EXPLANATORY MEMORANDUM TO

THE NATIONAL HEALTH SERVICE (JOINT WORKING AND DELEGATION ARRANGEMENTS) (ENGLAND) (AMENDMENT) REGULATIONS 2023

2023 No. 223

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.

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

2. Purpose of the instrument

2.1 This instrument amends the National Health Service (Joint Working and Delegation Arrangements) (England) Regulations 2022. It precludes Integrated Care Boards ('ICBs') and NHS England ('NHSE') from delegating decisions as to whether or not an individual is eligible for NHS Continuing Healthcare ('CHC') or NHS-funded Nursing Care ('FNC') ('CHC and FNC eligibility decisions') to any other body. It also precludes NHSE from delegating the function of arranging for the review of CHC eligibility decisions to any other body.

2.2 This instrument will enable consistent CHC and FNC eligibility decisions to be made by ICBs and NHSE in line with their statutory duties. It will also enable consistency in the approach to arranging for the review of CHC eligibility decisions.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This Explanatory Memorandum implements action which DHSC agreed to take in relation to the Explanatory Memorandum to the National Health Service (Joint Working and Delegation Arrangements) (England) Regulations 2022, which this instrument amends and which was reported by the Joint Committee on Statutory Instruments for requiring elucidation in the Tenth Report of Session 2022–23.

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

6. Legislative Context

6.1 The Health and Care Act 2022 abolished clinical commissioning groups ('CCGs') and allowed for the establishment of ICBs, who have taken on the NHS commissioning functions of CCGs.

6.2 Prior to the enactment of the Health and Care Act 2022, the powers for CCGs (as they then were) to delegate their functions were limited.

6.3 The Health and Care Act 2022 introduced broad powers of delegation, which relevantly enable ICBs and NHSE to delegate their functions to certain bodies, including the exercise of their commissioning functions under sections 3, 3A and 3B of the National Health Service Act 2006 ('NHS Act 2006'). Regulations may, however, specify any functions which are *not* to be delegated.

6.4 As an interim measure prior to the making of this instrument, NHSE have issued statutory guidance which has advised ICBs against delegating CHC and FNC eligibility decisions to any other organisation, as NHSE considers that such decisions are not suitable for delegation. The National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care ('National Framework') has also been updated to this effect.

7. Policy background

What is CHC and FNC?

7.1 CHC and FNC are provided in accordance with the requirements placed on ICBs and on NHSE to arrange for the provision of certain health services to the extent that they consider necessary, to meet the reasonable requirements of people for whom they have responsibility.

7.2 The legislative framework relating to CHC and FNC is set out in Part 6 of the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 ('Standing Rules').

7.3 ICBs are generally the bodies with responsibility for the assessment and provision of CHC and FNC, as set out in Part 6 of the Standing Rules. However, NHSE has such responsibility in respect of serving members of the armed forces and their families, and for prisoners and other detainees.

7.4 CHC is a package of NHS-funded ongoing care for adults with the highest levels of complex, intense or unpredictable needs, who have been assessed as having a primary health need, which meets needs that have arisen as a result of disability, accident or illness. To determine whether an individual has a primary health need, a detailed assessment and decision-making process must be followed, as set out in the National Framework.

7.5 The CHC assessment process is set out in the National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care, as underpinned by Part 6 of the Standing Rules.

7.6 Assessing eligibility for CHC is a two-stage process, the latter undertaken by a Multi-Disciplinary Team ("MDT"). A MDT is a team consisting of at least two professionals from different healthcare professions; or one healthcare professional and one social care professional.

7.7 It should be noted that this assessment process does not apply to individuals who may have a primary health need arising from a rapidly deteriorating condition, who may be entering a terminal phase. For this cohort of individuals, there is a separate 'Fast-Track' pathway to determining eligibility for CHC.

7.8 The CHC assessment process usually starts with a screening process using a document called the 'Checklist', which, if positive, indicates that an individual requires a full assessment for CHC. The assessment then involves a MDT undertaking a comprehensive assessment and evaluation of an individual's health and social care needs, and reviewing evidence such as medical records, examinations, assessments etc. to make an assessment of eligibility for CHC using a standardised tool called a 'Decision Support Tool' ("DST") to help inform the decision.

7.9 The MDT is required to make a recommendation to the ICB or NHSE as to whether the individual has a primary health need. The ICB or NHSE then takes a decision as to whether the individual has a primary health need, using the completed DST to inform that decision.

7.10 As such, the ICB or NHSE arranges for the MDT to complete an assessment of eligibility for CHC, using the DST.

7.11 The function of arranging for a MDT to complete an assessment of eligibility for CHC can be delegated to the bodies specified at section 65Z5 of the NHS Act 2006. However, the policy intention, which this instrument seeks to give effect to, is that the final decision as to whether or not a person has a primary health need (and is therefore eligible for CHC) remains with the ICB or NHSE, as the case may be.

7.12 If an individual is not eligible for CHC, it may need to be determined whether the individual is eligible for FNC.

7.13 FNC is the funding provided by the NHS to care homes for the provision of nursing care by a registered nurse. Once it has been established that an individual is eligible for FNC, the ICB or NHSE must pay a flat rate contribution to the care home towards the individual's registered nursing care costs.

7.14 The ICB or NHSE must assess eligibility for FNC where it appears that an individual who is, or may become, resident in a care home may need nursing care. Eligibility for CHC must be considered prior to any decision on eligibility for FNC, as set out in the Standing Rules.

7.15 A nursing needs assessment, which specifies the day-to-day care and support needs of the individual, should be used to assess whether the individual is eligible for FNC. More information is provided in the NHS-funded Nursing Care Practice guidance.

7.16 Again, the function of carrying out a nursing needs assessment can be delegated by the ICB or NHSE to the bodies specified at section 65Z5 of the NHS Act 2006. However, the policy intention, which this instrument seeks to give effect to, is to ensure that the determination as to whether or not a person is eligible for FNC remains with the ICB or NHSE, as the case may be.

What is being done and why?

7.17 The Health and Care Act 2022 made changes to several existing Acts, most notably the NHS Act 2006, following the publication of the white paper *Integration and Innovation: Working Together to Improve Health and Social Care for all*. The 2022 Act put in place reforms to the NHS and its structures. This includes the way in which,

and by whom, NHS services are to be commissioned and seeks to put on a statutory footing more integrated ways in which commissioners and providers of NHS services are able to work together in order to improve the quality and outcomes for patients of healthcare provided by the NHS in England. NHS bodies (Integrated Care Boards, NHS Trusts and NHS Foundation Trusts) have the power to jointly exercise their functions with or delegate their functions to other NHS bodies or local authorities or combined authorities in England. These arrangements facilitate partnership working and joint decision-making at place and system level. This flexibility enables collaboration and supports integration of the delivery of health and social care for patients in England. Whilst providing flexibility for NHS bodies to jointly exercise and delegate functions, it is also paramount to ensure that appropriate accountability is retained.

7.18 This instrument precludes ICBs and NHSE from delegating CHC and FNC eligibility decisions to any other body. It also precludes NHSE from delegating the function of arranging for the review of CHC eligibility decisions to any other body.

7.19 It should be noted that this instrument *does not* preclude ICBs or NHSE from delegating their functions relating to the carrying out of CHC or FNC assessments, or the commissioning of CHC and FNC services, to the bodies listed at section 65Z5(1) and (2) of the NHS Act 2006, which include, for instance, an NHS trust or a local authority. Owing to the fact that CHC and FNC can be (and is) delivered by ICBs locally, there may be instances where ICBs may properly delegate the carrying out of CHC and FNC assessments, or the commissioning of CHC and FNC services (such as commissioning appropriate care packages) to other bodies. Additionally, the policy intention is to ensure that NHSE similarly has the ability to delegate assessment and commissioning functions relating to CHC and FNC for the cohorts of individuals for whom NHSE has responsibility (specifically, prisoners and other detainees, and members of the armed forces and their families).

7.20 This instrument does not apply to individuals who may have a primary health need arising from a rapidly deteriorating condition, who may be entering a terminal phase. For this cohort of individuals, there is a 'Fast-Track' pathway to determining eligibility for CHC. Their eligibility for CHC is, in substance, determined by an appropriate clinician, in accordance with regulation 21(8) and (9) of the Standing Rules. That is because there is no discretion afforded to an ICB or NHSE in determining whether an individual on the Fast-Track pathway is eligible for CHC. Rather, they *must* find the individual eligible for CHC if an appropriate clinician has found such an individual to have a primary health need where the Fast Track Pathway Tool has been completed in accordance with regulation 21(8) of the Standing Rules.

7.21 The policy intention is to revert to the position prior to the enactment of the Health and Care Act 2022, whereby CHC and FNC eligibility decisions were non-delegable, nor was the function of NHSE arranging for the review of CHC eligibility decisions.

7.22 DHSC considers that this instrument shall assist in promoting consistency, quality and accountability in the approach to that decision-making, as NHSE and ICBs will be the only bodies to make CHC and FNC eligibility decisions.

7.23 ICBs establish and maintain governance arrangements for CHC and FNC eligibility processes. Maintaining control of final decision-making means that ICBs can internally assure that eligibility decisions are being made in line with their statutory

duties. It also enables NHSE to maintain oversight of these decisions as they monitor ICB performance.

7.24 DHSC and NHSE are not aware of any instances in which an ICB has utilised the broader delegation powers conferred on them by the Health and Care Act 2022 by delegating CHC and FNC eligibility decisions to any other body. In addition, the National Framework has already been updated to advise ICBs against delegating such eligibility decisions. As such, this instrument does not include transitional provisions. However, this instrument is laid 40 days before it enters force, to provide more time to adjust to the change in law in the very unlikely event that an ICB has a current delegation arrangement in place. We will also notify ICBs and NHSE of the change in law in writing.

7.25 In the very unlikely event that a CHC or FNC eligibility decision has been delegated by an ICB to another body, this instrument includes a savings provision. This provision sets out that an eligibility decision made by another body under a valid delegation prior to the coming into force of this instrument should continue to apply as if it was a decision made by the ICB or NHSE.

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 legislation.

10. Consultation outcome

10.1 There is no statutory requirement to consult on this amendment.

10.2 No formal consultation has been carried out in respect of this instrument, because its function is to revert to the position prior to the enactment of the Health and Care Act 2022, whereby eligibility decisions, and the function of arranging for the review of eligibility decisions for CHC, were non-delegable. This aligns with the policy position set out in the National Framework. We have engaged with NHSE who agree with the intention of this instrument.

11. Guidance

11.1 NHSE issued guidance on 28 September 2022 (later than the anticipated date of 1 July 2022) to ICBs to the effect that decisions regarding eligibility for CHC or FNC are not suitable for delegation.

11.2 The Explanatory Memorandum to the National Health Service (Joint Working and Delegation Arrangements) (England) Regulations 2022 mentioned that such guidance "would set out conditions for functions that may be delegated" (paragraph 7.3) and "conditions relating to the delegation of such functions" (paragraph 11.1). The reference to "conditions" was intended to mean advised or recommended limitations and constraints on the exercise of the powers relating to joint working and delegation. Any mandatory restrictions or conditions on the exercise of those powers would be prescribed in regulations.

11.3 The National Framework was also updated to advise ICBs against delegating eligibility decisions relating to CHC or FNC.

11.4 Both sets of guidance will be further updated to reflect the amendments made by this instrument.

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 its aim is to align legislative requirements with existing policy on CHC and FNC, as currently set out in the National Framework.

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 continued oversight of ICBs by NHSE, and DHSC oversight of CHC and FNC policy.

14.2 The instrument does not include a statutory review clause.

15. Contact

15.1 Alexandra Ostendorf at the Department of Health and Social Care Telephone: +44 20 7972 4157 or email: chc@dhsc.gov.uk can be contacted with any queries regarding the instrument.

15.2 Rose Thomas-Willis and Megan Bidder, Deputy Directors for Models of Care at the Department of Health and Social Care, can confirm that this Explanatory Memorandum meets the required standard.

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