

**EXPLANATORY MEMORANDUM TO**  
**THE NATIONAL HEALTH SERVICE LITIGATION AUTHORITY**  
**(ESTABLISHMENT AND CONSTITUTION) AMENDMENT ORDER 2013**

**2013 No. 295**

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

2.1 This Order makes the necessary provisions to transfer staff, property and liabilities of the National Clinical Assessment Service (NCAS), currently part of the National Institute for Health and Clinical Excellence (NICE), to the National Health Service Litigation Authority (NHS LA) on 1 April 2013. It also amends one of the specific functions of the NHSLA. It will now carry out the Secretary of State's appellate and other functions in relation to decisions and functions of the National Health Service Commissioning Board, instead of the decisions and functions of Primary Care Trusts which are being abolished. It also makes changes to the NHSLA's constitution.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None

**4. Legislative Context**

4.1 NHS LA and NICE are both Special Health Authorities established under section 28 of the National Health Service Act 2006 (the "Act").

4.2 NICE is currently directed to carry out the NCAS function by means of directions to it under sections 7 and 8 of the Act. It is to be abolished as a Special Health Authority on 1 April 2013 and to be re-established as a Non Departmental public body on 1 April 2013. Accordingly, the NCAS function is to be carried out by another body – the NHSLA.

4.3 The NHSLA was established by the National Health Service Litigation Authority (Establishment and Constitution) Order (the "Establishment Order"). This Establishment Order set out, amongst other things, the NHSLA's functions and constitution.

4.4 This Order now amends that Establishment Order, in particular NHSLA's functions and constitution.

4.5 The Establishment Order provides that that the NHSLA is to perform "such other functions as the Secretary of State may direct". Section 7 of the Act provides that the Secretary of State may direct a Special Health Authority to exercise any of his functions relating to the health service as are specified in directions and section 8 provides that the Secretary of State may direct a Special Health Authority regarding its exercise of any functions. The Secretary of State will issue directions to NHSLA to carry out the NCAS functions with effect from 1st April 2013.

4.6 The Establishment Order also provides that one of the NHSLA's functions (3(b)) is to carry out the SofS appellate and other functions in connection with the decisions of Primary Care Trusts (PCTs). From 1 April 2013 the National Health Service Commissioning Board

(the “Board”) will take on this role from PCTs and therefore this Order amends the NHSLA’s Establishment Order to replace reference to PCTs in function 3(b) with the Board.

4.7 Regarding the NHSLA’s constitution, the Order amends the NHSLA’s Establishment Order to make changes to its constitution.

4.8 This Order amends the provisions such that the Board will consist of a Chairperson, four members who are not officers of the NHS LA, and four other members being the persons who from time to time hold offices of the Chief Executive, Chief Finance officer and two other officers as determined by the NHS LA.

4.9 Given that NHSLA will, from 1 April 2013, be directed to carry out the NCAS function, this Order also provides, under section 28 (4) (b) of the Act for the transfer of officers, property and liabilities associated with the NCAS function, from NICE, to NHSLA.

## **5. Territorial Extent and Application**

5.1 This instrument applies to England and Wales save for article 3 and the definition of “NHS body” in article 2(1), which apply to England only. This is because article 3 amends the functions of the NHSLA so as to replace the reference to PCTs with the Board. This article applies to England only as the functions relating to the Board are not carried out in Wales. The definition of NHS body also only applies to England as it relates to a function which is an England only function.

## **6. European Convention on Human Rights**

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

- What is being done and why

7.1 Prior to April 2012, the NCAS functions had been performed by another Special Health Authority – the National Patient Safety Agency (NPSA). *Liberating the NHS: Report of the arm’s-length bodies review*, published in July 2010, recommended that the NPSA be abolished, and that its functions would be distributed to other parts of the NHS. It proposed that NCAS, a division of the NPSA, would, over the next few years, become a self-funded service and the Department of Health would agree a date with the service for achieving self-sufficiency.

7.2 With the passage of the Health and Social Care Act 2012, the NPSA was abolished at the end of July 2012. NICE was identified as an interim host for NCAS from 1 April 2012 for a period of one year, (and staff, property and liabilities associated with the NCAS function were transferred to NICE by means of an order under section 28 of the Act with effect from 1 April 2012 – see The Special Health Authorities (Establishment and Constitution Orders) Amendment Order 2012 SI 2012/476), during which time work continued to identify a new business model for NCAS. The NHS LA agreed to take on NCAS on a permanent basis from April 2013.

## **8. Consultation outcome**

8.1 A joint consultation by the Secretary of State was carried out under section 28(7) of the Act with bodies representing officers who, in the opinion of the SofS, were likely to be transferred or affected by transfers under this Order and by NICE under the Cabinet Office

Statement of Practice on Staff Transfers in the Public Sector 2000 (COSOP), on the decision by the Secretary of State to transfer the functions of NCAS from NICE to the NHS LA. It should be noted that the principles of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), have been applied in the informing and consulting process with NCAS staff.

8.2 The consultation period lasted from 28 November 2012 to 21 December 2012. The period was considered reasonable given that staff were aware that the transfer to NICE had been for an interim period only (this was during previous consultation about the transfer to NICE) and were well informed about the proposed transfer from NICE.

8.3 Three changes to the original proposals were identified as a result of the consultation:

- Finance team posts to relocate to the NHS LA office on 1 May 2013
- Legal Service team to remain at Skipton House, though to spend a minimum of 2 days a week at the NHS LA offices from 1 April 2013.
- Project Development team to be sited with the Senior management Team at Buckingham Palace Road.

There will be no significant change to the NCAS organisation structure as a result of the transfer because NCAS will transfer as a distinct operating division of the NHSLA.

8.4 70 staff will transfer to the NHS LA, covering 72.86 whole time equivalent posts, including 3.8 vacancies.

## **9. Guidance**

None.

## **10. Impact**

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is minimal impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

## **11. Regulating small business**

11.1 The legislation does not apply to small business.

## **12. Monitoring & Review**

12.1 Reviewed as part of the Department's accountability arrangements the Department of Health has with the NHS LA.

## **13. Contact**

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