

## EXPLANATORY MEMORANDUM TO

### THE NHS COUNTER FRAUD AUTHORITY (INVESTIGATORY POWERS AND OTHER MISCELLANEOUS AMENDMENTS) ORDER 2017

2017 No. 960

#### 1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department of Health (DH) 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 Order amends a number of instruments to reflect the establishment of a new special health authority, the NHS Counter Fraud Authority (“the NHSCFA”), pursuant to section 28 of the National Health Act 2006 (“the 2006 Act”). The new special health authority is to carry out the Secretary of State’s functions in relation to counter fraud against or affecting the health service in England. Until the 1 November 2017 such functions were undertaken by a division within the special health authority known as the NHS Business Services Authority (“the BSA”). The purpose of this instrument is principally to put the new special health authority in the same position as the BSA was, in particular so that the NHSCFA may use those powers which have previously been made available to carry out the Secretary of State’s health service counter fraud functions. The amendments largely substitute references to the new special health authority or its officers for references to the BSA or the division within it or its officers.

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

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

- 3.1 Section 105 of the Deregulation Act 2015 is relied on to combine enabling powers to include provisions in this Order which would otherwise require to be made in the form of 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 The Order provides for amendments to legislation required following the establishment of the NHSCFA on 1 November 2017 to exercise the counter fraud functions of the Secretary of State in relation to the health service in England. Before 1 November, such functions were exercised by the BSA.
- 4.2 The establishment of the new special health authority will be provided for in the NHS Counter Fraud Authority (Establishment, Constitution, and Staff and Other Transfer

Provisions) Order 2017 (SI 2017/960). That instrument (“the Establishment Order”) is being made on the same day as this instrument, applies in England, and is to come into force on the same day as this instrument, 1 November 2017.

- 4.3 Provision is made in the Establishment Order for the transfer of staff, from NHS Protect, a division within the BSA (see paragraph 7.5) to the NHSCFA, along with transfers of property (which includes rights) and liabilities. Provision is also made for continuity in relation to documents and records of, acts or omissions of, and things in the process of being done by, the BSA in respect of the Secretary of State’s counter fraud functions that the NHSCFA is to exercise on its establishment. Provision in that order is considered to address any need for continuity or other transitional provision that might arise by reason of the amendments being made in this Order. The Explanatory Memorandum in respect of the Establishment Order sets out more detail about the provision being made in respect of continuity and transfers.
- 4.4 A third instrument, the NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) (Amendment) Order 2017 (SI 2017/960) amends the statutory functions of the BSA to omit counter fraud functions in relation to England and Wales, and security management service functions in relation to England. (The Explanatory Memorandum accompanying this third instrument provides information about the arrangements for security functions.)
- 4.5 Directions are intended to be given by the Secretary of State to the NHSCFA about the exercise of its functions, planned to come into force on 1 November 2017; and supplementary amending directions to the BSA and other NHS bodies are also planned. (Directions will be published on the Department’s website.)

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

- 5.1 The instrument extends to Great Britain except for article 3, which also extends to Northern Ireland, and articles 4 and 6, which extend to England and Wales only. Article 4 applies only to England.
- 5.2 The new special health authority is itself to be established in relation to England only (and is therefore to exercise its statutory functions in relation to England only).

## **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*

- 7.1 The background to the establishment of a new special health authority to undertake counter fraud functions in respect of the health service in England is explained more fully in the Explanatory Memorandum accompanying the Establishment Order.
- 7.2 In discharging the Secretary of State’s health service counter fraud functions, the NHSCFA will be directed to apply the same operational safeguards and limitations as have been applied by its predecessor, the BSA, when it becomes necessary to consider the use of these powers to advance counter fraud activity, and indeed in exercising such powers.

- 7.3 The new special health authority is being established to focus entirely on counter fraud activities, to provide the independence and practical accountability that is required to deliver effective counter fraud services across the health service in England. The NHSCFA will enable investigation skills, knowledge and expertise, specifically developed for the health service to continue to be centrally retained, developed and deployed so that the highest standards of conduct are maintained in preventing, detecting and investigating fraud.
- 7.4 Since 1998, the Secretary of State's function to protect the health service from fraud has been carried out by a number of organisations. The Department of Health set up the Directorate of Counter Fraud Services (the "DCFS") in 1998, to have overall responsibility for all work to counter fraud and corruption in the NHS. In 1999, NHS Counter Fraud Operational Service (CFOS) provided an investigative capacity. The Counter Fraud and Security Management Service (the "NHS CFSMS"), a special health authority resulting from the reorganisation of both bodies, came into being in January 2003 by virtue of the Counter Fraud and Security Management Service (Establishment and Constitution) Order 2002 (SI 2002/3039). This placed responsibility for policy and operational matters related to the prevention, detection and investigation of fraud and corruption, alongside the management of security, in the NHS.
- 7.5 In 2005, the BSA was created as a special health authority to undertake the activities of NHS CFSMS and certain other Arm's Length Bodies. An outcome of this was that NHS CFSMS was abolished and its staff and property were transferred to the BSA (*see* SI 2006/635), with provision for continuity in the exercise of functions also being made as between the BSA and the abolished NHS CFSMS. As part of this re-organisation, a division was established within the BSA to assume the NHS CFSMS functions, taking the same title as the abolished special health authority (a title which appears in some of the provisions this instrument amends). The division was restructured in 2011 and became known as "NHS Protect" with responsibility for the prevention, detection and investigation of fraud and management of security. In addition, NHS Protect provides Welsh Ministers with certain counter fraud services by virtue of arrangements under section 83 of the Government of Wales Act 2006.
- 7.6 As part of delivering the Secretary of State's health service counter fraud function, the NHSCFA will carry out the role of central intelligence-gathering and national investigation of complex and high value fraud cases. Directions will provide the detail of these and other tasks and responsibilities the NHSCFA is to take on. The NHSCFA will assess information and investigate the most serious and complex examples of fraud against the NHS. To maintain standards, it is essential that the NHSCFA has access to the same powers available to its predecessors so that it can continue to tackle the inherent risks of economic crime associated with the scale of spending in the NHS.
- 7.7 NHS Protect staff involved in the counter fraud functions to be taken on by the NHSCFA will transfer to the new special health authority on 1 November 2017. The intention here is to provide the NHSCFA with an experienced, fully trained counter fraud workforce. In practice, this means all NHS Protect staff who are employed immediately before the transfer date will receive written notice that they will transfer to the NHSCFA under the Order. The principles set out in the Cabinet Office Statement of Practice on Staff Transfer in the Public Sector (COSoP) will apply. As staff are transferring between organisations which are both special health authorities,

the impact on employees and operations will be minimal and existing procedures and safeguards for the use and authorisation of the powers provided to the NHSCFA by the amendments contained in this Order will continue to apply.

#### **Pensions Act 2004**

- 7.8 The amendment in this Order to Schedules 3 and 8 to the Pensions Act 2004 (“the 2004 Act”) provides powers for the Pensions Regulator and the Pensions Board (the Board of the Pensions Protection Fund) to disclose certain restricted information that they hold to NHSCFA, subject to certain tests set out in, respectively, sections 86(1) and 200(1) of the 2004 Act. The reference being replaced in these two Schedules is in fact to the earlier NHS CFSMS special health authority mentioned in paragraph 7.4. The existing authorisation and data protection procedures and controls followed by the NHSCFA’s predecessor bodies will continue to apply in respect of information requests and safeguards for any disclosed information.
- 7.9 Section 86 of and Schedule 3 to the 2004 Act allow the Regulator to disclose certain restricted information to any person specified in the first column of Schedule 3 if the Regulator considers that it would enable or assist that person in exercising their functions as listed in column two of Schedule 3. Section 200 of, and Schedule 8 to, the 2004 Act make similar provision in respect of the Pensions Board and sets out a list of bodies to whom the Board may disclose restricted information where the Board considers the information is relevant to the discharge of the functions of that body specified in the Schedule
- 7.10 The Secretary of State may amend the Schedules by adding or removing bodies or functions from the list after consultation with the Regulator or the Board as appropriate. The Pensions Regulator and the Board of the Pension Protection Fund have both been consulted and had no objection to this change.
- 7.11 Requests for the disclosure of restricted information from the Board and Regulator are made to enable the recovery of fraudulently obtained health service funds in order to ensure appropriate sanctions and redress are applied. NHSCFA anticipates that it will require this information so that the proceeds of fraud can continue to be identified and returned to taxpayers and the NHS.

#### **Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010**

- 7.12 This Order amends the prescribed offices within a special health authority held by persons who are designated for the purposes of section 28 of the Regulation of Investigatory Powers Act 2000 (“the 2000 Act”). Designation under that section confers the power to grant authorisations for the carrying out of directed surveillance.
- 7.13 The amendment is made to the Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order 2010 (“the 2010 Order”), which is the Order under section 30 of the 2000 Act. This Order amends the entry in Part 2 of the Schedule to the 2010 Order which identifies a special health authority as a relevant public authority (that is, a public authority whose officers may be designated as mentioned). The description of senior managers of a certain grade as “prescribed officers” under column 2 in Part 2 of the Schedule is amended to omit reference to the “Counter Fraud and Security Management Service Division of the BSA” (which will no longer exist on 1 November 2017), and to refer instead to such senior managers by reference to the exercise of Secretary of State counter fraud functions. The intention is to ensure that only senior managers of a special health

authority which is concerned with health service counter fraud functions are designated (rather than senior officers in any other special health authority who do not exercise such functions). The amendment omits any reference to a named special health authority, meaning that the entry will continue to have effect in the event of further re-organisations among special health authorities in respect of the Secretary of State's counter fraud functions. Section 195 of the National Health Service Act 2006 identifies the counter fraud function of the Secretary of State as the power to take action for the purpose of preventing, detecting or investigating fraud, corruption and unlawful activities against or affecting the health service or the Secretary of State in relation to his responsibilities for the health service in England.

- 7.14 This Order therefore ensures that senior officers of the NHSCFA will have the same power to authorise the conduct of directed surveillance as senior officers of its predecessor, NHS Protect (also referred to as the Counter Fraud and Security Management Division of the BSA) providing operational continuity as the new special health authority takes on its new functions.
- 7.15 This amendment relates to directed surveillance only. The use of covert human intelligence sources (also provided for in Part 2 of the 2000 Act) is not authorised for use in carrying out the counter fraud functions. Directed surveillance is surveillance which is covert but not intrusive. (Intrusive surveillance means anything taking place on residential premises or in a private vehicle that involves the presence of an individual or use of a surveillance device on the premises, in the vehicle, or if placed elsewhere would provide the same level of information.)
- 7.16 Directed surveillance has been used by NHS Protect in cases where there have been no alternative routes to obtain information assessed as necessary and proportionate so that fraud investigations may continue and to obtain evidence to support criminal prosecutions.
- 7.17 As mentioned in paragraph 7.7, NHS Protect staff will move across under statutory transfer arrangements to provide a workforce of fully trained counter fraud staff in the new special health authority. The impact on employees and operations will be minimal and existing safeguarding and authorisation procedures in respect of investigatory work relying on the directed surveillance powers will continue to apply. In practice this means there will be no change to the number of staff able to authorise and use directed surveillance, the requirements for counter fraud specialist training, nor the level of seniority required to authorise directed surveillance (Agenda for Change pay band 8b).

#### **National Health Service (Performers Lists) (England) Regulations 2013**

- 7.18 The amendments to these 2013 Regulations provide for information concerning fraud to be requested by and provided to NHS England by NHSCFA in relation to the administration of the NHS Performers Lists which provides the framework for the management of primary care practitioners. It also imposes disclosure requirements on applicants for the performers' lists about involvement in fraud investigations and certain amendments are made in relation to those too. (The Establishment Order provides for the transfer of records from the BSA to the NHSCFA and for continuity in relation to documentation and things done and in the process of being done.)
- 7.19 The NHS Commissioning Board (referred to in this Memorandum by its operational title, "NHS England"), is responsible under Parts 4 to 6 of the National Health Service Act 2006 for administering and publishing lists of medical, dental and ophthalmic

practitioners carrying out primary care services in the NHS. In order to perform clinical work in NHS primary care services, practitioners are required to be named on the Medical, Dental or Ophthalmic Performers List, as appropriate. NHS England is responsible for an individual's admission, suspension and removal from the lists to ensure the suitability of performers to undertake clinical services and protect patients from performers who are not suitable, or whose efficiency to perform those services may be impaired. The arrangements allow NHS England to intervene at an early stage and provide support and remediation for practitioners whose performance is beginning to fall away from the required standards.

7.20 The National Health Service (Performers Lists) (England) Regulations 2013 name the BSA in respect of the provision of information which may be obtained by NHS England about fraud investigations and prosecutions. This information is used by the NHS England to assess the suitability of an individual for inclusion on a List. The amendment is required so that NHSCFA can continue to provide the same information to NHS England in relation to the Performers List as its predecessor, the BSA previously provided, in respect of:

a) NHS England's obligations to

- i. take account of information about fraud matters when considering a practitioner's application for inclusion on the List (regulation 5(1)(b)) and the refusal or deferment of a practitioner's application (regulation (7)(2)(d) and 8(1)(h) respectively);
- ii. take account of information about fraud matters in considering a practitioner's removal or the removal of an emergency registered practitioner from the List (regulation 15(3)(c) and paragraph 4(3)(b) of Schedule 1);
- iii. notify of a decision to refuse, remove or apply conditions to a practitioner in relation to the List which involves fraud matters (regulation 18(3)(g)); and
- iv. disclose information related to fraud obtained by NHS England in relation to the administration of the List (regulation 21(1)(j)).

b) the requirement for a Practitioner to

- i. make a declaration when applying for inclusion on a List of any current fraud investigation (as an individual or on behalf of a corporate body, regulation 4(5) and (7) respectively);
- ii. when included on the List, declare where a fraud investigation is opened, or of the negative outcome (for them) of an existing investigation (regulation 9(2)(l));

#### **Public Interest Disclosure (Prescribed Persons) Order 2014**

7.21 This Order amends the Schedule to the Public Interest Disclosure (Prescribed Persons) Order 2014 ("the 2014 Order") identifying prescribed persons to whom protected disclosures under employment legislation may be made. The effect is to allow individuals to make protected disclosures to the new special health authority in relation to fraud and other related matters in relation to the health service in England, which would have been made to its predecessor, the BSA before 1 November 2017.

7.22 Part 4A of the Employment Rights Act 1996 ("the 1996 Act") provides employment protection for workers who make certain disclosures of information to a "prescribed person" (so prescribed for certain matters). Prescribed persons are mostly regulators

but include other persons and bodies such as Members of Parliament (MPs), whom a person may approach outside their workplace to report suspected or known wrongdoing. Section 43F of the 1996 Act provides that a qualifying disclosure is a protected disclosure where, subject to certain requirements, the worker makes the disclosure to a prescribed person. The 2014 Order lists the prescribed persons and descriptions of matters for which they are prescribed to receive a worker's disclosure.

- 7.23 This Order amends the references in the Schedule, substituting reference to the NHSCFA for references to the BSA. The NHSCFA is prescribed in relation to reports of fraud, corruption and other unlawful activities.
- 7.24 The amendment also removes reference to security management service matters which were the responsibility of NHS Protect (the division within the BSA referred to in paragraph 7.5), before 1 November 2017. Such security functions of the Secretary of State in relation to the health service will no longer be exercisable by the BSA, as its establishment order is being amended by the Order referred to in paragraph 4.3 above to omit such functions. In practice, NHS Protect's security management role was essentially the preparation of guidance and dissemination of best practice amongst NHS bodies, and, perhaps reflecting this relatively limited role, NHS Protect did not receive protected disclosures of this nature under the Order which is the subject of amendment. Therefore, this change is expected to have little or no effect on the protection provided to workers making security management disclosures, nor the subsequent investigation. NHS Improvement (constituting Monitor and the NHS Trust Development Authority) recently consulted on and published their policy intended to standardise whistleblowing procedures and protections for staff in the NHS (see: <https://improvement.nhs.uk/resources/freedom-to-speak-up-whistleblowing-policy-for-the-nhs/>).

#### **Proceeds of Crime Act 2002 (References to Financial Investigators) (England and Wales) Order 2015**

- 7.25 This amendment to the above Order ("the 2015 Order") is made to ensure that the financial investigators transferring from the BSA to the NHSCFA can continue to pursue and recover the proceeds of crime from fraud committed against the health service. (As to provision in respect of continuity, see para 4.3 above.)
- 7.26 The Proceeds of Crime Act 2002 ("the 2002 Act") provides that a number of powers in the Act can be exercised by an accredited financial investigator in order to recover assets and money obtained through criminal activity. Financial investigators, who have been trained and accredited by the National Crime Agency, can use the powers if they are a person or a member of staff of a body specified in an Order by the Secretary of State under section 453 of the 2002 Act. The Schedule in the Order lists accredited financial investigators for the purposes of the relevant powers which the Act provides.
- 7.27 The amendment defines the NHSCFA for the purposes of the 2002 Act and replaces references to the Counter Fraud and Security Management service in column 2 of the Schedule to the 2015 Order with references to the NHSCFA in relation to powers concerning: applications for a restraint order under Part 2 (section 42(2)(c) and section 68(3)(c) of the 2002 Act); appropriate officers and senior officers for the purposes of confiscation investigations under Part 8 (section 378(1)(b) and section 378(2)(d) of the 2002 Act); appropriate officers and senior officers for the purposes of money laundering investigations under Part 8 (section 378(4)(a) and 378(6)(c) of the Act.)

- 7.28 The amendment allows trained financial investigators transferring to the NHSCFA to continue to recover the proceeds of crime for taxpayers and reduce the burden on other organisations, such as the police, to recoup these funds. Experienced staff will continue to apply established procedures to use the powers and the existing level of authorisation with remain unchanged (Agenda for Change grade 8c).

### *Consolidation*

- 7.29 Neither DH nor the other departments whose secondary legislation is amended by this instrument are considering consolidation for present purposes.

## **8. Consultation outcome**

- 8.1 Consultation with the Pensions Regulator and the Board of the Pensions Protection Fund has been undertaken in accordance with statutory requirements under the Pensions Act 2004. No additional consultation has been undertaken in respect of this Order. Consultation has been carried out with staff working within NHS Protect who are affected by the re-organisation (more detail about this is provided in the Explanatory Memorandum laid with the Establishment Order). The proposal has been broadly welcomed at staff engagement events.

## **9. Guidance**

- 9.1 A stakeholder engagement plan is in place to communicate with health service stakeholders about the establishment of the NHSCFA and its delivery of the counter fraud service.

## **10. Impact**

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 There is no impact on the public sector in relation to the matters provided for in this Order.
- 10.3 An Impact Assessment has not been prepared for this instrument.

## **11. Regulating small business**

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

## **12. Monitoring review**

- 12.1 This amending instrument will not itself be subject to monitoring or review but the instruments which it amends will be reviewed from time to time by the departments responsible for the policy areas concerned.
- 12.2 Specifically in relation to RIPA surveillance, the Government will keep under review the operation of this legislation, including:
- a) the independent inspection and oversight by the Investigatory Powers Commissioner, who has statutory oversight responsibility for keeping under review the use by public authorities of covert techniques under Part II of RIPA); and
  - b) the Investigatory Powers Tribunal which is made up of senior members of the judiciary and is independent of Government and has full powers to investigate and determine any proceedings or complaints falling within its jurisdiction.



### **13. Contact**

- 13.1 Mark Richardson at the Department of Health Telephone: 0207 972 1044 or email: [mark.richardson@dh.gsi.gov.uk](mailto:mark.richardson@dh.gsi.gov.uk) can answer any queries regarding the instrument.