9)* amends section 60(1) of the Health Act, to include the Council within the scope of this section so that the Council's legal framework, like that of the regulatory bodies themselves, can be updated if changed circumstances call for this in the future.

153. In particular, this subsection would allow an Order under section 60 of the Health Act to modify the Council's functions, powers and duties, to modify the list of regulatory bodies which fall within the scope of the Council and to alter the range of functions of a particular regulatory body which were covered.

154. The power to modify the legal framework of professional self-regulation under section 60 of the Health Act is circumscribed by paragraphs 7 and 8 of Schedule 3 to the Health Act, which provide for example that existing regulatory bodies cannot be abolished, have a lay majority imposed on them or have any of the key functions of a regulator (which are defined in paragraph 8) taken away from them. In addition,

subsection (10) further restricts the provision which a future section 60 Order can make. *Subsection (10)* provides that a future section 60 Order cannot give the Secretary of State more powers of direction over the Council. This is intended as a safeguard to the Council's independence from Government.

Section 27: Regulatory bodies and the Council

155. *Section 27* provides underpinning powers for the Council and duties on the regulatory bodies, in order to ensure that the Council can do its work effectively.

156. *Subsection (2)* provides the Council with a reserve power to direct a regulatory body to make rules for a particular purpose. One situation in which it is envisaged that this power might be used is where the Council felt that consistency between the fitness to practise rules of all regulators was essential for the protection of members of the public.

157. *Subsection (3)* limits the effect of this section to the more important types of rules which regulatory bodies can make, those where the rule-making powers created in their different enactments require the permission of the Privy Council before they come into force (or in the case of the Pharmaceutical Society of Northern Ireland, require the permission of the Department of Health, Social Services and Public Safety in Northern Ireland). These mostly have to do with the maintenance of the professional register and fitness to practise issues.

158. *Subsections (4)* to *(10)* (read in conjunction with *section 38(3) and (4))* provide for control over the Council's use of directions by stating that if a direction is made, it does not come into force until both Houses of Parliament (or, in the case of the Pharmaceutical Society of Northern Ireland, the Northern Ireland Assembly) have approved an Order laid before them setting a date for it to come into force.

159. *Subsection (11)* places a regulatory body under a duty to comply with directions which have come into force. If a regulator refused to comply with a direction made under this section, it would be open to the Council to seek, by way of judicial review, an appropriate declaration or order from the Court.

160. *Subsection (12)* ensures that a regulatory body is not in breach of the obligation to comply under *subsection (11)* merely because a court has interpreted the rules (made to comply with a direction) in a manner which means that the rules did not in fact give effect to that direction.

161. *Subsections (13)* and *(14)* require the Secretary of State to make regulations concerning the procedure to make a direction and providing that such regulations must include provision that a direction may only be made after consultation with the regulatory body in question.

Section 28: Complaints about regulatory bodies

162. This section provides for the Secretary of State to set up in regulations a complaints scheme under which the Council would acquire powers to investigate complaints about the regulatory bodies. The intention is that this should be used as a power to investigate maladministration, not a means of overturning the decisions of 'fitness to practise' committees. These regulations are to be made by the affirmative resolution procedure.

Section 29: Reference of disciplinary cases by Council to court

163. *Section 29* gives the Council the power to refer a fitness to practise decision by a regulatory body to the High Court where this seems to it to be desirable for the protection of the public. It is envisaged that the Council would do this in extreme cases where the public interest in having a clearly perverse decision reviewed by a Court outweighs the public interest in the independent operation of self-regulation. Where such a case was referred to the High Court, the Court would have the power to substitute its own decision for the one referred to it, or if it preferred to refer the

case back to the regulatory body for re-hearing. Existing Court Rules protect the rights of the professional whose case was being heard by ensuring that he or she becomes a "respondent" in the appeal, that is, has a right to be represented at the appeal hearing.

Appeals

Sections 30 to 34: Appeals

164. A professional has a right of appeal against the decisions of regulatory bodies on fitness to practise cases. Under current law, some professions appeal to the Judicial Committee of the Privy Council, and some appeal to the High Court. The purpose of these sections is to introduce consistency across the professions. The main effect of these five sections is to redirect appeals from doctors, dentists, opticians, osteopaths and chiropractors to the High Court.

165. In addition to dealing with appeals against fitness to practise decisions, these sections bring consistency to the route taken by appeals against registration decisions. At present the Osteopaths Act 1993, the Chiropractors Act 1994, the Medical Act 1983 and the Opticians Act 1989 provide for an appeal from decisions to remove registration on grounds of fraud or error to the Judicial Committee of the Privy Council. These sections move this appeal to, in England and Wales, and in Northern Ireland, a county court and in Scotland to a sheriff court.

166. The Osteopaths Act 1993 and the Chiropractors Act 1994 currently provide for an appeal on points of law from decisions to refuse registration on more general grounds (section 29 of each Act) to a county court or the High Court at the appellant's choice. These sections remove this option to appeal to the High Court and restrict such appeals to a county court. At the same time the basis of appeal is widened so that it can be on issues of fact and law, rather than solely on points of law as currently.

Section 30: Medical practitioners

167. *Section 30* amends the Medical Act 1983. *Subsection (2)* provides for appeals against decisions in 'fitness to practise' cases to be directed to the High Court or Court of Session in Scotland. The relevant court is dependent on the address which the appellant has (or would have if he was registered) as his registered address with the regulatory body. If an appellant's registered address is outside the United Kingdom the appeal will be to the High Court in England and Wales. This subsection also provides for appeals on decisions to remove registration on grounds of fraud or error to be directed to a county court, or in Scotland, to the sheriff. This subsection also sets out the appeal court's order making powers.

168. *Subsection (3)* deals with consequential amendments to the Medical Act 1983.

Section 31: Dentists

169. *Section 31* amends the Dentists Act 1984. *Subsection (2)* provides for appeals against decisions in 'fitness to practise' cases to be directed to the High Court or in Scotland, the Court of Session. The relevant court is dependent on the address which the appellant has as his registered address with the regulatory body. If an appellant's registered address is outside the United Kingdom, the appeal will be to the High Court in England and Wales. This subsection also sets out the appeal court's order making powers.

170. *Subsection (3)* amends section 44 of the Dentists Act 1984 to provide for a body corporate to appeal to the High Court (or Court of Session in Scotland) against decisions to withdraw their privilege to practise as a body corporate. The relevant court is dependent on the registered office address of the body corporate.

171. *Subsections (5)* to *(8)* make some consequential changes to the Dentists Act 1984, made necessary by the making of the Dentists Act 1984 (Amendment) Order 2001

("the 2001 Order") on 11 December 2001. The 2001 Order made provisions for new requirements for continuing professional development for dentists. Failure to comply with continuing professional development requirements can lead to the dentist's name being erased from the register. The 2001 Order provides for an appeal against erasure to the new Continuing Professional Development Committee and thereafter to the Privy Council. The 2001 Order amends section 29 of the Dentists Act 1984, which the present Act will itself amend. These consequential changes are therefore now necessary to take account of the changes brought about by the 2001 Order. The main effect is to substitute the High Court (and its equivalents throughout the UK) for the Judicial Committee of the Privy Council. The date of coming into force of the relevant provisions of the 2001 Order has not yet been determined, so *subsections (6)* to *(8)* cater for the relevant provisions of the 2001 Order coming into force prior to the coming into force of this section in the Act, or alternatively, for this section in the Act coming into force prior to the relevant provisions in the 2001 Order.

Section 32: Opticians

172. *Section 32* amends section 23 of the Opticians Act 1989. *Subsection (2)* provides for appeals against decisions in 'fitness to practise' cases in respect of individuals or a body corporate, to be directed to the High Court or in Scotland, the Court of Session. For individual appellants the relevant court is dependent on the address which the appellant has as his registered address with the regulatory body. For a body corporate the relevant court is dependent on the registered office address.

173. *New section (1B)* provides for a practitioner or body corporate to appeal against decisions to remove registration on grounds of fraud or error to a county court, or in Scotland to the sheriff.

174. *Subsection (2)* also sets out the appeal court's order making powers.

Section 33: Osteopaths

175. *Section 33* amends the Osteopaths Act 1993. *Subsection (2)* provides for appeals on decisions to remove registration on grounds of fraud or error to be directed to a county court, or in Scotland, to the sheriff. This subsection also provides that time for serving notice of appeal, runs for 28 days after notification of the order to remove is "served" rather than beginning on the date on which the order is made. *Subsection (2)* also sets out the appeal court's order making powers.

176. *Subsections (3)* and *(4)* deal with consequential amendments to sections 22 and 23 of the Osteopaths Act 1993.

177. *Subsection (5)* amends section 29 of the Osteopaths Act 1993 to provide that appeals against refusal of registration on more general grounds are to be to a county court or in Scotland, the sheriff. This removes the previous right of the appellant to choose whether to appeal to a county court or the High Court. This subsection also extends the basis of appeals to issues of fact as well as issues of law and sets out the appeal court's order making powers.

178. *Subsection (6)* provides for appeals against decisions in 'fitness to practise' cases to be directed to the High Court or Court of Session in Scotland. The relevant court is dependent on the address which the appellant has (or would have if he was registered) as his registered address with the regulatory body. If an appellant's registered address is outside the United Kingdom, the appeal will be to the High Court in England and Wales.

Section 34: Chiropractors

179. *Section 34* amends the Chiropractors Act 1994 and makes corresponding provision for chiropractors.

The pharmacy profession

Section 35: Regulation of the profession of pharmacy

180. *Section 35* amends Schedule 3 of the Health Act, and by doing so extends the powers in section 60 of that Act for Her Majesty by Order in Council to modify the regulation of the health professions to bring their scope in respect of the pharmacy profession more into line with that for other professions.

181. Orders under section 60 may be used to modify the statutory regulation of health care professions and to regulate other health care professions which are not yet subject to such regulation. Subject to certain limitations, an Order may repeal or revoke any enactment, amend it, or replace it. One such limitation relates to the Medicines Act 1968, which is one of two main Acts (the other being the Pharmacy Act 1954) which contain provisions relevant to the regulation of the pharmacy profession. At present, an Order may (except for certain associated purposes) only amend sections 80 to 83 of the Medicines Act 1968. Those sections deal with the disciplinary action which may be taken against bodies corporate and certain other persons lawfully conducting retail pharmacy businesses.

182. This section will permit an Order to amend any other provision of the Medicines Act insofar as it relates to the regulation of the profession of pharmacy in Great Britain. This might, for example, include section 79 of the Medicines Act 1968, which restricts the use of "pharmacist" and various other titles to people with particular qualifications. Equivalent provisions for other professions are already within the scope of the order making power.