EXPLANATORY MEMORANDUM TO

THE INTEGRATED CARE BOARDS (NOMINATION OF ORDINARY MEMBERS) REGULATIONS 2022

2022 No. 591

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 set out the descriptions of the NHS trusts, NHS foundation trusts and providers of primary medical services that may participate in the joint nomination process for ordinary members of an integrated care board ("ICB"). The ordinary members of an ICB are the members that are not the chair or the chief executive of the ICB (see sections 6 and 7 below for details on ICBs).

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.

4.2 The territorial application of this instrument is England only.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 ICBs are new statutory bodies established under section 14Z25[1] of the National Health Service Act 2006 ("the 2006 Act"). ICBs will replace clinical commissioning groups ("CCGs") which are the bodies currently primarily responsible for commissioning (amongst other things) secondary care services in England. CCGs will be abolished on 1st July 2022.

6.2 Schedule 1B to the 2006 Act[2] sets out what an ICB's constitution should cover. Paragraph 3(1) of Schedule 1B t states that an ICB's constitution must provide for the ICB to consist of a chair, a chief executive, and at least three other members. Paragraph 3(2) explains that reference to an "ordinary member" is to a member other than the chair or the chief executive.

[1] Section 14Z25 was inserted into the National Health Service Act 2006 by section 19 of the Health and Care Act 2022.
[2] Schedule 1B was inserted into the National Health Service Act 2006 by Schedule 2 to the Health and Care Act 2022.

6.3 Paragraph 8(2) of that Schedule states that the ICB constitution must provide for:

(a) at least one ordinary member nominated jointly by the NHS trusts and NHS foundation trusts that provide services for the purposes of the health service within the ICB's area, and are of a prescribed description;

(b) at least one ordinary member nominated jointly by persons who provide primary medical services for the purposes of the health service within the ICB's area, and are of a prescribed description; and

(c) at least one ordinary member nominated jointly by the local authorities whose areas coincide with, or include the whole or any part of, the ICB's area.

6.4 This instrument sets out the descriptions under paragraph 8(2)(a)(ii) and (b)(ii) of Schedule 1B to the 2006 Act of the NHS trusts, NHS foundation trusts and providers of primary medical services who are able to participate in the joint nomination process for ordinary members of ICBs.

6.5 The descriptions prescribed by this instrument are also relevant for determining whether an NHS trust or NHS foundation trust is a "partner trust" to an ICB under section 14Z48(3)[3] of the 2006 Act. Partnership status confers certain rights and obligations on the relevant trust. In particular, for each financial year, ICBs and their partner trusts must prepare and publish a plan ("5-year joint forward plan") that sets out how they intend to exercise their functions in the next 5 years (section 14Z52 of the 2006 Act)[4].

NHS trusts or NHS foundation trusts that may jointly nominate at least one ordinary member

6.6 This instrument prescribes that an NHS trust or NHS foundation trust may participate in the nomination of ordinary members of an ICB if it meets the "forward plan condition" (see paragraph 6.7) or, where it does not meet that condition, if the trust meets the "level of services provided condition" (see paragraph 6.8). The intention is that every NHS trust or NHS foundation trust will be a partner trust to at least one ICB.

6.7 A trust meets the forward plan condition if the relevant ICB considers that the provision of NHS services to people for whom the ICB has responsibility for the purposes of section 3 or 3A (or both) of the 2006 Act (the ICB's "patient group") by the trust or pursuant to arrangements made by the trust is essential to the exercise of the ICB's functions in the next five years. It lists certain duties and factors the ICB must have particular regard to in determining whether the trust is essential to exercising its functions in the next five years.

6.8 The level of services provided condition is met in relation to an ICB if a trust receives more income from the provision of NHS services to the ICB's patient group compared to the income it receives from the provision of NHS services to the patient group of any other ICB.

[3] Section 14Z48 is inserted into the National Health Service Act 2006 by section 25 of the Health and Care Act 2022.

[4] Section 14Z52 is inserted into the National Health Service Act 2006 by section 25 of the Health and Care Act 2022.

Providers of primary medical services that may jointly nominate at least one ordinary member

6.9 This instrument prescribes that a provider of primary medical services may participate in the nomination of ordinary members for an ICB if the provider is not an NHS trust or an NHS foundation trust and provides any primary medical services as prescribed in regulations made under section 14Z31(5) of the 2006 Act to the group of people for whom the ICB has core responsibility. The regulations made under section 14Z31(5) are the National Health Service (Integrated Care Boards: Description of NHS Primary Medical Services) Regulations 2022 which is to come into force on the same date as this instrument.

6.10 For the purposes of this instrument, this means primary medical services contract holders that provide essential services to registered patients during core hours, which includes persons for whom the ICB will have core responsibility, will be eligible to jointly nominate at least one ordinary member to the ICB. Essential services are the services described in regulation 17(4), (6), (7) and (9) of the National Health Service (General Medical Services Contracts) Regulations 2015.

7. Policy background

What is being done and why?

7.1 The Health and Care Act 2022 ("the 2022 Act") puts in place reforms to the NHS in England and its structures. This includes the way in which, and by whom, NHS services are to be commissioned and seeks to put on a statutory footing more integrated ways in which commissioners and providers of NHS services are able to work together in order to meet certain objectives. These objectives include, amongst other things, improving the quality and outcomes for patients of healthcare provided by the NHS in England.

7.2 One of the key changes under the 2022 Act is the creation of new statutory bodies known as ICBs which are to replace CCGs as the main commissioners of secondary care services. CCGs will be abolished on 1st July 2022.

7.3 The creation of ICBs entails considerable amendments to the 2006 Act and secondary legislation made under it. New secondary legislation, including this instrument, has also been made to reflect the replacement of CCGs by ICBs and to provide some continuity in terms of the ongoing arrangements for commissioning NHS services in England.

7.4 This instrument specifies the additional requirements that NHS trusts, NHS foundation trusts and providers of primary medical services must satisfy in order to participate in the process of nominating ordinary members of an ICB. This participation of trusts and providers in the governance arrangement will support integration between providers of primary medical services, secondary medical services and local authorities. The cooperation between these providers of health and social care is intended to improve quality of the services being provided and patient outcomes.

7.5 In relation to NHS trusts or NHS foundation trusts, this instrument is also relevant to the determination of the ICBs where a trust is to be a partner trust (see paragraph 6.5 above).

7.6 The policy intention is that each trust will be a partner of at least one ICB and that some trusts could be partners of more than one ICB. A trust is a partner to any of the ICBs in relation to which it meets the forward plan condition (see paragraph 6.7 above). In addition, a trust can be a partner trust of an ICB in relation to which it does not meet that condition, if in relation to the ICB it meets the level of services provided condition (see paragraph 6.8 above).

7.7 The forward plan condition enables ICBs to identify the relevant trusts that are nominating trusts (and so consequently will also be partner trusts). This is guided by whether their relationship to the ICB is essential to the development and delivery of the 5-year joint forward plan. This condition sets out which of the ICB's duties it must consider in particular in deciding whether a trust has an essential role in assisting the ICB to discharge its functions, which provides for some local discretion. The forward plan condition reflects the policy intention of promoting collaboration amongst commissioners and providers because the plan relates to the effective discharge of both the ICB's and trust's functions during that 5-year period.

7.8 The level of services provided condition is the 'backstop' condition which applies where an NHS trust or NHS foundation trust does not meet the forward plan condition in relation to a particular ICB. The trust can still be a nominating trust in relation to that ICB if it meets the level of services provided condition in relation to that ICB. This condition requires an assessment of the trust's income to determine the ICB from which the trust receives the largest proportion of its income for the provision of NHS services to patients for which ICBs are responsible. This condition is intended to ensure that all trusts are partners to at least one ICB.

7.9 In relation to providers of primary medical services, this instrument prescribes the description by reference to the definition of "NHS primary medical services" in section 14Z31(5) of the 2006 Act. The policy intention is to align the eligibility of providers of primary medical services that can nominate an ordinary member with the rules for CCG membership to ensure continuity.

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 amend or consolidate any other 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 NHS England has published guidance to CCGs on preparing ICB's constitutions, a copy of which is available at: https://www.england.nhs.uk/wp-content/uploads/2021/06/B1551--Guidance-to-Clinical-Commissioning-Groups-on-the-preparation-of-Integrated-Care-Board-constitutions.pdf. This sets out (amongst other things) the process for establishing ICBs, provides guidance regarding the ICB Board and its committees and the process for nominating ordinary members into the ICB.

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 this instrument relates to the internal governance of an ICB. However, a full Impact Assessment has been produced in relation to the provisions of the Health and Care Act 2022 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 This instrument 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 This instrument does not include a statutory review clause.

15. Contact

15.1 Tarlochan Grewal at the Department of Health and Social Care (telephone: 02079721542; email: tarlochan.grewal@dhsc.gov.uk) can be contacted with any queries regarding this instrument.

15.2 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 this instrument.

15.3 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.

15.4 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.