

EXPLANATORY MEMORANDUM TO
THE NATIONAL HEALTH SERVICE COMMISSIONING BOARD AND
CLINICAL COMMISSIONING GROUPS (RESPONSIBILITIES AND
STANDING RULES) (AMENDMENT) REGULATIONS 2013

2013 No. 2891

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
 - 2.1 The instrument amends aspects of the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 (“2012 Regulations”), which provide for a range of matters relating to the functioning and commissioning responsibilities of the National Health Service Commissioning Board (known as NHS England) and clinical commissioning groups (CCGs). The amendments:
 - make minor changes to the 2012 Regulations in relation to NHS Continuing Healthcare (NHS CHC), for example to take account of new duties for NHS England and CCGs in relation to the discharge of patients from hospital;
 - remove a disqualification for membership of Independent Review Panels (IRPs), which review decisions made by NHS England and CCGs about NHS CHC;
 - create new duties for NHS England and CCGs in relation to the provision of personal health budgets for NHS CHC or continuing care for children;
 - provide for greater choice for patients using mental health services;
 - refer to updated guidance relating to the right to start NHS consultant led treatment within 18-weeks of referral; and
 - make CCGs continue to be responsible for commissioning NHS CHC for people whom they have placed in care homes or independent hospitals in the area of a Local Health Board in Wales.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.
4. **Legislative Context**
 - 4.1 Section 3(1B) of the National Health Service Act 2006 (“2006 Act”) was inserted by section 13 of the Health and Social Care Act 2012 (“2012 Act”). It allows regulations to specify that a CCG also has responsibility for commissioning services (either generally, or in

relation to a specific service) for persons who have a prescribed connection with the CCG's area (section 3(1B)(b)). This is in addition to the persons for whom CCGs are required by the 2006 Act to commission services. Regulation 1 of, and Schedule 1 to, the 2012 Regulations provide for the additional categories of person for whom a CCG has the duty to commission services under section 3 of the 2006 Act, and the power to commission other services under section 3A of that Act. These currently include persons for whom a CCG has commissioned accommodation in a care home or an independent hospital which is situated in the area of another CCG, along with at least one other service, to meet the person's continuing care needs.

- 4.2 Section 6E of the 2006 Act was inserted by section 20 of the 2012 Act. It enables the Secretary of State to impose requirements on NHS England and CCGs when they are exercising their functions of commissioning health services. The requirements are known as the "Standing Rules", because they are intended to set core, ongoing requirements for the health service. The first set of Standing Rules was made as part of the 2012 Regulations, in preparation for the establishment of NHS England and CCGs, and these largely replicated existing policies which had been given effect by means of directions to Primary Care Trusts (which were abolished by the 2012 Act). These regulations amend certain Parts of the "Standing Rules", the current content of which is described in the following paragraphs.
- 4.3 Part 6 of the 2012 Regulations makes provision about NHS CHC and NHS-funded Nursing Care. Regulation 21 imposes duties on NHS England and CCGs in relation to the assessment of need for NHS CHC, and, where appropriate, as to the provision of such care. Regulation 23 makes provision in relation to NHS England's duty to organise a review where a person is dissatisfied with the procedure followed in reaching a decision as to eligibility for NHS CHC, or the decision itself. Regulations 24 to 27, and Schedule 5, make provision in respect of the appointment and term of office of members of a review panel, including the circumstances in which a person is disqualified for appointment.
- 4.4 Part 8 of the 2012 Regulations underpins rights set out in the NHS Constitution, namely the right to "choose the organisation that provides your NHS care when you are referred for your first outpatient appointment with a service led by a consultant", subject to certain exceptions. Referrals in respect of mental health services are currently excluded from this right.
- 4.5 Part 9 of the 2012 Regulations underpins rights set out in the NHS Constitution, namely the right to access services within maximum waiting times, or for the NHS to take all reasonable steps to offer a range of alternative providers if this is not possible. Regulation 50 requires NHS England and CCGs to have regard to a guidance document entitled "The Referral to Treatment Consultant-led Waiting Times Rules Suite" published in January 2012 in carrying out its duties under regulations 45 to 48 to give effect to patients' rights in relation to waiting times.

- 4.6 The amendments to the 2012 Regulations also make new provision in relation to personal health budgets, which are not currently addressed in legislation. One type of personal health budget – a direct payment – is currently dealt with in the Direct Payments Regulations 2013 (S.I. 2013/1617, made under section 12A of the 2006 Act).

5. Territorial Extent and Application

- 5.1 This instrument extends to England and Wales but applies in relation to England only.

6. European Convention on Human Rights

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

7. Policy background

NHS Continuing Healthcare and NHS-funded Nursing Care – regulation 2

- 7.1 Regulation 2 amends Part 6 of the 2012 Regulations. Regulation 20 of the 2012 Regulations defines “Fast Track Pathway Tool” as the Fast Track Pathway Tool for NHS CHC issued by the Secretary of State and dated 28th November 2012¹. This document is one of the supporting tools provided under the National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care². The Fast Track Pathway Tool is the document which is completed in respect of a person who may be eligible for NHS CHC and who has a rapidly deteriorating condition and the condition may be entering a terminal phase. Reference is made in the 2012 Regulations to “a” Fast Track Pathway Tool, which has led to some ambiguity as to which tool must be used. The correct tool to use should be the nationally published tool issued by the Secretary of State and not one which has been adapted locally. The amendments therefore refer to “the” Fast Track Pathway Tool, to remove this ambiguity.
- 7.2 NHS England and CCGs now have duties under the Community Care (Delayed Discharges) Act 2003 to notify local authorities about upcoming discharges from hospital. The amendments to the 2012 Regulations will require them to ensure that an assessment of eligibility for NHS CHC is carried out before giving notice to a local authority of a patient’s likely need for community care services. They will also allow those bodies to rely on assessments carried out by NHS trusts under the Delayed Discharges Directions 2013, which are being made alongside these Regulations³.

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/213140/NHS-CHC-Fast-Track-Pathway-tool.pdf

² <https://www.gov.uk/government/publications/national-framework-for-nhs-continuing-healthcare-and-nhs-funded-nursing-care>

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254680/Delayed_discharges_directions.pdf. A hard copy of the directions may be obtained on request from Anna Kershaw, 2E47, Quarry House, Quarry Hill, Leeds, LS2 7UE.

- 7.3 Independent Review panels (which are organised by NHS England to consider the assessment process followed and decisions as to eligibility for NHS CHC in cases where patients are dissatisfied) are constituted with an independent chair, a “CCG member” and a “social services authority member”. As a result of the changes to the NHS from April 1 2013, many CCGs have commissioned other organisations to undertake NHS CHC functions on their behalf, including the assessment function. In the main these organisations are commissioning support units, and there are a small number of social enterprises and Local Authorities also undertaking this function. Schedule 5 to the 2012 Regulations lists the persons who are not eligible to be members of independent review panels, and these include individuals working for bodies which provide commissioning support to CCGs. The amendments to Schedule 5 remove this prohibition in order to assist those CCGs which are struggling to find appropriate members from within the CCG with sufficient expertise and experience to be panel members.

Personal Health Budgets – regulation 3

- 7.4 A personal health budget is an amount of money to support a person's identified health and wellbeing needs, planned and agreed between the person and their NHS commissioner. It can be managed in one of three ways: as a direct payment to the patient or their representative, as a notional budget (where the application of the amount of money available to spend is discussed and agreed between the patient and the commissioner) or a real budget (where the money is transferred to an organisation or trust which assists the patient in choosing their package of care and which then buys that care with the agreement of the NHS commissioner). In October 2011, the Government announced that people receiving NHS CHC will have a ‘right to request’ a PHB, including a direct payment, from April 2014, subject to the results of the PHB pilot programme. This was confirmed in November 2012, following the publication of the independent evaluation of the pilot programme⁴.
- 7.5 Regulation 3 inserts a new Part 6A into the 2012 Regulations, which will require NHS England and CCGs to be able to offer at least one kind of PHB to people on NHS CHC or transitioning into NHS CHC (including children), and to give due consideration to requests for them. This sets the clear expectation that CCGs will need to develop the capacity and capability to deliver PHBs. New Part 6A will also impose some supporting obligations on NHS England and CCGs.

Mental Health Services – regulation 4

- 7.6 Part 8 of the 2012 Regulations is being amended in order to allow for greater patient choice in the provision of mental health services.
- 7.7 At present mental health is one of the services to which the duty of choice does not apply in full. People who are referred to mental health services are not entitled to a choice of provider and consultant-led team, although they are able to choose between teams led by health professionals at the provider to which they are referred. The

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amendments enable a greater level of choice to be made, so that people who require an elective referral for mental health services will from April 2014 have choice of provider and consultant-led team, as well as taking account of the fact that mental health services need not always be consultant led but may be led by any named health professional.

- 7.8 These amendments are necessary as part of the Department's commitment to parity of esteem between mental and physical health. Improving choice in mental health is one way of achieving greater parity.

18 Week Referrals – regulation 5

- 7.9 There is an amendment to Part 9 of the 2012 Regulations, relating to the right to start consultant-led treatment within a maximum of 18 weeks of referral. An update is required to regulation 50, which requires that NHS England and CCGs have regard to "The Referral to Treatment Consultant-led Waiting Times Rules Suite" dated January 2012. The 2012 Rules Suite requires updating because one of its illustrative case studies is no longer applicable as it relates to comprehensive sexual health services, the commissioning of which has been the responsibility of local authorities since April 2013. The updated Rules Suite is being published in tandem with these Regulations⁵.

Amendment in relation to NHS CHC patients in Wales – regulation 6

- 7.10 The amendments also identify an additional group of people as being the responsibility of CCGs, and regulation 6 amends Schedule 1 to the 2012 Regulations accordingly. The people are those whom the CCG has placed in a care home or independent hospital in the area of a Local Health Board in Wales and for whom it is commissioning services to meet the person's NHS Continuing Healthcare needs. The CCG will continue to be responsible for commissioning the accommodation and services for such people. This gives effect to the established protocol between England and Wales on this matter⁶.

8. Consultation outcome

- 8.1 Other than as referred to in paragraph 8.2, there were no formal consultations on the amendments. However, NHS England were informally consulted, as were relevant stakeholders.
- 8.2 Expanding choice in relation to mental health services was consulted on in *Liberating the NHS: greater choice and control*⁷ and in *Liberating the NHS: no decision about me, without me*⁸. The majority of respondents were supportive of this proposal.

⁵ <https://www.gov.uk/government/publications/right-to-start-consultant-led-treatment-within-18-weeks>

⁶ <http://www.england.nhs.uk/wp-content/uploads/2013/03/england-wales-protocol.pdf>

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http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/en/Consultations/Consultations/Consultations/DH_119651

⁸ http://www.dh.gov.uk/en/Consultations/Liveconsultations/DH_134221 and see the Government's response at: <https://www.gov.uk/government/publications/government-response-to-the-consultation-on-proposals-for-greater-patient-involvement-and-more-choice>

9. Guidance

- 9.1 NHS England issued guidance on maximum waiting times on 19 August 2013⁹.

10. Impact

- 10.1 A full impact assessment was produced in respect of the provisions of the Health and Social Care Act 2012 (sections 13 and 20 of which inserted sections 3(1B) and 6E, respectively, into the Act) and a copy is available at: <https://www.gov.uk/government/publications/health-and-social-care-bill-2011-combined-impact-assessments>. No separate impact assessment has been prepared in respect of regulations 2, 5 and 6, as these regulations have no impact on the private sector or civil society organisations. Copies of the impact assessments relating to the provisions of regulations 3 and 4 are annexed to this Explanatory Memorandum.

11. Regulating small business

- 11.1 The legislation does not apply to small business.

12. Monitoring & review

- 12.1 The standing rules will be reviewed annually and updated as required.

13. Contact

Adrian Harper at the Department of Health Tel: 0113 2545006 or email: adrian.harper@dh.gsi.gov.uk can answer any queries regarding the instrument.

⁹ <http://www.england.nhs.uk/statistics/wp-content/uploads/sites/2/2013/08/wait-times-guid-comms.pdf>