

**EXPLANATORY MEMORANDUM TO**

**THE NATIONAL HEALTH SERVICE (PRIMARY DENTAL SERVICES - MISCELLANEOUS AMENDMENTS AND DIRECTIONS TO THE NHS BUSINESS SERVICES AUTHORITY) REGULATIONS 2016**

**2016 No. 298**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

**2. Purpose of the instrument**

- 2.1 This instrument amends:
- a) The National Health Service (General Dental Services Contracts) Regulations 2005 (S.I. 2005/3361) (the GDS Regulations), which set out the framework for General Dental Services Contracts;
  - b) The National Health Service (Personal Dental Services Agreements) Regulations 2005 (S.I. 2005/3373) (the PDS Regulations), which set out the framework for Personal Dental Services Agreements; and
  - c) The National Health Service (Primary Dental Services) (Miscellaneous Amendments and Transitional Provisions) Regulations 2013 (S.I. 2013/364) (the 2013 Regulations)
- 2.2 The purpose of this instrument is to:
- i) implement the inclusion of Community Dental Services prototype contractors (CDS prototype contractors) into the Prototype Agreements Scheme introduced by the Secretary of State in November 2015 (*see* SI 2015/1728); and
  - ii) make it a function of the National Health Service Commissioning Board (known as NHS England) to publish average pensionable earnings of practitioners performing services under GDS contracts and PDS agreements and to direct the NHS Business Services Authority (NHSBSA) to exercise that function on behalf of NHS England.

**3. Matters of special interest to Parliament**

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

- 3.1 In its First Special Report of Session 2013-14, the Committee raised a point about the need for all explanatory text in a statutory instrument to be bracketed. In its 10th Report of 2015/16, the Committee reported S.I. 2015/1728 for failing to comply with proper drafting procedure as explanatory material contained in new regulations 24C and 20C, respectively inserted by this instrument into the GDS and PDS Regulations, was only partially bracketed. In the Department's memorandum to the Committee dated 10th November 2015, the Department apologised for this, and undertook to ensure that the Committee's point on this, raised in the Special Report referred to

above, would be taken into account in future statutory instruments. This instrument amends regulations 24C and 20C respectively of the GDS and PDS Regulations. Following careful consideration, the Department has decided not to make any changes to the bracketing of the explanatory material in both these regulations at this time. This is in the light of the proposal to implement a new dental contract in 2018, which will require new regulations.

*Other matters of interest to the House of Commons*

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

**4. Legislative Context**

- 4.1 Primary dental services are provided under Part 5 of the National Health Service Act 2006 (“the 2006 Act”). Under this Part, NHS England must, to the extent that it considers necessary to meet all reasonable requirements, secure the provision of primary dental services throughout England by entering into GDS contracts or PDS agreements with dental contractors.
- 4.2 This instrument amends the GDS and PDS Regulations. These Regulations govern the way in which NHS dental services are delivered, and contain the mandatory contractual terms and conditions that must be contained in primary dental services contracts made between NHS England and primary dental contractors.
- 4.3 The National Health Service (Primary Dental Services) (Miscellaneous Amendments) (No. 2) Regulations 2015 (S.I. 2015/1729) (the 2015 Regulations) amended the GDS Regulations and PDS Regulations to implement the Prototype Agreements Scheme, to trial new ways of remunerating NHS dental contractors.
- 4.4 This instrument makes further amendments to the GDS and PDS Regulations to provide for contractors providing Community Dental Services to be able to participate in the Prototype Agreements Scheme.
- 4.5 Existing Regulations and Directions implementing the Capitation and Quality Scheme 2 under which participating Community Dental Services contractors are currently operating will cease to have effect on 31 March 2016. New provision is therefore needed to enable those contractors to participate in the Prototype Agreements Scheme.
- 4.6 The instrument also amends the GDS and PDS Regulations to provide that NHS England must publish specified information relating to average pensionable earnings of dental practitioners performing services under GDS contracts and PDS agreements, and delegates this function to the NHS Business Services Authority (NHSBSA). Section 273(4) of the 2006 Act requires that where a direction is made under section 7 of that Act about a function of a person other than the Secretary of State, it must be given by regulations.
- 4.7 The instrument makes minor amendments to the GDS, PDS and 2013 Regulations to revoke spent regulations.

**5. Extent and Territorial Application**

- 5.1 The extent of this instrument is England
- 5.2 The territorial application of this instrument is England.

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

- 6.1 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*

#### The Prototype Agreements Scheme

- 7.1 The Prototype Agreements Scheme was introduced on 1st November 2015 to succeed the Capitation and Quality Scheme 2 (the Scheme 2). For background information on the legislative context and policy background to the Prototype Agreements Scheme, please see the Explanatory Memorandum to the 2015 Regulations available at - <http://www.legislation.gov.uk/ukxi/2015/1728/memorandum/contents>. The Prototype Agreements are currently testing:

- A clinical approach focussed on prevention as well as treatment
- Measurement of quality through a Dental Quality and Outcomes Framework (DQOF); and
- Remuneration based on a blend of activity and capitation.

#### Community Dental Services

- 7.2 Providers of community dental services (CDS) typically provide primary dental services to patients with additional needs and/or who have difficulty in accessing high street services.
- 7.3 Three community dental services sites have been participating in the Scheme 2 since 2013. They were brought within the Scheme to enable the preventative pathway to be tested within their particular specialist service.
- 7.4 In terms of remuneration, they were assigned to what was known as a ‘Type 1’ group who were not paid in respect of activity or capitation. Instead their original contract value was guaranteed and was not dependant on how much treatment they delivered or how many patients they saw.
- 7.5 These CDS pilots have provided an important test of how the pathway operates with vulnerable groups, including physically and/or learning disabled patients.
- 7.6 This instrument will allow the current CDS pilots to move into the Prototype Agreements Scheme. This will enable the Department to continue testing how a possible new contract can be applied to this service, including what remuneration system will be best suited to them.
- 7.7 The transitional provisions relating to the termination of the Capitation and Quality Scheme 2, which will apply to the CDS pilots, were included in the National Health Service (Dental Services) (Prototype Agreements) Directions 2015, available at - <https://www.gov.uk/government/publications/dental-prototype-agreements-directions-and-patient-information>.

### Patient Pathway

- 7.8 Similarly to the other prototypes agreements, CDS prototype contractors will continue to test the preventative pathway approach to care that was first trialled in the Capitation and Quality Schemes.

### Remuneration

- 7.9 It is proposed that CDS prototype contractors will continue to be paid as they are currently under the Scheme 2. This means that payments will not be on the basis of performance on patients seen and units of dental activity delivered being measured, but will instead be on the basis of the pre-Scheme 2 pilot contract value being guaranteed. Arrangements for the future funding of CDS will be considered as part of the work to prepare for any future roll out of a reformed system, using the learning from the CDS and the high street practices participating in the Prototype Agreements Scheme. For this reason the Regulations exclude CDS contractors from new regulations 18A-18C of the GDS Regulations, which deal with units of dental activity and capitated patients, parts of new regulation 24C which implements the Prototype Agreements Scheme, and Schedule 2A, which sets out how units of dental activity are to be calculated when services are provided under prototype agreements. The Regulations make similar provisions in the PDS Regulations.

### Private Data

- 7.10 The Scheme 2 pilots, including CDS sites, collected detailed data on NHS treatments and some basic data on private treatment delivered as part of a mixed/NHS course of treatment. The 2015 Regulations made provision, for the purposes of evaluating the Prototype Agreements Scheme, to require prototype contractors to collect data relating to all relevant private treatment (non-cosmetic) delivered to patients for whom the contractor is currently receiving NHS capitation.
- 7.11 It is not proposed to include CDS prototype contractors in these arrangements at this stage. The Regulations therefore exclude CDS prototype contractors from this notification provision. Provision is made instead by amendment of the National Health Service (Dental Services) (Prototype Agreements) Directions 2015 to provide that CDS prototype contractors will continue to provide data relating to private treatment delivered as part of a mixed course of treatment, as applied under the Scheme 2 pilots. Careful consideration is being given to what data relating to private treatment is needed from CDS prototype contractors for evaluation purposes. Proposals to expand the data collected in respect of these services may be brought forward at a later stage.
- 7.12 The current proposal is to provide for the three current CDS contractors to move into the Prototype Agreements Scheme. There are no plans to expand this to further CDS contractors at this stage.

### Transparency of earnings

- 7.13 The Regulations impose a requirement on NHS England to publish specified information relating to average pensionable earnings for dental practitioners performing services under GDS contracts and PDS agreements (known as dental performers). Specifically they are required to publish aggregate figures for the pensionable earnings of each GDS contract and PDS agreement, minus expenses, the number of dental performers associated with this figure, and the average pensionable

earnings of each dental performer under each contract or agreement. This function is delegated under the Regulations to the NHSBSA. The figures to be published this year will be in respect of earnings for 2014/15 and they must be published by 31 May 2016. This follows a similar requirement implemented in respect of GP earnings in line with a government initiative to promote transparency of earnings paid out of public funds, but provides for publication by the NHSBSA on their website, rather than on individual practice websites. This approach has been adopted in relation to dental practitioners because not all dental practices will have their own websites.

### ***Consolidation***

- 7.14 As the majority of NHS dental practices are not involved in the Prototype Agreements Scheme, it is necessary to maintain the GDS and PDS Regulations alongside these new regulations. Consolidation of regulations will be considered as part of any further work to develop a national contractual system.

## **8. Consultation outcome**

- 8.1 The BDA, as well as being very closely engaged with the dental contract reform work on an ongoing basis, has been consulted on these Regulations and on the associated directions given in the National Health Service (Dental Charges) (Prototype Agreements) (Amendment) Directions 2016. The associated directions amend the National Health Service (Dental Charges) (Prototype Agreements) Directions 2015, which set out the additional terms of service that apply to the Prototype Agreements Scheme. They were content with the provision enabling the transition of CDS contractors into the Prototype Agreements Scheme.
- 8.2 In respect of the transparency of earning provisions, the proposed draft regulations were amended in the light of a comment from the BDA which requested the removal of a reference in the consultation draft of the proposed regulations to basing average earnings on a performers' average commitment to performing dental services under a contract or agreement. It was accepted that data is not available relating to the time spent by individual performers in the provision of NHS care. NHS England was also consulted in relation to the transparency of earnings provision, and were content with the approach being taken for the publication of earnings relating to 2014/15.

## **9. Guidance**

- 9.1 CDS prototype contractors will have access to the suite of guidance documents that have been produced for all participants in the Prototype Agreements Scheme, which explains the Scheme and how to make it work in practice. They will also have access to ongoing support via the Contract Reform Programme Team.
- 9.2 Guidance is not planned in relation to the publication of dentists' earnings as this is being undertaken by the NHSBSA who have been consulted on what is required, and are developing systems to ensure that the publication of the specified information is carried out in line with the Regulations.

## **10. Impact**

- 10.1 The impact on business is minimal. There is no impact on charities or voluntary bodies.

- 10.2 The impact on the public sector is negligible with information being published for the transparency provision already being collected by the NHS Business Services Authority.
- 10.3 An Impact Assessment has not been prepared for this instrument.
- 10.4 We have considered the impact of this instrument in relation to our Public Sector Equality Duty (PSED). The PSED is not simply limited to eliminating discrimination, harassment and victimisation, but also includes positive obligations to promote equality of opportunity and to foster good relations between those who are likely to suffer discrimination and those who are not. When making legislation, Ministers are obliged to have due regard to all aspects of this duty. We have not identified any specific equalities issues in respect of our PSED duty. We have also considered the impact of the Secretary of State's duties under the 2006 Act, for example, in relation to promoting autonomy and the improvement in the quality of services. Again, we do not consider that there are specific issues in respect of these duties.

## **11. Regulating small business**

- 11.1 The legislation applies to activities that are undertaken by small businesses.
- 11.2 We consulted with the British Dental Association, who represent providers of NHS dental services, including small businesses. No mitigating actions have been taken in respect of small businesses. These Regulations concern the provision of NHS dental services in England on the basis of nationally determined terms of service, it is therefore not possible to differentiate between contractors according to their operational turnover or size. This is to ensure the application of agreed nation-wide standards and practices in the provision of such services as part of the nationally determined contractual framework.

## **12. Monitoring & review**

- 12.1 The Prototype Agreements Scheme will be subject to evaluation at regular intervals with a focus on the key areas being tested, which are: access – numbers of patients accessing NHS dentistry; the quality of care; and value for money. The evaluation of the Prototype Agreements Scheme will seek to inform the safe implementation of any new contractual system for providing NHS primary dental services, incorporating the care pathway. The Scheme will be evaluated to enable the wider system (the care pathway, the payment mechanisms, the financial levers, the approach to access to NHS dentistry, and the measurement of quality) to be understood and adjusted, to provide for the most effective implementation of any nationally rolled out new system.

## **13. Contact**

- 13.1 Helen Miscampbell **at the Department of Health Telephone:** 0207 210 4865 or e-mail [helen.miscampbell@dh.gsi.gov.uk](mailto:helen.miscampbell@dh.gsi.gov.uk)) or Derek Busby **at the Department of Health Telephone** 0207 210 5603 or email: [derek.busby@dh.gsi.gov.uk](mailto:derek.busby@dh.gsi.gov.uk)) can answer any queries regarding this Instrument.