EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE (CLINICAL COMMISSIONING GROUPS) (AMENDMENT) REGULATIONS 2022

2022 No. 316

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 amend the National Health Service (Clinical Commissioning Groups) Regulations 2012 ("the CCG Regulations") in order to facilitate the transition from clinical commissioning groups ("CCGs") to integrated care boards ("ICBs"), which are statutory bodies that will be established subject to Parliamentary passage of the Health and Care Bill.

2.2 CCGs are currently responsible for commissioning the majority of secondary care services in England. The Health and Care Bill (if enacted) will abolish CCGs and will replace them with new statutory bodies, ICBs.

2.3 Until ICBs are established, CCGs will continue to discharge their existing functions. This instrument will place an obligation on CCGs to consult with certain people nominated by the National Health Service Commissioning Board (commonly known as NHS England or "the Board") in commissioning decisions, as these decisions may affect the exercise of ICBs' functions (if and when established).

2.4 It will reduce the minimum member requirements of CCG governing bodies and remove the disqualification provisions for the chair and deputy chair of a governing body. This instrument also removes the qualification and disqualification provisions in relation to the chair of the audit committee of the CCG. The purpose of these amendments is to ensure that CCGs remain properly constituted and can exercise their functions, even if members leave office from CCG governing bodies to facilitate the transition to ICBs (if and when established).

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.

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 The Health and Social Care Act 2012 amended the National Health Service Act 2006 ("the 2006 Act") to provide for the establishment of the Board[1] and CCGs[2]. CCGs are largely responsible for commissioning secondary care services in England.

6.2 Section 14L of the 2006 Act requires each CCG to have a governing body and sets out the functions of the governing body. Section 14M of the 2006 Act requires each governing body of a CCG to have an audit committee and a remuneration committee and sets out the functions of the respective committees. Section 14N of the 2006 Act makes provision for regulations on CCG governing bodies, audit committees and remuneration committees.

6.3 The CCG Regulations set out the requirements for membership and governance of CCGs. Regulations 11 and 12 establish the membership requirements for the CCG governing body. Regulation 13 sets out the requirements for a chair and deputy chair of the CCG governing body. Regulation 14 sets out the requirements for the audit committee of the CCG governing body.

6.4 This instrument amends the CCG Regulations to help ensure that CCGs remain properly constituted, even if those responsible for exercising CCGs' functions leave office, by reducing the minimum membership requirements for CCG governing bodies and by removing certain qualification and disqualification provisions for certain posts.

6.5 This instrument also adds a requirement on a CCG governing body to consult a person or people notified by the Board to the CCG in writing, before it carries out decisions in the exercise of the CCG's commissioning functions, as part of the CCG governing body's decision-making procedure. The purpose of such consultation obligation is to ensure that CCGs have regard to the views of such people to enable the smooth transition to ICBs, if and when established (see section 7 below for more information).

7. Policy background

What is being done and why?

7.1 Subject to Parliamentary passage of the Health and Care Bill, it is anticipated that CCGs will be abolished and replaced with ICBs which will be statutory bodies that will take over from CCGs as being responsible for commissioning the majority of secondary care services in England. The target date for this change is summer 2022. It is anticipated that 42 ICBs will, together, cover the whole of England. These Regulations put in place measures to enable CCGs to continue to function effectively in the event that relevant personnel depart from CCGs prior to the establishment of their anticipated successor bodies.

Amending the minimum membership requirements of a CCG governing body

7.2 If members of CCG governing bodies leave office, vacancies might be difficult to fill due to the expectation that, subject to Parliamentary passage of the Health and Care

[1] Established under section 1H of the National Health Service Act 2006 as inserted by section 9 of the Health and Social Care Act 2012.
[2] Established under section 1I of the National Health Service Act 2006 as inserted by section 10 of the Health and Social Care Act 2012.

Bill, CCGs will be abolished later in the year. Therefore, there is a risk that CCGs do not remain properly constituted as these vacancies arise.

7.3 Regulation 2 subsections (2) and (3) reduces the minimum membership requirements of CCGs' governing bodies from six to four such that the composition of a governing body should consist of at least:

- an employee of the CCG who has a professional qualification in accountancy and the expertise or experience to lead the financial management of the CCG (known as the Chief Financial Officer under regulation 11(5) of the CCG Regulations);
- a registered nurse or an individual who is a secondary care specialist, in either case other than one who falls within regulation 12(1) (this is instead of having both a registered nurse and a secondary care specialist);
- a lay person that has the qualifications, expertise or experience such as to enable the person to express informed views about financial management and audit matters, or a lay person who has knowledge about the area specified in the CCG's constitution such as to enable the person to express informed views about the discharge of the CCG's functions (this is instead of having both types of lay person); and
- the accountable officer of the CCG who is appointed by the Board under paragraph 12(2) of Schedule 1A to the 2006 Act and is required to be a member of the CCG's governing body by virtue of regulation 11(2) of the CCG Regulations.

7.4 This is to mitigate against the risk that there would be insufficient members in the CCG's governing body to meet the minimum membership requirements, if members leave office and vacancies arise.

Removal of disqualification provisions for the chair and deputy chair of the governing body and the qualification and disqualification provisions for chair of the audit committee

7.5 Regulation 13(1) of the CCG Regulations requires that there must be a chair and deputy chair for the CCG governing body. Without the amendments under this instrument, regulation 13(2) lists certain people as being disqualified from being appointed as chair of the governing body and under regulation 13(3) if the chair is a health care professional within the meaning of section 14N of the 2006 Act, all members of the governing body other than lay people are disqualified from being deputy chair.

7.6 Furthermore, regulation 14(1) of the CCG Regulations requires a CCG audit committee to have a chair. Without the amendments under this instrument, regulation 14(2) states that the chair must be a lay person who has qualifications, expertise or experience such as to enable the person to express informed views about financial management and audit matters and under regulation 14(3), the chair of the governing body and the CCG's Chief Finance Officer are disqualified from being appointed as chair of the audit committee.

7.7 If members of CCGs' governing bodies leave office and due to the amendments made by this instrument reducing the minimum membership requirements of CCG governing bodies, there is a risk that applying the qualification and/or disqualification criteria above could result in there being no one suitable to take up these posts. Therefore, to mitigate against this risk, this instrument amends regulations 13 and 14

of the CCG Regulations to remove these qualification and disqualification criteria for appointments to such posts.

7.8 With the removal of these qualification and disqualification criteria, the Chief Finance Officer is eligible to be appointed as chair of the audit committee. As this would pose a conflict of interest, it is expected such an appointment would only be made where no other option is available, and in any case, given that these regulations will only remain in force in the transition period to ICBs (if and when established), it would only be a temporary measure.

CCG governing bodies to consult with people nominated by the Board

7.9 This instrument inserts a new regulation 17 into the CCG Regulations which places an obligation on a CCG governing body to consult with a person or persons nominated by the Board before a governing body makes a decision in the exercise of the CCG's functions in arranging for the provision of services as part of the health service. Decisions on which a CCG is expected to consult such nominees on would include:

- decisions on the content of the commissioning plan of the CCG under section 14Z11 of the 2006 Act, or any other plan for meeting the health needs of the CCG's population, including plans to ensure elective recovery following COVID-19;
- decisions on the allocation of resources to deliver such plans;
- decisions on proposals and plans for joint working arrangements and delegation of functions;
- decisions to enter into commissioning contracts or other agreements for the purpose of securing the delivery of joint working arrangements (including with place-based partnerships and provider collaboratives);
- decisions on service reconfiguration including decisions to adopt proposals for consultation as well as decisions on service change following consultation; and
- decisions by the CCG in relation to its existing primary medical services functions under the current delegation agreements with the Board under section 13Z of the 2006 Act.

7.10 In preparation for the transition to ICBs (if and when established), the Board has made arrangements for the recruitment of chairs and chief executive officers of each ICB. This is subject to the relevant approval and appointment powers in the Health and Care Bill coming into force and people being formally appointed to these positions in accordance with the provisions in the Bill. It is envisaged that the consultees nominated by the Board pursuant to the new regulation 17 of the CCG Regulations will be the proposed chairs and chief executives to the ICB (if and when established) that will encompass the geographical area of the relevant CCG. Many CCGs are already voluntarily consulting with such people, and so the policy intention is that this is a power that will only be used as a temporary "back-stop" provision to obligate CCGs to consult where they are resistant to doing so.

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 These regulations do not consolidate any existing legislation.

10. Consultation outcome

10.1 There were no formal consultations on the amendments. However, the Board was informally consulted.

11. Guidance

11.1 The Board has issued guidance on the procedures for CCGs to apply for a constitution change, merger, or dissolution: https://www.england.nhs.uk/wp-content/uploads/2019/04/procedures-for-clinical-commissioning-groups-to-apply-for-constitution-change-merger-dissolution-aug-2020.pdf.

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 public sector costs.

12.3 A full impact assessment was produced in respect of the provisions of the Health and Social Care Act 2012 and a copy is available at: https://www.gov.uk/government/publications/health-and-social-care-bill-2011-combined-impact-assessments. No separate impact assessment has been prepared in respect of this instrument as it will have no impact on the private sector or civil society organisations.

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 instrument does not include a statutory review clause because, subject to Parliamentary passage of the Health and Care Bill, Chapter A2 (clinical commissioning groups) will be omitted from the 2006 Act, and the CCG Regulations will subsequently be revoked.

15. Contact

15.1 Rachel Skingle at the Department of Health and Social Care. Telephone: 020 7972 6156 or email: rachel.skingle@dhsc.gov.uk can be contacted with any queries regarding the instrument.

15.2 Philippa Baker, Deputy Director for NHS Legislation and Programmes at the Department of Health and Social Care can confirm that this explanatory memorandum meets the required standard.

15.3 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.