EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE (DISAPPLICATION OF NHS ENGLAND'S POWERS OF DIRECTION) (ENGLAND) REGULATIONS 2023

2023 No. 945

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 NHS England ('NHSE'), by way of section 13YB of the National Health Service Act 2006 ('NHS Act 2006'), has the power to issue a direction providing for any of its relevant functions (as defined in section 13YB of the NHS Act 2006) to be exercised by one or more Integrated Care Boards ('ICBs').

2.2 This instrument disapplies NHSE's power to direct ICBs in relation to two key functions.

2.3 The first relates to NHSE's function of deciding whether or not an individual is eligible for NHS Continuing Healthcare ('CHC') or NHS-funded Nursing Care ('FNC') ('CHC and FNC eligibility decisions') in respect of serving members of the armed forces and their families, and for prisoners and other detainees.

2.4 The second relates to NHSE's power to review CHC eligibility decisions in relation to members of the armed forces and their families, and for prisoners and other detainees.

2.5 This instrument will ensure that NHSE continue to exercise these functions so that there is consistency in the approach in relation to CHC and FNC eligibility decisions and in the approach to arranging for the review of CHC eligibility decisions with respect to members of the armed forces and their families, and for prisoners and other detainees.

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 (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 The Health and Care Act 2022 inserts section 13YB into the NHS Act 2006. Section 13YB (Directions in respect of functions relating to provision of services) gives NHSE the power to provide, by way of direction, for any of its relevant functions (as defined in section 13YB(2) of the NHS Act 2006) to be exercised by one or more ICBs.

6.2 Section 13YB(3) of the NHS Act 2006 also provides the Secretary of State with the power to make Regulations to disapply NHSE's power to direct ICBs in relation to prescribed functions.

6.3 The relevant functions as defined in section 13YB(2) of the NHS Act 2006 includes any function of NHSE under section 3B(1) of the NHS Act 2006 (Secretary of State's power to require NHS England to commission services), as well as any other functions of NHSE so far as they are exercisable in connection with any function under section 3B(1). See section 13YB(2) for the full list of relevant functions.

6.4 Section 3B(1) of the NHS Act 2006 provides the Secretary of State with the power to make Regulations to require NHSE to commission services, including to arrange, to such extent as it considers necessary to meet all reasonable requirements, for the provision as part of the health service, of services or facilities for members of the armed forces or their families, and for persons who are detained in a prison or in other accommodation.

6.5 The National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 ('the Standing Rules'), were made under section 3B(1) of the NHS Act 2006 (commissioning functions) and section 6E(2) and 6E(3) of the NHS Act 2006 (which provide for powers relating to the exercise of NHSE commissioning functions). In accordance with the Standing Rules, NHSE has commissioning responsibility in respect of CHC and FNC for serving members of the armed forces and their families, and prisoners and other detainees.

6.6 The legislative framework relating to CHC and FNC is contained in Part 6 of the Standing Rules. Regulation 20 of Standing Rules defines CHC as a package of care arranged and funded solely by the health service in England for a person aged 18 or over to meet physical or mental health needs which have arisen as a result of disability, accident or illness. FNC is funding provided by the health service in England to care home providers for the provision of nursing care by a registered nurse.

6.7 This instrument disapplies NHSE's power to direct ICBs in relation to two key functions under the Standing Rules.

6.8 The first function relates to NHSE's power in the Standing Rules to make CHC and FNC eligibility decisions in relation to members of the armed forces or their families, and for prisoners and other detainees.

6.9 The second function relates to NHSE's power to review CHC eligibility decisions under the Standing Rules in relation to members of the armed forces or their families, and for prisoners and other detainees.

7. Policy background

What is CHC and FNC?

7.1 CHC and FNC are provided in accordance with the requirements placed on ICBs and on NHSE to arrange for the provision of certain health services to the extent that they consider necessary, to meet the reasonable requirements of people for whom they have responsibility. The legislative framework relating to CHC and FNC is set out in Part 6 of the Standing Rules.

7.2 ICBs are generally the bodies with responsibility for the assessment and provision of CHC and FNC, as set out in Part 6 of the Standing Rules. However, NHSE has such responsibility in respect of serving members of the armed forces or their families, and for prisoners and other detainees.

7.3 CHC is a package of NHS-funded ongoing care for adults with the highest levels of complex, intense or unpredictable needs which have arisen as a result of disability, accident or illness. To determine whether an individual is eligible for CHC, a detailed assessment and decision-making process must be followed to decide whether that person has a primary health need. The CHC assessment process is set out in the National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care, as underpinned by Part 6 of the Standing Rules.

7.4 Assessing eligibility for CHC is a two-stage process, the latter undertaken by a Multi-Disciplinary Team ("MDT"). An MDT is a team consisting of at least two professionals from different healthcare professions; or one healthcare professional and one social care professional.

7.5 It should be noted that this assessment process does not apply to individuals who may have a primary health need arising from a rapidly deteriorating condition, who may be entering a terminal phase. For this cohort of individuals, there is a separate 'Fast- Track' pathway to determining eligibility for CHC.

7.6 The CHC assessment process usually starts with a screening process using a document called the 'Checklist', which, if positive, indicates that an individual requires a full assessment for CHC. The assessment then involves an MDT undertaking a comprehensive assessment and evaluation of an individual's health and social care needs, and reviewing evidence such as medical records, examinations, assessments etc. to make an assessment of eligibility for CHC using a standardised tool called a 'Decision Support Tool' ("DST") to help inform the decision.

7.7 The MDT is required to make a recommendation to the ICB or NHSE as to whether the individual has a primary health need. The ICB or NHSE then takes a decision as to whether the individual has a primary health need, using the completed DST to inform that decision.

7.8 As such, the ICB or NHSE arranges for the MDT to complete an assessment of eligibility for CHC, using the DST. NHSE, by way of section 13YB of the NHS Act 2006, has the power to direct an ICB to exercise the function of arranging for an MDT to complete an assessment of eligibility for CHC with respect to members of the armed forces or their families, and prisoners or other detainees.

7.9 However, the policy intention, which this instrument seeks to give effect to, is that with respect to members of the armed forces and members of their families, and for prisoners and other detainees the final decision as to whether or not a person has a primary health need (and is therefore eligible for CHC) remains with NHSE.

7.10 If an individual is not eligible for CHC, it may need to be determined whether the individual is eligible for FNC.

7.11 FNC is the funding provided by the NHS to care homes for the provision of nursing care by a registered nurse. Once it has been established that an individual is eligible for FNC, the ICB or NHSE must pay a flat rate contribution to the care home towards the individual's registered nursing care costs.

7.12 The ICB or NHSE must assess eligibility for FNC where it appears that an individual who is, or may become, resident in a care home may need nursing care. Eligibility for CHC must be considered prior to any decision on eligibility for FNC, as set out in the Standing Rules. A nursing needs assessment, which specifies the day-to-day care and support needs of the individual, should be used to assess whether the individual is eligible for FNC. More information is provided in the NHS-funded Nursing Care Practice guidance.

7.13 Again, NHSE, by way of section 13YB, has the power to direct an ICB to exercise the function of carrying out a nursing needs assessment. However, the policy intention, which this instrument seeks to give effect to, is to ensure that with respect to members of the armed forces and their families, and for prisoners and other detainees, the determination as to whether or not a person is eligible for FNC remains with NHSE.

What is being done and why?

7.14 The Health and Care Act 2022 made changes to several existing Acts, most notably the NHS Act 2006, following the publication of the white paper *Integration and Innovation: Working Together to Improve Health and Social Care for all*. The 2022 Act put in place reforms to the NHS 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 improve the quality and outcomes for patients of healthcare provided by the NHS in England. NHS bodies (ICBs, NHS Trusts and NHS Foundation Trusts) have the power to jointly exercise their functions with or delegate their functions to other NHS bodies or local authorities or combined authorities in England. These arrangements facilitate partnership working and joint decision-making at place and system level. This flexibility enables collaboration and supports integration of the delivery of health and social care for patients in England. Whilst providing flexibility for NHS bodies to jointly exercise and delegate functions, it is also paramount to ensure that appropriate accountability is retained.

7.15 This instrument disapplies NHSE's power to direct ICBs in relation to two key functions in respect of serving members of the armed forces and their families, and for prisoners and other detainees.

7.16 The first relates to NHSE's function of making CHC and FNC eligibility decisions.

7.17 The second relates to NHSE's power to review CHC eligibility decisions.

7.18 This instrument *does not* preclude NHSE from directing ICBs with respect to NHSE's functions relating to the carrying out of CHC or FNC assessments.

7.19 This instrument does not apply to individuals who may have a primary health need arising from a rapidly deteriorating condition, who may be entering a terminal phase. For this cohort of individuals, there is a 'Fast-Track' pathway to determine eligibility for CHC. Their eligibility for CHC is, in substance, determined by an appropriate clinician, in accordance with regulation 21(8) and (9) of the Standing Rules. That is

because there is no discretion afforded to NHSE in determining whether an individual on the Fast-Track pathway is eligible for CHC. Rather, NHSE *must* find the individual eligible for CHC if an appropriate clinician has found such an individual to have a primary health need where the Fast Track Pathway Tool has been completed in accordance with regulation 21(8) of the Standing Rules.

7.20 The policy intention is to revert to the position prior to the enactment of the Health and Care Act 2022, whereby NHSE were unable to direct ICBs to carry out their functions of making CHC and FNC eligibility decisions or arranging for the review of CHC eligibility decisions, with respect to members of the armed forces and their family members and prisoners and other detainees.

7.21 This instrument takes an approach consistent with that taken in the National Health Service (Joint Working and Delegation Arrangements) (England) (Amendment) Regulations 2023, which similarly precludes NHSE from using its powers of delegation under section 65Z5 of the NHS Act 2006 to arrange for other bodies to exercise its functions in relation to CHC and FNC eligibility decisions and the function of arranging for the review of CHC eligibility decisions in respect of members of the armed forces and their families, and prisoners and other detainees.

7.22 DHSC considers that this instrument shall assist in promoting consistency, quality and accountability in the approach to that decision-making, as NHSE will be the only body to be able to make CHC and FNC eligibility decisions in relation to members of the armed forces and their families, and prisoners and other detainees.

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.

9. Consolidation

9.1 This instrument does not consolidate any legislation.

10. Consultation outcome

10.1 There is no statutory requirement to consult on this amendment.

10.2 No formal consultation has been carried out in respect of this instrument because its function is to revert to the position prior to the enactment of the Health and Care Act 2022, whereby CHC and FNC eligibility decisions and the function of arranging for the review of eligibility decisions for CHC, in respect of serving members of the armed forces and their families, and for prisoners and other detainees, could only be carried out by NHSE. This aligns with the policy position set out in the National Framework. We have engaged with NHSE who agree with the intention of this instrument.

11. Guidance

11.1 The National Framework sets out the roles and responsibilities of NHSE at paragraphs 23-25.

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 its aim is to align legislative requirements with existing policy on CHC and FNC, as currently set out in the National Framework.

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 continued oversight by NHSE through internal assurance processes, and DHSC oversight of CHC and FNC policy.

14.2 The instrument does not include a statutory review clause.

15. Contact

15.1 Rebekah Clenaghan at the Department of Health and Social Care Telephone: +44 113 254 5128 or email: chc@dhsc.gov.uk can be contacted with any queries regarding the instrument.

15.2 Rose Thomas-Willis and Megan Bidder, Deputy Directors for Models of Care, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

15.3 Helen Whately (MP), Minister of State for Social Care, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.