EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE (INTEGRATED CARE BOARDS: RESPONSIBILITIES) REGULATIONS 2022

2022 No. 635

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 prescribe additional persons that an integrated care board ("ICB") is to be responsible for arranging the provision of certain health care services and facilities for. This is in addition to the persons for whom an ICB has core responsibility under rules published by NHS England under section 14Z31(1) of the National Health Service Act 2006 ("the 2006 Act")[1] (see sections 6 and 7 below for details on ICBs and core responsibility). This instrument will ensure that the NHS is able to maintain continuity of patient care and clarity on commissioning responsibility when ICBs take over from clinical commissioning groups ("CCGs").

2.2 This instrument also places additional responsibilities on ICBs to arrange for the provision of mental health services during the course of a person's detention under the Mental Health Act 1983 ("MHA 1983") and for the provision of after-care services under section 117(2) of the MHA 1983.

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 21 of the Health and Care Act 2022 ("the 2022 Act"). As discussed in more detail below, section 21 of the 2022 Act will substitute new sections 3 and 3A into the 2006 Act, and new sections 3(2)(b) and 3A(2)(b) give the power to make this instrument.

3.2 Section 21 of the 2022 Act will set out the duties and powers of an ICB for arranging the provision of certain health care services and facilities to persons for whom it has core responsibility and such other people as may be prescribed. This instrument prescribes these additional persons that an ICB is responsible for. DHSC considers that it is expedient to rely on section 13 of the Interpretation Act 1978 in relation to section 21 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. DHSC intends to commence section 21 of the 2022 Act to coincide with the coming into force of this instrument.

[1] Section 14Z31 is inserted into 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 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 ICBs are new statutory bodies to be established under section 14Z25[2] of the 2006 Act and will replace CCGs as the main commissioners of secondary care services in England. CCGs will be abolished under section 14Z27(1) of the 2006 Act on the date this instrument comes into force.

6.2 Section 3(1) and section 3A(1)[3] of the 2006 Act set out the duties and powers (respectively) of an ICB to commission certain health services (including certain types of accommodation) specified in those sections, for persons for whom an ICB has responsibility. Section 3(2)(a) of the 2006 Act states that an ICB has responsibility for commissioning the services specified in section 3(1) for the people for whom it has core responsibility and such other persons as may be prescribed in regulations; section 3A(2)(a) includes a similar provision to this effect.

6.3 Section 14Z31(1) of the 2006 Act requires NHS England to publish rules for determining the groups of people for whom each ICB is to have core responsibility. 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. Exceptions to this may be made by regulations under section 14Z31(3).

6.4 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 which is set out in The National Health Service (Integrated Care Boards: Description of NHS Primary Medical Services) Regulations 2022 (to come into force concurrently with this instrument).

6.5 Sections 3(2)(b) and 3A(2)(b) of the 2006 Act allow for regulations to prescribe other persons that an ICB is responsible for, in addition to the persons for whom it has core responsibility. For the purposes of section 3(2)(b) and section 3A(2)(b), this instrument sets out the additional responsibilities of ICBs for arranging certain health care services for the persons described in this instrument, and for arranging the provision of mental health services during the course of a person's detention under the MHA 1983 and after-care services under section 117(2) of that Act under certain circumstances (see section 7 below for more information).

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

[3] A new section 3 and section 3A has been inserted into the National Health Service Act 2006 by section 16 of the Health and Social 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. 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 NHS secondary care services.

7.2 This instrument imposes additional responsibilities on an ICB for certain, specified persons ("prescribed persons"). It covers certain circumstances where the ICB would not have core responsibility for a person and place responsibility on an ICB for:

7.2.1 commissioning emergency ambulance services or accident and emergency services for any person present in an ICB's area;

7.2.2 commissioning accommodation and services for certain categories of children (including a child being 'looked after' or provided with advice and assistance by a local authority);

7.2.3 commissioning certain services and/or accommodation for certain adults and children who continue to need such services and/or accommodation (as applicable) to meet their continuing care needs;

7.2.4 continuing to commission certain services and/or accommodation for certain adults and children where, immediately before the coming into force of this instrument a CCG (whose area now falls within the area of the ICB or is the CCG whose responsibility for providing the services has transferred to the ICB under a transfer scheme) was responsible for commissioning those services and/ or accommodation (as applicable) and the person continues to be in need of them to meet their continuing care needs;

7.2.5 continuing to commission certain services and accommodation that were originally arranged before 1st April 2013 by a Primary Care Trust ("PCT") for certain adults and children (who continue to require them to meet such needs) in specified circumstances. These transitional provisions ensure that arrangements transferred to CCGs from PCTs continue to be commissioned by ICBs where a person to whom those arrangements relate, continues to be in need of them;

7.2.6 commissioning certain services and accommodation for certain persons resident in Northern Ireland, Scotland or Wales and present in the ICB's area who, amongst other things, are not being provided with NHS primary medical services;

7.2.7 commissioning the provision of vehicles (including wheelchairs) for the persons listed in paragraphs 7.2.1 - 7.2.6 above; and

7.2.8 commissioning the provision of mental health services during the course of a person's detention under the MHA 1983 and after-care services under section 117(2) of that Act under certain circumstances (see below).

7.3 In respect of the prescribed persons described in paragraphs 7.2.1 to 7.2.7 above, the intention is to reflect the responsibilities of CCGs under the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 ("the Standing Rules Regulations"). This instrument will partially revoke the Standing Rules Regulations by revoking the regulations that deal with the additional persons for whom a CCG has responsibility and that relate to mental health after-care services because the enabling powers for

those regulations are being amended or substituted with new provisions by the 2022 Act[4]. This instrument supersedes those provisions.

Mental health services during the course of a patient's detention

7.4 Where an application to detain a patient under the MHA 1983 is made on or after the date this instrument comes into force, the ICB responsible for commissioning mental health services for the patient during the course of their detention will be the ICB that had core responsibility at the time the relevant application resulting in the patient's detention was made. This is irrespective of where the patient is detained, including in the area of another ICB. A relevant application is an application made after a person is discharged from a previous period of after-care services relating to detention under the MHA 1983 or, where there is no previous detention, the first application for detention made. The new policy seeks to introduce continuity in commissioning responsibility. As long as a person discharged from hospital has not been discharged from after-care services arranged under section 117(2) of the MHA 1983, the ICB that had core responsibility at the time the relevant application to detain is made continues to have responsibility for commissioning mental health services for periods of further detention, regardless of whether the patient becomes (under NHS England's rules under section 14Z31) the core responsibility of a different ICB in that time.

7.5 Under the position with CCGs, a CCG had additional responsibility for every person who was liable to be detained under the MHA 1983 in a hospital or registered establishment in the CCG's area. This instrument therefore represents a change in policy on commissioning responsibility for mental health services and will bring commissioning responsibility in line with the position on payment responsibility as set out in NHS England's "Who Pays?" document since 2020. The policy aim is to support continuity of clinical care for patients whilst preventing any perverse incentives for ICBs to place a patient in a hospital or registered establishment in a different ICB area to avoid commissioning responsibility.

7.6 This instrument also provides continuity of treatment for patients who are in detention on the coming into force of this instrument, are detained on or after the coming into force of this instrument pursuant to an application made before it came into force and for patients in receipt of after-care services on the coming into force this instrument (but in all cases, not discharged from after-care services). The policy intention is that in those scenarios, the ICB that had core responsibility for the patient on the date these regulations come into force continues to have responsibility for commissioning mental health services, even for periods of further detention, provided that the patient has not been discharged from after-care services, regardless of whether the patient becomes (under NHS England's rules under section 14Z31) the core responsibility of a different ICB.

After-care services: imposition of ICB responsibility

7.7 In relation to after-care services under section 117(2) of the MHA 1983, this instrument sets out that the ICB that had the responsibility to arrange the mental health services during the patient's detention that preceded the after-care services to be provided, will continue to have responsibility to commission the after-care

[4] Sections 3 and 3A of the National Health Service Act 2006 is substituted with new sections 3 and 3A by section 21 of the Health and Care Act 2022. Section 117 of the Mental Health Act 1983 is amended by paragraph 16 of Schedule 4 and paragraph 1(2) of Schedule 1 of the Health and Care Act 2022.

services. This is to ensure continuity in clinical care for patients and also align the commissioning responsibility with the payment responsibility under NHS England's "Who Pays?" document.

7.8 This instrument also applies to a scenario where the patient is in receipt of after-care services relating to a period of detention from which they were discharged prior to this instrument coming into force. The policy intention is that the ICB that had core responsibility for that patient on the date this instrument comes into force will be responsible for arranging that patient's after-care services.

7.9 Where a patient was in NHS England-commissioned detention that began before this instrument came into force and is discharged into ICB-commissioned after-care services on or after the coming into force of this instrument, then the ICB that had core responsibility on the date of the patient's discharge into ICB-commissioned after-care services will be responsible for commissioning the provision of such services. On the other hand, where the NHS England-commissioned detention began on or after this instrument came into force, the ICB that had core responsibility for the patient on the first day of the patient's detention, will be responsible for commissioning the after-care services.

After-care services: imposition of NHS England responsibility

7.10 An ICB does not have to arrange the provision of after-care services under section 117(2) of the MHA 1983 where the person is receiving after-care services under section 117(2) which, if they had been provided under the 2006 Act, would be a service that NHS England had a duty to arrange. This reflects the position with CCGs under the Standing Rules Regulations.

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 and no consultation has been carried out. This is because this instrument mirrors the former position with CCGs in respect of the additional responsibilities for certain persons that an ICB has responsibility. In relation to the commissioning of mental health services and after-care services, whilst this is a shift in policy, this brings commissioning responsibility in line with NHS England's existing policy on payment responsibility and will not have any adverse impacts on continuity of care for patients.

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 responsibilities for commissioning and for paying for NHS services, it will specify situations where responsibility for payment differs from that for commissioning and

sets the rules for determining the group of people for whom each ICB has core responsibility.

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 the ICB commissioning responsibilities in line with CCG's additional responsibilities in relation to certain prescribed persons. This instrument will change the commissioning responsibilities for mental health services and after-care services but will have minimal impact on the public sector, as it reflects the existing payment responsibilities as set out in NHS England's "Who Pays?" guidance document.

12.3 A full Impact Assessment has not been prepared for this instrument because this instrument reflects current commissioning responsibilities of CCGs which will, from the date this instrument comes into force, be additional responsibilities of the newly created ICBs. In relation to the commissioning of mental health services and after-care services, whilst this is a shift in policy, this brings commissioning responsibility in line with NHS England's existing policy on payment responsibility.

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 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.

15. Contact

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

15.2 Naveed Khan at the Department for Health and Social Care (telephone: 01132546104; email: Naveed.khan@dhsc.gov.uk) can be contacted with any queries regarding the instrument.

15.3 Philippa Baker, Deputy Director, Legislation Programme Team, at the Department for 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.