

Explanatory Memorandum to ‘The NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) (Amendment) Order 2017.

This Explanatory Memorandum has been prepared by Health & Social Services Group and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1

Cabinet Secretary/Minister’s Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of ‘The NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) (Amendment) Order 2017’.

Vaughan Gething AM,

Cabinet Secretary for Health, Well-being and Sport

4 October 2017

1. Description

The NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) (Amendment) Order 2017 (“the Order”) amends The NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Establishment and Constitution) Order 2005 (SI 2005/2414), which established the NHS Business Services Authority (“the NHSBSA”), to remove the NHSBSA’s counter fraud and security management functions in relation to the health service in England and its counter fraud functions in relation to the health service in Wales.

2. Matters of special interest to the Constitutional and Legislative Affairs Committee

The NHSBSA is a cross border Special Health Authority that was established by the Secretary of State and the National Assembly for Wales. Both The NHS Business Services Authority (Awdurdod Gwasanaethau y GIG) (Establishment and Constitution) Order 2005’ and The NHS Business Services Authority (Awdurdod Gwasanaethau y GIG) (Establishment and Constitution) (Amendment) Order 2006 (SI 2006/632), were Composite Instruments, made by the Secretary of State and the National Assembly for Wales. It is therefore appropriate that the Order is made as a composite order.

As a Composite Order, the Instrument will not be bilingual and this position has been confirmed previously by the First Minister, to the Constitutional and Legislative Affairs Committee.

3. Legislative background

The Order amends ‘The NHS Business Services Authority (Establishment and Constitution) Order 2005’ (“the principal order”), which established the NHS BSA. The principal Order was amended by ‘The NHS Business Services Authority (Establishment and Constitution) (Amendment) Order 2006’ (“the 2006 Order”).

The amendments made by the 2006 Order required the NHSBSA to exercise the Secretary of State’s counter fraud and security management functions in relation to the health service in England, and certain counter fraud functions of Welsh Ministers in relation to the health service in Wales, subject to and in accordance with directions that might be given by the Secretary of State, in relation to England, and Welsh Ministers, in relation to Wales.

The counter fraud functions that the NHSBSA could exercise in relation to Wales, if directed to do so by the Welsh Ministers, are set out in article 3(j) and are functions in connection with:

“(j) the prevention and detection of fraud in relation to general dental services contracts, personal dental services agreements, pharmaceutical services and local pharmaceutical services in Wales;”

The Secretary of State issued Directions to the NHSBSA to exercise the Secretary of States’ counter fraud and security management functions in relation to the health service in England and funded the establishment of NHS Protect (a division of the NHSBSA) to carry out those functions.

In relation to Wales, there are no current directions to the NHSBSA given by Welsh Ministers requiring them to carry out functions in connection with the counter fraud activities specified at article 3(j) to the principal Order. Instead, the Welsh Ministers have entered into arrangements with the NHSBSA, pursuant to section 83 of the Government of Wales Act 2006, which deal with the discharge of certain counter fraud functions in relation to the health service in Wales. These arrangements are supported by an agreed work plan and an annually negotiated payment value.

Both the principal Order and the 2006 Order were made under the National Health Service Act 1977, but now have effect as if made under section 28 of the National Health Service Act 2006 and section 22 of the National Health Service (Wales) Act 2006, by virtue of section 4 of and paragraph 1, Part 1 of Schedule 2 to, the National Health Service (Consequential Provisions) Act 2006.

The Secretary of State has the power to make this Order pursuant to sections 28(2) and 273(1) of the National Health Service Act 2006 (c.41). The functions formerly exercised by the Assembly in relation to establishing, and changing the functions of, Special Health Authorities are now functions of the Welsh Ministers by virtue of sections 22(2) and 204(1) of the National Health Service (Wales) Act 2006(c.42), pursuant to which the Welsh Ministers have the power to make this Order.

This Order is subject to the negative resolution procedure.

4. Purpose & intended effect of the legislation

The Secretary of State for Health (England) has made the decision to establish, from the 1 November 2017, a new (England only) Special Health Authority to provide counter fraud services to the health service in England.

The Order amends the principal Order to remove the counter fraud functions for England (set out at articles 3(h), (i) and (o) of the principal Order) from the NHSBSA. A separate Order made by the Secretary of State for Health transfers the associated staff employed by the NHS Protect Division of the NHSBSA (which is funded by England) to the new NHS Counter Fraud Authority (“the NHSCFA”). From the 1 November 2017, the NHSCFA will be required to exercise the Secretary of State’s counter fraud functions in relation to the health service in England.

As a result of the Secretary of State’s decision to remove the counter fraud functions in relation to England from the NHSBSA and to transfer the associated staff to the new NHSCFA; NHS Protect (the counter fraud division of the NHSBSA) will cease to exist. Therefore, from the 1 November 2017, the NHSBSA will have no staffing resource to perform the specialised counter fraud functions in relation to Wales and the current section 83 arrangement between the Welsh Ministers and the NHSBSA will cease.

The Order therefore also amends the principal Order to remove the NHSBSA’s counter fraud functions for Wales which are set out at article 3(j). On the creation of the new NHSCFA by the Secretary of State, Welsh Ministers will make new arrangements on the 1 November 2017 under section 83 of the Government of Wales Act 2006 with that new authority, for the discharge of

certain counter fraud support functions in relation to the health service in Wales. These arrangements will be supported by an agreed work plan and an annually negotiated payment value. The services that will be provided under the section 83 arrangement with the new NHSCFA will replicate the counter fraud services that are currently provided in relation to Wales under the current section 83 arrangement with the NHSBSA. Therefore, there will be no loss of service to Welsh Ministers or to the NHS in Wales.

5. Consultation

Consultation on this amendment has been undertaken with key stakeholders: the NHSBSA, Velindre NHS Trust who host the NHS Counter Fraud Services Wales team (a division of the NHS Shared Services Partnership) and the Local Health Boards and Trusts in Wales as employers of the Local Counter Fraud Specialists.

No comments on the proposal have been received.

6. Regulatory Impact Assessment (RIA)

A Regulatory Impact Assessment has not been undertaken as this subordinate legislation will not impose any material costs or savings on the public, private or charities and voluntary sector. The annual charge for counter fraud functions provided by the new NHS Counter Fraud Special Health Authority will be consistent with those currently charged to the Welsh Ministers by the NHSBSA.

This legislation has no impact on the statutory duties (sections 77 -79 GOWA 06) or statutory partners (sections 72-75 GOWA 06).