

## EXPLANATORY MEMORANDUM TO

### THE LOCAL AUTHORITY (PUBLIC HEALTH, HEALTH AND WELLBEING BOARDS AND HEALTH SCRUTINY) (AMENDMENT AND SAVING PROVISION) REGULATIONS 2024

2024 No. 16

#### 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.

#### 2. Purpose of the instrument

- 2.1 This instrument makes provision in relation to the function of local authorities in scrutinising proposed changes to health services in their areas. This includes removing the ability of a local authority to report/refer a reconfiguration of NHS services to the Secretary of State and to update the process for local authority scrutiny of reconfigurations to reflect new powers of the Secretary of State to intervene in reconfigurations. “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 None.

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

#### 6. Legislative Context

- 6.1 The Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013 (“2013 Regulations”) allow for the review and scrutiny by local authorities of matters relating to the health service in their areas. This includes the scrutiny of proposals for substantial development of the health service in the area of a local authority or substantial variation in the provision of such services often known as reconfigurations or service changes.
- 6.2 Schedule 6 to the Health and Care Act 2022 Act (“the 2022 Act”) inserts Schedule 10A into the National Health Service Act 2006 (“the 2006 Act”). This Schedule provides the Secretary of State with new intervention powers, including a new discretionary power for the Secretary of State to call in and make a decision on a reconfiguration proposal. The Secretary of State will be able to use this “call-in” power at any stage in the development of a reconfiguration. The Secretary of State will exercise this power by issuing a direction to NHS England or an integrated care

board (known as an NHS commissioning body) calling in any proposal by the body for the reconfiguration of NHS services. This will allow the Secretary of State to consider a proposed reconfiguration and take a decision. The “reconfiguration of NHS services” is defined in Schedule 10A as “a change in the arrangements made by an NHS commissioning body for the provision of NHS services where that change has an impact on (a) the manner in which a service is delivered to individuals (as the point when the service is received by users), or (b) the range of health services available to individuals.

- 6.3 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.
- 6.4 With the coming into force of Schedule 6 (which inserts paragraph 3 of Schedule 10A to the 2006 Act) it is necessary to ensure that the Secretary of State does not have any potential overlap or conflict of powers in respect of reconfiguration proposals. Therefore, this instrument amends the 2013 Regulations to remove the ability of a local authority to report/refer a reconfiguration to the Secretary of State. This allows the Secretary of State to “call in” reconfiguration proposals and make decisions in line with Schedule 10A to the 2006 Act without any risk that the same proposal could be the subject of a report to the Secretary of State and decision making under the 2013 Regulations.
- 6.5 There is no intention to remove the local scrutiny role of the health overview and scrutiny committee or the requirement to consult with them in respect of reconfigurations as provided for in the 2013 Regulations. The changes to the 2013 Regulations concern how the Secretary of State may be involved in the process and what NHS England and integrated care boards will need to consider when discharging their duties during any “call in” by the Secretary of State.
- 6.6 This instrument also allows for a clear transition for proposals of reconfigurations which have been reported to the Secretary of State under the 2013 Regulations local scrutiny process at the time this instrument comes into force.

## **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.
- 7.2 One of the key policy objectives of the new intervention powers in Schedule 10A to the 2006 Act was to allow the Secretary of State to have more flexible intervention powers in respect of local reconfigurations.

### *Explanations*

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

- 7.3 The Secretary of State’s discretionary power to take certain decisions based on the grounds of a report/referral made under the 2013 Regulations was able to assist with

difficult cases. However, reports/referrals often came very late in the process meaning Ministers had to account for service changes in Parliament without having been meaningfully engaged on them.

Why is it being changed?

- 7.4 The intention of the changes brought in by Schedule 10A to the 2006 Act, 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. Most reconfigurations will continue to be managed at a local level and will not require ministerial intervention.

What will it now do?

- 7.5 This instrument makes amendments to Part 4 of the 2013 Regulations to ensure the local scrutiny procedure operates alongside the new Secretary of State intervention powers (Schedule 10A to the 2006 Act). Regulation 2 inserts a provision into regulation 23 of the 2013 Regulations which provides that a responsible person (namely NHS England or an integrated care board) must consider any direction given to it under paragraph 3 of Schedule 10A to the 2006 Act when discharging its duties under regulation 23. This is important because paragraph 4 of Schedule 10A to the 2006 Act provides that if a direction has been given to “call-in” a reconfiguration proposal, the NHS commissioning body (namely NHS England or an integrated care board) must not take further steps in relation to a proposal except to such an extent (if any) as may be permitted by the direction. Therefore, the NHS commissioning body must consider such a direction when determining what duties, it can discharge under the 2013 Regulations during any “call-in” period.
- 7.6 This instrument removes the ability of local authorities to report/refer reconfiguration proposals to the Secretary of State under regulation 23(9) of the 2013 Regulations. Instead, it will be possible for anyone, including local authorities to request that the Secretary of State considers using their “call in” power in respect of a certain reconfiguration. This process will be set out in guidance produced under paragraph 7 of Schedule 10A to the 2006 Act.
- 7.7 Regulation 3 clarifies that the amendments to the 2013 Regulations do not apply to any proposal that has been reported to the Secretary of State by a local authority or joint overview and scrutiny committee before the new powers came into force. This is to aid a clear transition for local authorities and means that any reconfiguration proposal which has been reported to the Secretary of State prior to 31<sup>st</sup> January 2024 will continue to be considered under the current process set out in 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 new process as required by paragraph 7 of Schedule 10A to the 2006 Act.
- 11.2 The DHSC's 2014 Local Authority Health Scrutiny Guidance will be updated to reflect amendments to the 2013 Regulations and will be published simultaneously with the statutory 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 Local authorities' scrutiny responsibilities for service change (and wider scrutiny responsibilities) have not changed. Further, NHS commissioning bodies' duties to involve and consult local authorities via their health overview and scrutiny committees and the public remain in place. Where a reconfiguration has been called in, each local authority whose area the proposed reconfiguration of NHS services relates to will have an opportunity to make representations to the Secretary of State.
- 12.4 Local authorities' powers of report/referral to the Secretary of State under regulation 23(9) of the 2013 regulations have been removed. Instead of the report/referral power, local authorities (often via their health overview and scrutiny committee) and other interested parties can write to request that the Secretary of State consider calling in a reconfiguration proposal, if they feel that local resolution cannot be reached. Such a request will then be considered as set out in the statutory guidance.
- 12.5 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.
- 12.6 An Impact Assessment was published in respect of the 2022 Act on 4 November 2022 and is available [here](#).<sup>1</sup> This Impact Assessment covered the intervention powers provisions contained within Schedule 6 (which inserted 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.

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

**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](mailto: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.