EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE (NHS PAYMENT SCHEME - CONSULTATION) (NO. 2) REGULATIONS 2023

2023 No. 53

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care and is laid before Parliament by Command of His Majesty.

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

2. Purpose of the instrument

2.1 NHS England must consult on the NHS payment scheme, which sets out the rules for determining prices payable for NHS health care services and public health services, with integrated care boards ("ICBs"), relevant providers and such other persons as NHS England considers appropriate. The consultees have the option to object to the proposed rules, and where a certain percentage of integrated care boards or relevant providers object a further process is triggered. This instrument defines what these objection percentages are (66%).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The provisions in these regulations come into force on the day after the instrument is made. This is necessary in order for the objection percentages to be in force by the end of the period of the upcoming consultation that NHS England will conduct. NHS England intends to conduct the consultation in December 2022. The Department considers that delaying this consultation would prejudice the public interest in efficient use of public money.

3.2 The Department considers this coming into force provision is reasonable because the objection percentages in relation to both providers and commissioners are remaining the same as the corresponding percentages for the predecessor to the NHS payment scheme, the national tariff.

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 Will Quince MP, the Minister of State for Health and Secondary Care has made the following statement regarding Human Rights:

"In my view the provisions of The National Health Service (NHS Payment Scheme - Consultation) (No.2) Regulations 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 The Health and Care Act 2022 (c. 31) ("the 2022 Act") replaces the national tariff, which set out the prices and rules for determining prices payable by NHS commissioners to providers for providing NHS-funded healthcare, with the NHS payment scheme, by inserting new sections 114A to 114F into the Health and Social Care Act 2012 ("the 2012 Act"). The instrument is required to ensure the consultation on the NHS payment scheme, can proceed as required by new sections 114C and 114D.

6.2 The previous consultation process on the national tariff, as set out in sections 118 to 123 of the 2012 Act, required that, if a prescribed percentage ("the objection percentage") of either clinical commissioning groups or relevant providers objected to the proposed tariff, a further process had to be undertaken, involving a reference to the Competition and Markets Authority. Under the new regime relating to the NHS payment scheme, as provided by the new section 114D, if a prescribed percentage of either ICBs or relevant providers objects to the proposed scheme, NHS England will have to undertake a further consultation process set out in subsections (3) to (5) of section 114D. There is no longer a requirement for a referral to the Competition and Markets Authority.

6.3 These regulations prescribe the objection percentages referred to in section 114D.

7. Policy background

What is being done and why?

7.1 The National Tariff set out prices and rules for determining prices payable by NHS commissions to providers for providing NHS-funded healthcare. The NHS payment scheme will set rules around how commissioners establish prices to pay providers for healthcare services for the purposes of the NHS, or public health services which are commissioned by an integrated care board, or NHS England, on behalf of the Secretary of State for Health and Social Care. As well as specifying prices, under the new payment scheme NHS England will have power to set rules around how NHS Commissioners determine prices, for example by publishing a formula to take into account local factors.

NHS England must consult on the rules set out in the payment system. In doing so, providers and integrated care boards can object to the proposals set out in the consultation. This instrument will determine what percentage of either providers or integrated care boards must object before the proposals are revaluated.

Explanations

What did any law do before the changes to be made by this instrument?

7.2 NHS England previously consulted on the rules set out in the national tariff, as per their duty in section 118 of the 2012 Act. This instrument relates to the new duties imposed on NHS England in relation to consulting on the NHS payment scheme, which were inserted into the 2012 Act by the 2022 Act. The objection percentages will remain the same as those prescribed in the National Health Service (Licensing and Pricing) Regulations 2013 for the previous consultations made on the national tariff. Therefore, this represents consistency with previous thresholds set for the national tariff.

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 other instrument.

10. Consultation outcome

10.1 No consultation was required for the instrument. Consultation occurred when the objection rate of the National Tariff System was established at 66% by the National Health Service (Licensing and Pricing) (Amendment) Regulations 2015. As the NHS Payment Scheme prescribes the same percentage, further consultation is not necessary.

11. Guidance

11.1 Guidance on completing the consultation process on the new NHS payment scheme will be published by NHS England alongside the consultation.

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 of low or no impact to business.

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 implementation of this legislation will be monitored and reviewed by the Department of Health and Social Care.

15. Contact

15.1 James Richardson at the Department of Health and Social Care, Telephone: 0207 210 6336 or email: james.richardson@dhsc.gov.uk can be contacted with any queries regarding the instrument.

15.2 Ed Jewell, Deputy Director for NHS Finance, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

15.3 Will Quince MP, the Minister of State for Health and Secondary Care at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.