

2013 No. 295

**NATIONAL HEALTH SERVICE, ENGLAND AND
WALES**

**The National Health Service Litigation Authority (Establishment
and Constitution) Amendment Order 2013**

<i>Made</i>	- - - -	<i>12th February 2013</i>
<i>Laid before Parliament</i>		<i>19th February 2013</i>
<i>Coming into force</i>	- -	<i>1st April 2013</i>

The Secretary of State for Health makes the following Order in exercise of the powers conferred by sections 28(1), (2) and (4), 272(7) and (8) and 273(1) of the National Health Service Act 2006(a), and section 4 of, and paragraph 8 of Schedule 2 to, the National Health Service (Consequential Provisions) Act 2006(b).

In accordance with section 28(7) of that Act, the Secretary of State has consulted such bodies as the Secretary of State recognises as representing officers who in the Secretary of State's opinion are likely to be transferred or affected by transfers in pursuance of this Order.

Citation, commencement, application and interpretation

1.—(1) This Order may be cited as the National Health Service Litigation Authority (Establishment and Constitution) Amendment Order 2013 and comes into force on 1st April 2013.

(2) Subject to paragraph (3), this Order applies to England and Wales.

(3) Article 3 and the definition of “NHS body” in the substitute paragraph (2) to be inserted into the Establishment Order by article 2 of this Order apply to England only.

(4) In this Order, “the Establishment Order” means the National Health Service Litigation Authority (Establishment and Constitution) Order 1995(c).

Amendment of article 1 of the Establishment Order

2. In article 1 of the Establishment Order (citation, commencement and interpretation), for paragraph (2) substitute—

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- (a) 2006 c.41. Section 28 was amended by section 55(1) of, and paragraph 13 of Schedule 4 to, the Health and Social Care Act 2012 (c.7), with effect from 1st October 2012 (*see* S.I. 2012/1831).
- (b) 2006 c. 43. The powers of the Secretary of State under the provisions of the National Health Service Act 2006 under which this Order is made are exercisable only in relation to England by virtue of section 271(1) of that Act. However paragraph 8 of Schedule 2 to the National Health Service (Consequential Provisions) Act 2006 specifically saves the effect of article 2 of the National Assembly of Wales (Transfer of Functions) Order 1999, so that for a function relating to a cross border Special Health Authority which cannot be exercised specifically for Wales, the Secretary of State or Welsh Ministers can exercise the function concurrently.
- (c) Established by S.I. 1995/2800, amended by S.I. 2002/2621, S.I. 2005/503 and 1445 and S.I. 2012/1641.

“(2) In this Order—

“the Authority” means the National Health Service Litigation Authority established by this Order;

“NHS body” means a clinical commissioning group, the Health and Social Care Information Centre, the National Health Service Commissioning Board, the National Institute for Health and Care Excellence, an NHS trust, an NHS foundation trust, and a Special Health Authority;

“the Institute” means the National Institute for Health and Clinical Excellence established by the National Institute for Clinical Excellence (Establishment and Constitution) Order 1999;

“transfer date” means 1st April 2013.”.

Amendment of article 3 of the Establishment Order

3. In article 3 of the Establishment Order (functions of the Authority), in paragraph (b) for “Primary Care Trusts” substitute “the National Health Service Commissioning Board”.

Substitution of article 4 of the Establishment Order

4. For article 4 of the Establishment Order (constitution of the Authority), substitute—

“Constitution of the Authority

4. The Authority is to consist of—

- (a) a chairman;
- (b) four members who are not officers of the Authority; and
- (c) four other members, being the persons who for the time being hold the offices of Chief Executive Officer, Chief Finance Officer and such other executive posts as determined by the Authority.”.

Transfer of officers, property and liabilities and enforceability of rights

5. After article 5 of the Establishment Order (remuneration of members), insert—

“Transfer of officers from the Institute to the Authority

6.—(1) This paragraph applies in relation to any person who—

- (a) immediately before the transfer date is employed by the Institute and is engaged wholly or mainly in performing functions in connection with the assessment of the performance of doctors, dentists or pharmacists engaged in the health service; and
- (b) has been notified in writing by the Institute by 31st March 2013 that they are to be transferred to the Authority.

(2) Any person to whom paragraph (1) applies is, on the transfer date, to be transferred to the employment of the Authority.

(3) The contract of employment of a person whose employment has transferred to the Authority under paragraph (2)—

- (a) is not terminated by the transfer, and
- (b) has effect from the transfer date as if originally made between that person and the Authority.

(4) Without prejudice to paragraph (3)—

- (a) all the rights, powers, duties and liabilities of the Institute, under or in connection with its contract of employment with a person transferred under paragraph (2), are to transfer to the Authority on the transfer date; and
- (b) any act or omission before the transfer date of or in relation to the Institute, in respect of that person or that person's contract of employment, is deemed to have been an act or omission of or in relation to the Authority.

(5) Paragraphs (2) to (4) do not operate to transfer the contract of employment of a person to whom paragraph (1) applies, or any rights, powers, duties and liabilities under, or in connection with, that contract, if, before the transfer date, that person informs the Authority or the Institute that they object to becoming employed by the Authority.

(6) Where a person to whom paragraph (1) applies has objected to the transfer of that person's contract of employment to the Authority as described in paragraph (5), the transfer operates so as to terminate that person's contract of employment with the Institute.

(7) Subject to paragraph (8), a person whose contract of employment is terminated in accordance with paragraph (6) is not to be treated, for any purpose, as having been dismissed by the Institute.

(8) Where the transfer involves or would involve a substantial change in the working conditions to the material detriment of a person whose employment is or would have transferred under paragraph (1), that person may treat the contract of employment as having been terminated, and that person shall be treated for any purpose as having been dismissed by the employer.

(9) No damages shall be payable by an employer as a result of a dismissal falling within paragraph (8) in respect of any failure by the employer to pay wages to a person in respect of a notice period which the person has failed to work.

(10) Paragraphs (2), (3) and (5) to (8) are without prejudice to any right of a person arising apart from this article to terminate that person's contract of employment without notice in acceptance of a repudiatory breach of contract by the employer.

Enforceability of rights and transfer of property and liabilities from the Institute to the Authority

7.—(1) The property of the Institute identified as property to transfer to the Authority in the document entitled "The National Institute of Health and Clinical Excellence Property Schedule 2013(a)" and signed on behalf of the Institute on 4th January 2013, and on behalf of the Authority on 14th January 2013, is to be transferred to the Authority on the transfer date.

(2) All liabilities of the Institute relating to the property referred to in paragraph (1) are to be transferred to the Authority on the transfer date.

(3) Any right relating to the property of the Institute referred to in paragraph (1) that was immediately before the transfer date enforceable by or against the Institute is, on or after the transfer date, to be enforceable by or against the Authority."

Revocation of article 5

6. Article 5 of the Establishment Order (remuneration of members) is revoked.

Signed by the authority of the Secretary of State for Health.

12th February 2013

Dr Daniel Poulter
Parliamentary Under-Secretary of State,
Department of Health

(a) The National Institute of Health and Clinical Excellence Property Schedule 2013 is not a published document. It can be obtained from the Department of Health, Quarry House, Quarry Hill, Leeds LS2 7UE on request.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the National Health Service Litigation Authority (Establishment and Constitution) Order 1995 (the Establishment Order).

Article 3 amends the functions of the National Health Service Litigation Authority (the Authority) so as to replace the reference to Primary Care Trusts, as they are being abolished, with the NHS Commissioning Board. This article applies to England only as the functions relating to the NHS Commissioning Board are not carried out in Wales.

The Authority will be directed to carry out the Secretary of State's appellate and other functions, in connection with the decisions and functions of the NHS Commissioning Board.

Article 4 increases the number of members of the Authority who are officers from three to four and amends the posts to which such members are appointed.

Article 5 of this Order amends the Establishment Order to provide for the transfer of staff who are engaged in carrying out the functions of assessing the performance of doctors, dentists and pharmacists engaged in the NHS, from the National Institute for Health and Clinical Excellence (the Institute) to the Authority. The Institute is being abolished as a Special Health Authority on 1st April 2013. These functions were conferred on the Institute by means of directions of the Secretary of State under sections 7 and 8 of the National Health Service Act 2006. Instead the Authority will be directed to carry out these functions. Article 5 also provides for the transfer of property and liabilities relating to those functions, from the Institute to the Authority.

Article 6 revokes article 5 of the Establishment Order.

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