EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE (PRIMARY DENTAL SERVICES) (AMENDMENT) REGULATIONS 2023

2023 No. 554

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 This instrument amends-

(a) the National Health Service (General Dental Services Contracts) Regulations 2005 ("the GDS Contracts Regulations"); and

(b)the National Health Service (Personal Dental Services Agreements) Regulations 2005 ("the PDS Agreements Regulations").

2.2 The purpose of this instrument is to require NHS England to amend Schedule 3 of the terms of General Dental Services contracts ("GDS contracts") and Personal Dental Services agreements ("PDS agreements") held by contractors providing primary NHS dental services in England to give effect to the changes to both the GDS Contracts Regulations and PDS Agreements Regulations, which will enable NHS England to permanently amend the level of contracted activity, and corresponding value, of a GDS contract or a PDS agreement, in cases where all the following conditions have been met:

1. the contractor has failed to deliver a minimum of 96% of their contracted Units of Dental Activity (UDAs) and/or Units of Orthodontic Activity (UOAs), as the case may be, per financial year,
2. the delivery of UDAs at a rate lower than 96% has occurred for three consecutive financial years (save for Covid years),
3. the commissioner has issued a breach notice (which has not been waived or set aside and no appeals are pending against it) for each of those years by reason of such under performance,
4. there have not been force majeure circumstances causing the underperformance in any of those years
5. the contractor has not agreed to voluntarily amend their contract to enable them to meet it in future years by lowering the number of associated UDAs and/or elements such as the monetary value of the contract.

2.3 The value of the contract will be amended to the highest number of UDAs delivered by the contractor over the three preceding non-Covid years ("Covid years" are 2020/21 and 2021/22) that they did not deliver at least 96% of their contract.

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 territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

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

6. Legislative Context

6.1 NHS England commission contracts with dentists to deliver NHS primary dental services. The nature of these contracts is established through the GDS and PDS regulations. Service delivery of these contracts is, in most part, measured in UDA and/or UOAs. Hereafter, "UDAs" will be taken to mean "and/or UOAs". Dentists are contracted to deliver a certain number of UDAs each financial year, with the payment of these UDAs spread over 12 equal monthly payments. Any undelivered UDAs at the end of the financial year are recovered by commissioners in the next financial year. This process is often lengthy, and as the recovery against undelivered activity happens in the financial year following the delivery deficit, the associated monies cannot be allocated to secure additional NHS dental care from other contractors in the financial year in which the deficit has occurred.

6.2 There is a contract tolerance for dentists of 4%, meaning dentists can deliver between 96% and 100% of their contract value without being in breach of their contract. Most dentists deliver within this tolerance, however, around 13% of dentists persistently fail to deliver at least 96% of their contracted UDAs.

6.3 This change to the contract will mean that if a contractor delivers less than 96% of their contracted UDAs in three consecutive non-Covid years, their contract with NHS England can be permanently rebased to the highest number of UDAs they delivered over the preceding three non-Covid years. The contractor will at this point have the option to continue delivering NHS dentistry to the newly specified UDA levels and contract value, or terminate their contract.

7. Policy background

What is being done and why?

7.1 The GDS Contract Regulations and PDS Agreements Regulations were introduced to set out the approach to provision of NHS dental services.

7.2 Access to NHS dental services has become an increasingly challenging issue following the impacts of the COVID-19 pandemic on the sector. There is significant media and parliamentary interest in the provision of NHS dentistry, with concerns primarily focused on patients being unable to find or access NHS dental care.

7.3 To improve upon the dental system for patients, a set of reforms to the NHS dental system (of which this amendment is one) were negotiated with the BDA and consulted on with stakeholders across the dental sector. Two changes were implemented to the Regulations in November 2022 – the splitting of Band 2 to more fairly remunerate dentists for complex dental work; and the requirement that dentists update their available services on the NHS.uk website at least every 90 days.

7.4 The primary intended policy outcome is that patient access to NHS dentistry will be improved within the current cost envelope. This will be achieved through commissioners being able to reallocate UDAs to other contractors to enable them to deliver more NHS dental care and increase access for patients.

Explanations

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

7.5 Prior to this instrument, NHS dentists would receive their annual contract payment in 12 equal payments over the course of the financial year, regardless of past under performance. Currently, commissioners can withhold monies for that year following the contractor's mid-year review, if the contractor has delivered less than 30% of their contract at mid-year. In order to irrevocably remove this money from that contract, whether in-year or for the permanent duration of the contract, prior to this amendment NHS England would need to rebase the contract with the agreement of the contractor.

7.6 The contract tolerance is in place to assist practices who may have underdelivered during the year for a variety of reasons, and the permanent rebasing will only affect the minority of practices that consistently and persistently fail to deliver their agreed UDAs over three consecutive non-Covid years.

Why is it being changed?

7.7 There was no mechanism prior to the changes in this instrument to allow commissioners to permanently rebase the contracts for those practices that consistently and repeatedly fail to deliver the agreed activity (unless by mutual agreement with contractors).

7.8 This meant that undelivered activity would be lost until the following financial year when it is recovered. By rebasing the contracts of contractors who persistently under-deliver their agreed activity to the highest number of UDAs delivered in the qualifying three years, commissioners will be able to distribute UDAs to practices that do deliver NHS activity and thus improve access to NHS dental care for patients.

What will it now do?

7.9 NHS commissioners will be able to rebase the NHS dental contract values of both GDS Contracts and PDS Agreements of dental contractors who have not delivered at least 96% of their contract value in the preceding three consecutive non-Covid years (Covid years being 2020/21 and 2021/22), without securing the agreement of the contractor. The first year to be considered will be 2019/20. The first year in which rebasing could be effected would not be before financial year 2024/25.

7.10 Commissioners will be able to permanently set the value of the contract to the highest number of UDAs delivered by a contractor over those three consecutive non-Covid years from the start of the following financial year, without the consent of the contractor if agreement cannot be reached.

7.11 The qualifying non-Covid years start from 2019/20 and exclude 2020/21 and 2021/22.

7.12 This will allow commissioners to allocate unused UDAs to other practices that can deliver more NHS work.

7.13 This increased access comes at no additional cost, and makes more efficient use of current budgets.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 The Department does not have any plans for consolidation.

10. Consultation outcome

10.1 Negotiations have been carried out with the British Dental Association (BDA), who have agreed to these changes. A wider group of dental sector and patient stakeholders were also consulted on these changes and generally agreed that they are positive or took a neutral stance.

11. Guidance

11.1 NHS England will support NHS dental practices with these changes.

12. Impact

12.1 This instrument will not have any impact on the dental practices that deliver their contracted NHS activity within the contract tolerance (96%-102%). The current review and support systems for these practices will remain unchanged.

12.2 This instrument will have an impact on dental practices that persistently and consistently fail to deliver the minimum agreed number of UDAs in their contracts. As the payment for undelivered UDAs is already recovered by NHS England under the current regulations, practices are unlikely to be financially disadvantaged. Rebasing will contribute to contractors meeting their future contractual obligations, without finance being diverted to a contract that consistently under performs. A key indicator of practices failing to deliver their contracted UDAs is previous under-delivery.

12.3 There will be a positive impact for patients as dentists that do deliver their UDAs will be able to increase the amount of NHS dentistry they deliver within the current budgets where previously un-delivered activity is reallocated, increasing access for patients.

12.4 There is no impact on charities or voluntary bodies.

12.5 The instrument will have a positive impact upon the public sector, as it will improve NHS dental service delivery and reduce the administrative burden that commissioners face when undertaking financial recovery against un-delivered activity.

12.6 This instrument is covered by the full impact assessment (9591) dated 27th October 2022 that was published alongside the Explanatory Memorandum for the first stage of NHS Dental System Reforms. It is available on the legislation.gov.uk website via following link: https://www.legislation.gov.uk/ukia/2022/90/pdfs/ukia_20220090_en.pdf

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses – dentists undertaking NHS dental work hold contracts with local commissioners and operate as small businesses in many cases. This instrument will not place small or large businesses at an advantage over the other.

14. Monitoring & review

14.1 NHS England (on behalf of the Secretary of State for Health and Social Care) are responsible for monitoring the implementation of, and compliance with this legislation; however, the Secretary of State is ultimately responsible for these regulations and the policies they implement.

14.2 This instrument does not include a statutory review clause.

15. Contact

15.1 Laurence Bickerton at the Department of Health and Social Care Telephone: 020 7972 2998 or email: Laurence.bickerton@dhsc.gov.uk can be contacted with any queries regarding the instrument.

15.2 Sarah Norton, Deputy Director for Dentistry, 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.