

EXPLANATORY MEMORANDUM TO
THE HEALTH AND CARE ACT 2022 (CONSEQUENTIAL AND RELATED
AMENDMENTS) REGULATIONS 2023

2023 No. 306

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care and is laid before Parliament by Command of His Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The purpose of this instrument is to make certain amendments to secondary legislation to give effect to provisions of the Health and Care Act 2022 (c. 31) (“the 2022 Act”).
- 2.2 This instrument will make changes consequential to the commencement of the provisions of the 2022 Act which replace the NHS national tariff payment system (“the tariff”), with the NHS payment scheme (section 77 of and Schedule 10 to that Act). It will amend the National Health Service (Licensing and Pricing) Regulations 2013 (S.I. 2013/2214) to remove provisions setting the definition of “relevant providers” and the level of objection percentages relating to consultation on the tariff and will amend the National Health Service (Charges to Overseas Visitors) Regulations 2015 (S.I. 2015/238) (the “OV Charging Regulations”) so that the process for setting charges to overseas visitors for health care references the NHS payment scheme, rather than the tariff.
- 2.3 This instrument also amends the Welsh language versions of the Public Health Wales National Health Service Trust (Membership and Procedure) Regulations 2009 (S.I. 2009/1385 (W. 141)) and the Local Health Boards (Directed Functions) (Wales) Regulations 2009 (S.I. 2009/1511 (W. 147)) to correct errors in amendments previously made by the Health and Care Act 2022 (Consequential and Related Amendments and Transitional Provision) Regulations 2022 (S.I. 2022/634). The amendments were consequential on the establishment of integrated care boards and the abolition of clinical commissioning groups (see section 19 of the 2022 Act). These Regulations will therefore be issued free of charge to all known recipients of the instruments containing the errors.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Joint Committee on Statutory Instruments reported the Health and Care Act 2022 (Consequential and Related Amendments and Transitional Provision) Regulations 2022 (S.I. 2022/634) for defective drafting in the Tenth Report of Session 2022–23 in relation to errors contained in amendments made to the Welsh language versions of two statutory instruments. The Department acknowledges this, and this instrument will correct these errors.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction it forms part of the law of) is England and Wales.
- 4.2 The territorial application of this instrument (that is, where it produces a practical effect) is England and Wales.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 The 2022 Act amends the Health and Social Care Act 2012 (c. 7) (“the 2012 Act”) to replace the tariff, which set out the prices and rules for determining prices payable by NHS commissioners to providers for providing NHS-funded healthcare, with the NHS payment scheme.
- 6.2 As a result, the two sets of regulations which include reference to the tariff require consequential amendments. Section 182 of the 2022 Act allows the Secretary of State to make provision consequential on that Act. Some of the amendments to the OV Charging Regulations potentially go further than provision that is purely consequential. The power at section 175 of the National Health Service Act 2006, which allows for regulations to be made prescribing NHS charges, and the supplementary powers at section 272 of that Act, have therefore also been used to make these provisions.
- 6.3 The Health and Care Act 2022 (Consequential and Related Amendments and Transitional Provision) Regulations 2022 (S.I. 2022/634), made amendments to the English and Welsh language versions of two statutory instruments which were consequential upon the establishment of integrated care boards and the abolition of clinical commissioning groups, following commencement of section 19 of the 2022 Act. Section 182 of that Act was relied upon for that purpose. It subsequently became clear that the amendments to the Welsh language versions contained errors. Section 182 of the 2022 Act is again relied upon to correct those errors, so that the provisions in the English and Welsh language versions of the two statutory instruments consistently and accurately reflect the intended position.

7. Policy background

What is being done and why?

- 7.1 The tariff sets out prices and rules for determining prices payable by NHS commissioners to providers for providing NHS-funded healthcare. Upon the full commencement of section 77 of and Schedule 10 to the 2022 Act, which will occur on 1st April 2023, the tariff will be replaced by the NHS payment scheme.
- 7.2 The NHS payment scheme will set rules around how commissioners establish prices to pay providers for healthcare services for the purposes of the NHS, or public health services which are commissioned by an integrated care board, or NHS England, on behalf of the Secretary of State for Health and Social Care. As well as specifying prices, under the NHS payment scheme NHS England will have power to set rules determining the price payable by a commissioner for NHS health care services and public health services, for example by publishing a formula to consider local factors.

- 7.3 **National Health Service (Licensing and Pricing) Regulations 2013 (S.I. 2013/2214)** – this set of regulations includes two provisions relating to the consultation on the tariff. As the tariff provisions will no longer be in force, the references can be removed. Similar provisions have already been put in place for the NHS payment scheme under S.I. 2022/1189 and S.I. 2023/53.
- 7.4 **National Health Service (Charges to Overseas Visitors) Regulations 2015 (S.I. 2015/238)** – charges to overseas visitors who are purchasing NHS healthcare services are currently determined by reference to the tariff. They will now need to be determined by reference to the NHS payment scheme.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.5 **National Health Service (Licensing and Pricing) Regulations 2013 (S.I. 2013/2214)** – in order to be published, consultation was required to be carried out on the tariff with relevant providers and clinical commissioning groups. Those relevant providers and clinical commissioning groups were able to object to the proposals. These regulations determined the definition of relevant providers and what the objection percentages were which would require the tariff proposals to be reassessed, when consulting.
- 7.6 **National Health Service (Charges to Overseas Visitors) Regulations 2015 (S.I. 2015/238)** - these regulations allow NHS Providers to determine the charges to overseas visitors purchasing NHS healthcare services.
- 7.7 **Welsh language text amendments in Welsh legislation** - as noted above, this instrument contains amendments to the Welsh language versions of the Public Health Wales National Health Service Trust (Membership and Procedure) Regulations 2009 (S.I. 2009/1385 (W. 141)) and the Local Health Boards (Directed Functions) (Wales) Regulations 2009 (S.I. 2009/1511 (W. 147)) to ensure consistency with the English language version of the legislation.

Why is it being changed?

- 7.8 The Regulations are being consequentially amended in preparation for the abolition of the tariff and the commencement of the NHS payment scheme on 1st April 2023.

What will it now do?

- 7.9 As the tariff will be abolished, the provisions relating to consultation on the tariff in the National Health Service (Licensing and Pricing) Regulations 2013 (S.I. 2013/2214) will be redundant and so are being revoked. It is intended that the obligations under the National Health Service (Charges to Overseas Visitors) Regulations 2015 (S.I. 2015/238) will continue to operate as previously, but amendments have been made to the provision in those regulations in relation to calculating the charges for overseas visitors, as these will now be calculated based on the NHS payment scheme rather than the tariff.

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 other instrument.

10. Consultation outcome

10.1 There is no statutory requirement to consult on the amendments made by this instrument.

11. Guidance

11.1 Guidance for the NHS payment scheme will be published by NHS England in preparation for the commencement of the scheme on 1st April 2023.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because of low or no impact to business.

12.4 A full Impact Assessment has been produced in relation to the provisions of the 2022 Act and a copy is available at: 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 The implementation of this legislation will be monitored and reviewed by the Department of Health and Social Care.

15. Contact

15.1 James Richardson at the Department of Health and Social Care, Telephone: 0207 210 6336 or email: james.richardson@dhsc.gov.uk can be contacted with any queries regarding the instrument.

15.2 Ed Jewell, Deputy Director for NHS Finance, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

15.3 Will Quince MP, Minister of State for Health and Secondary Care at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.