

EXPLANATORY MEMORANDUM TO

THE APPOINTMENTS COMMISSION (AMENDMENT) REGULATIONS 2010

2010 No. 1072

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.
2. **Description**
 - 2.1 The Appointments Commission (Amendment) Regulations 2010 amend the Appointments Commission Regulations 2006 which make provision about the membership of the Appointments Commission.
 - 2.2 The Regulations allow the Secretary of State to direct that the appointment of the vice-chair ceases when the chair is suspended, and for the Secretary of State to appoint a new vice-chair.
 - 2.3 The amendments will apply in relation to a person appointed at any time, including a time before the coming into force.
 - 2.4 The Regulations will bring provisions relating to the Appointments Commission board in line with suspension provisions for the Secretary of State's other public appointments.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.
4. **Legislative Background**
 - 4.1 This is the first use of the powers to make provision in relation to vice-chairs when a chair of the Appointments Commission is suspended. Provisions amending the Health Act 2006 were included with others in the Health Act 2009 to bring suspension provisions relating to other national bodies concerned with health into line with existing suspension provisions for NHS trusts and PCTs.
 - 4.2 Regulations are currently being drafted to make provision for suspension in relation to chairs, vice-chairs and other non-executive members of some of these other bodies.
 - 4.3 The Appointments Commission was established under section 57 of the Health Act 2006. Schedule 4 to the Act provides for the appointment of the chairman, vice-chairman and non-executive members and contains powers to enable provision in regulations for the terms on which they may be appointed, including for suspension and termination. The terms of appointment of chairmen and non-executive members are governed by The Appointments Commission Regulations 2006.
 - 4.4 By virtue of paragraph 19 of Schedule 3 to the Health Act 2009, the amendments made by these Regulations apply in relation to a vice chairman appointed at any time, including a time before the coming into force of the power in paragraph 6(2) of Schedule 4 to the Health Act 2006 under which the Regulations are made.
5. **Territorial Extent and Application**
 - 5.1 This instrument applies to 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*

- 7.1 The policy is to bring the suspension provisions that apply in respect of the chairman, vice-chairman and non-executive members of the Appointments Commission in line with the provisions that apply in relation to the Secretary of State's other public appointments.
- 7.2 The Secretary of State already has power to suspend the chairman and non-executive members of the Appointments Commission. The vice-chairman is appointed by the members of the Commission, not the Secretary of State. The Regulations will allow the Secretary of State to appoint a new vice-chairman to lead the organisation during the period of the chair's suspension. In order for this to happen, the appointment of the vice-chairman would automatically cease when the chair is suspended.

8. Consultation outcome

- 8.1 A formal 12 week consultation exercise¹ was carried out between 17 July and 9 October 2008 on introducing the new suspension powers and processes. Consultation was held with all of the bodies affected by the provisions, Department of Health sponsor branches and the Devolved Administrations. Responses to the consultation revealed no general concerns about introducing the new policy, which was already in place for PCTs and NHS Trusts. The Government's response² was published on 16 January 2009.

9. Guidance

- 9.1 Draft guidance was issued as part of the formal consultation and is intended to be updated and published by the Appointments Commission once suspension provisions come in to force, for the Secretary of State's delegated appointments. There will also be similar guidance issued by the Department of Health for those few appointments not delegated to the Appointments Commission, which includes the Commission's public appointments.

10. Impact

- 10.1 A full impact assessment has not been produced for this instrument as no impact on the private or voluntary sectors is foreseen. However the impact on the public sector is outlined in the Impact Assessment carried out for the suspension provisions in the Health Act 2009 (attached).

11. Regulating small business

- 11.1 The legislation does not apply to small business.

¹ "Removing or suspending chairs and non-executives of health bodies: consultation on introducing new powers of suspension, Department of Health."

² "Removing or suspending chairs and non-executives of Health Bodies: feedback on the consultation to introduce powers of suspension."

12. Monitoring & review

12.1 These Regulations will strengthen the way the healthcare system holds people to account when they fail to meet the requirements of public office, by allowing time for a considered and balanced investigation to take place prior to any decision being made as to whether to commence procedures for termination of an individual's appointment.

12.2 They will be reviewed 18 months after the Regulations come in to force.

13. Contact

Julie Nichols at the Department of Health, Tel: 0113 254 5915 or e-mail:

julie.nichols@dh.gsi.gov.uk

or

Jacky Cooper at the Department of Health, Tel: 0113 254 5446 or e-mail:

jacky.cooper@dh.gsi.gov.uk can answer any queries regarding the instrument.

Summary: Intervention & Options

Department /Agency: DH	Title: Impact Assessment of the introduction of the function to suspend chairs and non-executive directors of Health Bodies (SHAs, SpHAs and ALBs)	
Stage: Final Proposal	Version: 1	Date: 09 January 2009
Related Publications: Removing or suspending chairs and non-executives from Health Bodies: consultation on introducing powers of suspension		

Available to view or download at:

<http://www.dh.gov.uk>

Contact for enquiries: Jacky Cooper or Julie Nichols

Telephone: 0113 2545446

What is the problem under consideration? Why is government intervention necessary?

Currently where there is a suspected case that it is not in the interests of the NHS for a non executive to remain in post, this will normally result in the office holder resigning or in termination of the appointment. It is not possible to suspend the individual whilst investigations are carried out. Powers have been created via secondary legislation for the Appointments Commission to suspend non executives of NHS Trusts and Primary Care Trusts. These powers are not in place for Strategic Health Authorities, Special Health Authorities and Arms Length Bodies, including Executive and Advisory Non-Departmental Public Bodies, for which primary legislation is needed.

What are the policy objectives and the intended effects?

To give the Appointments Commission powers to suspend health body chairs and/or non-executives to provide greater flexibility and time for a full investigation of the case to take place before any decision is taken to terminate an appointment, whilst at the same time preventing the non-executive from exercising his/her functions during the investigation process. This will ensure the efficient and effective discharge of the organisation's functions, protect patients, preserve and promote public confidence in NHS organisations, as well as safeguard public funds.

What policy options have been considered? Please justify any preferred option.

1. Do nothing (continue to use existing powers and procedures)
2. Introduce suspension powers – this is the preferred option as it will allow for greater flexibility and time for a full investigation of the allegations or issues to determine the facts and consider evidence before a decision is taken

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? This policy will be reviewed 18 months after the proposed suspension function comes into force.

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Minister:

Ann Keen**Date:** 12th January 2010

Summary: Analysis & Evidence

Policy Option: 2	Description: Introduce powers to suspend non-executives of health bodies
-------------------------	---

COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups' Costs arise from appointing a replacement during the period of suspension for up to six months (subject to extension in certain cases). Offsetting cost savings arise from savings in media-handling and risk of legal challenge.	
	One-off (Transition) Yrs		
	£		
	Average Annual Cost (excluding one-off)		
	£ 0k	Total Cost (PV)	£
Other key non-monetised costs by 'main affected groups'.			

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups' Avoidance of untoward incidents more than offsets risk of loss in continuity.	
	One-off Yrs		
	£		
	Average Annual Benefit (excluding one-off)		
	£ +19k	Total Benefit (PV)	£
Other key non-monetised benefits by 'main affected groups' Maintaining public confidence, protecting patients, staff and NHS funds.			

1. **Key Assumptions/Sensitivities/Risks** Figures based upon baseline of 2 terminations per year, and projection that the Appointments Commission will suspend on average 3 non-executives a year

Price Base Year	Time Period Years	Net Benefit Range (NPV) £	NET BENEFIT (NPV Best estimate) £
--------------------	----------------------	-------------------------------------	---

What is the geographic coverage of the policy/option?	UK				
On what date will the policy be implemented?	Spring 09				
Which organisation(s) will enforce the policy?	Appt Commission				
What is the total annual cost of enforcement for these organisations?	£ N/A				
Does enforcement comply with Hampton principles?	Yes				
Will implementation go beyond minimum EU requirements?	No				
What is the value of the proposed offsetting measure per year?	£ N/A				
What is the value of changes in greenhouse gas emissions?	£ N/A				
Will the proposal have a significant impact on competition?	No				
Annual cost (£-£) per organisation (excluding one-off)	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">Micro</td> <td style="width: 25%; text-align: center;">Small</td> <td style="width: 25%; text-align: center;">Medium</td> <td style="width: 25%; text-align: center;">Large</td> </tr> </table>	Micro	Small	Medium	Large
Micro	Small	Medium	Large		
Are any of these organisations exempt?	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">No</td> <td style="width: 25%; text-align: center;">N/A</td> <td style="width: 25%; text-align: center;">N/A</td> </tr> </table>	No	No	N/A	N/A
No	No	N/A	N/A		

Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)
Increase of £	Decrease of £	Net Impact £

Kev:	Annual costs and benefits: Constant Prices	(Net) Present Value
------	--	---------------------

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

Suspension of non executives from health bodies – assessment of options

1. A consultation was carried out to seek views on the processes to be followed on the rare occasions when an appointee may not be able to meet the requirements of public office in health and social care and it is necessary for them to be removed from post, including circumstances when it may be appropriate to suspend someone from office.
2. It is proposed that the Secretary of State shall be given suspension powers relating to 'Health Bodies' which covers: Strategic Health Authorities, Special Health Authorities and relevant Department of Health's Arms Length Bodies³.
3. As a result of the responses received from this consultation, there has been no significant impact on the preferred policy proposal.
4. We propose to use primary legislation to establish powers to suspend chairs and/or non-executives of the bodies referred to above. The Department has already taken steps with relation to bodies for which primary legislation is not required.⁴
5. We considered 2 options:
 - Do nothing - If there are serious concerns regarding a chair or NED's fitness for office as defined by the requirements of the post, they remain in post whilst an investigation is carried out or their appointment is terminated.
 - Introduce a suspension function – If there are serious concerns regarding a chair or NED's fitness for office as defined by the requirements of the post, they can be temporarily removed from their post whilst an investigation is carried out.
6. We considered each of these options in relation to the potential cash costs of any legal challenge, investigation and for a replacement whilst an individual is suspended. We also considered some of the less quantifiable costs/benefits around performance and reputation. A cost benefit analysis is presented on page 7.
7. The do nothing option entails that in any given case of alleged impropriety there will be two potential courses of action – either the individual will remain in post or their appointment will be terminated. The IA assumes that on average two non-executives are removed from post and one remains in place each year.

³ Special Health Authorities: Health and Social Care Information Centre, National Institute for Health and Clinical Excellence, National Patient Safety Agency, National Treatment Agency, NHS Blood and Transplant, NHS Business Services Authority, NHS Institute for Innovation and Improvement, NHS Litigation Authority, NHS Professionals.

Arms Length Bodies: Monitor, Standing Advisory Committees, Care Quality Commission, Human Tissue Authority, Health Protection Agency, Human Fertilisation and Embryology Authority, Administration of Radioactive Substances Advisory Committee, Advisory Board on the Registration of Homeopathic Products, British Pharmacopoeia Commission, Commission on Human Medicines, Herbal Medicines Advisory Committee, Postgraduate Medical Education and Training Board, Appointments Commission, Alcohol Education and Research Council

⁴ Removing or suspending chairs and non-executives of primary care trusts and trusts from office: feedback on the consultation to introduce powers to suspend http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_084755

Option 1 Do nothing – individual remains in post or their appointment is terminated

Individual Remains in post

8. It is unlikely that there would be any cash costs in the short term, however there is a risk that the alleged underperformance of the individual, if real, could continue and damage the organisation. Issues may remain unresolved and build up contributing to an untoward incident occurring as a result of continued and unchecked malpractice and/or poor performance. This would ultimately entail significant costs down the line.

Power of termination is used to remove an individual from post

9. There is a risk that a decision will be made before all evidence has been considered and which is not based on a thorough investigation and this could lead to mistakes and legal challenge, as well as appearing draconian. Termination also can take time and money to implement, which means the individual may not be removed from the position as quickly as may be desirable to address service and public concerns. There is a risk of negative perceptions from within and outside of the trust which may put off potential high calibre candidates from applying for non-executive positions in the future.

Option 2 Introduce new powers to suspend non-executives of health bodies

10. The Appointments Commission is well placed to appoint an interim non-executive for the duration of the suspension if needed, so there should be limited risks associated with continuity on the performance of the organisation during the period of suspension. Legal challenge is much less likely as there will have been an opportunity for any decision to terminate an appointment to be thoroughly investigated and considered. Costs will be associated with the investigation itself and there will be a cost to pay for a replacement during the period of suspension, if required. Benefits will be realised from effectively managing public perceptions of and relationships with the organisation.

11. A full cost/benefit evaluation will be carried out as part of the policy review process 18 months after the proposed suspension function comes into force.

12. The following table summarises the potential impacts of taking forward each of two options to address the current situation.

	Impact upon Public perceptions	Impact upon Performance	Risk of Legal challenge	Risk of Investigation	Replacement Cost
One –do	Individual remains in post				

	The public perception that “nothing was being done” could be damaging to the organisation	The questions in relation to the individuals’ performance may be related to financial management and poor practice could continue. It is possible – but probably unlikely – that the individual could cause damage to the organisation. which could prejudice any investigation	No – except as a result of poor performance / untoward incident	No – except as a result of subsequent poor performance / untoward incident	No
Power of termination used to remove an individual from post					
	Appear draconian Too slow – does not respond to needs of service / public concerns. Termination is a very resource hungry process	Too slow – does not respond to needs of service / public concerns.	Significant, given risk that a quick decision, not founded on full investigation and assessment of information, could lead to mistakes and legal challenge	Costs of investigation e.g. legal advice, audit, employing an Independent Assessor, remuneration committee etc	Cost of replacement to cover for the individual
Two – introduce suspension	Benefits of more effectively managing public perceptions of and relationships within the organisation	Perceived unwarranted suspensions and the disruption in continuity could result in a diminished performance of the board in the short term However, providing a good replacement when this is necessary should minimise this	Unlikely given due process and investigation	Costs of investigation e.g. legal advice, audit, remuneration committee etc	Additional costs to fund a replacement during the period of suspension

Potential impacts associated with option 2 relative to option 1:

	Impact upon Public perceptions	Impact upon Performance	Risk of Legal challenge	Investigation	Replacement
--	---------------------------------------	--------------------------------	--------------------------------	----------------------	--------------------

	Impact upon Public perceptions	Impact upon Performance	Risk of Legal challenge	Investigation	Replacement
<i>Option Two – introduce suspension</i>	Neutral/Positive	Neutral/Positive: reduced risk of poor performance being allowed to continue likely to outweigh risk to continuity.	Reduced	Moderately costly	Costly

		Costs & (negative) Benefits						
	Expected number per year	Public perception / Media handling	Performance	Legal challenge	Investigation	Replacement	Total	
Option 1 - Do nothing								
		1 full time staff x 3 months (incurred during period and paid later)	6 months loss of value (equal to cost) plus 10% risk of costs of £100,000		500 per day x 30 days			
	1	15,000	17,000		15,000		47,000	
		1 half time staff x 3 months	3 months loss of value (continuity)	10% risk of legal fees / settlement of 50,000	500 per day x 30 days			
	2	7,500	3,500	5,000	15,000		62,000	
Option 2 - Introduce power to suspend								
		1 half time staff x 1 month	6 months loss of value (continuity)	5% risk of legal fees of 50,000	500 per day x 30 days	For chair, NED would step up. For NED no replacement. 6 months times £6,000		
	3	2,500	7,000	2,500	15,000	3,000	90,000	
Benefit of option 2 over and above option								
		22,500	3,000	2,500	0	-9,000	19,000	

13. Currently, the Appointments Commission only make between one and three terminations each year. It is unlikely that they would suspend a significantly higher number. Terminations average two per year and for the purposes of the cost benefit analysis and IA we anticipate that suspensions will be 50% higher than this.

Conclusion

14. Reflecting on the cost benefit analysis, although suspension in some cases will introduce a cost of paying for a replacement for the duration of suspension, it is anticipated that option 2 will reduce the cost of media and departmental handling associated with 'knee jerk' terminations and potential associated costs of handling incidents that may arise as a result of the individual remaining in post. It also reduces the risk of legal challenge costs as a decision to terminate an appointment will have been reached after a full investigation.

15. It is envisaged that the benefits of maintaining public confidence, protecting patients, staff and NHS funds will outweigh the extra remuneration costs of appointing a temporary replacement.

Related publications

1. Adding value to a 21st century Health Service: A review of the NHS public appointments process.
2. Removing or suspending chairs and non-executives of Primary Care Trusts and NHS trusts from office: Consultation on introducing powers of suspension. (Launch date on DH web - 24 January 2008, Closing date - 6 March 2008)
3. Removing or suspending chairs and non-executives of Primary Care Trusts and NHS trusts from office: Feedback on consultation on introducing powers of suspension. (Published on DH web on 13 May 2008 and attached as an Annex below.)
4. Developing the NHS Performance Regime (published by DH on 4 June 2008)
5. Making and managing public appointments - a guide for departments forth edition February 06.

HEALTH IMPACT ASSESSMENT

1. A health impact assessment has not been carried out because the policy being consulted on does not impact directly on health care in the manner covered by the health impact assessment screening process.

EQUALITY IMPACT ASSESSMENT

Summary of the purpose and aim of the proposed policy

1. Non-executives make an invaluable contribution to the effective management of the NHS and we want to ensure that they continue to be able to do so. On rare occasions, an appointee is not able to meet the requirements of public office in health and social care and it is necessary for them to be removed from their post.
2. The Appointments Commission has long had the power to terminate appointments. However, there are also circumstances when the Appointments Commission should be able to suspend someone from office - for example, where there is an allegation of fraud or other impropriety that would require the individual to be suspended in order to protect patients or public funds. Suspension would be used as a temporary measure pending further investigations or the completion of any termination process.

Assessment

Race, gender, transgender, age, religion or belief, and sexual orientation,

3. The proposed policy is not likely to impact differently on people on grounds of their race, gender, transgender, age, religion or belief, and sexual orientation. The guidance supporting the policy sets out a clear process for suspending an individual, which should be followed regardless of who the individual is or of their background. There is no reason for deviation from this guidance as a result of an individual's race, gender, transgender, age, religion or belief, or sexual orientation. All cases should be treated in line with this guidance.
4. The policy will be implemented by the Appointments Commission. The Department of Health holds four performance review meetings a year with the Commission where they are required formally to report progress against activity. This includes evidence of outcomes and the current diversity profile for appointments they make to both local NHS organisations and national health sector bodies.
5. The Appointments Commission are developing their own Single Equality Scheme under the guidance of their Equality and Diversity Group. The DEAG is made up of chairs and non-executive members of NHS boards and ALBs.
6. In relation to disability the Appointments Commission operate an Interview Access Scheme (IAS) for disabled people for local NHS appointments and they write to the local voluntary sector when recruiting to those posts to ensure that as many people as possible are aware of the appointment opportunities. In addition, candidates are asked to declare whether they are disabled and the position is monitored in relation to those appointed on a quarterly basis. Information is published in the Appointments Commission annual report and is provided to OCPA for collation across Whitehall to be included in the Commissioners Annual Report.

7. There is no upper or lower age limit on the age of office holders. To apply a limit would contravene Age discrimination legislation introduced in 2007. All appointments are based on the competence of the candidates and are regardless of age.
8. Over recent years, no individuals from any minority groups have featured in those cases where individuals have been found not to meet the requirements of public office in the NHS, for example, those who have had their position terminated. There is, therefore, no reason to believe that the introduction of powers of suspension will impact on one group more than any other.
9. We have considered whether there are opportunities to promote equality of opportunity that could be taken if the proposed policy were adjusted. We have concluded that nothing additional is required, because considerable work has already been undertaken to promote equality in this field, which will also relate to this policy. Including the Appointments Commission and DH document 'Equality and Human Rights in the NHS: A guide for NHS Boards', which was published in 2006. This sets out Board responsibilities for equality and human rights.

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_062906

10. The following table illustrates July 2008 data on the proportion of minority groups appointed by the Appointments Commission.

Total number of appointments	2895
% of board members (including chairs) who are women	36.75
% of board members (including chairs) from black and ethnic minorities	11.40
% of board members (including chairs) who are disabled	4.18

11. To enable us to judge the likely impact of the proposed policy, we will be carrying out a review of the impact of the approach after 18 months.
12. The proposed policy is thought likely to help to eliminate unjustifiable discrimination. The reasons for this are that it will introduce a new process through which a decision to suspend an individual can be made. It provides the opportunity to make an interim decision – sometimes described as 'a neutral act' - and to allow further investigations and /or a termination process to be properly conducted.
13. The proposed policy is thought likely to help to eliminate harassment because it will provide an opportunity for a more robust and balanced assessment of a case.
14. The proposed policy is thought likely to promote good relations between people of different groups. The reasons for this are it will provide the opportunity for a process through which a fair and transparent investigation can be carried out.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	No	No
Small Firms Impact Test	No	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	No	No

Annexes