

EXPLANATORY MEMORANDUM TO
THE NATIONAL HEALTH SERVICE (NOTIFIABLE RECONFIGURATIONS AND
TRANSITIONAL PROVISION) REGULATIONS 2024

2024 No. 15

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 His Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument sets out which reconfigurations of NHS services will be subject to a new notification duty. To ensure a smooth introduction to the new notification process, the instrument provides that the notification duty is not intended to apply to reconfigurations that are already being consulted on with the local authority at the time this instrument and the notification duty comes into force. “Reconfiguration of NHS services” is defined in para 6.2 below.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 DHSC relies on section 13 of the Interpretation Act 1978 in relation to section 46 of and Schedule 6 to the Health and Care Act 2022 (“the 2022 Act”) in so far as those provisions insert paragraph 2 of Schedule 10A into the National Health Service Act 2006 (“the 2006 Act”). As discussed in more detail below, paragraph 2(1) of Schedule 10A sets out a duty on NHS commissioning bodies to notify the Secretary of State of notifiable reconfigurations of NHS services and paragraph 2(2) provides that the description of what is a notifiable reconfiguration of NHS services will be specified in regulations.
- 3.2 DHSC considers that it is necessary and expedient to rely on section 13 of the Interpretation Act 1978 in order to make regulations under paragraph 2(2) of Schedule 10A to the 2006 Act in advance of paragraph 2 coming into force. This is because it is necessary for regulations setting out what a notifiable reconfiguration is to come into force at the same time so that the duty to notify the Secretary of State of a notifiable reconfiguration under paragraph 2(1) of Schedule 10A to the 2006 Act is operable.
- 3.3 Paragraph 2 of Schedule 10A to the 2006 Act comes into force on 31st January 2024, in accordance with the Health and Care Act 2022 (Commencement No. 8 and Transitional and Saving Provision) Regulations 2023 (S.I. 2023/1431). This coincides with the coming into force of this instrument.

4. Extent and Territorial Application

- 4.1 The extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is England.

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 Schedule 10A to the 2006 Act (as inserted by Schedule 6 to the 2022 Act) provides the Secretary of State with intervention powers in relation to the reconfiguration of NHS services, including a new discretionary power for the Secretary of State to “call-in” and make a decision on a reconfiguration proposal. It also includes a new notification power in respect of notifiable reconfigurations.
- 6.2 Schedule 10A states that a “Reconfiguration of NHS Services” is a change in the arrangements made by NHS England or an integrated care board for the provision of NHS services where that change has an impact on – (a) the manner in which a service is delivered to individuals (at the point when the service is received by users) or (b) the range of health services available to individuals.
- 6.3 Paragraph 2(1) of Schedule 10A requires NHS England or an integrated care board (known as an NHS commissioning body) to notify the Secretary of State of a notifiable reconfiguration. Paragraph 2(2) contains a regulation-making power which allows the Secretary of State to specify the description of reconfigurations which must be notified in accordance with paragraph 2(2).
- 6.4 This instrument is the first use of the power under paragraph 2(2) of Schedule 10A to the 2006 Act. It specifies the description of reconfigurations which must be notified in accordance with paragraph 2(2) by referencing reconfigurations which must be consulted upon under the Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013 (“2013 Regulations”).
- 6.5 Part 4 of the 2013 Regulations sets out the arrangements for local authorities to scrutinise reconfigurations of NHS services in their areas and places a requirement on NHS commissioning bodies to consult a local authority in respect of certain reconfiguration of NHS services. This local scrutiny and consultation process will continue to apply in accordance with the 2013 Regulations (with some amendments made by the Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) (Amendment and Saving Provision) Regulations 2024) and will operate alongside the provisions of Schedule 10A to the 2006 Act. In essence, this instrument provides that reconfiguration proposals which NHS commissioning bodies must consult local authorities about under paragraph 23(1)(a) of 2013 Regulations will need to be notified to the Secretary of State under the new notification duty at paragraph 2(1) of Schedule 10A. This instrument, together with paragraph 2(1), sets out the duty NHS England and integrated care boards are under in respect of notifying the Secretary of State of proposed reconfigurations of NHS services.
- 6.6 This instrument also sets out the transitional arrangements in respect of reconfigurations which are already proposed at the time the notification duty comes into force.
- 6.7 Schedule 6 to the 2022 Act comes into force on 31st January 2024 (in accordance with the Health and Care Act 2022 (Commencement No. 8 and Transitional and Saving Provision) Regulations 2023). Schedule 6 inserts the relevant paragraphs of Schedule 10A into the 2006 Act and means the duty to notify will apply to NHS England and

integrated care boards from 31st January 2024. This instrument comes into force on the same date in order to facilitate the notification duty.

7. Policy background

What is being done and why?

- 7.1 Schedule 6 to the 2022 Act (by inserting Schedule 10A into the 2006 Act) introduces new powers and duties to allow the Secretary of State to have greater oversight of local reconfigurations to support their use of new intervention powers.

Explanations

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

- 7.2 Pre-commencement of Schedule 6 to the 2022 Act, the Secretary of State was only able to intervene in reconfigurations upon receiving a local authority report/referral relating to the adequacy or lack of consultation, or whether the proposal was in the interest of the health service in its area. This was set out in the 2013 Regulations. Following such a report/referral, the Secretary of State had a discretionary power to take certain decisions based on the grounds of the report/referral.

Why is it being changed?

- 7.3 While the previous approach was able to help with difficult cases, reports/referrals often came very late in the process meaning the Secretary of State had to account for service changes in Parliament without having been meaningfully engaged on them.
- 7.4 The intention of the changes brought in by Schedule 6 is to support local partners to find a way forward to enable improvement to happen faster in respect of reconfigurations in the NHS and produce sustainable solutions with good democratic oversight. This includes the ability for the Secretary of State to “call-in” a proposal for reconfigurations at any stage of the development of such proposal and make a decision concerning that proposal as set out at paragraph 3 of Schedule 10A to the 2006 Act. This power comes into force at the same time as the notification duty at paragraph 2. The notification of reconfigurations will help to ensure the Secretary of State is aware of reconfigurations of interest and help to inform the use of the “call-in” power.

What will it now do?

- 7.5 This instrument is intended to support the Secretary of State with use of their powers to intervene in reconfigurations and also aims to minimise the additional administrative burden on NHS commissioning bodies to notify reconfigurations to the Secretary of State by aligning notifiable reconfigurations with the existing duty for those responsible for a reconfiguration to consult a local authority on it. NHS commissioning bodies (and NHS trusts and NHS Foundation Trusts) are already familiar with the operation of the 2013 Regulations and the need to consult local authorities in respect of reconfiguration proposals under regulation 23. Therefore, this instrument builds on that approach and provides that a “notifiable” reconfiguration for the purposes of paragraph 2(1) of Schedule 10A to the 2006 Act can be determined on the basis of whether it would need to be consulted on under regulation 23(1)(a) of 2013 Regulations. This approach provides some continuity for the system, minimises the burden on NHS commissioning bodies and has been developed alongside

stakeholder engagement. It will also ensure that the Secretary of State is notified of reconfiguration proposals of most interest.

- 7.6 Notifications will provide early information to assist the Secretary of State in using their intervention powers proportionately and the DHSC in handling any requests received from individuals and organisations that may ask the Secretary of State to consider using their “call-in” power.
- 7.7 The Secretary of State will be made aware of the most complex and challenging reconfigurations (substantial reconfigurations) at an earlier stage via notifications from NHS commissioning bodies which will be submitted to the DHSC (in accordance with the duty under paragraph 2(1) of Schedule 10A to the 2006 Act. A notification will not automatically lead to a Secretary of State intervention and is intended to support ministerial oversight of the system. Most reconfigurations will continue to be managed at a local level and will not require ministerial intervention.
- 7.8 To ensure a smooth introduction of the new notification process, the notification duty is not intended to apply to reconfigurations that are already being consulted on with the local authority at the time this instrument and the notification duty comes into force. Therefore, a notifiable reconfiguration will not include a reconfiguration where, prior to 31st January 2024, an NHS commissioning body has begun consultation with a local authority on such a proposal in accordance with regulation 23(1)(a) of the 2013 Regulations.

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 instruments.

10. Consultation outcome

- 10.1 There is no statutory duty to consult on the policy underpinning this instrument and no consultation has been held. Nonetheless, engagement exercises have been undertaken throughout the development of the policy. Since late 2021, the DHSC have proactively engaged wider Department colleagues, HMT, NHS England, and the Independent Reconfiguration Panel as members of a monthly Steering Group. In July 2023, the DHSC extended membership to the Local Government Association, the Centre for Governance and Scrutiny and an NHS Commissioning Body. The Steering Group has overseen the design of policy, advised on feasibility of implementation options, and assisted with stakeholder management. The DHSC have separately been engaging with the Department for Levelling Up, Housing and Communities.

11. Guidance

- 11.1 The DHSC will publish statutory guidance on the notification duty as required by paragraph 7 of Schedule 10A to the 2006 Act.
- 11.2 Accompanying guidance for local authorities will be published simultaneously with an update to the DHSC’s 2014 Local Authority Health Scrutiny guidance. NHS England is expected to publish further guidance for NHS bodies with an update to the 2018 Planning, Assuring and Delivering Service Change for Patients guidance.

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 NHS commissioning bodies will be required to notify the Secretary of State of notifiable reconfigurations, however DHSC expects the impact to be minimal as a notifiable reconfiguration is aligned with the existing duty for those responsible for a reconfiguration to consult a local authority on it.
- 12.4 A full Impact Assessment has not been prepared for this instrument because minimal impact on bodies is foreseen and the instrument does not lead to any bodies incurring a high cost.
- 12.5 An Impact Assessment was published in respect of the 2022 Act on 4 November 2022 and is available [here](#)¹. This Impact Assessment covered the intervention powers provisions contained within Schedule 6 (which inserts Schedule 10A to the 2006 Act) and the policy associated with those powers.

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 DHSC.

15. Contact

- 15.1 Francesca Day at the Department of Health and Social Care. Telephone: 02079725906 or email: Francesca.Day@dhsc.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Jennifer Benjamin, Deputy Director for NHS Provider Policy, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Andrew Stephenson MP, the 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.

¹ <https://www.gov.uk/government/publications/health-and-care-act-2022-combined-impact-assessments>