These notes relate to the National Health Service Reform (Scotland) Act 2004 (asp 7) which received Royal Assent on 11 June 2004

NATIONAL HEALTH SERVICE REFORM (SCOTLAND) ACT 2004

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the National Health Service Reform (Scotland) Act 2004 ("the Act"). They do not form part of the Act and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE ACT – AN OVERVIEW

3. The Act gives effect to the proposals in the White Paper "Partnership for Care" and fulfils the commitments in the Partnership Agreement ("A Partnership for a Better Scotland: Partnership Agreement" published in May 2003) to bring forward legislation to reform the National Health Service ("NHS") by introducing provisions in relation to:

- the dissolution of NHS Trusts;
- establishing Community Health Partnerships;
- placing a duty on Health Boards to co-operate with each other, with Special Health Boards and with the Common Services Agency, in the interests of developing more effective regional planning of health services;
- extending Ministerial powers to intervene to secure the quality of healthcare services;
- placing a duty on Health Boards and Special Health Boards to involve the public in the planning, development and operation of health services; and
- placing a duty on the Scottish Ministers and Health Boards to take action to promote health improvement.

4. The Act also includes provisions in relation to:

- the governance of NHS staff;
- the promotion of equal opportunities in the NHS; and
- certain minor and consequential amendments and repeals.

5. The Act primarily impacts upon the National Health Service (Scotland) Act 1978 ("the 1978 Act") by repealing and amending provisions of that Act and by inserting new sections into it.

6. The Act is in three Parts:

- Part 1: Organisation and operation of National Health Service;
- Part 2: Promotion of health improvement;
- Part 3: Supplementary

COMMENTARY ON SECTIONS

PART 1: ORGANISATION AND OPERATION OF NATIONAL HEALTH SERVICE

Section 1 – Dissolution of National Health Service trusts: modifications of enactments

7. Section 1(1) of the Act repeals section 12A of, and Schedule 7A to, the 1978 Act. Section 12A contains the power enabling the Scottish Ministers to establish NHS Trusts. Schedule 7A contains the provisions regulating the establishment and functions and operation of NHS Trusts. The effect of the repeal is that the power to establish NHS Trusts ceases to exist.

8. Section 1(2) inserts a new subsection (2B) into section 82 of the 1978 Act. Section 82 provides for the transfer of certain trust and endowment property to Health Boards. New subsection (2B) applies to property of an NHS Trust which is subject to an endowment or trust which is transferred to a Health Board upon dissolution of that NHS Trust. New subsection (2B) provides that the property shall transfer to the Health Board free of the endowment or trust terms which existed prior to the transfer, but that the Health Board which receives the property shall hold it on trust for purposes relating either to services provided under the 1978 Act or to research, as the Board thinks fit. New subsection (2B) is subject to existing section 82(3) of the 1978 Act. The effect of section 82(3) is to impose a duty on the Board which acquires the trust or endowment property to ensure that the objects of the original trust or endowment are not prejudiced by the exercise of their power to decide the purposes to which the property will be put.

9. Section 1(3) inserts a new sub-paragraph (1A) into paragraph 26 of Schedule 7A to the 1978 Act. Paragraph 26 applies where an NHS Trust is dissolved. Sub-paragraph (1) of paragraph 26 enables the Scottish Ministers to transfer or provide for the transfer of the property, rights and liabilities of dissolved NHS Trusts to themselves, Health Boards, the Common Services Agency or another NHS Trust.

10. New sub-paragraph (1A) puts it beyond doubt that the power in sub-paragraph (1) applies to endowments and property held in trust.

11. New sub-paragraph (1A) has effect until the coming in to force of section 1(1) of the Act, which repeals Schedule 7A to the 1978 Act in its entirety.

12. Schedules 1 and 2 contain minor amendments, repeals and amendments consequential on the provisions of section 1. Paragraph 1(6) of Schedule 1 inserts a new subsection (2A) into section 79 of the 1978 Act. This subsection makes it clear that the powers conferred on Scottish Ministers (and therefore Health Boards, to whom such powers may be delegated) by subsections (1) and (1A) of section 79 to use and dispose of land include power to grant a lease over land.

Section 2 - Community health partnerships

13. Section 2 inserts two new sections, 4A and 4B, into the 1978 Act, which provide for the establishment and operation of Community Health Partnerships ("CHPs").

14. In new section 4A, subsection (1) requires every Health Board to establish either a single CHP to cover the whole of the Board's area or two or more CHPs each covering a district which, when taken together, must cover the whole area of the Board. The new subsection also places a duty on Health Boards to establish the CHPs in accordance with a scheme of establishment approved by Scottish Ministers.

15. Subsection (2) sets out the status of CHPs by providing that they shall be committees or sub-committees of the Health Board which establishes them.

16. Subsection (3) provides for the establishment of joint CHPs where the geographical area to be covered by the CHP straddles 2 or more Health Board areas. Subsection (4) provides that joint CHPs shall be formed as joint committees of the Health Boards by which they are established.

17. Subsections (5) sets out the functions of CHPs. CHPs are to have two main functions as set out in paragraphs (a) and (b) of subsection (5). They may also exercise other functions prescribed in regulations, specified in the scheme of establishment or delegated to them by parent Health Boards under paragraph (c) of this subsection.

18. The first main function is that of co-ordinating the planning, development and provision of certain services in its area with a view to improving those services. The services to which this function applies are those prescribed in regulations or specified in the scheme of establishment or any other services specified by the parent Health Board.

19. The second main function is that of providing or securing the provision of, certain services. Those services are services which it is the function of its parent Health Board to provide or secure the provision of and which are prescribed in regulations, those which are delegated to it under the scheme of establishment or such other services as the parent Health Board may specify.

20. In new section 4B, subsection (1) puts every Health Board under a duty to prepare and submit to the Scottish Ministers a scheme of establishment for CHPs in their area. The Scottish Ministers have the power to specify a period of time by which the schemes must be submitted.

21. Subsection (2) requires Health Boards to take certain actions when preparing a scheme of establishment. These are, firstly, that Health Boards should have regard to any guidance about CHPs issued by the Scottish Ministers under subsection (7) and to the community planning

process provided for by section 15(1) of the Local Government in Scotland Act 2001 as it relates to the area of the CHP's parent Health Board . Secondly, Health Boards must consult each local authority whose area is included in whole or in part in the proposed CHP's area and any other person that the Health Board thinks it appropriate to consult. Finally, they shall encourage the local authorities and other persons who were consulted to be involved in preparing the scheme of establishment.

22. Subsection (3) allows the Scottish Ministers either to approve or reject a scheme of establishment submitted to them by a Health Board. The Scottish Ministers may modify a scheme before approving it. Subsection (4) provides that where the Scottish Ministers refuse to approve a scheme, they must return it to the Health Board and the Scottish Ministers may then direct the Board to resubmit the scheme by a specified date and they may specify the modifications that the Health Board is to make to the scheme. In addition to the modifications specified by the Scottish Ministers, the Board may make its own further modifications to the scheme.

23. Subsection (5) allows Health Boards to submit to the Scottish Ministers a new scheme for CHPs in their Board area whenever the Board thinks that it is appropriate so to do. It also places Health Boards under a duty to submit a new scheme within a particular timescale if directed to do so by the Scottish Ministers.

24. Subsection (6) allows the Scottish Ministers to make regulations on a number of matters relating to CHPs. Those matters are—

- the membership of CHPs;
- the procedures for submitting a scheme of establishment and the scheme's form and content;
- the functions of CHPs and how those functions should be exercised;
- the application of provisions of the 1978 Act and any provision made under the 1978 so far as applying to CHPs to joint CHPs with such modifications as may be necessary; and
- any other matters relating to CHPs as Scottish Ministers think fit.

25. Under section 105 of the 1978 Act, regulations made under subsection (6) will be subject to negative resolution procedure before the Scottish Parliament.

26. Subsection (7) enables the Scottish Ministers to issue statutory guidance on CHPs but only after consulting such persons as they see fit. If the Scottish Ministers use this power, they are under a duty to publish the guidance.

27. Subsection (8) extends the power for Health Boards to appoint committees to include a power to appoint joint committees. Under this provision Health Boards may only form joint-committees for the purpose of establishing joint CHPs. Section 2(11) of the 1978 Act allows the Scottish Ministers to establish joint committees for the areas of two or more Health Boards but that power does not allow Health Boards to do so themselves.

28. Subsection (9) provides that sections 4A or 4B do not affect the extent of the general powers in the 1978 Act to establish and regulate committees and sub-committees of Health Boards.

Section 3 – Duty in relation to governance of staff

29. Section 3 inserts a new section 12HA into the 1978 Act. This new section places a duty on Health Boards, Special Health Boards and the Common Services Agency to put and keep in place arrangements for the purposes of improving the management of staff employed by the relevant Board or Agency. The duty also extends to monitoring such management and to putting in place and maintaining arrangements relating to workforce planning.

Section 4 – Equal opportunities

30. Section 4 inserts a new section 2D into the 1978 Act. This section requires Health Boards, Special Health Boards and the Common Services Agency to perform their functions in a manner that encourages equal opportunities and the observance of equal opportunity requirements.

Section 5 - Health Boards: duty of co-operation

31. Section 5 inserts a new section 12I into the 1978 Act. Subsection (1) of the new section places a new duty on Health Boards to co-operate with one another and with Special Health Boards and the Common Services Agency in exercising their functions in relation to the planning and provision of services.

32. Subsection (2) covers two distinct circumstances. Firstly, where a Health Board provides services for persons in the area of another Health Board, the second Health Board (the one who is having services provided for it) is given the power to enter into these arrangements with the first Health Board. Secondly, Health Boards are given the power to provide services jointly across their areas.

33. Subsection (3) sets out the things a Health Board may do when either providing services on behalf of another Health Board or providing services jointly. Under subsection (3), those Health Boards may enter into arrangements with other Health Boards, Special Health Boards or the Common Services Agency in relation to the provision of services and, so that they can provide services for persons outwith their geographical area, they may do anything in relation to those persons which they could do in relation to the provision of services to persons from within their own area.

Section 6 - Powers of intervention in case of service failure

34. Section 6 inserts two new sections into the 1978 Act: sections 78A and 78B. New section 78A gives the Scottish Ministers power, in the case of a failure or anticipated failure by a body or person to provide a service under the 1978 Act or a failure or anticipated failure to provide it to an acceptable standard, to direct that the relevant functions to which that service relates, should be performed by another body or person.

35. Under subsections (2) of new section 78A the Scottish Ministers may direct that another body, person or persons may perform the functions of the body or person being intervened on that the Scottish Ministers specify. The Scottish Ministers may only do this if they think it is necessary to ensure the provision of the service in question to a standard that they consider to be acceptable. The direction may specify the extent to which those functions are to be performed by the alternative body or person and the duration of the intervention.

36. Subsection (4) lists the bodies which may be identified in a direction made under subsection (2) (specifically a Health Board, a Special Health Board or the Common Services Agency). This restricts the bodies that may be directed by the Scottish Ministers to take on the functions of the failing body or person to one of these three types of body.

37. Subsection (5) lists the persons who may be identified in a direction made under subsection (2). The subsection states that only persons who are: employees of the bodies listed in subsection (4); a member of staff of the Scottish Administration; or an employee of a local authority may be identified in the direction.

38. Subsection (6) states that the body or person appointed in the direction made under subsection (2) will be known as the "appointed person".

39. Subsection (7) places a duty on the appointed person to comply with the terms of the direction under which the person is appointed.

40. Subsection (8) provides that the body being intervened upon will be liable for the remuneration and expenses of, and any other costs reasonably incurred by, the appointed person when performing the functions specified in the direction. Subsection (9) provides that anything done or omitted by the appointed person when performing the functions in the direction is to be regarded as being done by the body being intervened upon. Subsection (10) makes it clear that third parties dealing with an appointed person in good faith can assume that the appointed person is acting within the powers conferred by virtue of the direction.

41. New section 78B makes it clear that the power in section 78A is additional to those in sections 77 and 78 of the 1978 Act, and that the powers in those sections are not restricted by those in section 78A.

Section 7 - Public involvement

42. Section 7 inserts a new section 2B into the 1978 Act covering public involvement. Subsections (1) and (2) together place a duty on Health Boards, Special Health Boards and the Common Services Agency to take action with a view to securing that patients and the public are involved in the planning and development of services as well as decisions that are to be made by those bodies which will significantly affect the operation of services.

43. Subsection (3) defines the services to which the duty applies. Firstly, the services must be ones which it is the function of the Health Board, Special Health Board or the Common Services Agency to provide or secure the provision of and secondly the services must be provided to individuals either by the body itself or by another person on behalf of the body.

Section 8 - Dissolution of local health councils

44. Subsection (1) of section 8 provides for local health councils to be dissolved on a date specified in an order by the Scottish Ministers. Under subsection (2), such an order will be subject to negative resolution procedure before the Scottish Parliament.

45. Schedules 1 and 2 include amendments and repeals of enactments consequential on the dissolution of local health councils.

PART 2: PROMOTION OF HEALTH IMPROVEMENT

Section 9 - Duty to promote health improvement

46. Section 9 inserts two new sections into the 1978 Act, sections 1A and 2A. New section 1A places a duty upon the Scottish Ministers to promote improvement in the physical and mental health of the people of Scotland. New section 2A places a similar duty upon Health Boards, Special Health Boards and the Common Services Agency.

47. Section 1A provides the Scottish Ministers with an express power to act at their own hand to implement a wide range of measures designed to improve health. It also provides that the duty does not restrict any other functions of the Scottish Ministers, in particular those contained in section 1 of the 1978 Act. Section 2A confers on Health Boards, Special Health Boards and the Common Services Agency powers similar to those of conferred on the Scottish Ministers under section 1A.

48. Section 1A(2) specifies the powers available to the Scottish Ministers in pursuance of the duty to promote health improvement. It allows the Scottish Ministers to do anything that they think is likely to assist in promoting health improvement including:

- giving direct financial assistance to any person;
- entering into arrangements or agreements with any person; and
- co-operating with, or facilitating or co-ordinating the activities, of any person.

49. Person in this context includes other bodies.

50. Subsection (2) of section 2A makes corresponding provision in relation to Health Boards, Special Health Boards and the Common Services Agency.

51. Subsection (4) of section 2A provides that anything done by a Health Board or a Special Health Board under section 2A is to be treated as done in exercise of a function of the Scottish Ministers delegated to the Health Board and Special Health Board by way of an order made under section 2(1)(a) or (b) of the 1978 Act respectively.

PART 3: SUPPLEMENTARY

Section 10 - Ancillary provision

52. Section 10 contains power to make any incidental, supplemental, consequential, transitional, transitory or saving provision in consequence of any provisions in the Act. Such an order will be subject to negative resolution procedure before the Scottish Parliament (subsection (3)) unless the order contains amendments to primary legislation in which case the order will be subject to affirmative resolution procedure (subsection (4)).

Section 11 – Modification of enactments

53. Section 11 introduces schedule 1 (which makes minor amendments and consequential amendments) and schedule 2 (which contains consequential repeals).

Section 12 – Commencement and short title

54. Section 12 allows the Scottish Ministers to set different dates to commence different provisions of the Act.

PARLIAMENTARY HISTORY

55. The following table sets out, for each Stage of the proceedings of the Scottish Parliament on the Bill for this Act, the dates on which proceedings for that Stage took place, the references to the Official Report of those proceedings and the dates on which Committee Reports were published and the references to those Reports.

Proceedings and Reports	**Reference**
Introduction	
26 June 2003	SP Bill 6 (Session 2)
Stage 1	
Health and Community Care Committee	
15th Meeting 2003	2 December 2003, cols 357-382
16th Meeting 2003	9 December 2003, cols 406-452
17th Meeting 2003	16 December 2003, cols 455-489
1st Meeting 2004	6 January 2004, cols 497-552
3rd Report 2004 (6th February 2004):	
Stage 1 Report on the NHS Reform (Scotland) Bill	SP Paper 90
Finance Committee	

8th Meeting 2003	30 September 2003, cols 287-301
9th Meeting 2003	7 October 2003, cols 321-343
Subordinate Legislation Committee	
10th Meeting 2003	28 October 2003, cols 170-177
11th Meeting 2003	4 November 2003, cols 183-187
Consideration by Parliament	
3 March 2004	Cols 6184-6239 and 6243-6247
Stage 2	
Health and Community Care Committee	
9th Meeting 2004	23 March 2004, cols 650-703
Bill (as amended at Stage 2)	SP Bill 6A (Session 2)
Stage 3	
Subordinate Legislation Committee	
14th Meeting, 2004	27 April 2004, cols 415-417
15th Meeting, 2004	4 May 2004, cols 423-424
19th Report 2004 (6th May 2004):	
Report on the NHS Reform (Scotland) Bill	
as amended at Stage 2.	SP Paper 151
Consideration by Parliament	
6 May 2004	Cols 8116-8175 and 8259-8263
Royal Assent	
11th June 2004	