

EXPLANATORY MEMORANDUM TO
THE NATIONAL HEALTH SERVICE COMMISSIONING BOARD AND
CLINICAL COMMISSIONING GROUPS (RESPONSIBILITIES AND
STANDING RULES) (AMENDMENT) (NO. 3) REGULATIONS 2014

2014 No. 1611

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 (SI 2012/2996) (“the 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:
 - update the 2012 Regulations to reflect revised rates of NHS-funded Nursing Care payable by the relevant body (NHS England or CCGs);
 - make changes in relation to the provision of personal health budgets (“PHB”) for NHS Continuing Healthcare (NHS CHC) or continuing care for children;
 - provide that duties as to choice of health service provider do not apply in the case of persons detained in certain accommodation; and
 - make minor corrections.
3. **Matters of special interest to the Joint Committee on Statutory Instruments**
 - 3.1 None.
4. **Legislative Context**
 - 4.1 Section 6E of the National Health Service Act 2006 (the “2006 Act”) was inserted by section 20 of the Health and Social Care Act 2012. 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, and was amended in 2013. These regulations amend certain Parts of the “Standing Rules”, the content of which is described in the following paragraphs. Part 8 is also made under section 75 of the Health and Social Care Act 2012 (c. 7), which enables the Secretary of State to make regulations imposing

requirements on NHS England and CCGs for the purpose of securing that they protect and promote the right of patients to make choices with respect to treatment or other health care services.

- 4.2 Part 6 of the 2012 Regulations makes provision about NHS CHC and NHS-funded Nursing Care. Regulation 20 sets out the flat rate and high band payments payable in respect of NHS-funded Nursing Care. The amendments to Part 6 increase the rates payable for NHS-funded Nursing Care.
- 4.3 Part 6A of the 2012 Regulations, inserted by the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) (Amendment) Regulations 2013 (SI 2013/2891) (the “2013 Regulations”) makes provision about PHBs. Part 6A provides for a right to ask for a PHB in NHS CHC and continuing care for children. The amendments change the right to ask for a personal health budget to a right to have the request granted, unless it is not appropriate in the circumstances, and extend the appeal right to cover the situation where the PHB is refused in part and the type of PHB granted.
- 4.4 Part 8 of the 2012 Regulations places a duty on relevant bodies to ensure that persons are offered a choice of health service provider. That duty does not apply to persons detained in or on temporary release from prison. The amendments extend that exclusion to persons detained in or on temporary release from other custodial settings.
- 4.5 Under section 6E(9) of the 2006 Act, where regulations under section 6E are made to come into force on a day other than 1 April, the Secretary of State must publish a statement explaining the reasons for making the regulations so as to come into force on such a day, and lay the statement before Parliament. As these Regulations come into force on 1 October 2014, the Secretary of State has laid before Parliament and published a statement of explanation.

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-funded Nursing Care – regulation 3

- 7.1 NHS-funded Nursing Care is the funding provided by the NHS to care homes providing nursing, to support the provision of nursing care by a registered nurse for those assessed as eligible. If an individual does not qualify for NHS Continuing Healthcare, the need for care from a

registered nurse should be determined. If the individual has such a need and it is determined that the individual's overall needs would be most appropriately met in a care home providing nursing care, then this would consequently lead to eligibility for NHS-funded Nursing Care. Once the need for such care is agreed, the relevant body's responsibility to pay a flat rate contribution to the care home towards registered nursing care costs arises.

- 7.1.1 There are two rates of NHS-funded Nursing Care payable, the standard rate and the higher rate. The single band of NHS-funded nursing care was introduced on 1 October 2007 and replaced the previous low, medium and high bands of nursing care. The single band is a contribution towards the cost of services provided by a registered nurse, involving either the provision of care or the planning, supervision or delegation of the provision of care, but it does not cover services which do not need to be provided or supervised by a registered nurse. All individuals newly eligible for NHS-funded nursing care since 1st October 2007 have been placed on the standard rate / single band. The NHS is responsible for this funding. Accommodation and social care costs are the responsibility of either the LA and/or the individual (subject to the outcome of a community care assessment and financial assessment).

Individuals who were in receipt of the high band of NHS-funded nursing care under the three-band system that was in force until 30 September 2007 are entitled to continue on the high band until:

- a) on review, it is determined that they no longer have any need for nursing care;
- b) on review, it is determined that their needs have changed, so that under the previous three-band system, they would have moved onto the medium or low bands. In this situation, the individual should be moved onto the standard rate / single band;
- c) they are no longer resident in a care home that provides nursing care;
- d) they become eligible for NHS continuing healthcare; or
- e) they die.

CCGs must continue to make NHS-funded nursing care contributions in respect of those individuals who were deemed eligible for this funding prior to 1st April 2013, until such time as any of the circumstances listed above apply.

- 7.1.2 The rates set out in the 2012 Regulations are £108.70 per week for the standard flat rate payment, and £149.60 per week for the high band payment. These Regulations increase the rates to £110.89 per week and £152.61 per week respectively. The Secretary of State has previously announced increases to the rates in the 2012 Regulations with effect from 1 April for the financial years 2013/14 and 2014/15 respectively. In practice, health care bodies pay at the rates published by the Secretary of State. These Regulations provide the first opportunity to insert the published rates for 2014/15 in the 2012 Regulations.

Personal Health Budgets – regulation 4

- 7.2 A PHB 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 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 and continuing care for children would have a 'right to request' a PHB 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 programme. The Minister of State for Care and Support announced in October 2013 that from 1 October 2014, the right to request a PHB would be a "right to have" a PHB, unless it was not appropriate in the circumstances. The expectation is that a request for a PHB should be granted in most cases, in full, or failing that in part to the extent that is appropriate.
- 7.2.1 The 2013 Regulations inserted Part 6A in the 2012 Regulations with effect from 1 April 2013, which requires 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. These amendments enhance the right of people on NHS CHC and Continuing Care for Children packages to access PHBs as CCGs have to grant a request for a PHB unless it is not appropriate in the circumstances of that person's case. The regulations also extend the right of appeal to the type of PHB granted, and to situations where the request is refused in part.
- 7.2.2 All 211 CCGs have now signed up to NHS England's support programme with 176 attending the training provided in the run up to the "right to request". The training programme will be rerun this summer and provide support to CCGs to help them prepare for the "right to have" a PHB.

Choice of health service provider – regulation 5

- 7.3 In 2006 the government legislated to give patients requiring an elective appointment with a consultant or specialist as an outpatient for a physical health condition the right to choose. The policy was a choice from 4 or 5 organisations that provide NHS care for treatment (including local NHS trusts and foundation trusts, specialist services provided by GPs within their surgeries, and some existing independent sector providers). From 2008 this policy was expanded so that patients referred by their GP for hospital treatment could choose to be treated in any hospital anywhere in the country, which met the standards set by the NHS. From 2009, the NHS Constitution made 'free choice' a right for patients when they are referred for their first outpatient appointment with a service led by consultants, and to information to support that

choice. These rights were expanded to mental health services on 1 April 2014; however, some exceptions still remain.

- 7.3.1 The right to choice of health service provider does not apply in certain circumstances, including where a patient is detained in, or on temporary release from, prison. The policy intention is that this right should not extend to persons in other secure settings, including courts, secure children's homes, certain secure training centres and immigration removal centres, and young offender institutions.

8. Consultation outcome

- 8.1 There was no formal consultation on the amendment to the rates of NHS-funded Nursing Care. The amendment follows routine consideration of the rates payable.
- 8.2 There were no formal consultations on the amendments to the personal health budgets regulations. Following the PHB pilot period, the DH policy and delivery team informally discussed options for rollout with a range of stakeholders including InControl, third sector organisations, PCTs and Royal Colleges. DH has continued to consult NHS England informally on the proposals relating to PHBs, and NHS England has continued to consult with their stakeholders on these changes as the policy has developed.
- 8.3 The Department of Health consulted with NHS England on the choice in custody amendments after it was identified that an incomplete description of secure estates was used in the 2012 Regulations. It was agreed that the Regulations should be amended to include all secure settings for which NHS England commissions services.

9. Guidance

- 9.1 Guidance on NHS-funded Nursing Care is available in the *National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care November 2012 (Revised)*¹ and in the *NHS-funded Nursing Care Practice Guide July 2013 (Revised)*².
- 9.2 NHS England will issue guidance on the right to have a PHB in NHS CHC and continuing care for children, the publication of which will coincide with these amendments coming into force.
- 9.3 NHS England has issued interim guidance on choice of health service provider in mental health, the final publication of which will coincide with these amendments coming into force.

¹ <https://www.gov.uk/government/publications/national-framework-for-nhs-continuing-healthcare-and-nhs-funded-nursing-care>

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

10. Impact

- 10.1 NHS-funded Nursing Care is an existing policy and is not subject to change. From 1 April 2014 the rates have been increased by 1%, in line with general increases in NHS pay.
- 10.2 A full impact assessment has been completed on the changes to the personal health budget regulations and this can be found at Annex A.
- 10.3 The potential impacts of choice policy have been considered explicitly in a series of formal Impact Assessments published at each stage of the consultation process and historically alongside key policy guidance or publications. The most recent of which include an IA and EA as part of the 'No Decision About Me, Without Me' consultation, published in 2012 and available on www.gov.uk

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

Personal Health Budgets: Anna Farley at the Department of Health Tel: 0207 210 5577 or email anna.farley@dh.gsi.gov.uk