EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE (PERFORMERS LISTS) (ENGLAND) (AMENDMENT) (NO. 2) REGULATIONS 2023

2023 No. 828

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.

2. Purpose of the instrument

2.1 These Regulations amend the National Health Service (Performers Lists) (England) Regulations 2013 (S.I. 2013/335, as amended) (the "2013 Regulations"). The 2013 Regulations establish the medical performers list, dental performers list, and ophthalmic performers list. A practitioner must be included in the relevant list in order to perform the appropriate services in the NHS in England. There are 16 main changes to the 2013 Regulations made by these Regulations.

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 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 only.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 Under section 91 of the National Health Service Act 2006, a person is only able to provide primary medical care for the purposes of that Act if they are included in a list maintained by NHS England (NHSE) in accordance with regulations made under that section. To note, NHSE is referred to as "the Board" in the 2013 Regulations.

6.2 Regulations made under section 91 may make provision about various matters, for example, who is eligible for inclusion in a list, the process for inclusion in and withdrawal from a list and restriction that apply if a person is included in a list.

6.3 The principal regulations made under section 91 are the 2013 Regulations. The 2013 Regulations provide the regulatory framework for managing medical, dental and ophthalmic practitioners who perform primary care services in the NHS in England. They establish performers lists of practitioners approved to practise in the NHS, and

place responsibility for managing the performers lists on NHSE as the commissioner of primary care services.

6.4 These regulations are also made under section 91 (in conjunction with sections 106, 123, and 272(7) and (8)) of the 2006 Act and amend the 2013 Regulations. These regulations are made with the aim of reducing bureaucracy, simplifying existing processes, and modernising existing legislative arrangements and requirements, whilst maintaining patient safety. Specific details of how the regulations go about this are included in section 7 of this Memorandum immediately below.

7. Policy background

What is being done and why?

7.1 The 2013 Regulations are being amended to reduce bureaucracy, simplify processes, and modernise the legislation. The policy intention behind these changes is to support the NHS workforce and facilitate the provision of primary care services in England without comprising patient safety.

Explanations

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

7.2 The 2013 Regulations provide the regulatory framework to ensure that medical, dental and ophthalmic practitioners who contract with NHSE are qualified and competent to provide safe and effective primary medical, dental and ophthalmic services.

Why is it being changed and what will it do now?

7.3 The 2013 Regulations are considered to be overly bureaucratic and, in places, unnecessarily duplicate existing clinical governance structures. There is a need to modernise the regulations to ensure they continue to be fit for purpose and to ensure that patient safety is not compromised.

7.4 The main 16 changes to the 2013 Regulations made by these Regulations are detailed below:

Allow GP Registrars (GPRs) on a GMC approved postgraduate training programme to deliver primary care services without requiring them to be included on the Medical Performers List (MPL); and moving the point at which GPRs apply to join the MPL to 6 months before they are awarded their Certificate of Completion of Training (CCT)

- The 2013 Regulations mean that GP Registrars (GPRs), who are doctors training to become GPs, must be included on the MPL if they perform primary care services for longer than 3 months. There is, however, limited benefit to GPRs being on the PL during training as they are subject to clinical supervision during this period. GPRs will be permitted to apply to join the MPL from 6 months before achieving their CCT. If they join in the 6 months before completion, they will benefit from the streamlined application process and will be able to practise as soon as they receive their CCT.
- Regulation 16 amends regulation 24(3) of the 2013 Regulations and omits regulation 24(4) and Regulation 24(5) of the 2013 Regulations to allow GPRs on a General Medical Council (GMC) approved postgraduate training programme to deliver primary care services without requiring them to be

included on the MPL. This regulation also creates an exemption for all other registered medical practitioners from inclusion on the MPL where they are undertaking a GMC approved postgraduate training programme.

- Regulation 4 adds new paragraphs (9)(b), (10) and (11)(a) to regulation 4 of the 2013 Regulations to move the point at which GPRs apply to join the MPL to the end of their training as a GPR. The amended regulations allow applicants to submit applications 6 months before they are awarded their CCT and allows for a streamlined application process if GPRs apply in that 6-month window. The streamlined application process is to incentivise GPRs to apply within the 6-month window.
- Regulation 16 amends regulation 24(3) of the 2013 Regulations to reference section 34I(1)(a) of the Medical Act 1983, as this is the statutory authority under which the GMC approves postgraduate training programme.

Introduction of a streamlined application process for GPRs and Dental Foundation Trainees (DFTs) to join their respective Performers List (PL)

- GPRs and Dental Foundation Trainees (DFTs) are already known to NHSE when they come to join the PL. A substantial amount of data on GPRs and DFTs will already have been collected by NHSE by the time they come to join the PL. The changes proposed will, therefore, introduce a streamlined application process for GPRs and DFTs. This will reduce the amount of information NHSE must request from applicants, as NHSE will already hold it. This includes date of birth, CV, evidence of registration with a professional regulator and references (to note, one reference will be required for streamlined DFT applications). This change will reduce duplication of data collection, thereby increasing process efficiency and reducing bureaucracy.
- Regulation 4 amends regulation 4 of the 2013 Regulations to change the information that must be provided in an application for inclusion in the PL, including reduced requirements specific to DFTs and GPRs completing their training. Regulation 4 adds new paragraphs (9)(c) and (11)(b) to regulation 4 of the 2013 Regulations in relation to DFTs. Regulation 4 adds new paragraphs (9)(b), (10) (11)(a) to regulation 4 of the 2013 Regulations in relation to GPRs.

Introduction of a streamlined process for practitioners applying to return to the PL following a period of absence

- The current legislation does not allow for practitioners to spend periods of time out of practice whilst remaining on the PL. This increases bureaucracy, as practitioners must leave the PL and then re-join again if they wish to practise. NHSE already holds a substantial amount of information about practitioners who apply to re-join a PL. The regulations will, therefore, introduce a streamlined application process for returning practitioners. This will reduce the amount of information NHSE must request from applicants, as NHSE will already hold it. This includes date of birth, CV, evidence of registration with a professional regulator and references.
- Returning practitioners will need to make a declaration to NHSE that they have no adverse regulatory finding/employment action taken in the period for which they have not been included on the PL. NHSE then have 3 months to undertake the relevant checks on the returner.

- Regulation 3 amends regulation 2 of the 2013 Regulations to introduce a new definition of a 'returning practitioner' to the PL, for the purposes of the Regulations. Regulation 17 adds a new paragraph (7) to regulation 26 of the 2013 Regulations to omit the requirement to provide various pieces of information from a returning medical practitioners' application for inclusion on the medical performers list. Regulation 18 adds a new paragraph (4) to regulation 33 of the 2013 Regulations to omit the requirement to provide certain pieces of information from a returning dental practitioners' application for inclusion on the dental performers list. Regulation 19 adds a new paragraph (8) to regulation 39 of the 2013 Regulations to omit the requirement to provide certain pieces of information from a returning ophthalmic practitioners' application for inclusion on the ophthalmic performers list. Regulation 4 amends paragraph (2) and adds a new paragraph (9)(a) to regulation 4 of the 2013 Regulations in order to omit the requirement to provide various pieces of information from a returning practitioners' application for inclusion on a PL.
- Regulation 5 amends regulation 5(1)(b) of the 2013 Regulations so that when NHSE is considering an application from a returning practitioner, they need not check whether there is any record of fraud in relation to a practitioner. Regulation 5 also substitutes regulation 5(1)(c) of the 2013 Regulations to provide that NHSE need not check whether the practitioner has been the subject of a Health Professional Alert Notice (HPAN) or any other notification or finding.
- Regulation 8 inserts a new regulation 7A into the 2013 Regulations, requiring further checks to be carried out within 3 months of a returning practitioner's inclusion in the relevant PL and permitting the removal of a returning practitioner where it is justified following the checks carried out and further information sought after an application has been accepted by NHSE. The checks and further information are set out in regulations 5(1)(b), (c) and 5(2). New regulation 7A(2) introduces a 3 month decision making period for NHSE. This is the same time period as applicants from equivalent lists under regulation 5A(2)(b). New regulation 7A(3) links NHSE's decision making under this regulation with a decision to refuse a non-streamlined application under regulation 7.

Changes to enhanced criminal record checks for applicants who have lived outside of the UK for prescribed time periods

- At present, the 2013 Regulations currently requires all applicants to have an enhanced criminal record check (Disclosure and Barring Service check (DBS)), but DBS checks rely on applicants having resided in the UK. Overseas applicants may never have lived in the UK, so an enhanced DBS check does not add value to the assessment of suitability of such applicants as they will not be able to provide one. The enhanced criminal record checks change will allow applicants from overseas to provide evidence of an equivalent check to a DBS if they have lived outside of the UK for 12 months or more in the 5 years. If a practitioner is unable to obtain such a certificate, the change will mean they can provide a statement in writing demonstrating that they have taken all reasonable steps to obtain such a certificate.
- Regulation 4 of the regulations inserts a new paragraph (2)(n) to regulation 4 which requires applicants from overseas to provide evidence of an equivalent

check to a DBS if they have lived outside the UK for 12 months or more in the 5 years immediately before their application to join their respective PL.

- Regulation 4 of the regulations inserts a new paragraph (2)(n)(ii) to regulation 4 to allow for circumstances in which a practitioner is unable to obtain such a certificate. In these circumstances, new regulation 4(2)(n)(ii) allows the practitioner to provide a statement in writing demonstrating that the practitioner has taken all reasonable steps to obtain such a certificate.
- Regulation 9 of the regulations inserts a new paragraph (8A) into regulation 9 of the 2013 Regulations requiring practitioners who have resided in a country other than the United Kingdom for 12 months or more whilst being included on a PL to provide a certificate issued by an authority of that country which is equivalent to an enhanced criminal record certificate, or where they are not able to obtain such a certificate, a statement in writing demonstrating that the practitioner has taken all reasonable steps to obtain such a certificate.

A requirement for NHSE to check the relevant information held by the Practitioner Performance Advice Service and Primary Care Appeals arm of NHS Resolution (or predecessor organisation) relating to the practitioner; and information held relating to a Health Professional Alert Notice

- Currently, Regulation 5(1)(c) specifies that NHSE should check with NHS Litigation Authority (NHSLA) for records of investigations or proceedings. Regulation 5(1)(c) of the 2013 Regulations does not specify the exact type of information that NHSE requires from NHSLA in order to make a decision whether it include a practitioner on a PL. The regulations will set out the exact information that NHSE can request from NHSLA.
- Regulation 5 substitutes regulation 5(1)(c) and inserts a new regulation 5(1A) and 5(4) to specify the checks on applications that must be made with the National Health Service Litigation Authority.

Ensuring temporary conditions on practising agreed during investigations are not confused with permanent conditions on practising imposed after findings following an investigation

- It is presently not clear in the 2013 Regulations that conditions imposed under regulations 12(4)(b) and 12(10)(b) are only temporary conditions put in place to enable the practitioner to work pending a finding of fact about a practitioner being investigated. The act of imposing these temporary conditions is a neutral act that ensures patient safety as NHSE investigates a case about the practitioner. The change is being implemented to ensure that temporary conditions on practising agreed during investigations are not confused with permanent conditions on practising imposed after an investigation. The temporary conditions will be reviewable but not susceptible to appeal.
- Regulation 10 will amend regulations 12(4)(b) and 12(10)(b) of the 2013 Regulations to provide that temporary conditions may be agreed with a practitioner, if the practitioner's practice is to be subject to such temporary conditions pending a decision in a case. If the parties do not agree, then NHSE has the right to suspend the practitioner under regulation12(1).
- Regulation 12 adds new paragraphs (1A) and (3A) to regulation 16 of the 2013 Regulations and amends regulation 16(3)(b). These amendments provide that a practitioner may request that NHSE reviews any conditions it has agreed with

that practitioner under regulation 12(4)(b) or regulation 12(10)(b) and any decision NHSE has made to allow the practitioner to resume practice.

- Regulation 13 amends regulation 17(2)(b) to omit the reference to regulation 12 so that conditions imposed under regulation 12(4)(b) or regulation 12(10)(b) are not appealable under regulation 17.

Introduction of a time limit for claims for payment to be made following suspension of a practitioner (90 days from the date of first suspension); and,

Introduction of a time limit for a practitioner to request the redetermination of a decision relating to suspension payments (28 days)

- In the current 2013 Regulations there is no time limit on when a practitioner can make a claim under regulation 13 for payments whilst suspended from the PL. There is also no time limit on when a suspended practitioner can request a reconsideration of a decision relating to suspension payments. The change to the regulations will introduce a 90-day time period for practitioners to make a claim for suspension payments, and a 28-day time period to request a reconsideration of a decision relating to suspension payments.
- Regulation 11 inserts a new regulation 13(A1) to introduce a time limit of 90 days for practitioners suspended from their respective PL to make a claim to NHSE for suspension payments. Regulation 11 inserts a new regulation 13(3A) which provides that a suspended practitioner can make a request for reconsideration of a decision on suspension payments within 28 days of that decision.

A process to enable conditions imposed under regulations 10,11 or 12 to be removed

- At present, the 2013 Regulations allow NHSE to 'maintain or vary' conditions imposed under regulation 10 (conditions), regulation 11 (failure to comply with conditions) and regulation 12 (suspension). This means that if NHSE want to remove conditions placed on a practitioner they have to 'vary' condition to 'no conditions'. We have changed this to allow NHSE to remove conditions imposed under regulation 10, regulation 11 and regulation 12.
- Regulation 12 amends regulation 16(2)(a) of the 2013 Regulations so that NHSE can maintain, vary, or remove conditions imposed on practitioners under regulations 10, 11 and 12.

Modification (in certain circumstances) of the review periods where the First-tier Tribunal (FTT) has imposed a national disqualification

- National disqualification of performers from the PL may, in certain cases, be necessary to protect patient safety and NHS resources. The power to nationally disqualify practitioners from the PL in England is provided in section 159 of the NHS Act 2006.
- The 2013 Regulations do not stipulate review period for circumstances in which the FTT has imposed a national disqualification on a practitioner previously included on a PL. The decision to impose a national disqualification is a decision of the FTT. The person on whom a national disqualification is imposed is open to request a review of the decision by the FTT. It is considered appropriate by the Department to extend the review periods from one and two

years, to three and five years respectively, where the FTT is of the opinion that the criminal or professional conduct of the practitioner is such that there is no realistic prospect of a review being successful if held within that period. The regulations will include extended review periods (three and five years) to prevent practitioners from requesting a review a short time after the FTT decision or the last FTT review, if the FTT considers there is no realistic prospect of the review resulting in a different outcome. The amended regulations also allow for a national disqualification to be reviewed after one day (that is, almost immediately) where a criminal conviction or other decision relevant to the national disqualification has been quashed or the penalty reduced on appeal.

- Regulation 14 inserts a new regulation 17A into the 2013 Regulations, modifying (in certain circumstances) the review period applying to a decision of the FTT imposing a national disqualification from a PL under section 159 of the National Health Service Act 2006 (the NHS Act 2006). New regulations 17A(1)(a) and (b) provide for review periods of five and three years, rather than two or one year respectively if the FTT is of the opinion that the criminal or professional conduct of the practitioner is such that there is no realistic prospect of a review being successful if held within that period of two or one years respectively.
- New regulation 17A(1)(c) provides that a national disqualification can be reviewed after one day where the criminal conviction or other decision has been quashed or the penalty reduced on appeal. A period of one day is specified, rather than an immediate review, because the power in section 159(9) of the NHS Act 2006 only allows the review period to be changed, not abolished entirely.

Requirement for a performer to provide an annual declaration that confirms that they remain on the PL and that their information is up to date

- Currently, a practitioner may remain on the PL for the duration of their career without any subsequent refresh of the point of entry checks. We want to ensure that information about practitioners included in the PL remains up to date. The change will require performers to provide an annual declaration that confirms that they remain clinically active, and that information is up to date.
- Regulation 9 of the regulations inserts new regulations 9(1A) and 9(1B) into the 2013 Regulations, introducing a requirement for an annual declaration from practitioners that they remain clinically active, and that information held about them by NHSE remains up to date. Regulation 9(1B) defines the "reporting period" during which the practitioner must make their annual declaration. Practitioners included on a PL will be required to make an annual declaration between 1st January 2024 and the 31st December 2024 and each subsequent period of 12 months thereafter.

Removing the requirement for NHSE to collect data on the practitioner's sex, when an application to join the PL is made

- We have removed the requirement for practitioners to declare their sex, as NHSE does not require applicants to provide this data to process their applications. All protected characteristics will be collected by NHSE, but it will

not be mandatory for practitioners to declare their protected characteristics to be included on a PL.

- Regulation 4 omits regulation 4(2)(b) to remove the requirement for practitioners to declare their sex when making their application to join a PL.

Removing the requirement to provide 'an explanation of any gaps between appointments' for all types of applicants to the PL

- We have removed the requirement for applicants to provide 'an explanation of any gaps between appointments' for all types of application. The reasoning for this is that people choose to take a gap in employment for a variety of reasons and should not have to justify why. If there were any significant patient safety concerns due to a gap in a practitioner's CV, this would be captured via other checks at the point of application.
- Regulation 4 will amend regulation 4(2)(e) so that applicants to a PL are no longer required to explain any gaps in their professional experience when applying to join a PL.

Making clear that performers declare to NHSE within 7 days if they have become involved in any enquiry or investigation by the police or other regulatory body, NHS body or employer anywhere inside or outside of the UK

- The 2013 Regulations sets out the undertakings that practitioners included on a PL must comply with when making an application to join a PL. We have made it clear that performers to declare to NHSE within 7 days if they have become involved in any enquiry/investigation by the police or other regulatory body, NHS body or employer anywhere inside or outside of the UK. This change is necessary for patient safety purposes.
- Regulation 4 amends paragraph (3)(b) of regulation 4 to make clear that practitioners have 7 days to declare to NHSE if they become aware of any material change to the information provided in or with their application.

Removal of the need to issue a notification on the death of a practitioner

- At present, NHSE must notify a series of individuals and organisations about decisions made about a practitioner. This includes notification of decision which follows the death of the practitioner. This is unnecessary. NHSE will no longer need to issue a notice in circumstances where a practitioner has died.
- Regulation 15 amends regulation 18(2)(e) of the 2013 Regulations to make clear that there is no obligation to notify the persons and bodies listed at paragraph 18(3) of the 2013 regulations when a practitioner is removed from a PL following their death.

Allow Type 2 armed forces GPs to be exempt from the requirements to perform primary medical services, as is already the case for Type 1 armed forces GPs

- Type 1 armed forces GPs are currently exempt from the requirements to perform primary medical services. However, there was an omission in the drafting of the 2013 regulations that did not exempt Type 2 armed forces GPs. Type 2 armed forces GPs will, therefore, be exempt from the requirements to perform primary medical services, as is already the case for Type 1 armed forces GPs.

- Regulation 7 of the regulations amends regulation 7(5) to exempt Type 2 armed forces GPs from the requirements to perform primary medical services at the point of application to join the MPL, as is already the case for Type 1 armed forces GPs.

7.5 We have also made 2 small drafting changes to the National Health Service (Performers Lists) (England) (Amendment) Regulations 2023 (the '2023 Regulations'). The 2023 regulations introduced amendments to the 2013 Regulations for, among other things, practitioners already included on "equivalent lists" to the English PL in the devolved administrations. Regulation 4 inserts a new regulation 4(2)(ha) into the 2013 Regulations that applicants to a PL must provide information about whether they currently are, or ever have been, included in an equivalent list. Regulation 6 amends regulation 5A(1)(c)(ii) of the 2023 Regulations to change the word 'suspect' to 'suspend', to correct a typographical error.

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 There are no plans to consolidate the amendments made to the 2013 Regulations.

10. Consultation outcome

10.1 No public consultation was carried out. However, the Department did engage relevant stakeholders through a short, targeted consultation. The proposed changes were shared with the following organisations: NHSE, The General Medical Council, The General Dental Council, The General Optical Council, The British Medical Association (BMA) and the BMA General Practitioners Committee**,** The Royal College of General Practitioners, NHS Resolution, NHS Confederation, NHS Employers, The Devolved Governments, The British Dental Association, FODO (The Association for Eye Care Providers), Association of Optometrists and the Optometric Fees Negotiating Committee and Healthwatch.

10.2 There was broad support for the majority of the proposed changes. The Department considers there is a strong public interest in introducing this legislation swiftly, in order to take immediate steps to improve access to NHS primary care services and meet the unprecedented demand for them. Based on the feedback to the targeted consultation, the Department considers the changes to be proportionate and fair.

11. Guidance

11.1 No guidance is required. NHSE have briefed the sector on the upcoming changes and will provide a further update when the legislation comes into force.

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 the SI relates to maintenance of existing regulatory standards.

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 that the Department will continue to work with NHSE to ensure the Regulations provide an effective regulatory framework for managing medical, dental and ophthalmic performers.

14.2 The instrument does not include a statutory review clause. The legislation will be subject to review by officials as part of ongoing policy development work on the delivery of primary care services.

15. Contact

15.1 Rebekah Thompson at the Department of Health and Social Care - Telephone: +44 20 7972 3386 or email: rebekah.thompson@dhsc.gov.uk can be contacted with any queries regarding the instrument.

15.2 Philip Harper, Deputy Director for Professional Regulation, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.

15.3 Neil O'Brien, Parliamentary Under Secretary of State for Primary Care and Public Health, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.