House of Lords
House of Commons

Joint Committee on Statutory Instruments

Twenty-fifth Report of Session 2014-15

Drawing special attention to:

Ministry of Defence Police (Conduct etc.) Regulations 2015 **(S.I. 2015/25)**
Health and Social Care Act 2008 (Regulated Activities) (Amendment) Regulations 2015 **(S.I. 2015/64)**
Care Act 2014 and Children and Families Act 2014 (Consequential Amendments) Order 2015 **(Draft S.I.)**
Authority to Carry (Civil Penalties) Regulations 2015 **(Draft S.I.)**

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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 Joanna Welham (*Commons Clerk*), Jane White (*Lords Clerk*) and Liz Booth (*Committee Assistant*). Advisory Counsel: Peter Davis, Peter Brooksbank, Philip Davies and Daniel Greenberg (*Commons)*; Nicholas Beach, Peter Milledge and John Crane *(Lords)*.

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Instruments reported

At its meeting on 11 March 2015 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 four 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. 2015/25: Reported for defective drafting

Ministry of Defence Police (Conduct etc.) Regulations 2015 (S.I. 2015/25)

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

1.2 The Regulations establish procedures for the taking of disciplinary proceedings in respect of the conduct of members of the Ministry of Defence Police. They revoke, re-enact and amend earlier legislation.

1.3 The definition of "document" in regulation 3 includes the phrase "image or images". Since by virtue of section 6(c) of the Interpretation Act 1978 the plural includes the singular and *vice versa* in legislative usage in the absence of contra-indication, the Committee asked the Ministry of Defence to explain the use of the phrase. In a memorandum printed at Appendix 1, the Department accepts that this, although based on a precedent, was an error.

1.4 Paragraph 3 of Schedule 3 purports to amend the footnote to regulation 11(1) of the Ministry of Defence Police (Performance) Regulations 2012 (S.I. 2012/808). Regulation 11(1) reads, so far as is relevant, as follows: "Any reference in these Regulations to a [specified period] does not include any time the officer concerned is taking leave under the Ministry of Defence Statement of Civilian Personnel Policy Extended Special Unpaid Leave.". The footnote, linked to the end of the text and presented as a standard referential footnote, reads as follows: "The current Statement was issued on 31 October 2011." The Committee asked the Department to explain what is intended to be achieved by that paragraph and, in particular, why it uses an operative provision to amend a footnote to previous regulations. In its memorandum the Department accepts that this was also an error. The intention was to correct a defective footnote, but the Department accepts that this was not the right way to make the correction and the Department's plan is to replace regulation 11(1) with "an appropriate provision, with no footnote". The Committee agrees: it considers that, apart from any defect, the Department's difficulty arose because of the original placing in a footnote of material that ought preferably to have been adapted for inclusion in the operative text.

1.5 The Department states that in respect of both errors to which the Committee has drawn attention, it intends to make corrections at the earliest convenient opportunity, which is expected to arise fairly soon, and helpfully indicates its intention to notify the Department responsible for the precedent from which the first error was derived. **The**

Committee accordingly reports regulation 3 and paragraph 3 of Schedule 3 for defective drafting, acknowledged in both cases by the Department.

2 S.I. 2015/64: Reported for defective drafting and for failure to comply with Statutory Instrument Practice

Health and Social Care Act 2008 (Regulated Activities) (Amendment) Regulations 2015 (S.I. 2015/64)

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 and fail to comply with Statutory Instrument Practice in a related respect.**

2.2 The Regulations make amendments of the Health and Social Care Act 2008 (Regulated Activities) Regulations (S.I. 2014/2936) ("the 2014 Regulations"). The 2014 Regulations are made under various provisions of the Health and Social Care Act 2008 ("the 2008 Act"), including sections 20 and 161. Regulation 4 amends regulation 2(1) of the 2014 Regulations.

2.3 Regulation 2(1) of the 2014 Regulations begins "In these Regulations—" and there follows a list of definitions. One of those definitions is of the phrase "shared lives scheme" and regulation 4 amends that definition by adding at the end ", and for the purposes of section 20A of the [2008] Act (functions relating to processing of information by registered persons) "adult placement scheme" has the same meaning as "shared lives scheme"". Section 20A(5) of the 2008 Act provides that ""adult placement scheme" and "personal care" each have such meaning as they have from time to time in regulations under section 20".

2.4 The Committee asked the Department of Health to explain—

(a) why the provision made by regulation 4 takes the form of an insertion into a paragraph that sets out definitions for the purposes of the 2014 Regulations (and not the 2008 Act), rather than a separate free-standing provision, and

(b) why section 20A(5) of the 2008 Act is neither cited as the authority for the making of that provision nor identified in a footnote.

2.5 In a memorandum printed at Appendix 2 the Department accepts (on the first point) that, as regulation 2(1) of the 2014 Regulations begins "In these Regulations—" and the text inserted by regulation 4 is "for the purposes of section 20A", it may have been more appropriate for regulation 4 to have made the insertion as a separate free-standing provision. The Committee agrees with that, apart from the implicit uncertainty in the phrase "may have been". Regulation 2(1) as it is framed is not the correct place for an

amendment of a definition which operates for the purposes of the 2008 Act rather than those of the 2014 Regulations.

2.6 On the second point, the Department's memorandum states its view that subsection (5) of section 20A of the 2008 Act is a "deeming provision" for the purposes of that section, rather than an enabling power. It explains that, when section 20A was inserted into the 2008 Act (by section 280(3) of the Health and Social Care Act 2012) "adult placement scheme" was a defined term in regulations under section 20 of the 2008 Act, namely regulation 2 of S.I. 2010/781, now revoked and replaced by the 2014 Regulations. The Department further explains that, because the social care sector no longer uses the term "adult placement scheme", but instead uses the term "shared lives schemes", the 2014 Regulations do not employ the term "adult placement scheme" and that, because of that, the Department considered it necessary to amend the 2014 Regulations to ensure that section 20A(5) continued to have effect. The Department relied for the provision making that amendment on the power in section 161(4)(a) of the 2008 Act to make supplemental, incidental or consequential provision. The Department agrees with the Committee that identifying section 20A(5) in a footnote may have been helpful for the reader, but points out that the reader's attention is already drawn to section 20A by both regulation 4 and by the Explanatory Note.

2.7 The Committee is grateful to the Department for elaborating on how it sees subsection (5) of section 20A of the 2008 Act as operating but it does not find the Department's explanation entirely convincing – the phrase "from time to time" in that subsection alone indicates that the relevant definition can be altered periodically, which is what has been done in this case. It is implicit in paragraph 2.4.4 of Statutory Instrument Practice that that subsection should have been seen as sufficiently significant within the derivation of powers to be cited in the preamble or a footnote. Nonetheless the Committee accepts that the power bestowed by reference to the subsection is in principle ancillary to the section 20 power, which is cited in the preamble, and therefore omission of the subsection does not give rise to any uncertainty as to the power to include regulation 4, whether or not the power to include it is also within the scope of section 161(4)(a) of the 2008 Act.

2.8 **The Committee accordingly reports regulation 4 for defective drafting, the possibility of which is acknowledged by the Department, and reports the omission to mention section 20A(5) of the 2008 Act in either the preamble or any footnote for failure to comply with Statutory Instrument Practice.**

3 Draft S.I.: Reported for defective drafting

Care Act 2014 and Children and Families Act 2014 (Consequential Amendments) Order 2015 (Draft S.I.)

3.1 **The Committee draws the special attention of both Houses to this draft Order on the ground that it is defectively drafted in one respect.**

3.2 The draft Order makes amendments in consequence of provisions of the Care Act 2014 and the Children and Families Act 2014. The amendments are set out in the Schedule to the draft Order, and include at paragraphs 73 and 74 the repeal of section 15 of the Community Care (Delayed Discharges etc.) Act 2003 ("the 2003 Act") and the amendment of section 16 of that Act. Paragraph 95 of the Schedule amends section 1 of the Personal Care at Home Act 2010 Act ("the 2010 Act") in consequence of the amendments made to the 2003 Act by paragraphs 73 and 74. The amendments made by paragraph 95 are however not comprehensive, and in particular do not include the required consequential amendments to subsections (2) to (5) of section 1 of the 2010 Act. In a memorandum printed at Appendix 3, the Department of Health acknowledges that paragraph 95 of the Schedule should have amended section 1(2) to (5) of the 2010 Act. The Department undertakes to ensure that the omission is corrected at the earliest opportunity. **The Committee accordingly reports paragraph 95 of the Schedule for defective drafting, acknowledged by the Department.**

4 Draft S.I.: Reported for defective drafting

Authority to Carry (Civil Penalties) Regulations 2015 (Draft S.I.)

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

4.2 The draft Regulations allow the Secretary of State to impose financial penalties on persons who breach requirements of the Authority to Carry Scheme 2015 ("the Scheme"). Regulation 3(2) describes the requirements whose breach will give rise to a liability to pay a financial penalty. They include:

- a requirement to provide specified information by a specified time before travel (*regulation 3(2)(b)*),
- a requirement to provide information in a specified manner and form (*regulation 3(2)(c)*), and
- a requirement to be able to receive communications from the Secretary of State in a specified manner and form (*regulation 3(2)(d)*).

4.3 Regulation 3(4) defines "specified" as it is used in regulation 3(2) as meaning *specified in the Scheme*. Having considered the Scheme, the Committee was unable to identify any requirements of the kinds described in regulation 3(2)(b) to (d). Accordingly the Committee asked the Home Office to identify the provisions of the Scheme which impose requirements of the kinds referred to in regulation 3(2)(b) to (d) and to explain how, having regard to the definition of "specified" in regulation 3(4), the relevant provisions of the Scheme were said to specify the matters to which those requirements relate.

4.4 In a memorandum printed at Appendix 4, the Home Office states that, as regards regulation 3(2)(b), the Scheme imposes requirements as to the information to be provided, and the time by which information is to be provided, by referring to equivalent

requirements imposed under provisions of the Immigration Act 1971 ("the 1971 Act") and the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act"). According to the Home Office the relevant provisions appear in paragraphs 6 and 16 of the Scheme. The Committee does not agree. Paragraph 6 states that, in the case of a person who is subject to a requirement to provide passenger, crew and service information under the 1971 or 2006 Act, the Scheme requires the person to provide specified information by a specified time before travel. However, it does not say in terms that the information to be provided under the Scheme is the same as that to be provided under the 1971 or 2006 Act. Nor does the Committee consider that that link can be found in the last sentence of paragraph 16 as suggested by the Home Office. That sentence simply states that the submission of information required under the 1971 or 2006 Act will constitute a request by the carrier for authority to carry passengers and crew.

4.5 As regards regulation 3(2)(c), the Home Office states that the requirements of the Scheme as to the manner and form in which information is to be provided are specified in paragraphs 19 and 20 of the Scheme. The Committee found it difficult to understand the relevance of paragraph 20 since that paragraph is concerned solely with the manner in which persons without compatible information systems will be informed of decisions to refuse authority to carry. Paragraph 19 states that, where a person is required to provide information under the 1971 or 2006 Act in an electronic form compatible with the Government's Border System, the person must seek authority to carry using the same system. In the view of the Committee, a requirement that a person seeks authority to carry in a particular way is not the same as a requirement to provide information in a specified manner and form. In this context, the Committee notes that the drafting of regulation 3(2) treats requirements about the provision of information as being separate and different from requirements about seeking authority to carry.

4.6 The Home Office refers in its memorandum to paragraphs 6 and 19 of the Scheme as imposing requirements about the manner and form in which communications are able to be received, and therefore as imposing requirements of the kinds referred to in regulation 3(2)(d). Although paragraph 6 refers to the fact that the Scheme requires a person to receive information in a specified manner and form, it does not actually specify the manner and form in which the information must be received. The reference in paragraph 6(c) to information being received by means of an interactive messaging system appears to be used as an example, and not to have the effect of requiring information to be capable of being received in that way. Paragraph 19 refers to the fact that a person must have "a system" in place for receiving notifications of the grant or refusal of authority to carry. But, as the Home Office seems to acknowledge, that goes no further than saying that a person will have to comply with a requirement to receive communications in such manner or form as may be specified. It cannot reasonably be taken by itself as specifying the manner and form in which communications are to be received.

4.7 The Committee considers that, if something is to be regarded as being "specified in" the Scheme as indicated by regulation 3(4), it must be fully described in the Scheme, whether that is done by setting the thing out on the face of the Scheme itself or by describing it by reference to other matters. But if the latter approach is adopted, it seems to the Committee

that the precise nature of the thing being specified should still be clear. In the view of the Committee, something cannot be regarded as having been specified in the Scheme, if the description in the Scheme leaves substantive matters to be particularised subsequently with nothing in the Scheme to indicate how that is to be done. For the reasons given above, the Committee considers that, in so far as the Scheme contains requirements relating to the matters referred to in regulation 3(2)(b) to (d), it does not do so by specifying those matters in the Scheme. What the Scheme does instead is to impose requirements under which the relevant matters are all to be particularised subsequently in a way that is left unspecified in the Scheme itself. In the circumstances, the Committee does not consider that the Scheme as drafted imposes requirements of the kind described in regulation 3(2)(b) to (d), and it therefore takes the view that those provisions are defectively drafted since they fail to achieve their intention which is to refer to the requirements actually contained in the Scheme. **The Committee accordingly reports regulation 3(2)(b) to (d) for defective drafting**.

Instruments not reported

At its meeting on 11 March 2015 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

○ *denotes written evidence has been submitted but not printed*

Annex

Draft Instruments requiring affirmative approval

Draft S.I.	Contracts for Difference (Allocation) (Amendment) Regulations 2015
Draft S.I.	Greater Manchester Combined Authority (Amendment) Order 2015
Draft S.I.	Nicotine Inhaling Products (Age of Sale and Proxy Purchasing) Regulations 2015
Draft S.I.	Proxy Purchasing of Tobacco, Nicotine Products etc. (Fixed Penalty Amount) Regulations 2015
Draft S.I.	Local Authorities (Prohibition of Charging Residents to Deposit Household Waste) Order 2015
Draft S.I.	Community Radio (Amendment) Order 2015
Draft S.I.	Council Tax and Non-Domestic Rating (Powers of Entry: Safeguards) (England) Order 2015
Draft S.I.	Regulation of Investigatory Powers (Acquisition and Disclosure of Communications Data: Code of Practice) Order 2015
Draft S.I.	Retention of Communications Data (Code of Practice) Order 2015
Draft S.I.	Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015

Instruments subject to annulment

S.I. 2014/3300	Criminal Justice (European Protection Order) (England and Wales) Regulations 2014
○ **S.I. 2014/3342**	Prohibition of Keeping or Release of Live Fish (Specified Species) (England) (Amendment) Order 2014
S.I. 2014/3345	Sea Fishing (Points for Masters of Fishing Boats) Regulations 2014
S.I. 2014/3352	School and Early Years Finance (England) Regulations 2014
S.I. 2014/3487	National Health Service (Mandate Requirements) Regulations 2014
S.I. 2015/18	Local Audit (Health Service Bodies Auditor Panel and Independence) Regulations 2015
S.I. 2015/21	Classification, Labelling and Packaging of Chemicals (Amendments to Secondary Legislation) Regulations

S.I. 2015/92	General Medical Council (Maximum Period of Provisional Registration) Regulations Order of Council 2015
S.I. 2015/93	Health and Care Professions Council (Registration and Fees) (Amendment) Rules Order of Council 2015
S.I. 2015/103	Local Elections (Principal Areas) (England and Wales) (Amendment) Rules 2015
S.I. 2015/104	Local Elections (Parishes and Communities) (England and Wales) (Amendment) Rules 2015
S.I. 2015/121	Gaming Machine (Circumstances of Use) (Amendment) Regulations 2015
S.I. 2015/122	Proposed Marriages and Civil Partnerships (Meaning of Exempt Persons and Notice) Regulations 2015
S.I. 2015/123	Referral of Proposed Marriages and Civil Partnerships Regulations 2015
S.I. 2015/124	Social Security (Information-sharing) (NHS Payments and Remission of Charges etc.) (England) Regulations 2015
S.I. 2015/132	Yarmouth (Isle of Wight) Harbour Commissioners (Removal of Pilotage Functions) Order 2015
S.I. 2015/138	Dangerous Dogs Exemption Schemes (England and Wales) Order 2015
S.I. 2015/169	Appointed Person (Designs) Rules 2015
S.I. 2015/172	Merchant Shipping (United Kingdom Wreck Convention Area) Order 2015
S.I. 2015/174	Social Security Contributions (Decisions and Appeals) (Amendment) Regulations 2015
S.I. 2015/175	Social Security and Tax Credits (Miscellaneous Amendments) Regulations 2015
S.I. 2015/193	Retention and Sale of Registration Marks Regulations 2015
S.I. 2015/196	National Health Service (General Medical Services Contracts and Personal Medical Services Agreements) (Amendment) Regulations 2015
S.I. 2015/225	Education (Prescribed Courses of Higher Education) (Information Requirements) (England) Regulations 2015
S.I. 2015/226	Employment Rights (Increase of Limits) Order 2015
S.I. 2015/227	Control of Noise (Code of Practice for Construction and Open Sites) (England) Order 2015
S.I. 2015/233	Health Service Medicines (Control of Prices and Supply of Information) (Amendment) Regulations 2015
S.I. 2015/234	Accounts and Audit Regulations 2015
S.I. 2015/235	Public Processions (Electronic Communication of Notices) (Northern Ireland) Order 2015
S.I. 2015/307	Smoke Control Areas (Exempted Fireplaces) (England) Order 2015

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2015/101	Welfare Reform Act 2012 (Commencement No. 22 and Transitional and Transitory Provisions) Order 2015
S.I. 2015/176	Child Maintenance and Other Payments Act 2008 (Commencement No. 15) Order 2015
S.I. 2015/210	Exempt Charities Order 2015

Appendix 1

S.I. 2015/25: memorandum from the Ministry of Defence

Ministry of Defence Police (Conduct etc.) Regulations 2015 (S.I. 2015/25)

1. The Joint Committee on Statutory Instruments requested a memorandum in response to two points made in relation to the above mentioned instrument.

2. The first point is:

(1) Having regard to section 6(c) of the Interpretation Act 1978 explain what is intended by the phrase "image or images" in the definition of "document" in regulation 3

3. This is an error and requires correction. The Committee should be aware that Parts 1 to 7 of SI 2015/25 are modelled on the Police (Conduct) Regulations 2012 (SI 2012/2632), and this error also appears in regulation 3(1) of those regulations. We will alert the Home Office to this fact.

4. The second point is:

(2) Explain what is intended to be achieved by paragraph 3 of Schedule 3 to the Regulations and in particular why it uses an operative provision to amend a footnote to previous regulations.

5. This is also an error. The intention was to correct what we consider to be a defective footnote in regulation 11(1) of SI 2012/808, but we accept the point that the intended amendment is not effective. We intend to correct the matter by revoking regulation 11(1) and replacing it with an appropriate provision, with no footnote. For clarity, we will at the same time revoke paragraph 3 of Schedule 3 to SI 2015/25.

6. We intend to make these corrections at the earliest convenient opportunity. We anticipate needing to make an SI amending SI 2015/25 fairly soon, because we know that the Home Office is considering amendments to SI 2012/2632, which we will need to reflect. This will provide an opportunity to make the corrections on the two points which the Committee has raised as well.

Ministry of Defence
27 February 2015

Appendix 2

S.I. 2015/64.: memorandum from the Department of Health

Health and Social Care Act 2008 (Regulated Activities) (Amendment) Regulations 2015 (S.I. 2015/64)

1. In its letter to the Department of 25th February 2015, the Committee requested a memorandum on the following points:

"Explain—

(a) why the provision made by regulation 4 takes the form of an insertion into a paragraph that sets out definitions for the purposes of S.I 2014/2936 (and not the Health and Social Care Act 2008), rather than a separate free-standing provision, and

(b) why section 20A(5) of that Act is neither cited as the authority for the making of that provision nor identified in a footnote."

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

3. The Department's view is that section 20A(5) of the Health and Social Care Act 2008 ("the 2008 Act") is a deeming provision for the purposes of that section, rather than an enabling power. It provides that in section 20A of the 2008 Act "adult placement scheme" has the same meaning as in regulations made under section 20 of that Act. When section 20A was inserted into the 2008 Act, by section 280(3) of the Health and Social Care Act 2012[a], "adult placement scheme" was a defined term in regulations under section 20 of the 2008 Act, i.e. in regulation 2 (interpretation) of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 (S.I. 2010/781). Those Regulations are being revoked and replaced by the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (S.I. 2014/2936) ("the 2014 Regulations").

4. The social care sector no longer uses the term "adult placement scheme", but instead refers to these schemes as "shared lives schemes". In reflection of this change in terminology, the 2014 Regulations do not use the term "adult placement scheme". As that term is not used in the 2014 Regulations, the Department considered it necessary to amend those Regulations to ensure that the deeming provision in section 20A(5) continued to have effect. As the

[a] Section 280(3) was commenced on 1 April 2013 by S.I. 2013/160.

Department's view is that section 20A(5) is not an enabling power, we instead relied on the power in section 161(4)(a) of the 2008 Act to make the supplementary provision made by regulation 4. We agree that identifying section 20A(5) in a footnote may have been helpful for the reader, but the reader's attention is drawn to section 20A by both regulation 4 and by the Explanatory Note to S.I. 2015/64.

5. As "shared lives scheme" is the term now used instead of "adult placement scheme", the Department thought it appropriate to insert the text provided for by regulation 4 into the definition of "shared lives scheme", so that the reader could immediately see the meaning of those terms. However, as regulation 2(1) of the 2014 Regulations begins "In these Regulations" and the text inserted by regulation 4 "is for the purposes of section 20A", the Department accepts that it may have been more appropriate for regulation 4 to have made the insertion as a separate free-standing provision. Nonetheless, it is clear what the insertion made by regulation 4 intends to do.

Department of Health
3 March 2015

Appendix 3

Draft S.I.: memorandum from the Department of Health

Care Act 2014 and Children and Families Act 2014 (Consequential Amendments) Order 2015 (Draft S.I.)

1. In its letter to the Department of 25th February 2015, the Committee requested a memorandum on the following point:

"Paragraph 95 of the Schedule amends section 1 of the Personal Care at Home Act 2010 in consequence of amendments to the Community Care (Delayed Discharges etc) Act 2003 ("the 2003 Act") made by paragraph 74 of that Schedule. Explain why paragraph 95 does not amend section 1(2) to (5) of the Personal Care at Home Act 2010 in consequence of the provision in subsection (4) of section 15 of the 2003 Act becoming subsection (5) of section 16 of that Act?"

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

3. The Department accepts that paragraph 95 of the Schedule should have amended section 1(2) to (5) of the Personal Care at Home Act 2010 ("the 2010

Act"). Failure to do so is an oversight on the Department's part, for which it apologises.

4. Section 1(2) to (5) of the 2010 Act makes prospective amendments to section 15 of the Community Care (Delayed Discharges etc.) Act 2003 ("the 2003 Act"). The 2010 Act is not yet in force (which of course means the amendments to section 15 of the 2003 Act have not yet taken effect).

5. The Department undertakes to ensure that the omission will be corrected at the earliest suitable opportunity. The provisions of the 2010 Act would, somewhat unusually, be commenced by an order subject to the affirmative resolution procedure (see section 2(4)). It would therefore be possible to exercise the power under section 123(1) of the Care Act 2014 to make the amendments to sections 1(2) to (5) of the 2010 Act in the same order.

Department of Health
3 March 2015

Appendix 4

Draft S.I.: memorandum from Home Office

Authority to Carry (Civil Penalties) Regulations 2015 (Draft S.I.)

1. The Committee has requested a Memorandum on the following point:

Identify the provisions of the authority-to-carry scheme which impose requirements of the kinds referred to in sub-paragraphs (b) to (d) of regulation 3(2). In the case of each such requirement explain how, having regard to regulation 3(4), the provision specifies the matters to which the requirement relates.

2. In this memorandum, references to "the scheme", are references to the Authority to Carry Scheme 2015, references to "the 1971 Act" are to the Immigration Act 1971 and references to "the 2006 Act" are to the Immigration, Asylum and Nationality Act 2006.

Regulation 3(2)(b)

3. Regulation 3(2)(b) of this S.I. provides that the Secretary of State may require a carrier to pay a penalty if satisfied that the carrier has breached a requirement of the scheme to provide specified information in a specified time before travel.

Regulation 3(4) defines "specified" as "specified in the authority-to-carry scheme".

4. The Home Office's view in drafting the scheme, was that the details of the information required and the time or means by which it must be provided must not necessarily be set out on the face of the scheme itself in order to satisfy the requirements of regulation 3(4). Therefore, in respect of the information required and the time/s by which it should be required, the approach adopted was to make reference to another document, namely the written notices given to carriers under the 1971 Act and the 2006 Act. The contents of these notices are tailored for different circumstances. The nature of the information and the number of times and points at which that information can be required on a particular route or from a particular carrier varies widely due to different legal constraints. A very large volume of different authority-to-carry schemes would therefore be required if these arrangements were to be specified on the face of the scheme in every case and this is impracticable. The Home Office's view is that Parliament must have recognised this when section 22(5) of the Counter-Terrorism and Security Act 2015 was passed and it must therefore have been understood that the specifications made in the scheme might be made by reference to material outside the scheme itself.

5. Paragraph 6 of the scheme refers to the written requirements under the 1971 Act and the 2006 Act to provide specified information by a specified time before travel. The detail of this information, beyond the fact that it is specified passenger, crew and service information and the fact that it is required to be provided in advance of departure and may be required on more than one occasion (see paragraph 16 of the scheme) will be included in these written requirements.

6. Further, the last sentence of paragraph 16 of the scheme specifies that it is the information requested in the written notice that must be provided under the scheme in order to make the request for authority to carry. The Home Office's view is that it is possible to read into this that the *proper* submission of this information is required (i.e. within the timeframe set out in the notice). It is, however, acknowledged that the link between the written notice and the regulation 3(2)(b) requirement could be more explicitly set out in the scheme.

<u>Regulation 3(2)(c)</u>

7. Regulation 3(2)(c) of this S.I. provides that the Secretary of State may require a carrier to pay a penalty if satisfied that the carrier has breached a requirement of the scheme to provide information in a specified manner and form.

8. The Home Office considers that the substantive imposition of requirements to provide information in a specified manner and form (i.e. the means of transmission) can be found in paragraphs 19 and 20 of the scheme. The following paragraphs of the scheme are relevant:

    i. Paragraph 6: This stipulates that the Scheme requires a carrier served with a written requirement under paragraphs 27 and 27B of Schedule 2 to the 1971 Act or section 32 of the 2006 Act to provide information in a specified manner and form.

    ii. Paragraphs 19 & 20: These paragraphs set out the different manner and form in which specific carriers may be required to provide information under the relevant legislative provisions. The default is for transmission of information in an electronic form compatible with the Government's Border Systems but paragraph 20 also covers the position of carriers who do not have a compatible information system.

9. The means of transmission agreed with a particular carrier will be found in the written notice served on them under paragraphs 27 & 27B of Schedule 2 to the 1971 Act or under section 32 of the 2006 Act. The content of that notice will not contain any additional information about form and manner beyond the options already set out in the scheme. This approach supports the flexibility required to accommodate different operational needs of different carriers on different routes who are still working to a number of different systems for transmitting information.

Regulation 3(2)(d)

10. Regulation 3(2)(d) provides that the Secretary of State may require a carrier to pay a penalty if satisfied that the carrier has breached a requirement of the scheme to be able to receive, in a specified manner and form, communications from the Secretary of State.

11. The Home Office considers that the requirement on carriers to be able to receive communications from the Secretary of State in a specified manner and form is contained in the scheme at paragraphs 6 (paragraph 6(c) in particular which specifically references interactive messaging systems) and at paragraph 19. The final sentence of paragraph 19 makes it clear that a carrier required to be able to receive communications, in particular, must have a system in place to receive notification of the grant or refusal of authority to carry. Again, if a specific requirement is placed on a carrier, it will be done by way of a written notification because it is not possible to adopt a uniform approach for all carriers.

Home Office
6 March 2015