EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE (INTEGRATED CARE BOARDS: EXCEPTIONS TO CORE RESPONSIBILITY) REGULATIONS 2022

2022 No.736

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.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 The purpose of this instrument is to provide exceptions to the obligation on an integrated care board in England ("ICB") under section 14Z31[1] of the National Health Service Act ("the 2006 Act") to make arrangements for the provision of secondary care services in relation to certain prescribed persons. Persons usually resident in Northern Ireland, Scotland or Wales and who are registered with a provider in England of NHS primary medical services do not need to be allocated to a group for whom an ICB will have core responsibility (see sections 6 and 7 below for details on ICBs and core responsibility).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 DHSC relies on section 13 of the Interpretation Act 1978 in relation to section 20 of the Health and Care Act 2022 ("the 2022 Act"). As discussed in more detail below, section 20 of the 2022 Act will insert a new section 14Z31 into the 2006 Act, and sub-section (3) of section 14Z31 gives the power to make this instrument.

3.2 Other amendments made by section 20 of the 2022 Act will set out, in conjunction with the provision made by this instrument, the complete legislative framework relating to the commissioning responsibilities of ICBs in England and the respective commissioners for Northern Ireland, Scotland and Wales to arrange for the provision of certain secondary care services and facilities to persons for whom they are responsible for. DHSC considers that it is expedient to rely on section 13 of the Interpretation Act 1978 in relation to section 20 of the 2022 Act because it considers it desirable for reasons of clarity and certainty that the whole regime comes into force at the same time. As further explained below, this instrument seeks to maintain the status quo in the commissioning responsibilities of health commissioners in England, Northern Ireland, Scotland and Wales. DHSC intends to commence section 20 of the 2022 Act to coincide with the coming into force of this instrument.

[1] Section 14Z31 is inserted in to the National Health Service Act 2006 by section 20 of the Health and Care Act 2022.

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 The Minister of State for Health, Edward Argar MP, has made the following statement regarding Human Rights:

"In my view the provisions of The National Health Service (Integrated Care Boards: Exceptions to Core Responsibility) Regulations 2022 are compatible with the Convention rights."

6. Legislative Context

6.1 Section 14Z31 of the 2006 Act has been inserted by section 20 of the 2022 Act. Section 14Z31(1) requires NHS England to publish rules for determining the groups of people for whom each ICB is to have core responsibility, namely responsibility for arranging certain secondary care services and facilities. This includes responsibility for arranging hospital accommodation and dental, ophthalmic, ambulance and nursing services.

6.2 ICBs are new statutory bodies established under section 14Z25[2] of the 2006 Act. ICBs replace clinical commissioning groups ("CCGs") which were the bodies previously responsible for commissioning secondary care services in England. CCGs have been abolished by section 14Z27 of the 2006 Act.

6.3 Section 14Z31(2) states that NHS England's rules on core responsibility must ensure that every person who is provided with NHS primary medical services and any other person who is not being provided with such services but who is usually resident in England, is a person for whom ICBs have core responsibility.

6.4 Section 14Z31(3) gives the Secretary of State the power to create by regulations exceptions to the requirement in section 14Z31(2), as outlined in paragraph 6.3. This instrument sets out that persons who are usually resident in Northern Ireland, Scotland or Wales and who are registered with a provider of NHS primary medical services (i.e. a GP) in England are exceptions to the requirement in section 14Z31(2) of the 2006 Act.

6.5 Section 14Z31(5) of the 2006 Act requires regulations to specify the description of the primary medical services that fall within the meaning of "NHS primary medical services" in section 14Z31. The National Health Service (Integrated Care Boards: Description of NHS Primary Medical Services) Regulations 2022 (to come into force concurrently with this instrument) will prescribe the description of "primary medical services" for the purposes of that section.

[2] Section 14Z25 is inserted into the National Health Service Act 2006 by section 19 of the Health and Care Act 2022.

7. Policy background

What is being done and why?

7.1 The 2022 Act puts in place some 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.

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.

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 the ongoing arrangements for commissioning NHS services in England.

7.4 ICBs must, or in some instances, may, arrange the provision of secondary care services for persons for whom they have core responsibility. This instrument prescribes the description of people that are exceptions to the group of people for whom an ICB will have core responsibility. This instrument sets out that persons who are usually resident in Northern Ireland, Scotland or Wales and who are registered with a provider of NHS primary medical services (i.e. a GP) in England are exceptions to the group of people for whom an ICB will have core responsibility.

7.5 Health services are primarily a devolved matter and this instrument maintains the position applicable to CCGs (prior to their abolition) so that Scotland, Wales and Northern Ireland will remain responsible for commissioning health services for people who usually reside in those areas but are registered with a provider of NHS primary medical services in England.

7.6 This limited exception does not prohibit people who usually reside in Wales, Scotland or Northern Ireland from accessing health services in England but removes the core responsibility for commissioning their health services from an ICB in England. These persons are exceptions to an ICB's core responsibility because these categories of person would already be under the commissioning responsibility of another commissioner (for example, a person registered with a GP in England but usually resident in Wales would be under the responsibility of the relevant Welsh Local Health Board).

7.7 Pursuant to section 272(6)(zba)[3] of the 2006 Act, this instrument is subject to the affirmative resolution procedure.

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.

[3] Section 272(6)(zba) is inserted into the National Health Service Act 2006 by section 20 of the Health and Care Act 2022.

9. Consolidation

9.1 This instrument does not amend or consolidate any other instruments.

10. Consultation outcome

10.1 There is no duty to consult on the policy underpinning this instrument and no consultation has been carried out, as this instrument mirrors the former position with CCGs in relation to the commissioning responsibilities of the devolved administrations ("DAs") under CCGs.

11. Guidance

11.1 NHS England will publish an updated "Who Pays?" document (which should be available at the time this instrument comes into force) which will serve a number of functions: it will provide guidance on the position under the 2022 Act on the responsibilities for commissioning and paying for NHS services, specify situations where responsibility for payment differs from that for commissioning and set the rules for determining the group of people for whom each ICB has core responsibility. It will also provide guidance on how to determine usual residence where there is doubt.

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 as we are seeking to bring ICBs' commissioning responsibilities in line with the position for CCGs (prior to their abolition) for persons who are usually resident in Northern Ireland, Scotland or Wales and who are registered with a provider of NHS primary medical services in England. This is the position as set out in The National Health Service (Clinical Commissioning Groups— Disapplication of Responsibility) Regulations 2013 and with NHS England's Who Pays? Guidance (2020). This instrument does not change the health commissioning responsibilities of the DAs and will not have any additional direct financial impacts for DAs nor ICBs, relative to the position of their predecessor CCGs.

12.3 A full Impact Assessment has not been prepared for this instrument because this instrument reflects the commissioning responsibilities of the DAs when CCGs existed and will not have any additional direct financial impacts for DAs nor ICBs, relative to the position of their predecessor CCGs.

12.4 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 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 No specific monitoring or review of cross-border patient flows or the commissioning of health services will be undertaken, beyond that which is already undertaken as part of DHSC's routine data collection.

14.2 The instrument does not include a statutory review clause because this instrument brings ICBs' commissioning responsibilities in line with the position of their predecessor CCGs in relation to the commissioning responsibilities of the DAs.

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.