

EXPLANATORY MEMORANDUM TO

THE HEALTH AND CARE ACT 2022 (CONSEQUENTIAL AND RELATED AMENDMENTS AND TRANSITIONAL PROVISIONS) REGULATIONS 2022

2022 No. 634

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care (“DHSC”) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to make certain amendments to various secondary legislation to give effect to the Health and Care Act 2022 (“the 2022 Act”).
- 2.2 Section 182 of the 2022 Act confers a power on the Secretary of State to make regulations that make provision consequential on that Act. Section 183 provides powers to make consequential, supplementary, incidental, transitional or saving provision and different provision for different purposes. This instrument makes consequential and transitional amendments to and some revocations of, a number of statutory instruments to ensure that the changes set out the 2022 Act are implemented in secondary legislation. It also makes related amendments to the National Health Service Trusts (Membership and Procedure) Regulations 1990 (in reliance on the power in paragraph 4(1) of Schedule 4 to the National Health Service Act 2006 (“NHS Act 2006”), primarily to ensure that functions currently delegated to the NHS Trust Development Authority (the “TDA”) will be conferred on NHS England following the TDA’s abolition.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales, Scotland and Northern Ireland.
- 4.2 The territorial application of this instrument is England and Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

- 5.1 As this instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 Section 182 of the 2022 Act allows the Secretary of State to make provision consequential on that Act. Section 183 provides powers to make consequential, supplementary, incidental, transitional or saving provisions and different provisions for different purposes.

- 6.2 The 2022 Act, amongst other things, puts in place reforms to the NHS and its structures. The 2022 Act will establish new statutory bodies known as integrated care boards (“ICBs”). It will also abolish a number of NHS bodies and transfer the functions and responsibilities from those abolished statutory bodies to their relevant successors. The 2022 Act also creates certain offences against virginity testing and hymenoplasty. As further detailed in section 7 below, consequential amendments are required to various secondary legislation in order to implement the changes being made by the 2022 Act.
- 6.3 Paragraph 4, Schedule 4 of the NHS Act 2006 gives the power to the Secretary of State to make regulations with respect to (amongst other things) the qualifications for and the tenure of office of the chairman and directors of an NHS trust and the persons by whom the directors and any of the officers must be appointed and the manner of their appointment. As section 59 of the 2022 Act replaces the Secretary of State with NHS England as having the power to appoint the chair of the board of directors of an NHS trust, paragraph 4, Schedule 4 of the NHS Act 2006 provides the enabling power for the other related amendments to the National Health Service Trusts (Membership and Procedure) Regulations 1990 transferring functions of the Secretary of State (including functions formerly delegated to the TDA) to NHS England.

7. Policy background

What is being done and why?

- 7.1 This instrument makes certain amendments to secondary legislation to reflect the 2022 Act. This section deals with the policy background for each category of amendments, as follows.

Establishment of integrated care boards and the abolition of clinical commissioning groups

- 7.2 The 2022 Act creates new statutory bodies known as ICBs to replace clinical commissioning groups (“CCGs”). The National Health Service (Areas of Integrated Care Boards: Appointed Day) Regulations 2022(SI 2022/632) appoint the 1st July as the day on which any remaining CCGs will be abolished.
- 7.3 CCGs are statutory bodies established under Chapter A2, Part 2 of the NHS Act 2006. CCGs’ main functions relate to the commissioning of NHS secondary care services. ICBs will be established by NHS England by order and will replace CCGs as the main commissioners of secondary care, as well as commissioning other health and care services. The responsibilities, property, rights and/or liabilities of former CCGs will be transferred to its successor ICB. Amendments to secondary legislation will be made by this instrument to reflect these changes, to ensure the operability of existing legislation and the smooth transfer of functions from CCGs to ICBs.

The abolition of Monitor and transfer of functions to NHS England

- 7.4 Section 33 of the 2022 Act abolishes Monitor. Monitor is an independent regulator for NHS healthcare services in England. It was established as the Independent Regulator of NHS Foundation Trusts under the Health and Social Care (Community Health and Standards) Act 2003 and the Health and Social Care Act 2012 changed its name to Monitor and conferred additional functions such as the licensing of providers of NHS healthcare services. Monitor’s functions will be taken over by NHS England. This instrument will make consequential amendments to existing secondary legislation to reflect this.

The abolition of NHS Trust Development Authority and transfer of functions to NHS England

- 7.5 The TDA is a Special Health Authority established by the Secretary of State by order under section 28 of the NHS Act 2006 and was primarily established to manage performance and development of English NHS trusts and other functions as directed by the Secretary of State. Section 36 of the 2022 Act abolishes TDA. TDA's functions will be taken over by NHS England and so this instrument will make consequential amendments to existing secondary legislation to reflect this.
- 7.6 TDA currently exercises functions with Monitor (the regulator of NHS foundation trusts) and with NHS England under the non-statutory umbrella of NHS England and Improvement (NHSE/I) and so the policy intention is to put this on a legal footing.

The abolition of Local Education and Training Boards and transfer of functions to Health Education England

- 7.7 Local Education and Training boards ("LETBs") are committees of Health Education England ("HEE") established under the Care Act 2014 to exercise HEE's functions at a local level. LETBs plan and commission education and training and quality assure the education and training given to local providers of NHS services.
- 7.8 The policy rationale for abolishing LETBs as committees of HEE is to enable HEE to develop and adapt its own flexible regional operating model to best deliver its objectives over time. Workforce planning will continue to be undertaken at local and regional level but in a more flexible manner. Consequential changes are made by this instrument to reflect LETB's abolition.

The new virginity testing and hymenoplasty offences

- 7.9 Virginity testing is a gynaecological examination conducted under the belief that it determines whether a woman or girl has had vaginal intercourse. It has no scientific merit or clinical indication. Hymenoplasty is an invasive medical procedure to reconstruct a hymen. It is linked to virginity testing and has no clinical or medical need. Both procedures are a violation of human rights, are often conducted coercively and have an adverse impact on women and girls' physical, psychological and social wellbeing. The 2022 Act will make it a UK-wide criminal offence to carry out, offer or aid and abet virginity testing and hymenoplasty and so consequential amendments to legislation will accordingly be made by this instrument.

Other consequential and transitional provisions and related amendments

- 7.10 Other amendments need to be made by this instrument by virtue of changes made by the 2022 Act. For example this instrument:
- (a) amends secondary legislation where the 2022 Act repeals and/or replaces the relevant sections in the NHS Act 2006 that provide the enabling powers for or are referenced in secondary legislation;
 - (b) amends the state indemnity schemes under the Clinical Negligence Scheme for Trusts (SI 2015/559), the Liabilities to Third Parties Scheme (SI 2018/756) and the Property Expenses Scheme (SI 2018/757) to reflect the restructuring of NHS bodies as stated above;
 - (c) makes amendments and transitional provision to the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 to reflect various changes made by the 2022 Act; and

- (d) amends the National Health Service Trusts (Membership and Procedure) Regulations 1990 with changes which are related to the 2022 Act (for instance section 59 of the 2022 Act gives the power to appoint the chair of the board of directors of NHS trusts to NHS England, rather than the Secretary of State).

Revocations

- 7.11 This instrument also revokes certain secondary legislation that relate to CCGs in consequence of the abolition of CCGs.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

- 9.1 This instrument does not consolidate any instruments.

10. Consultation outcome

- 10.1 There is no specific duty to consult on the policy underpinning this instrument. However, NHS England was informally consulted.

11. Guidance

- 11.1 Guidance has not been produced for this instrument as this instrument makes consequential amendments to secondary legislation to give full effect to the 2022 Act.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There will be some impact on the public sector as we are seeking to introduce consequential amendments to existing UK Government and Devolved legislation relating to several public sector bodies.
- 12.3 A full Impact Assessment has not been prepared for this instrument because this instrument only introduces amendments and transitional provisions that are consequential on the 2022 Act. Therefore, we rely on the impact assessment produced for the 2022 Act.
- 12.4 A full Impact Assessment has been produced in relation to the provisions of the 2022 Act and a copy is available at: <https://www.gov.uk/government/publications/health-and-care-bill-combined-impact-assessments>.

13. Regulating small business

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

14. Monitoring & review

- 14.1 No specific monitoring or review will be undertaken, beyond that which is already undertaken as part of DHSC's routine data collection.
- 14.2 The instrument does not include a statutory review clause because this instrument only introduces amendments and transitional provisions that are consequential on the 2022 Act.

15. Contact

- 15.1 Naveed Khan at the Department of Health and Social Care (telephone: 01132546104; email: Naveed.khan@dhsc.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Philippa Baker, Deputy Director, Legislation Programme Team, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Edward Argar MP, the Minister of State for Health at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.