House of Lords
House of Commons

Joint Committee on Statutory Instruments

Twenty-ninth Report of Session 2010-12

Drawing special attention to:

Energy Information Regulations 2011 ***(S.I. 2011/1524)***
Environmental Protection (Controls on Ozone-Depleting Substances) Regulations 2011 ***(S.I. 2011/1543)***
Care Quality Commission (Additional Functions) Regulations 2011 ***(S.I. 2011/1551)***
National Health Service (Charges to Overseas Visitors) Regulations 2011 ***(S.I. 2011/1556)***
Ionising Radiation (Medical Exposure) (Amendment) Regulations 2011 ***(S.I. 2011/1567)***

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Joint Committee on Statutory Instruments

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The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 74, available on the Internet via www.parliament.uk/jcsi.

Remit

The Joint Committee on Statutory Instruments (JCSI) is appointed to consider statutory instruments made in exercise of powers granted by Act of Parliament. Instruments not laid before Parliament are included within the Committee's remit; but local instruments and instruments made by devolved administrations are not considered by JCSI unless they are required to be laid before Parliament.

The role of the JCSI, whose membership is drawn from both Houses of Parliament, is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of each House to any instrument on one or more of the following grounds:

i. that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;
ii. that its parent legislation says that it cannot be challenged in the courts;
iii. that it appears to have retrospective effect without the express authority of the parent legislation;
iv. that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;
v. that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where the instrument has come into force before it has been laid;
vi. that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;
vii. that its form or meaning needs to be explained;
viii. that its drafting appears to be defective;
ix. any other ground which does not go to its merits or the policy behind it.

The Committee usually meets weekly when Parliament is sitting.

Publications

The reports of the Committee are published by The Stationery Office by Order of both Houses. All publications of the Committee are on the Internet at www.parliament.uk/jcsi.

Committee staff

The current staff of the Committee are John Whatley (*Commons Clerk*), Jane White (*Lords Clerk*) and Jennifer Steele (*Committee Assistant*). Advisory Counsel: Peter Davis, Peter Brooksbank, Philip Davies and Daniel Greenberg (*Commons)*; Allan Roberts, Nicholas Beach and Peter Milledge *(Lords)*.

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Statutory Instruments, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2026; the Committee's email address is: jcsi@parliament.uk.

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Instruments reported

At its meeting on 19 October 2011 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to five of those considered. The Instruments and the grounds for reporting them are given below. The relevant Departmental memoranda are published as appendices to this report.

1 S.I. 2011/1524: Reported for unexpectedly limited use of power

Energy Information Regulations 2011 (S.I. 2011/1524)

1.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that in one respect they make unexpectedly limited use of the power under which they are made.**

1.2 The Regulations, which are made under section 2(2) of the European Communities Act 1972, transpose Directive 2010/30/EU ("the Directive") which establishes a framework for the setting of energy labelling and standard product information requirements for energy-related products and apply to products covered by delegated EU measures made under the Directive: each such measure is referred to in the Directive as a delegated act.

1.3 Recital (5) of the preamble to the Directive begins as follows: "The provision of accurate, relevant and comparable information on the specific energy consumption of energy-related products should influence the end-user's choice in favour of those products which consume or indirectly result in consuming less energy and other essential resources during use ....". Then Article 5 of the Directive, so far as relevant, reads as follows: "Member States shall ensure that:

(a) suppliers placing on the market or putting into service products covered by a delegated act supply a label and a fiche in accordance with this Directive and the delegated act; .....

(c) suppliers make the technical documentation available for inspection purposes for a period ending five years after the last product concerned was manufactured.".

1.4 The Committee assumes that the inclusion of the late end date for the obligation in Article 5(c) is aimed at covering products no longer being manufactured but still being marketed, and notes that no start date for that obligation is expressly indicated.

1.5 Regulation 7(3)(a) varies the wording of the Directive by requiring suppliers of products covered by the Directive and delegated acts to make the relevant technical documentation available "for a period of at least 5 years beginning with the date the last product was manufactured". The Committee asked the Department for Environment, Food and Rural Affairs when the requirement was intended to begin and how effect had been given to that intention. In a memorandum printed at Appendix 1, the Department explains that its intention is that the period should begin from the time required by article

5(c) of the Directive, which the Department identifies as "the time of the manufacture of the last product concerned". Failure to comply is an offence (regulation 11).

1.6 The Committee accepts that, were the matter in dispute in proceedings for an offence, the start date would probably be interpreted as the Department intends: unclear offences in national legislation are expected to be interpreted in favour of the defendant, even in circumstances where transposition might be incomplete (see Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969).

1.7 However, while the Department's memorandum rightly identifies the purpose of the end date, it appears to the Committee that the start of the period of obligation in the Directive is most likely the time when placing on the market or putting into service begins. Firstly, that seems the better interpretation in the context of Article 5, as it would be surprising if the obligations in paragraphs (a) and (c) did not begin simultaneously. Secondly, there seems little point in having a trading period during the entirety of which those seeking to inspect cannot insist on seeing materials necessary for product verification. Nothing in the Department's memorandum addresses those arguments. In so far as the Committee's interpretation of the Directive is correct, transposition appears to be incomplete. **The Committee accordingly reports regulation 7(3)(a) for unexpectedly narrow use of the enabling power.**

2 S.I. 2011/1543: Reported for defective drafting

Environmental Protection (Controls on Ozone-Depleting Substances) Regulations 2011 (S.I. 2011/1543)

2.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in one respect.**

2.2 The Regulations provide for enforcement of EU legislation about substances that deplete the ozone layer. Regulation 8(3) applies powers in section 108 of the Environment Act 1995 to "the offshore area", a term that is not defined. The Committee asked the Department for Environment, Food and Rural Affairs what that term was intended to mean and why it was not defined. In a memorandum printed at Appendix 2, the Department explains that "the meaning of the term 'offshore area' in regulation 8(3) is intended to be the same as the meaning of 'marine area' in paragraph 1(1) of Schedule 1 to the Regulations, which term is defined". The Department also "accepts that the term should been defined for the purposes of regulation 8(3) (and that the same defined term should have been used in each provision)" and undertakes to correct the mistake when a suitable opportunity arises**. The Committee accordingly reports regulation 8(3) for defective drafting, acknowledged by the Department.**

3 S.I. 2011/1551: Reported for requiring elucidation and defective drafting

Care Quality Commission (Additional Functions) Regulations 2011 (S.I. 2011/1551)

3.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that their form calls for elucidation in two respects and that they are defectively drafted in one respect.**

3.2 The Regulations impose on the Care Quality Commission duties, to be performed on the making of an application, to review certain decisions made pursuant to the High Security Psychiatric Services (Arrangements for Safety and Security at Ashworth, Broadmoor and Rampton Hospitals) Directions 2011 ("the Directions"). The decisions concerned are decisions to withhold items brought in for a patient, to withhold internal post sent by a patient and to monitor and record a patient's telephone conversations.

3.3 Regulation 1(2) defines the Directions as "the 2011 Directions" for the purposes of the Regulations. Footnote (b) to that definition states that the Directions are available at the Department of Health's website. The Committee asked the Department what steps were being taken to provide access to the Directions by those without the ability to get access to them on the Department's website. In a memorandum printed at Appendix 3, the Department explains that hard copies of the Directions will be made available, usually free, and that steps will be (and, indeed, have already been) taken to make patients at the hospitals concerned aware of them. The Committee accepts that explanation but feels that it might have been helpful if the availability of copies had been advertised in the footnote. It also feels that the reference there to the Department's website might usefully be more specific: the Committee did not find it straightforward to locate the Directions on the website. **The Committee accordingly reports regulation 1(2) as calling for elucidation, provided in the Department's memorandum as amplified above.**

3.4 Regulations 2 to 4 impose on the Care Quality Commission a duty to review decisions under the Directions. All of those regulations do so only where an application is made "within six months beginning with the day on which" specified information or a specified notice is received. So, if information or a notice is received on 1 February, the Care Quality Commission will have to consider any application made before the end of 31 July. But the provisions of the Directions to which Regulations 2 to 4 relate make provision for applications to be made "within six months from the date" on which information or a notice is received. That formulation leaves it unclear whether the six month period is inclusive or exclusive of the day on which the information or a notice is received. In other words, it is unclear whether the period for making an application where information or a notice is received on 1 February expires with 31 July or 1 August. The Committee asked the Department why the duties to carry out reviews under regulations 2 to 4 terminated at a time that accorded with the more restrictive possible interpretation of those provisions of the Directions. In its memorandum the Department explains its reasoning and undertakes to amend the Directions so as to bring them clearly into line with the Regulations. The Committee accepts that, in so far as there is a flaw in the drafting, it lies in the Directions rather than the Regulations. **The Committee accordingly reports regulations 2 to 4 as calling for the elucidation provided in the Department's memorandum.**

3.5 Regulation 4(2) provides that, on an application for review of a decision made in accordance with direction 34(5) of the Directions, the Care Quality Commission may direct that the recording and monitoring of the patient's telephone calls shall cease. Under direction 34 monitoring and recording may be undertaken in accordance with paragraph (6) under a risk management plan that includes provision made pursuant to a decision under paragraph (5) that recording and monitoring is to take place on the ground that there is risk of escape or to safety and security. Under paragraph (7) of directive 34 up to 10 per cent of a patient's calls may be recorded without the need for a risk management plan. The Committee asked the Department what was the intended effect of action taken under regulation 4(2) on direction 34(7) and how that intended effect is clearly achieved. In its memorandum the Department states that action under regulation 4(2) is not intended to affect direction 34(7) and that the Directions do not provide for a right of appeal against recording of calls under it. But regulation 4(2) is not confined to direction 34(5) and therefore a direction of the Care Quality Commission might have the effect that recording and monitoring under direction 34(7) should cease. That possible interpretation is reinforced by direction 34(9), which requires compliance with any direction given by the Care Quality Commission under regulation 4(2). It follows that regulation 4(2) should have explicitly excluded recording under direction 34(7). **The Committee accordingly reports regulation 4(2) for defective drafting.**

4 S.I. 2011/1556: Reported for defective drafting

National Health Service (Charges to Overseas Visitors) Regulations 2011 (S.I. 2011/1556)

4.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in two respects.**

4.2 The Regulations consolidate with amendments the rules about when charges may be made for certain services, such as treatment, provided in England by the National Health Service to overseas visitors.

4.3 Regulation 8 provides that no charge is to be made if the overseas visitor is present in the United Kingdom, in the Continental Shelf or on a structure in United Kingdom territorial waters. The Committee asked the Department of Health when a person needs to be present in any of those places (other than in England) in order to be within the exemption, given that the treatment concerned inevitably takes place in England. In a memorandum printed at Appendix 4, the Department states that a person is within the exemption if he would be in one of those places when beginning a course of treatment but for the fact that the patient is in England when doing so. The Committee considers that this should have been set out in terms. Instead regulation 8, read literally, imposes a largely impossible condition. **The Committee accordingly reports regulation 8 for defective drafting.**

4.4 Regulations 6 to 23 make provision that no charge may be made in respect of services provided to an overseas visitor in certain specified circumstances. They constitute

exceptions from the proposition in regulation 3 that charges are to be made in respect of services provided to an overseas visitor. Regulation 24 provides that no charge may be made in respect of particular services provided to a member of the family of an overseas visitor in certain circumstances. The Committee asked the Department why regulation 24 was included, given the apparent absence of any provision for the making of charges for services provided to *a member of the family of* an overseas visitor. In the memorandum the Department explains that a member of the family of an overseas visitor may be an overseas visitor and that regulation 24 specifies circumstances in which an overseas visitor who is a member of the family (defined as spouse, civil partner or child) of a person who is an overseas visitor is to enjoy exemption from charges. The Committee considers that this is not apparent from the terms of regulation 24, which appears on a literal reading not to match the remainder of the Regulations. It should have been made clear in the text that the exemption covered an overseas visitor who was a member of the family of another overseas visitor. If the Department amends the provision to that effect, it will need to consider whether—in the case of spouses or civil partners—further adjustment is needed to make clear which range of exemptions applies, given that both spouses and both civil partners will count as family members. **The Committee accordingly reports regulation 24 for defective drafting.**

5 S.I. 2011/1567: Reported for failure to comply with proper drafting practice

Ionising Radiation (Medical Exposure) (Amendment) Regulations 2011 (S.I. 2011/1567)

5.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they fail to comply with proper drafting practice in one respect.**

5.2 S.I. 2000/1059 lays down measures to protect people's health from dangers of ionising radiation in relation to medical exposure. Regulation 2 of these Regulations seeks to make clear that S.I. 2000/1059 applies to exposure to radiation of people who do not have any symptoms of disease but undergo CT scans as part of a self-initiated health assessment. Regulation 2 sets out to achieve this by adding to paragraph (a) of regulation 3 of S.I. 2000/1059 the words "including any exposure of an asymptomatic individual" after the existing words "the exposure of patients as part of their own medical diagnosis or treatment". The Committee asked the Department of Health why regulation 2 proceeded in that way rather than by adding a new paragraph to regulation 3.

5.3 In a memorandum printed at Appendix 5, the Department states that a person who is paying for a health assessment is a patient, so that it is appropriate to proceed by including such a person in paragraph (a). The Committee considers that it is stretching the meaning of "patient" to include such a person. Even so, that might not have troubled the Committee, had the concept of a patient not itself been qualified by the phrase "as part of their own medical diagnosis or treatment": the Committee considers that a person

undergoing a voluntary health assessment is certainly not undergoing "diagnosis" or "treatment".

5.4 Paragraph (b) of regulation 3 already caters separately for people undergoing occupational health surveillance, and the Committee, while accepting that it is likely that the coverage of the Regulations will work as intended in practice, considers that the amendment made by regulation 2 would have been more appropriately made by the addition to regulation 3 of a similar separate new paragraph. **The Committee accordingly reports regulation 2 for failure to comply with proper drafting practice.**

Instruments not reported

At its meeting on 14 September 2011 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

Annex

Draft Instruments requiring affirmative approval

Draft S.I.	Al-Qaida (Asset-Freezing) Regulations 2011
Draft S.I.	Health and Social Care Act 2008 (Regulated Activities) (Amendment) Regulations 2011
Draft S.I.	Legal Services Act 2007 (Appeals from Licensing Authority Decisions) (No. 2) Order 2011
Draft S.I.	Local Authorities (Contracting Out of Community Infrastructure Levy Functions) Order 2011
Draft S.I.	London Olympic Games and Paralympic Games (Advertising and Trading) (England) Regulations 2011
Draft S.I.	Statistics and Registration Service Act 2007 (Disclosure of Value Added Tax Information) Regulations 2011
Draft S.I.	West Northamptonshire Development Corporation (Area and Constitution) (Amendment) Order 2011

Instruments subject to annulment

S.I. 2011/1589	Town and Country Planning General (Amendment) (England) Regulations 2011
S.I. 2011/1626	Financial Services and Markets Act 2000 (Exemption) (Amendment) Order 2011
S.I. 2011/1628	Childcare (Fees) (Amendment) Regulations 2011
S.I. 2011/1656	Olympic Route Network Designation (Amendment) Order 2011
S.I. 2011/1664	Non-Domestic Rating (Small Business Rate Relief) (England) (Amendment) Order 2011
S.I. 2011/1665	Non-Domestic Rating (Collection and Enforcement) (Local Lists) (Amendment) (England) (No. 2) Regulations 2011
S.I. 2011/1668	Prospectus Regulations 2011
S.I. 2011/1675	Joseph Priestley College, Leeds (Dissolution) Order 2011
S.I. 2011/1676	Leeds College of Art (Transfer to the Higher Education Sector) Order 2011
S.I. 2011/1677	Leeds College of Music (Dissolution) Order 2011

S.I. 2011/1682 Natural History Museum (Authorised Repositories) Order 2011

S.I. 2011/1683 European Communities (Designation) Order 2011

S.I. 2011/1737 Supreme Court Fees (Amendment) Order 2011

S.I. 2011/1781 Money Laundering (Amendment) Regulations 2011

S.I. 2011/1795 Beer (Amendment) Regulations 2011

S.I. 2011/1796 Veterinary Surgeons (Recognition of University Degree) (Nottingham) Order of Council 2011

S.I. 2011/1854 Motor Cycles Etc. (Replacement of Catalytic Converters) and Motor Vehicles (Replacement of Catalytic Converters and Pollution Control Devices) (Amendment) Regulations 2011

S.I. 2011/1856 Statutory Auditors and Third Country Auditors (Amendment) Regulations 2011

S.I. 2011/1893 Afghanistan (Asset-Freezing) Regulations 2011

S.I. 2011/1903 Morpeth School, Oaklands School and Swanlea School Order 2011

S.I. 2011/1941 Agency Workers (Amendment) Regulations 2011

S.I. 2011/1954 Changing of School Session Times (England) (Revocation) Regulations 2011

S.I. 2011/1986 Education (Student Support) Regulations 2011

S.I. 2011/1987 Education (Fees and Awards) (England) Regulations 2007 (Amendment) Regulations 2011

S.I. 2011/2008 Architects (Recognition of European Qualifications) Regulations 2011

S.I. 2011/2010 Export Control (Belarus) and (Syria Amendment) Order 2011

S.I. 2011/2052 Patents (Amendment) Rules 2011

S.I. 2011/2059 Patents Act 1977 (Amendment) Regulations 2011

S.I. 2011/2064 Allocation and Transfer of Proceedings (Amendment No. 2) Order 2011

S.I. 2011/2065 Criminal Defence Service (Funding) (Amendment) Order 2011

S.I. 2011/2066 Community Legal Service (Funding) (Amendment No. 2) Order 2011

S.I. 2011/2131 Plant Protection Products Regulations 2011

S.I. 2011/2257 Superannuation (Admission to Schedule 1 to the Superannuation Act 1972) Order 2011

S.I. 2011/2261 Air Traffic Controller Licensing (National Supervisory Authority) Regulations 2011

Instruments not subject to Parliamentary proceedings laid before Parliament

S.I. 2011/1678 Syria (Restrictive Measures) (Overseas Territories) Order 2011

S.I. 2011/1679 Egypt (Restrictive Measures) (Overseas Territories) Order 2011

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2011/1454 Air Navigation (Dangerous Goods) (Amendment) (No. 2) Regulations 2011

S.I. 2011/1636 Equality Act 2010 (Commencement No. 7) Order 2011

S.I. 2011/1690 Chief Regulator of Qualifications and Examinations Order 2011

S.I. 2011/1728 Charities Act 2006 (Commencement No. 8, Transitional Provisions and Savings) Order 2011

S.I. 2011/1741 Borders, Citizenship and Immigration Act 2009 (Commencement No. 2) Order 2011

S.I. 2011/1825 Offshore Installations (Safety Zones) (No. 2) Order 2011

S.I. 2011/1938 Terrorism Act 2000 (Designated Ports) Order 2011

S.I. 2011/2002 Riot (Damages) (Amendment) Regulations 2011

S.I. 2011/2007 Staffordshire and Stoke on Trent Partnership National Health Service Trust (Establishment) Order 2011

S.I. 2011/2009 Riot (Damages) (Amendment No. 2) Regulations 2011

S.I. 2011/2107 Designation of Schools Having a Religious Character (Independent Schools) (England) (No. 4) Order 2011

S.I. 2011/2144 Police and Justice Act 2006 (Commencement No. 14) Order 2011

S.I. 2011/2148 Coroners and Justice Act 2009 (Commencement No. 8) Order 2011

S.I. 2011/2296 Police Act 1997 (Criminal Records and Registration) (Isle of Man) Regulations 2011

Appendix 1

S.I. 2011/1524: memorandum from the Department for Environment, Food and Rural Affairs

Energy Information Regulations 2011 (S.I. 2011/1524)

1. The Committee has asked the Department for a memorandum on the following point:

> *When is the period for which regulation 7(3)(a) requires documentation to be made available for inspection intended to begin and how is effect given to that intention?*

2. The Department's intention is for the period to begin from the time required by Article 5(c) of Directive 2010/30/EU, viz. from the time of the manufacture of the last product concerned. The Department believes that it has given effect to this intention in regulation 7(3)(a), the only difference in expression being that the Directive refers to the ending of the period whereas the Regulations define the period of availability from its beginning.

3. The Department has copied out the obligation in Article 5(c) of the Directive without further elaboration, including the method by which suppliers are obliged to make the documents available for inspection purposes and to whom. In practice the most likely scenario is that inspection will be required by the market surveillance authority for up to 5 years after a last product in that production cycle has been manufactured, to enable the market surveillance authority to test products which are on sale but which are no longer being manufactured.

Department for Environment, Food and Rural Affairs
18 July 2011

Appendix 2

S.I. 2011/1543: memorandum from the Department for Environment, Food and Rural Affairs

Environmental Protection (Controls on Ozone-Depleting Substances) Regulations 2011 (S.I. 2011/1543)

1. The Committee has asked the Department for Environment, Food and Rural Affairs for a memorandum on the following point:

What is the intended meaning of "the offshore area" in regulation 8(3) and why is the expression not defined?

2. The meaning of the term "offshore area" in regulation 8(3) is intended to be the same as the meaning of "marine area" in paragraph 1(1) of Schedule 1 to the Regulations, which term is defined.

3. The Department accepts that the term should been defined for the purposes of regulation 8(3) (and that the same defined term should have been used in each provision).

4. The Department regrets the oversight and will correct the instrument when a suitable opportunity arises.

Department for Environment, Food and Rural Affairs
18 July 2011

Appendix 3

S.I. 2011/1551: memorandum from the Department of Health

Care Quality Commission (Additional Functions) Regulations 2011 (S.I. 2011/1551)

1. In its letter to the Department of 13 July 2011 the Joint Committee requested a memorandum on the following points:

   (a) what steps are being taken to provide access to the Directions referred to in paragraph 1(2) by those without the ability to get access to them on the Department's website;

   (b) given that the duty to *give notice of* review rights specified in each of the individual directions referred to in regulations 2 to 4 appears ambiguous as to the expiry of the application period (for example, where notice is given on 1 February, it is not clear whether the period expires on 31 July or 1 August), why the duty to carry out the review under those regulations terminates on the more restrictive possible interpretation of the expiry date; and

   (c) what the intended effect of action under regulation 4(2) is on direction 34(7) of the Directions in question and how the intended effect is clearly achieved.

2. The Department's response to each of the Committee's points is outlined below.

3. Point (a)—Any person contacting the Department direct for a copy of the Directions, in the absence of being able to access them on the website, would be provided with a copy. It would not normally be the Department's practice to ask for a charge for such a copy although that position might be reviewed if a large number of requests were received. In addition, the Department has asked the High Security Hospitals covered by the Directions to inform patients of the content of the new Directions. The patients are already aware that new Directions are proposed and were able to discuss the proposed contents at patient forums during the drafting period. The Department would expect that the patient forums would again be used as part of the process of making the patients aware of the contents of the final Directions. The Department would also expect the hospitals to facilitate access to copies of the Directions were any patient to request that (provided that, bearing in mind any patient safety considerations, it was appropriate in the individual circumstances).

Point (b) – It is the intention of the Regulations to make clear when exactly the time period of 6 months for appeal began to run, the options seeming to be either the start of the day the patient was told of the decision and the right to appeal or the start of the day *after* they were told. The Department considered both options. In addition it considered the drafting guidance of the Office of Parliamentary Counsel dated 2 October 2010 and available through the LION website and the Cabinet Office website. Amongst the points made in that guidance was the suggestion at paragraph 5 of Part 5 (page 49) (which deals with drafting in respect of periods of time) that it might be inappropriate for the period to start running from the beginning of the day *after* the day of the decision, "because that would disallow an appeal made on the day of the decision." Although the Department felt that it was unlikely that the CQC would take such a point it felt that if there was a risk of ambiguity, which might leave open the question of whether an appeal made immediately was valid, it was preferable to make clear in the regulations that the period began at the beginning of the day upon which the patient was given the necessary information. The Department was aware that this was arguably the more restrictive interpretation which reduced the period for appeal by 24 hours. However it felt that as the patient would be made aware when told of their rights that the appeal period had started they would still have a reasonable period (6 months) in which to appeal and that consequently the more restrictive interpretation would not cause any real hardship.

Guidance on the Directions, aimed at the high secure psychiatric services providers, has already been published on the DH website.[a]In order to deal with any possible ambiguity in the Directions as to the time that the appeal period starts to run, the Department will in addition write to the hospitals concerned to

[a] www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_128208

emphasise to them that, when giving patients notice of their right of appeal to the Care Quality Commission as required by the Directions, the patients must be made aware of the fact that the period of six months starts to run on and includes the day upon which they are given the notice.

The Department will also amend the provisions of the Directions at the first convenient opportunity to ensure that the provisions in directions 22, 27 and 34 clearly reflect the provisions of the Regulations regarding the time the appeal period starts to run.

Point (c)—there is no intended effect of action under regulation 4(2) on direction 34(7).

Direction 34 makes provision in respect of recording and monitoring phone calls. It makes provision as to which categories of calls may not be monitored or recorded. It also makes provision for specific circumstances under which calls may be monitored and recorded. The first of those circumstances is that covered by directions 34(5) and (6). Direction 34 (5) and (6) together relate to the situation where an individual patient may have all their telephone calls monitored and recorded. Direction 34(5) provides that where the patient's clinical team has decided, following a risk assessment, that:

(a) the patient presents a risk, as set out in direction 34(5)(a) or
(b) there is a need to protect the safety or security of others, as set out in direction 34(5)(b)

then it must consider including in the risk management plan for that patient arrangements for an authorised member of staff to monitor and record that patient's calls.

Direction 34(6) provides that where the risk management plan *does* require the patient's calls to be monitored (i.e. having considered this option as required under direction 34(5) the clinical team has decided that it will include such arrangements in the risk management plan) then those calls may be monitored and recorded and the patient must be told of their right to ask for the decision to be reviewed by the CQC. It is this decision (the decision made in accordance with direction 34(5)) which is subject to review under regulation 4(2).

The provisions of direction 34(5) and 34(6) thus together authorise the trust to monitor and record certain phone calls.

Direction 34(7) deals with the second circumstance where calls may be monitored and recorded. It is a wholly separate situation from that dealt with in directions 34(5) and (6).

Direction 34(7) provides that in addition to any recording made under arrangements included in a risk management plan (i.e. the one other instance under this direction 34 where calls may be recorded), an authorised member of staff may record up to 10% of incoming or outgoing patient calls over a seven day period. This is intended to authorise the trust to record patient phone calls across the hospital on a random basis as part of its general security procedures. Before recording any such calls the patient and person making or receiving the call must be informed that the call is being recorded (see direction 34(4) which imposes this obligation in respect of any recording carried out in accordance with the direction) The Directions do not provide for a right of appeal to the CQC by any patient whose calls are recorded as part of this general security process under direction 34(7). The Regulations do not make any provision therefore for CQC to review such recording decisions.

Department for Health
19 July 2011

Appendix 4

S.I. 2011/1556: memorandum from the Department of Health

National Health Service (Charges to Overseas Visitors) Regulations 2011 (S.I. 2011/1556)

1. In its letter to the Department of 13th July 2011, the Joint Committee requested a memorandum on the following points:

(1) Precisely when does a person need to be present in any of the places specified in paragraph 1(b) to (d) of regulation 8 (or, in a case within paragraph 1(a) of that regulation involving presence otherwise than in England, in a part of the United Kingdom other than England) in order to be within the exemption from charges provided by that regulation?

(2) Given the apparent absence from the Regulations of a provision for the making and recovery of charges in respect of relevant services provided to *a member of the family of* an overseas visitor, explain the inclusion of regulation 24.

2. The Department's response to each of the Committee's points is outlined below.

Point (1)

The exemption at regulation 8 requires an overseas visitor to be present at one of a list of places for a specified purpose. At the time a patient begins a new course of treatment at

a relevant NHS body questions will be asked so that decisions can be made about whether the patient should be charged or not. If that person would be present in one of the listed places for a listed purpose but for the fact they are at the relevant NHS body then no charge may be made or recovered. It is the underlying situation applying at the time a patient begins treatment which is used to determine the presence test.

The Department considers that regulation 8, and the context in which it falls to be considered by relevant NHS bodies is clear and would be applied by the overseas charging officer in NHS bodies as described. Regulation 8 replicates an earlier provision in the 1989 overseas visitors regulations and so is a presence test that has been applied for some time.

Point (2)

A family member of an overseas visitor may be an overseas visitor themselves, and as such would be charged under Regulation 3 if they are provided with relevant services.

The regulations set out a number of categories of overseas visitor who are exempt from charges. Regulation 24 identifies the circumstances in which an overseas visitor who is the family member of a person in one of the categories identified in preceding regulations, but who is not themselves directly exempt under one of those other exemptions, can be exempt by virtue of their family member status.

Department of Health
19th July 2011

Appendix 5

S.I. 2011/1567: memorandum from the Department of Health

Ionising Radiation (Medical Exposure) (Amendment) Regulations 2011 (S.I. 2011/1567)

1. In its letter to the Department of 13 July 2011 the Joint Committee requested a memorandum on the following points:

   "Given the purpose of the Regulations as identified in the Explanatory Memorandum, why does regulation 2 proceed by amending paragraph (a) of regulation 3 of S.I. 2000/1059 (which is limited to patients) rather than by adding a new paragraph to that regulation?".

2. The Department's response to the Committee's point is outlined below.

3. The Department considered in drafting the Regulations whether to proceed by amending paragraph (a) of regulation 3 or by inserting a new paragraph into that regulation.

4. The Department concluded that the former approach was the correct one.

5. The Department formed the view that a person who is paying a doctor or other health care professional to render a service to check their health, is that doctor's or health care professional's patient.

6. It is to be noted that the Directive, which these Regulations implement, does not define the terms "patient", "medical" or "diagnosis" and that there is an inconsistent use of language within the Directive. The Department formed the view that a person of the type described should be treated as a patient under the Directive.

Department of Health
19th July 2011