EXPLANATORY MEMORANDUM TO

THE HEALTH EDUCATION ENGLAND (TRANSFER OF FUNCTIONS, ABOLITION AND TRANSITIONAL PROVISIONS) REGULATIONS 2023

2023 No. [XXXX]

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 This instrument is made under Part 3 of the Health and Care Act 2022 (the 2022 Act) to transfer the functions of Health Education England (HEE) to NHS England (NHSE) and, as a result, abolish HEE. It does this by making amendments to various items of primary and secondary legislation, and also makes transitional and savings provision.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This instrument will come into force on 1 April 2023, which may be relatively soon after it is made. This is so that the merged organisation can legally exist from the start of the financial year, meaning that only one set of Government objectives, business plan, financial allocations and accounts will be required from 2023/24, which means that efficiencies can be realised earlier.

3.2 The instrument does not create criminal offences or diminish the legal rights of any person. The instrument does not create significantly more onerous duties; rather it transfers existing functions between public bodies. Both HEE and NHSE have been consulted on the policy and on the instrument and have had adequate time and opportunity to prepare for the change.

3.3 This Explanatory Memorandum has been revised following comments received from the Secondary Legislation Scrutiny Committee to include further information on the consequences of the abolition and transfer of functions and more detailed financial information.

4. Extent and Territorial Application

4.1 Except as outlined in paragraph 4.3 below, the extent of this instrument (that is, the jurisdictions which the instrument forms part of the law of) is England, Wales, Scotland and Northern Ireland.

4.2 Except as outlined in paragraph 4.3 below, the territorial application of this instrument (that is, where the instrument produces a practical effect) is England, Wales, Scotland and Northern Ireland.

4.3 Any amendment, repeal or revocation made by these Regulations, other than that made by paragraph 12(3) of Schedule 1, has the same extent and application as the provision amended, repealed or revoked.

5. European Convention on Human Rights

5.1 The Minister of State for Health and Secondary Care Will Quince MP has made the following statement regarding Human Rights:

"In my view the provisions of the Health Education England (Transfer of Functions, Abolition and Transitional Provisions) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 Section 1H of the National Health Service Act 2006 (the NHS Act 2006), as inserted by Part 1 of the Health and Social Care Act 2012 (the 2012 Act), established NHSE as a Non-Departmental Public Body (NDPB). NHSE was given broad duties, in conjunction with the Secretary of State, to promote a comprehensive health service and to arrange and secure the provision of services for the purposes of the health service. HEE was established by Chapter 1 of Part 3 of the Care Act 2014, as the NDPB with the responsibility for the planning and delivery of education and training for health care workers.

6.2 Part 3 of the 2022 Act introduced a power for the Secretary of State to effect the transfer, by regulations, of functions from one of a list of relevant NDPBs to another. The relevant bodies listed include both HEE and NHSE. This instrument abolishes HEE and transfers its functions to NHSE.

6.3 In order to effect this transfer this instrument makes amendments to the key pieces of legislation governing the functions of HEE and NHSE, the NHS Act 2006, the 2012 Act and the Care Act 2014. It also makes a number of other consequential amendments to other relevant primary and secondary legislation, largely to ensure that references to HEE will be references to NHSE following the transfer of HEE's functions.

6.4 The instrument also makes transitional provision in relation to things done by or in relation to HEE before the transfer and provides for these to be treated as done by or in relation to NHSE. It also makes provision for references to HEE in enactments, instruments and other documents to be read as references to NHSE, and for any documents and forms printed for use in connection with transferred functions to continue to be usable, despite the transfer of those functions.

6.5 A general provision is also included allowing NHSE to undertake any action which appears to it to be necessary for the winding up of the affairs of HEE, and provision is included requiring NHSE to produce a final annual report on HEE's exercise of its functions and a final set of consolidated annual accounts for HEE.

7. Policy background

What is being done and why?

7.1 The then Secretary of State for Health and Social Care announced on 21 November 2021 that HEE, NHS Digital (the legal name of which was the Health and Social Care Information Centre) and NHSX (a joint unit of DHSC and NHSE) would merge into

NHSE1. The merger of NHS Digital into NHSE was implemented by the Health and Social Care Information Centre (Transfer of Functions, Abolition and Transitional Provisions) Regulations 2023 (S.I. 2023/98), which came into force on 1 February 2023. These Regulations implement the merger of HEE into NHSE.

7.2 HEE is an NDPB (established in the Care Act 2014) whose core function is to ensure that there is an effective system for the planning and delivery of education and training to persons working in the health service in England.

7.3 HEE's functions will be transferred to NHSE, another NDPB of DHSC, established by s.1H of the NHS Act 2006, whose core function is to arrange for the provision of services for the purposes of the health service in England. As all of HEE's functions are being transferred to NHSE, as a consequence HEE is being abolished.

7.4 The policy intention is to ensure that service, workforce and finance planning are integrated in one place at a national and local level for the NHS in England. It will simplify the national system for leading the NHS, ensuring a common purpose and strategic direction. This intends to produce a wider societal benefit in that the NHS workforce is more closely aligned to service need, with the aim of better care standards and workforce availability which could potentially minimise the impact of illness and disease and benefit the workforce.

7.5 In addition to the mergers, NHSE is undertaking a wider transformation programme. This follows the Health and Care Act 2022 which resulted in the merger of Monitor and the Trust Development Authority into NHSE, and the creation of Integrated Care Boards, which changed the balance of responsibilities between national and regional level. NHS Digital (NHSD) has also been merged with NHSE as a result of The Health and Social Care Information Centre (Transfer of Functions, Abolition and Transitional Provisions) Regulations 2023. The transformation programme is being carried out at the same time as the HEE functions are transferred to NHSE and are outside the scope of this statutory instrument.

Explanations

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

7.6 Chapter 1 of Part 3 of the Care Act 2014 established HEE and set out its functions. These were primarily exercising on behalf of the Secretary of State the function under section 1F(1) of the NHS Act 2006 to secure an effective system for the planning and delivery of education and training to health care workers. The Chapter also placed a number of duties on HEE in relation to fulfilling this function, and obligations to produce forward-looking plans in relation to the education and training of health care workers and to report on the exercise of its functions.

What will it now do?

7.7 This instrument transfers the functions of HEE to NHSE and abolishes HEE. This is achieved through substituting references to HEE with references to NHSE in relevant legislation, and through amending the functions of both bodies in legislation to operate better in the merged body.

[1] Major reforms to NHS workforce planning and tech agenda - GOV.UK (www.gov.uk) https://www.gov.uk/government/news/major-reforms-to-nhs-workforce-planning-and-tech-agenda

7.8 Following the transfer, NHSE will effectively be able to exercise all of the previous functions of HEE under the Care Act 2014, but some of the provisions relating to HEE (such as the constitutional provisions in Schedule 5 to the Care Act 2014) have been omitted as they overlap with NHSE's existing functions. The transferring functions of HEE are excluded from the scope of some of NHSE's broader duties, where it is either viewed to be inappropriate for such a duty to apply to the HEE education and training functions or where a similar duty is already imposed elsewhere.

7.9 New duties on NHSE are introduced into the NHS Act 2006 as new section 13PA (co-operation in relation to education and training functions), section 296A (arrangements with devolved authorities in relation to education and training) and an amended section 13YA (the power to provide assistance and support), to replicate duties on HEE that would otherwise be lost by the repeal of Schedule 5 to the Care Act 2014. Amendments are also made to the existing reporting and planning duties on NHSE (and those transferring from HEE), to ensure that NHSE is subject to a coherent overall set of planning and reporting obligations.

7.10 In all instances in which the instrument substitutes or inserts a reference to NHSE, it is referred to as 'NHS England' rather than its previous name of "the National Health Service Commissioning Board". The Board was renamed "NHS England" by section 1 of the 2022 Act. Certain items of secondary legislation amended in this way still contain references to NHSE by its old name of "the NHS Commissioning Board" or simply "the Board". However, under paragraph 1(3) of Schedule 1 to the 2022 Act, such references to the NHS Commissioning Board will fall to be read as references to NHS England. It is also intended that there will be another instrument implementing amendments consequential on the 2022 Act which will update the remaining references to "the National Health Service Commissioning Board" to "NHS England".

7.11 In certain items of secondary legislation there are references to HEE as a "health service body". The relevant provisions include eligibility rules for the membership of certain health care bodies. In overview, these rules provide that a person who has been removed or otherwise dismissed from certain positions in "health service bodies" is ineligible to become a member of the body the legislation establishes. In such legislation, the reference to HEE in the definition of "health service body" has been retained to ensure that those disqualification provisions continue to apply to persons removed from relevant roles in HEE. The exception to this approach is where the relevant legislation already includes a definition of "former health service body"; in such legislation, we have added HEE to this definition and removed it from the definition of "health service body". This is consistent with the approach that has been adopted in relation to the abolition of other bodies such as Monitor, Clinical Commissioning Groups and NHS Digital.

7.12 The regulations also require NHSE to prepare a final annual report on HEE's exercise of its functions (regulation 5) and to prepare a final set of consolidated annual accounts (regulation 6) for 2022/23.

7.13 Regulation 7 of the instrument includes provision to ensure NHSE is able to undertake actions considered necessary or appropriate for the winding up of the affairs of HEE. It also includes transitional provision to ensure that NHSE must (or, where appropriate, may) continue to fulfil any functions of HEE which are in progress at the time of the transfer. It also includes specific provision to state that references to HEE in enactments, instruments or other documents should be read as references to NHSE following the coming into force of the instrument, and that documents and forms

printed for use in connection with a function of HEE can continue to be used in connection with that function when it transfers to NHSE.

What are the costs and savings as a consequence of the transfer of functions?

7.14 These regulations do not directly generate significant financial savings. However, savings are expected as the transferred HEE functions are restructured as part of the wider NHSE wider transformation programme.

7.15 There are a number of one-off transition costs that will be incurred as a result of the transfer of functions from HEE to NHSE. Costs will depend on the final structure of the new merged organisation. The transition costs in cash terms are expected to be relatively small and more than offset by the discounted savings delivered over time.

7.16 Transition costs include:

- The creation of the HEE Transition Programme Office staffed by existing HEE and NHSE employees seconded to time-limited roles with a cost of approximately £1m.
- Short term consultancy to deliver the overarching design of the new workforce function – this work has ended with a cost of £1m plus VAT. There are also consultancy costs across the whole NHSE transformation programme, which are out of the scope of this statutory instrument.

7.17 Ongoing savings and efficiencies from the wider NHSE transformation programme are expected to include:

- A reduction in the total size of the new NHSE (including HEE and NHSD) of up to 40% whole time equivalent staff which will create savings of up to £400m each year which can be reinvested into frontline services, helping the NHS address waiting lists and support staff. NHS England has set an initial budget of up to £100m for voluntary redundancies and associated costs. The budget is expected to cover at least 1,000 departures, as well as associated costs, such as legal advice made available to staff. The number of departures covered by the cost will vary depending on who applies and is accepted to the scheme, and whether further schemes are run.
- Irrespective of the decision to reduce the overall size of the new organisation, the total staffing complement for corporate services across the organisations would be expected to reduce through greater economy of scale.
- Savings from not having a HEE Board – the budgeted cost of HEE's Board and support infrastructure is £1.3m pa (including the annual cost of the HEE Chair and Non-Executive Directors of £115, 552).
- In addition to removing the need for a separate HEE Board with sub-committees, the merger will also remove the need for a range of duplicate processes currently in place. These include separate clearance processes for policy and strategy documents, financial transfers between the organisations to ensure training resources can support specific service development, and the need to agree or align external communications which cover both organisations' interests.

7.18 There may be opportunities over time to reduce the cost of HEE's premises as HEE leases its accommodation, which is regularly reviewed. Over time (and as opportunities arise) the intention is that HEE staff will be co-located with NHSE staff. NHSE, HEE and (before it was merged into NHSE) NHSD have been working with

the Department on an overall estates strategy for NHSE, including the Government's Places for Growth strategy. Costs associated with moving will be factored into decisions about future office moves.

8. European Union Withdrawal and Future Relationship

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

9. Consolidation

9.1 This instrument does not consolidate any legislation.

10. Consultation outcome

10.1 Consultation with HEE, NHSE and such other persons as the Secretary of State considers appropriate is required by s.108(3) of the 2022 Act. In accordance with this requirement, the Department has consulted HEE and NHSE, and the Devolved Governments (DGs). It was not considered necessary to seek consent from the DGs, as required by section 108(1) of the 2022 Act in certain circumstances, as it was not considered that the provision made by this instrument falls within devolved legislative competence or modifies the functions of the Scottish Ministers, Welsh Ministers, or a Northern Ireland Department.

10.2 The Department formally consulted HEE and NHSE by way of a letter to the Chairs and Chief Executives of HEE and NHSE. The consultation ran from 20 December 2022 to 6 January 2023. Prior to formal consultation, the Department had communicated regularly with NHSE and HEE at working level to collaboratively develop the Regulations. Given the collaborative approach taken to the development of the Regulations, two weeks was considered a sufficient and appropriate timeframe for their responses.

10.3 Formal consultation letters were also sent to the Ministers of Health in Wales and Scotland and the Permanent Secretary in the Northern Ireland Department of Health preceded by discussion at official level.

10.4 Comments received from NHSE, HEE, and the DGs were considered and incorporated where appropriate.

11. Guidance

11.1 No guidance is being produced in relation to this instrument.

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 the existing functions of HEE will continue to be carried out but by a different organisation. We therefore expect there to be limited impact on businesses, charities, voluntary bodies or the public sector.

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 approach to monitoring of this legislation is through ongoing accountability arrangements for NHS England and reporting to Ministers and Parliament. NHS England will produce an annual report on how it has exercised the functions which are transferring to it. The changes set out in this instrument aim to bring together the national leadership of workforce policy and delivery, in a single organisation. The outcome will be subject to internal review after 12 months.

15. Contact

15.1 Sarah Owen or Keith Wright at the Department of Health and Social Care Telephone: 01132545958 or 01132545699 or email: Sarah.Owen@dhsc.gov.uk or Keith.E.Wright@dhsc.gov.uk can be contacted with any queries regarding the instrument.

15.2 Alan Robson, Deputy Director for NHS Workforce Supply, 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, can confirm that this Explanatory Memorandum meets the required standard.