HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

23rd Report of Session 2012-13

Draft Social Security (Personal Independence Payment) Regulations 2013

NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) Regulations 2012

Energy Performance of Buildings (England and Wales) Regulations 2012

Building Regulations &c. (Amendment) Regulations 2012

Correspondence:

Statement of Changes in Immigration Rules (HC 820)

Includes 5 Information Paragraphs on 7 Instruments

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Secondary Legislation Scrutiny Committee (formerly Merits of Statutory Instruments Committee)

The Committee has the following terms of reference:

(1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), scrutinise—

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (2).

(2) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may inappropriately implement European Union legislation;

(d) that it may imperfectly achieve its policy objectives.

(3) The exceptions are—

(a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;

(b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;

(c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.

(4) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.

(5) The Committee shall also consider such other general matters relating to the effective scrutiny of secondary legislation and arising from the performance of its functions under paragraphs (1) to (4) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

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Information about interests of Committee Members can be found in Appendix 3.

Publications

The Committee's Reports are published on the internet at www.parliament.uk/seclegpublications

Information and Contacts

If you have a query about the Committee or its work, including concerns or opinions on any new item of secondary legislation, please contact the Clerk of the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email seclegscrutiny@parliament.uk.

Statutory instruments

The National Archives publishes statutory instruments on the internet at http://www.legislation.gov.uk/, together with a plain English explanatory memorandum.

Twenty-Third Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the following instruments and has determined that the special attention of the House should be drawn to them on the grounds specified.

A. Draft Social Security (Personal Independence Payment) Regulations 2013

Date laid: 13 December
Parliamentary Procedure: affirmative

Summary: There appears to be general agreement that the Disability Living Allowance system had become flawed and needed revision. We commend the DWP for their extensive consultation on its replacement and for working with voluntary organisations that represent the interests of the disabled in its formulation. However the new benefit also has the objective of decreasing overall expenditure and targeting it more effectively on those most in need, which, according to Lord Freud's statement on 13 December 2012, means that, of those reassessed under the Personal Independence Payment scheme by October 2015, about 28% of people currently on Disability Living Allowance will get a reduced award and about 30% will get no award. With those consequences in mind the House will therefore wish to examine very carefully whether the initial arrangements set out here seem to be appropriate and also how the outcome of the initial stages will be evaluated. It is unsurprising that the questions raised in correspondence to the Committee relate to the guidance, which is unfortunately not yet available. ***As it is so material to the House's understanding of how the system will operate for individuals, rather than on a theoretical level, the Committee suggests that proper scrutiny is not possible if the guidance is not published before the debate on these Regulations takes place.***

These Regulations are drawn to the special attention of the House on the grounds that they give rise to issues of public policy likely to be of interest to the House.

1. These draft Regulations have been laid by the Department for Work and Pensions (DWP) accompanied by an Explanatory Memorandum (EM). Proposed regulations covering transitional provisions that will follow later are also attached as an Appendix to the instrument. The Minister made a statement in the Lords on 13 December 2012.[1]

2. Those interested may also wish to note the House of Commons' Work and Pensions Select Committee's report Government support towards the additional living costs of working age disabled people although this was published on in 8 February 2012, before the detailed provisions of the new benefit's structure were available.

[1] HL Debates, 13 December 2012, cols 1191-1201

Background

3. This instrument provides the legislative detail to support the introduction of Personal Independence Payment (PIP) under powers taken at Part 4 of the Welfare Reform Act 2012. PIP will replace Disability Living Allowance (DLA) for people aged 16 to 64 from 8 April 2013 onwards.

4. The Government argue that DLA, which was introduced in 1992, has, over time, become inconsistent and lacks sufficient accountability. PIP is proposed as a more transparent and objective assessment. It is made up of two components, daily living and mobility, both paid at one of two rates, standard or enhanced. Individuals can receive either or both of these components in different combinations. Regulation 24 sets the benefit at:

   - Daily living: standard rate £53 (8 points), enhanced rate £79.15 (12 points) and
   - Mobility: standard rate £21 (8 Points), enhanced rate £55.25 (12 points).

5. The assessment for entitlement to the two components looks at individuals' ability to carry out a range of key everyday activities that are fundamental to daily life. These are set out in Schedule 1 of the Regulations:

   - Part 1: sets out the key definitions;
   - Part 2: sets out ten activities that relate to entitlement to the daily living component, for example the ability to prepare food or to wash and bathe unaided; and
   - Part 3: sets out the two activities that relate to the mobility component.

   Within each activity different descriptors of ability are linked to a specific number of points which dictate whether the person is entitled to the benefit and, if so at which rate (see previous paragraph).

6. When considering someone's ability to undertake an activity, the assessment will take account of any aids and appliances an individual may need to use in order to complete the activity and also where people need support from another person, such as supervision, prompting or assistance.

The Assessment Process

7. Assessments for PIP will be carried out by independent providers who were selected through open competition as follows:

   - Lot 1 (Scotland, North East and North West England) has been awarded to Atos Healthcare;
   - Lot 2 (Wales and Central England) has been awarded to Capita Business Services Ltd; and
   - Lot 3 (London and Southern England) has been awarded to Atos Healthcare.
   - Lot 4 (Northern Ireland) has been awarded to Capita Business Services Ltd.

8. In accordance with specifications set by the Department, the providers will be responsible for recruitment and training of the health professionals who will carry out the PIP assessments. These requirements include that the health professionals are occupational therapists, nurses (level 1),

physiotherapists, paramedics or doctors and that they must be fully registered with their relevant licensing body (doctors must have a licence to practise). In addition to this, before they can carry out assessments for PIP, every health professional must be approved by the Department's Chief Medical Adviser on behalf of the Secretary of State: DWP state that such approval will depend on the health professionals being able to demonstrate their competence against a published set of requirements.

9. On receipt of a case, the health professional will review all the information, including the claimant questionnaire and any additional information submitted by the claimant. If necessary, the health professional will request further evidence, for example from the claimant's GP, consultant or social worker. If the evidence is sufficient, the health professional will conduct an assessment on the basis of the paper evidence. In most cases the claimant will be required to attend a face-to-face consultation with the health professional. DWP state that this will give the claimant an opportunity to put across their view of how their health condition or impairment affects their daily life. Once the assessment is complete, the health professional will write an assessment report and select the activity descriptors that they consider apply to the claimant, which will be sent, with the evidence, to the Decision Maker.

10. If the Decision Maker disagrees they can challenge the advice and go back to the health professional for further advice or further evidence. The final decision on descriptors and benefit entitlement rests with the Decision Maker. The Decision Maker also provides a written reason for the decision, which is included in the notification letter. If a claimant is being disallowed benefit or will have a reduced award, the Decision Maker will phone the claimant to explain their decision.

11. Although they are different benefits the Committee asked whether, in the interests of reducing the overall administration, there was any potential read-across from the medical assessments used in the Work Capability Assessment that underpins Employment and Support Allowance and the PIP Assessment. DWP replied

> "The PIP assessment and the Work Capability Assessment (WCA) are very different assessments. The assessment for Personal Independence Payment will focus on ability to carry out key everyday activities, rather than capability to work and direct measures of associated functions as in the Work Capability Assessment. As a result of this, in the majority of cases we do not intend to use information collected during the WCA as part of the PIP assessment. However, in the case of a claimant who is terminally ill, we will use relevant evidence held on any Employment and Support Allowance awards to reduce the burden on the claimant and to ensure we make a decision as quickly as possible."

The Appeals system

12. The Committee is also aware from its scrutiny of Employment and Support Allowance legislation that about 40% of WCA assessments are being overturned on appeal, so we asked what measures are DWP taking to ensure the rate of decisions being overturned its lower under the PIP appeal mechanism. DWP replied:

> "The Department has been undertaking a pilot to explore the reasons for overturn of Departmental decisions on appeals. Lessons learned

from this exercise will be used to improve the standard of decision making processes in the future and inform continuous improvement in training and guidance for staff.

Focusing on PIP specifically, wherever possible, we aim to resolve concerns early on, without the case going into a lengthy appeals process. Decision Makers will call all PIP claimants who have been disallowed or have had a reduction in their benefit in order to provide a personalised explanation for that decision. This step has been built into the PIP process to help the claimant understand the reason behind their decision and to alert the Decision Maker early on where there is any additional evidence that has not already been considered when making the decision.

If a claimant wishes to dispute a decision on entitlement to PIP they will be able to ask for a reconsideration of the original decision. Reconsideration will be a mandatory step ahead of making any appeal. It is intended that this will provide claimants with a further opportunity to present any additional evidence that could help the decision maker to revise a decision if appropriate.

After this, if the claimant still thinks the decision is incorrect, they can appeal to an independent tribunal. The Department is working closely with Her Majesty's Courts and Tribunals Service to ensure that the end-to-end process is as effective and efficient as possible, and that support is available throughout for all claimants. Initial PIP cases that reach the appeals stage will be monitored closely. We will aim to provide Presenting Officers at these early appeals (i.e. the first 400 cases) so that they can understand what has caused a decision to be overturned on appeal and feed back lessons learned to staff and into guidance and training."

Guidance for Decision Makers

13. The guidance provided for Assessors and Decision Makers will be key to the understanding of how the PIP assessment will operate. We understand from Paragraph 9.1 of the EM that DWP has been drawing this up in liaison with a Stakeholder Forum, but we are not clear exactly when this will be published, only that the Decision Makers' Guidance will be made available before PIP goes live on 8 April 2013.

14. Immigration Rules recently had to merge their guidance with legislation following the judgment in the case of Alvi because the courts felt material that was taken into account in deciding a case was not enshrined in legislation and had not been subject to Parliamentary scrutiny.[2] We therefore asked DWP whether they were confident that they have got the balance right between what is in legislation and what is in guidance. DWP replied:

"In the Alvi case the issue arose that codes of practice were not subject to parliamentary scrutiny and purported to be "guidance", while they were in fact determinative of the applicant's rights. The guidance in relation to PIP will not be of that nature.

[2] See our 9th Report of this session (HL Paper 40), item on Statement of Changes of Immigration Rules CM 8423

> A key part of the development of the benefit has been to ensure that we strike the correct balance between the legislation and guidance. We carefully considered key areas to include within the legislation to ensure that that the assessment was formed on a solid foundation that would stand up to scrutiny, while at the same time ensuring that we could be flexible in the areas that require a broader interpretation by putting them in guidance. Most terms have been defined in length within the Regulations, with limited areas taken into account within the guidance.
>
> We needed to allow room within the assessment to be able to consider everyone as individuals, meaning that some flexibility around certain terms is necessary. For example, we consulted on whether we should include the terms *'safely, reliably, repeatedly and in a timely manner'* within the regulations or the guidance. Following feedback we concluded that including them in the regulations would be too prescriptive, so instead we have included the term reliably (which means safely, to a necessary and appropriate standard, repeatedly and in a timely manner) in the guidance, to ensure there is enough flexibility to achieve the policy intent.
>
> Beyond this we have been engaging with stakeholders on the development of PIP guidance, taking on board comments and recommendations where possible. We have also developed guidance for the assessment providers, which will be available in by the end of this month. While we will not run a formal consultation on this, we will consider any comments that are submitted."

15. Nonetheless certain aspects of these definitions and the different significance that they may have depending on whether they are in legislation or guidance remain contentious. The Committee has received evidence from the Multiple Sclerosis Society, and the Spartacus network which expresses their concerns in particular about the omission from the Regulations of *"safely, reliable, repeatedly and in a timely manner"* and its effect on those with fluctuating disorders. The interpretations of other definitions are also questioned. Similarly the RNIB have asked for clarification of what test will be used for determining if someone can read, for example because the font style and size may make a significant difference in the result, but that is not specified in the Regulations. The evidence is published in full on our website.

Timetable

16. Paragraph 7.5 of the EM states that the Government's intention is to have a two-stage roll out of PIP for new claimants starting on 8 April 2013 with people living in parts of the North East and the North West of England (the specific postcodes will be set out in the Commencement Order). Then all new claimants nationally will be included from 10 June 2013.

17. A number of bodies have said that the timetable is ambitious and too dependent on the IT system working correctly from day 1, so we asked DWP to state why they are confident that it can be achieved. DWP replied:

> "Following feedback to the detailed design consultation held last year, the Government published a technical briefing note on 13 December – this set out the finalised reassessment strategy and impacts. This note provided a detailed timetable, which is also included in the Government response to the detailed design consultation.

http://www.dwp.gov.uk/docs/pip-reassessments-and-impacts.pdf

In summary

- From April 2013: New claims to PIP will be taken from April 2013 in areas of the North West and parts of the North East of England.
- From June 2013: New claims will begin in all areas of GB.
- From October 2013: The following DLA claimants will be invited to claim PIP:
  - People reporting a change in their condition that may affect their rate of payment;
  - fixed-term awards recipients whose awards expire from the end of February 2014 onwards;
  - young people turning 16 (with the exception of those awarded DLA under the rules for people who are terminally ill); and
  - any existing DLA recipient voluntarily wishing to claim PIP (including those with fixed or indefinite awards).
- From October 2015: All remaining DLA claimants will be invited to claim PIP.

The decision to complete the reassessment of DLA claimants over a longer period will allow us to learn from the early introduction of PIP new claims and reassessment. We recognise PIP is a major change and are determined and confident that we can get the delivery right.

As part of our assurance and testing processes, we have set up a Model Office to test our systems processes, learning and development and IT. Model Office is the testing facility within the Programme that simulates the live environment. We have successfully completed the first phase of Model Office testing and we are well into the testing of IT systems and processes.

Before we start to reassess the bulk of DLA claimants, we will be able to learn from our new claims experience and the reassessment of those invited to claim PIP from October 2013, make sure our systems are working as we intend, and consider the findings from the first independent review of PIP, which is due by the end of 2014."

Impact

18. DWP has appeared rather reticent about publishing up-to-date headline figures for this policy change. This point was also raised in the debate on the Minister's Statement. Figures are not stated in the EM, the reader is instead referred to the Impact Assessment published in May 2012.[3] The headline costs given in that document are:

- Costs of £710m to implement a new benefit and move existing DLA recipients to the new benefit. Net costs to individuals of £2,240m from reduced benefit expenditure over the three year migration period from focussing support on disabled people with greatest needs.

[3] See http://www.dwp.gov.uk/docs/dla-reform-wr2011-ia.pdf

- Savings expected to result from this reform are equivalent to 20% of forecast working age DLA expenditure.

19. The majority of the savings will be derived from changed assessments. In his statement to the House the Minister announced the following assumptions about the impact of PIP on the caseload:

> "By October 2015, we estimate that we will have reassessed 560,000 claimants. Of those, 160,000 [28%] will get a reduced award and 170,000 [30%] will get no award. However, 230,000 will get the same support or more support. Under the new criteria, almost a quarter of PIP recipients will get both of the highest rates, worth £134.40 each week, compared with only 16% on DLA." (col 1193)

20. We understand that this is published formally in the Benefit Expenditure and Caseload Forecasts on the Department's website.[4]

Impact on the Voluntary Sector

21. The EM states at paragraph 10.1 that there is no impact on civil society organisations. The Committee questioned DWP on this as we are aware that benefits applicants are heavily dependent on assistance from voluntary organisations. This point is also taken up in the evidence we have received. DWP states:

> "The introduction of PIP, of itself, provides no Regulatory burden on third sector organisations. However, we are aware that claimants will seek advice from voluntary sector organisations and recognise the valuable support charities provide. That is why throughout the design and development of Personal Independence Payment we have put claimants and disability organisations, including charities, at the heart of our reforms.
>
> We are continuing to work with disability charities to support them with their preparations for the introduction of PIP. We also continue to support Disabled People's User Led Organisations (DPULO) in order for them to become stronger, more sustainable organisations through our DPULO programme.
>
> We remain absolutely committed to introducing Personal Independence Payment in an open and transparent manner. We have published a range of information to keep claimants and disability organisations informed, including answers to frequently asked questions. We are also developing a set of information to provide support to these organisations and help them with conversations with claimants. This information can be found at: http://dwp.gov.uk/policy/disability/personal-independence-payment/information-for-advisers/
>
> A vital part of this process will be learning from disabled people's experiences, and that is why we will continue to involve them, and their organisations, in supporting this work going forward. We will be looking closely at both the experience of claimants and support organisations throughout the implementation and feeding any lessons learned into our continuous improvement work."

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[4] See http://research.dwp.gov.uk/asd/asd4/budget_2012_211212.xls

22. However there are a number of practical implications for the functioning of the PIP system; under the proposed transitional regulations once someone is notified of the need to apply for PIP rather than DLA they have 28 days to respond:

- the MS Society write that their waiting list for assisting people with their applications is over 2 months.
- RNIB ask whether the material for blind and partially sighted people will be provided in an appropriate format, for example Braille, or whether it will have to be requested; if the latter will the 28 day limit be extended to accommodate that?

23. DWP replied that

> "Unlike the DLA claim form, where considerable information is requested on the claimant's disability and the effect it has on their life, we are only asking the claimant to provide basic information at the point they make their claim to PIP. Information required at this stage includes the claimant's name, address, National Insurance number and their GP's contact details. It is for this reason that the Government considers 28 days a reasonable period in which to respond to the invitation to claim and to make the claim, which, in most circumstances, will be through a short phone call. However, we will also include a discretionary provision to extend the four weeks where the Secretary of State considers it reasonable; for example, where the claimant has recently gone into hospital. This is included in the working draft PIP Transitional Regulations the Department made available on 13 December 2012. [A copy of which was attached to the EM of the current Regulations.]
>
> We are building in reminders to ensure there are adequate safeguards in this process. Where a claim to PIP is made and they comply, individuals will have their existing DLA award extended until a decision on entitlement to PIP has been made.
>
> Failure to claim within four weeks would result in DLA being suspended for up to four more weeks during which time a claim could be made and the suspension lifted and benefit restored. If, following this period of eight weeks, no claim to PIP has been made, payment of DLA would be terminated. The process is designed to ensure that claimants have sufficient opportunity and time to make a claim and that there are appropriate safeguards to provide additional time where that is reasonable.
>
> The claim process will include procedures to identify individuals who may need additional support with their claim and the information requirements, whether from DWP or an independent adviser. This includes where the claimant requires material in an alternative format. The Department is committed to ensuring that information will be clear and easy to understand. PIP products will be available in a range of alternative formats, including audio, large print, Braille and BSL."

Interaction with the benefit cap?

24. Because this change is just one of a wide range all being made at once the Committee asked for clarification whether PIP payments would be part of the calculated income considered in the benefit cap. DWP responded**:**

> "To recognise that individuals who have health conditions or disabilities have additional costs, all households which include someone who is receiving Disability Living Allowance or Personal Independence Payment will be exempt from the benefit cap. For the purposes of paying out-of-work benefits a household is considered to be a single adult or a couple, and any children or qualifying young person for whom that adult or couple are responsible.
>
> An adult disabled child has always been treated as a separate household for benefit purposes and our approach for the benefit cap remains consistent with this. A disabled adult on PIP can also be entitled to the Employment Support Allowance (including if appropriate the support component) or Income Support or Jobseeker's Allowance if they meet the respective conditions of entitlement. PIP will be disregarded as income for the income-related benefits."

Conclusion

25. There appears to be general agreement that the DLA system had become flawed and needed revision. We commend the DWP for their extensive consultation on its replacement and for working with voluntary organisations that represent the interests of the disabled in its formulation. However the new benefit also has the objective of decreasing overall expenditure and targeting it more effectively on those most in need, which according to figures in Lord Freud's statement on 13 December, means that of those reassessed under PIP by October 2015, about 28% of people currently on Disability Living Allowance will get a reduced award and about 30% will get no award. With those consequences in mind the House will therefore wish to examine very carefully whether the initial arrangements set out here seem to be appropriate and also how the outcome of the initial stages will be evaluated. It is unsurprising that the questions raised in correspondence to the Committee relate to the guidance, which is unfortunately not yet available. **As it is so material to the House's understanding of how the system will operate for individuals, rather than on a theoretical level, the Committee suggests that proper scrutiny is not possible if the guidance is not published before the debate on these Regulations takes place.**

B. NHS Bodies and Local Authorities (Partnership Arrangements, Care Trusts, Public Health and Local Healthwatch) Regulations 2012 (SI 2012/3094)

Date laid: 17 December
Parliamentary Procedure: negative

Summary: These Regulations make provision for the partnership arrangements between NHS bodies and local authorities (including the designation of certain NHS bodies as Care Trusts), the public health functions of local authorities (for example in promoting and surveying dental health) and set the criteria for local authority interaction with the Local Healthwatch organisations. The Committee has received representations from those already involved in LINks expressing doubts about whether the legislation will operate as intended. The correspondents all seem to support the Department's stated intention but express concerns that the current wording may leave Local Healthwatch vulnerable to manipulation. The White Paper said the objective is "to strengthen the collective voice of patients", the Department's response acknowledges that staff of local healthcare contractors could become members of Local Healthwatch; their influence may not be disinterested and may not represent the concerns of patients. The Department has offered a legal and policy response, but that may not be enough: the Department needs to address urgently the points raised to the satisfaction of the public because without trust in the basic structure the Department simply may not get the volunteers it wants.

These Regulations are drawn to the special attention of the House on the grounds they give rise to issues of public policy likely to be of interest to the House and that they may imperfectly achieve their policy objective.

26. These Regulations have been laid by the Department of Health under provisions of the National Health Service Act 2006 and the Local Government and Public Involvement in Health Act 2007 (both as amended, in particular by the Health and Social Care Act 2012 ("the 2012 Act")). They are accompanied by an Explanatory Memorandum (EM).

27. The instrument makes provision for the partnership arrangements between NHS bodies and local authorities (including the designation of certain NHS bodies as Care Trusts), the public health functions of local authorities (for example in promoting and surveying dental health) and sets the criteria for local authority interaction with the Local Healthwatch organisations which will carry out certain activities relating to patient and public involvement in health and social care services.

Conversion of LINks to Local Healthwatch

28. Under section 221(2) of the Local Government and Public Involvement in Health Act 2007 ("the 2007 Act") LINks (Local Involvement Networks) were required to:

- promote and support the involvement of people in the commissioning, provision and scrutiny of local care services;
- enable people to monitor for the purposes of their consideration of service standards and improvements, and to review for those purposes, the commissioning and provision of local care services;

- obtain the views of people about their needs for, and their experiences of, local care services; and
- make those views known and make reports and recommendations about how local care services could or ought to be improved to persons responsible for commissioning, providing, managing or scrutinising local care services.

29. Part 5 of the 2012 Act includes provision for the activities currently carried on by LINks to be carried on by social enterprises, known as Local Healthwatch organisations, which must satisfy criteria prescribed by regulations, and for LINks to be abolished. Local Healthwatch will also have the following additional responsibilities:

- making the views of people known and reports and recommendations about how local care services could or ought to be improved to the Healthwatch England committee of the Care Quality Commission;
- providing advice and information about access to local care services and about choices that may be made with respect to aspects of those services;
- reaching views on service standards and whether and how standards could or ought to be improved and making those views known to the Healthwatch England committee of the Care Quality Commission;
- making recommendations to that committee to advise the Commission about special reviews or investigations to conduct (or, where the circumstances justify, making such recommendations direct to the Commission);
- making recommendations to that committee to publish reports under section 45C(3) of the Health and Social Care Act 2008 about particular matters; and
- giving that committee such assistance as it may require to enable it to carry out its functions effectively, efficiently and economically.

30. These Regulations set out in more detail the governance and accountability arrangements between local authorities and Local Healthwatch organisations, and impose duties on local authorities and others to respond to Local Healthwatch organisations within a specified time.

The Policy objective

31. In the Explanatory Memorandum the Department states that one of the key policy objectives of the 2012 Act is to put patients and the public at the heart of care. The White Paper *Equity and Excellence: Liberating the NHS*,[5] set out the following proposal:

> "We will strengthen the collective voice of patients, and we will bring forward provisions in the forthcoming Health Bill to create Healthwatch England, a new independent consumer champion within the Care Quality Commission. Local Involvement Networks (LINks) will become the Local Healthwatch, creating a strong local infrastructure, and we will enhance the role of local authorities in promoting choice, through the Healthwatch arrangements they commission."

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[5] White Paper Equity and Excellence: Liberating the NHS, published July 2010

32. In debate on the Report stage of the 2012 Act, Lords placed great emphasis on the words "strong local infrastructure" and the need for there to be the right balance between the influence of the local authority and the NHS providers and that of local patients and service users when commissioning services. In response the Government gave the following commitment:

> "I have listened to the concerns expressed about the need for Local Healthwatch to have strong lay involvement. I completely agree. This will be vital to the success of local Healthwatch. Therefore, I confirm to the House today that we will use the power of the Secretary of State to specify criteria, which Local Healthwatch must satisfy, to include strong involvement by volunteers and lay members, including in its governance and leadership. This will have the effect that a local authority cannot award a Local Healthwatch contract to a social enterprise unless this condition is satisfied. I hope that that provides reassurance to noble Lords." [6] (Baroness Northover)

Concerns

33. However, the Committee has received representations from three organisations which question whether the wording in these Regulations delivers that undertaking. The correspondence from Health Link, the National Association of LINks Members (NALM) and Rutland LINk is published in full on our website.[7]

34. Section 34(1) of the Regulations defines two types of 'lay involvement': 'lay people' and 'volunteers' but the representations express concern that combined effect of these definitions is that non professional or managerial staff in health, social care or local government can be involved as 'lay people' or 'volunteers' so long as they are not paid by Local Healthwatch and that paid staff from Local Healthwatch contractors could be either lay persons or a volunteer. In response DH officials state that the definitions deliberately do not exclude such people because their contribution would be valuable irrespective of whether the individual was employed in health or social care or even a member of a Local Healthwatch contractor's staff. The Department's full response is also published on our website.

35. The representations also question the intention of Section 38 of the instrument which requires the 'involvement' of lay persons and volunteers in the 'governance' of Local Healthwatch, because it does not define what is intended by either of those terms. Health Link's letter goes on to say:

> "In the context of the NHS involving patients and the public, a statutory requirement in the principal Act on clinical commissioning groups, 'involvement' is defined as providing information as a minimum, which means that just giving information is adequate to discharge the involvement duty. It seems likely that to avoid this minimal involvement applying in Local Healthwatch relationship much stronger wording would be needed... They might be told about them afterwards without any say."

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[6] HL debate, 8th March 2012(col. 1980)

[7] www.parliament.uk/seclegpublications

36. The Department of Health responded

> a) "The policy was aimed at strong lay involvement with a view to ensuring adequate representation of the local community. However it would not be right for the centre to be too prescriptive and, potentially, restrictive in setting out the provisions. It is important to recognise that in line with the localism agenda and to acknowledge the potential for differences between local areas, it is appropriate for each area to have a measure of flexibility. The requirement of "involvement" has been strengthened by incorporating it in several ways: as a qualifying criterion (the governance arrangements of Local Healthwatch (regulation 38) and through provisions on contractual requirements (requirements imposed on the local authority contract in relation to the carrying-on of section 221 activities by Local Healthwatch and its contractors - regulation 40(1)(g) and 41(1)(e) - and the making of relevant decisions by Local Healthwatch - regulation 40(1)(a) read with 40(2),(3) and(4)) Against this, we need to allow for the localism agenda and the need for local flexibilities to enable local Healthwatch organisations to operate in a way that is best for their local people and communities.
>
> b) However, whilst "involvement" does not necessarily require full consultation or participation in all aspects of an activity, it does still require the taking of steps by the body on whom the obligation to involve falls. The appropriate level of involvement would depend on the matter in question. In most cases, the plain provision of information would not be sufficient to comply with the obligation to involve. For example, where the provisions require the Local Healthwatch organisation to involve lay persons and volunteers in relevant decisions (set out in regulation 40(1)(a) read with 40(2), (3) and (4)), involvement would have to be in the making of that decision. Under the regulations, it would not be sufficient for information about the decision simply to be given after the decision had been made – in the context of the provisions that would not amount to involvement in the decision itself. We hope this assures you on this point."

37. The Committee does note however the qualifying statement above "in most cases".

Conclusion

38. The representations come from those already involved in LINks and who therefore have a detailed knowledge of how the system operates – if only in their specific local area. If they are expressing doubts about whether the legislation will operate as intended, the Department would do well to pay close attention to them. As the letter from NALM states:

> "It is essential that Local Healthwatch is independent and led by the service users and the public if it is to have credibility and influence. It must not be a tool of those it monitors and inspects".

39. The correspondents all seem to support the Department's stated intention but express concerns that the current wording may leave Local Healthwatch vulnerable to manipulation. The White Paper said the objective is "to strengthen the collective voice of patients", the Department's response (see paragraph 34 above) acknowledges that staff of local healthcare contractors could become members of Local Healthwatch; their influence may not be

disinterested and may not represent the concerns of patients. The Department has offered a legal and policy response, but that may not be enough: the Department needs to address urgently the points raised to the satisfaction of the public because without trust in the basic structure the Department simply may not get the volunteers it wants.

C. Energy Performance of Buildings (England and Wales) Regulations 2012 (SI 2012/3118)

Date laid: 19 December
Parliamentary Procedure: negative

Summary: The Regulations consolidate the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 (SI 2007/991) with subsequent amendments made to them by some 10 further statutory instruments. They implement the requirements of EU legislation on the energy performance of buildings, but go beyond those requirements by making certain additional provisions which support Government policies, such as the Green Deal.

We draw this instrument to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

40. The Department for Communities and Local Government (DCLG) has laid these Regulations, coming into force on 9 January 2013. It has also provided an Explanatory Memorandum (EM) and impact assessment.

EU Directives

41. The history of Energy Performance Certificates (EPCs), as embodied in secondary legislation over the last five years, is a complicated one. The Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 (SI 2007/991: "the 2007 Regulations") first implemented European legislation agreed in 2002: the Energy Performance of Buildings (EPB) Directive ("the 2002 Directive").[8] The 2002 Directive has been recast in a Directive from 2010 ("the 2010 recast Directive").[9] In the EM, DCLG states that the latest Regulations enact where necessary the requirements of the 2010 recast Directive, and make two amendments to provisions enacting the 2002 Directive.

42. DCLG sets out, at paragraph 4.1 of the EM, the 10 separate statutory instruments that have made amendments to the 2007 Regulations. The Department confirms that, as a result of consolidation by the latest Regulations, the 2007 Regulations and most of the subsequent amending instruments have been revoked in their entirety. We welcome this consolidation: if a Department sees no alternative to frequent amendment of a statutory instrument, it should not lose sight of the difficulty that this process presents for external stakeholders in keeping track of the requirements of secondary legislation.

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[8] Directive 2002/91/EC.

[9] Directive 2010/31/EU.

"Gold-plating"

43. In the EM, DCLG also deals with the extent to which implementation of the relevant EU legislation has involved "gold-plating"—that is, making provisions which go beyond the requirements of the Directives. On the one hand, the Department states (at paragraph 7.6 of the EM) that some gold-plated provisions have been retained because they support Government policies such as the "Green Deal". These include domestic and non-domestic EPC Registers; the requirement for energy assessors to be both accredited and qualified; and the requirement on estate agents to ensure that an EPC has been commissioned. On the other, DCLG explains (at paragraph 7.5) that the latest Regulations also serve to remove elements of "gold-plating" contained in earlier implementation. These include extending the list of buildings exempt from the requirement to have an EPC, and removing the requirement to attach an EPC to an estate agent's written particulars.

EPCs and written particulars

44. As regards the latter requirement, it was introduced by amending Regulations made in 2011 ("the 2011 Amending Regulations"),[10] which are now being revoked. The 2011 Amending Regulations provided that a copy of the first page of an EPC had to be attached to written particulars, for both domestic and non-domestic buildings. In the EM to the 2011 Amending Regulations, the Department said that the "amendment will make it more likely that potential buyers and tenants see the recommendations attached to the EPC, rather than just the rating and will therefore meet the objectives of the EPB [Directive] more effectively."

45. In explaining the change made by the latest Regulations, DCLG acknowledges that the requirement was intended to help ensure that potential buyers were made aware of the existence of a Green Deal on the property, and to improve levels of compliance with the need to obtain an EPC. The Department states that it is now removing the requirement because it believes that there are adequate measures in place to alert buyers and tenants to the existence of a Green Deal on a property, and because the new requirement for property advertisements to display EPC ratings will help to ensure compliance.

46. Whether the provision of an EPC influences the behaviour of property-owners, and whether that influence is strengthened by including an EPC in written particulars, are issues that can be debated. We note, however, that the Department has not sought views on making this change. In the EM to the latest Regulations, DCLG states that consultation was carried out on a draft of the recast Directive in 2009, and that a clear majority of respondents supported the Government's preferred position. However, while the 2009 consultation sought views on the proposal that property advertisements should include the EPC, it did not raise the issue of whether an EPC should be attached to written particulars. There has been no further consultation: Ministers decided that this was unnecessary.

47. The House may be interested to see that the Government have now consolidated a proliferation of statutory instruments relating to the energy

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[10] The Energy Performance of Buildings (Certificate and Inspections) (England and Wales) (Amendment) Regulations 2011 (SI 2011/2452)

performance of buildings, and also to note the Government's decisions on "gold-plating" in implementing the relevant European legislation.

Building Regulations &c. (Amendment) Regulations 2012 (SI 2012/3119)

Date laid: 19 December
Parliamentary Procedure: negative

Summary: The Regulations make a range of changes to the building regulations regime in England. These include proposed changes to Part P, which deals with electrical safety: the consultation process showed that a significant minority of respondents had concerns about the proposals.

We draw this instrument to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

48. The Department for Communities and Local Government (DCLG) has laid these Regulations: different provisions come into force on different dates in, and after, 2013. It has also provided an Explanatory Memorandum (EM) and several impact assessments dealing with the range of changes.

49. On 18 December 2012, the Parliamentary Under-Secretary of State for Communities and Local Government, Mr Don Foster, MP, made a Written Statement[11] about "the changes that will be made to the building regulations regime in England to deliver an even better and more cost-effective way of ensuring our buildings remain safe and sustainable".

50. These Regulations present most of the changes. They amend Regulations made in 2010[12] in several important respects. These include:

- rationalisation of Parts K, M and N, which deal with protection from falling, collision and impact, access to and use of buildings and glazing safety respectively;
- changing the provisions on electrical safety in the home in Part P;
- changing statutory notification provisions of the local authority building control system;
- introducing new requirements for certificates relating to competent person self-certification schemes to contain Green Deal information; and
- authorisation of new types of work and extensions of type of work for competent person schemes.

51. In addition, while the Energy Performance of Buildings (England and Wales) Regulations 2012 (SI 2012/3118)[13] do most of the work of transposition of the relevant EU Directive,[14] the provisions of the Directive relating to the construction or renovation of buildings are transposed through these Regulations.

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[11] HC Hansard, 18 December 2012 : Column 83WS

[12] The Building Regulations 2010 (SI 2010/2214)

[13] We provide more detailed information on SI 2012/3118 elsewhere in this Report.

[14] Directive 2010/31/EU

52. In his Statement, Mr Foster put a good deal of emphasis on the changes to Part P, dealing with electrical safety, stating that the Government recognised that there was "scope to streamline the requirements by removing the requirement to notify smaller-scale, lower-risk electrical work to a building control body". In the EM, the Department for Communities and Local Government (DCLG) confirms that the Regulations extend the range of work that is non-notifiable to include alteration work outdoors, in kitchens and in lower-risk parts of a room containing a bath or shower, while maintaining the requirement of notification for higher risk electrical installation work.

53. DCLG carried out consultation on the proposals over 13 weeks to the end of April 2012.[15] In the EM, the Department says that 158 responses were received in relation to the electrical safety proposals; and that 65% of respondents supported making more electrical work non-notifiable (with 27% opposed). The published consultation summary makes it clear that, while the 65:27% split related to the general question of whether more work should be non-notifiable, responses on specific areas of work were more evenly balanced. Of the 132 responses relating to whether electrical alteration work in kitchens should be made non-notifiable, 51% supported the proposal, while 43% opposed it. Of the 133 responses dealing with alteration work outdoors, 49% of respondents supported the proposal to make it non-notifiable, with 41% opposed. Of the 133 responses dealing with alteration work in lower-risk parts of bathrooms, 54% supported the proposal while 39% opposed it.

54. In his Statement, Mr Foster said that the new Part P of the Regulations sought to "achieve a reasonable balance of risk". The House may wish to note that the detail given in the Department's consultation summary indicates that large numbers of interested parties may not be persuaded that this is the case.

STATEMENT OF CHANGES IN IMMIGRATION RULES (HC 820): CORRESPONDENCE

55. This instrument corrects three provisions from a previous Statement of Changes in Immigration Rules (HC 760), following representations from interested parties after its publication. HC 820 was not reissued free of charge as is normal for correcting instruments and raised a number of procedural questions, in particular why consultation is not conducted before the instrument is published to ensure accuracy and why the Home Office says these instruments have no impact on the various charities and lawyers that help with immigration applications. The Committee wrote for an explanation to Mark Harper MP, Minister for Immigration, and this letter and the Minister's reply are included in Appendix 1.

[15] A summary of the responses to the consultation is available at:
https://www.gov.uk/government/consultations/building-regulations-accessstatements-security-changing-places-toilets-and-regulation-7

INSTRUMENTS OF INTEREST

Draft Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2013

Consumer Rights (Payment Surcharges) Regulations 2012 (SI 2012/3110)

56. Payment surcharges are additional fees added to the price of a product or service when a consumer chooses to pay by a certain means of payment. The Department for Business, Innovation and Skills (BIS), which has laid these instruments, points to two ways in which excessive payment surcharges cause detriment to consumers:

- by adding a significant amount to the total cost of the transaction which consumers, particularly online, may have no realistic way of avoiding; and
- by making it more difficult for consumers to calculate the final price they will pay and compare that price with competing products, particularly where they are not made aware of the payment surcharge at the same time as they are informed of the headline price.

57. BIS states that excessive payment surcharges are most common in certain industries where a large volume of transactions are completed online: complaints from consumers and consumer bodies have focussed on the passenger transport industry. The impact assessment submitted with the instruments gives figures for the estimated total value of card surcharges in 2010 in the principal affected sectors – airlines, ferries, rail and leisure – and gives £473.2 million as the mid-point estimate of that total (of which £289 million is attributed to airlines).

58. The Consumer Rights (Payment Surcharges) Regulations 2012 (SI 2012/3110) implement Article 19 of the EU Consumer Rights Directive,[16] and prohibit traders from charging consumers "above-cost" payment surcharges. The Regulations implement the ban earlier than the remaining provisions of the Directive because of evidence that excessive payment surcharges are particularly detrimental to consumers and have a damaging effect on competition.

59. The draft Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2013 adds SI 2012/3110 to the list of consumer protection measures that may be enforced within the framework of Part 8 of the Enterprise Act 2002, and allows the enforcers specified in that Part of the Act to apply to the courts for civil enforcement orders.

[16] Directive 2011/83/EU of the European Parliament and of the Council on consumer rights

Draft Modifications to the Standard Conditions of Electricity and Gas Supply Licences, Electricity Distribution Licences and Gas Transporter Licences (Smart Meters)

60. We have previously provided information about two statutory instruments[17] laid by the Department for Energy and Climate Change (DECC), relating to the programme to roll out some 53 million gas and electricity smart meters to domestic properties and smaller non-domestic sites by the end of 2019.

61. This instrument modifies the conditions of electricity and gas supply, electricity distribution and gas transporter licences to support the smart metering programme. The modifications provide for data access and privacy protections for consumers; supplier responsibility for "end-to-end security" of all of the equipment required for the programme; and the establishment and funding by energy suppliers of a central delivery body (CDB) to carry out consumer engagement activities. They also provide that the Secretary of State and Ofgem have the power to require suppliers and network operators to submit information on the progress of the smart metering roll-out.

62. In the Explanatory Memorandum, DECC states that the Government consulted on its consumer engagement strategy, and data access and privacy policy, between April and June 2012. On consumer engagement, the majority of the 55 respondents agreed with the need for a CDB, but views differed over the mechanics of its set-up and operation. In response, DECC has revised both the CDB's objectives and its governance structure. On the proposals for data access and privacy, the 41 responses received showed a general acceptance that the Government had struck a reasonable balance between the interests of energy suppliers and consumers. However, given residual concern from consumer groups and Ofgem about allowing suppliers to see daily data provided the customer did not object, DECC confirms the Government's intention to monitor how this works in practice.

Council Tax (Administration and Enforcement) (Amendment) (No. 2) (England) Regulations 2012 (SI 2012/3086)

Council Tax (Demand Notices) (England) (Amendment) Regulations 2012 (SI 2012/3087)

63. These two sets of Regulations, laid by the Department for Communities and Local Government (DCLG), serve several purposes. They provide for council tax to be paid in 12 monthly instalments rather than 10, if requested by the person liable to pay it; they allow certain information which billing authorities must supply with demands for council tax to be published on a website rather than supplied in hard copy, unless requested to do so; and they amend procedures relating to billing and collecting council tax, to reflect the local reduction schemes and empty homes premiums introduced by the Local Government Finance Act 2012.

64. In the Explanatory Memorandum (EM) DCLG explains that it consulted on the first two changes over eight weeks from October to December 2011. Of the 221 responses that answered the question of whether to allow

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[17] The draft Electricity and Gas (Smart Meters Licensable Activity) Order 2012, in the 8th Report of this Session (HL Paper 36); the Electricity and Gas (Competitive Tenders for Smart Meter Communication Licences) Regulations 2012 (SI 2012/2414), in the 10th Report of this Session (HL Paper 46).

information to be provided electronically, 217 agreed, stating that authorities would be able to save costs, while 4 local authorities disagreed. Of the 231 responses that answered the question of whether to make the default pattern of council tax bill instalments payable by 12 monthly instalments, 44 agreed and 187 disagreed; those who disagreed cited factors including the potential effect on local authority cash flow, and the benefits to bill payers of having two months of council tax "holiday" at the end of the financial year where payment is made by 10 monthly instalments.

65. We obtained further information about these changes, and in particular about the Department's decision in the one case to proceed in accordance with majority opinion and, in the other, to go against the preference of most respondents. We enclose that information in Appendix 2.

Employment and Support Allowance (Amendment) Regulations 2012 (SI 2012/3096)

66. The Work Capability Assessment (WCA), which determines the rate at which a claimant may be paid Employment and Support Allowance, has been subject to an extended review by Professor Harrington. As part of the second phase of his review he asked Macmillan Cancer Support to make recommendations on how people being treated for all types of cancer should be assessed. These Regulations amend the WCA scheme criteria in line with those recommendations, in particular by expanding the range of people who can be "treated as" either having Limited Capability for Work or Limited Capability for Work Related Activity without the need for further face to face assessment. The Regulations also amend some of the WCA tests in response to case law decisions, for example by making it clear that the term "in-patient" is not intended to apply to minor, day surgery procedures and by clarifying the definitions in some of the WCA Activity tests including "standing and sitting", "manual dexterity", "understanding communication", "continence" and "getting about".

Civil Legal Aid (Procedure) Regulations 2012 (SI 2012/3098)

67. These Regulations set out provisions of the new Legal Aid scheme that will come into force in April 2013. It will largely remove private family law cases from the scope of Legal Aid except for victims of domestic violence or child abuse as defined by the Lord Chancellor (see the list of relevant offences listed in Annex 1 to the Explanatory Memorandum). The Regulations also set out, more generally, the process for applying for and determining eligibility for the different forms of civil legal services which are grouped into different categories:

- Gateway Work: broadly legal help in the areas of special educational needs, debt and discrimination. Gateway Work will primarily be delivered by specialist telephone providers but exempted persons (which includes those under 18 and those deprived of their liberty) and others whose circumstances make telephone advice difficult will be able to access face-to-face providers;
- Controlled Work: mainly family mediation, help at court and certain tribunals. Applications will be made in person to legal aid providers, who will make decisions in line with guidance;

- Licensed Work: applies to more complex cases and decisions will generally be made by the Director of Legal Aid Casework or civil servants acting on the Director's behalf; and
- Special Case Work (principally high cost cases and multi-party actions) and emergency representation.

68. This is one of a number of statutory instruments which implement Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which will be laid in time for Part 1 of the Act to come into force on 1 April 2013.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft Instruments subject to affirmative approval

Civil Enforcement of Road Traffic Conventions (Representations and Appeals) (Wales) Regulations 2013

Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2013

Immigration and Nationality (Fees) (Amendment) Order 2013

Parental Leave (EU Directive) Regulations 2013

Draft Instruments subject to annulment

Modifications to the Standard Conditions of Electricity and Gas Supply Licences, Electricity Distribution Licences and Gas Transporter Licences (Smart Meters)

Proposal by the Secretary of State for Culture, Media and Sport to Designate Jointly Patrick Swaffer, President of the British Board of Film Classification ("BBFC"), Alison Hastings and Gerard Lemos, Vice Presidents of the BBFC, and David Cooke, Director of the BBFC, under Section 4 of the Video Recordings Act 1984

Instruments subject to annulment

HC 820	Statement of Changes in Immigration Rules
HC 847	Statement of Changes in Immigration Rules
SI 2012/3038	Greenhouse Gas Emissions Trading Scheme Regulations 2012
SI 2012/3084	London Thames Gateway Development Corporation (Transfer of Property, Rights and Liabilities) (Greater London Authority) (No. 2) Order 2012
SI 2012/3085	Council Tax Reduction Schemes (Prescribed Requirements and Default Scheme) (England) (Amendment) Regulations 2012
SI 2012/3086	Council Tax (Administration and Enforcement) (Amendment) (No.2) (England) Regulations 2012
SI 2012/3087	Council Tax (Demand Notices) (England) (Amendment) Regulations 2012
SI 2012/3091	Legal Services Act 2007 (Alteration of Limit) Order 2012
SI 2012/3092	Legal Services Act 2007 (Legal Complaints) (Parties) Order 2012
SI 2012/3096	Employment and Support Allowance (Amendment) Regulations 2012

SI 2012/3098 Civil Legal Aid (Procedure) Regulations 2012

SI 2012/3099 Milton Keynes (Urban Area and Planning Functions) (Revocation) Order 2012

SI 2012/3109 Town and Country Planning (Development Management Procedure) (England) (Amendment No.3) Order 2012

SI 2012/3110 Consumer Rights (Payment Surcharges) Regulations 2012

SI 2012/3112 Apprenticeships, Skills, Children and Learning Act 2009 (Consequential Amendments to Subordinate Legislation) (England and Wales) Order 2012

SI 2012/3122 Payments in Euro (Credit Transfers and Direct Debits) Regulations 2012

SI 2012/3123 Public Lending Right Scheme 1982 (Commencement of Variation) (No. 2) Order 2012

SI 2012/3124 Building (Repeal of Provisions of Local Acts) Regulations 2012

SI 2012/3125 Greater London Authority (Consolidated Council Tax Requirement Procedure) (No. 2) Regulations 2012

SI 2012/3128 Local Justice Areas (No. 3) Order 2012

SI 2012/3129 Port of Ipswich Harbour Revision Order 2012

SI 2012/3134 Children (Secure Accommodation) (Amendment) (England) Regulations 2012

SI 2012/3135 Government Resources and Accounts Act 2000 (Estimates and Accounts) (Amendment) Order 2012

SI 2012/3152 Merchant Shipping (Carriage of Passengers by Sea) Regulations 2012

SI 2012/3158 Pupil Referral Units (Miscellaneous Provisions) (No. 2) (England) Regulations 2012

SI 2012/3170 Energy Act 2011 (Amendment) (Energy Performance of Buildings) Regulations 2012

APPENDIX 1: STATEMENT OF CHANGES IN IMMIGRATION RULES (HC 820): CORRESPONDENCE

Letter from Lord Goodlad to Mark Harper MP, Minister for Immigration

The Secondary Legislation Scrutiny Committee initially considered this item at its meeting on 8 January and asked me to raise a number of questions with you as the responsible Minister.

The Cost of Corrections

HC 820 appears to us to have been issued solely to correct three items from the previous Statement of Changes in Immigration Rules (HC760). As is routine, our staff asked the Home Office to explain how these errors were identified and why they were not picked up in the checking procedures before HC760 was issued. The Home Office official replied:

> "First, the changes relating to the Immigration Rules on family and private life are not corrections to the substance of the changes in HC 760. They are confined to the date of implementation of those changes and reflect representations from the UK Border Agency caseworkers following the publication of HC 760 about the optimum implementation of the changes to provide the greatest clarity for applicants and caseworkers.
>
> Second, the changes relating to Tier 1 (Investor) supplement, rather than correct, HC 760. The clarifications to the category set out in HC 760 continue to apply. However, one HC 760 was published, representations were received regarding applicants who had been following these investment practices. We have introduced the transitional concessions set out in HC 820 to ensure that those migrants in, or who had applied for, the route before HC 760 came into force are not adversely affected.
>
> Third, the indefinite leave to remain provision for Bulgarian and Romanian nationals who had established themselves in business in the UK under an EC Association Agreement was proposed for deletion on the basis that it was redundant following those countries' accession to the EU on 1 January 2007. It emerged following the publication of HC 760 that there may be individuals who would be disadvantaged by the deletion of the provision and it has therefore been retained."

We were not persuaded that these are not corrections as normally understood – the first two items correct errors of omission – inserting additional material required for the legislation to operate smoothly – and the third element is described in paragraph 7.9 of the Explanatory Memorandum as follows: *"HC 760 deletes this provision from the Rules in error and this Statement reverses the deletion."*

The official's response above was silent on why these errors were not picked up before Statement HC 760 was published.

We feel it is important to establish the status of these legislative changes because, where an instrument is issued wholly or mainly to correct administrative errors by the Department, it is normal practice for Statutory Instruments to be issued free of charge. HC 820 is priced at £6.25; although it is a House of Commons Paper rather than a Statutory Instrument, a similar mechanism exists for the free

publication of corrections. However if the Commons' Journal Office is not notified that these are corrections, because your Department does not categorise them as such, then the mechanism for issuing the document free of charge will not be applied. **We would therefore welcome your comments on why the public should be expected to pay for an instrument that solely corrects official error.**

Consultation

There is also a wider point about consultation in relation to Statements of Changes of Immigration Rules. As is common for these instruments, paragraph 8 of the Explanatory Memorandum to HC 820 says that *"The changes in this Statement have not been subject to consultation as this would be disproportionate".* The response from your officials quoted above makes it clear that the amendments made by HC 820 are being made as a result of representations made after publication by interested parties including the UKBA staff who are required to operate the Immigration Rules.

We note consultation on HV 760 was also deemed "disproportionate" and that it similarly corrected provisions in the Statements before that, HC 565 and CM 8423, in the light of subsequent comments from users. This Committee takes the general view that consultation prior to issuing legislation tends to improve its accuracy and effectiveness. **We would therefore welcome an explanation of why the Home Office deems it more appropriate to issue frequent and extensive corrections to Immigration Rules rather than conduct prior consultation.**

No impact on business and charities?

As is also common practice in these Statements paragraph 10.1 of the Explanatory Memorandum says *"There is limited or no impact on business, charities the public sector or voluntary bodies such that an impact assessment is unnecessary."* Four of the last five such statements have used this phrase, some of which have made a substantial volume of changes to the Rules. While the impact may not always reach the £5m threshold required for a formal Impact Assessment, we have received representations from solicitors and charitable organisations in connection with our current inquiry that indicate the cumulative impact of these changes is extensive, and is aggravated when, as in the case of HC 820, they come into effect the day after laying. **The Committee would therefore be grateful if you could explain what evidence the Home Office has to support the assertion that there is no impact on the various charities and lawyers that help with immigration applications when they change the Immigration Rules so frequently.**

Lord Goodlad

9 January 2013

Reply from Mark Harper MP to Lord Goodlad

Thank you for your letter of 9 January 2013, in which you raised three issues concerning the Statement of Changes in Immigration Rules HC 820 laid on 12 December 2012.

First, you queried why that Statement of Changes, which corrected and supplemented provisions contained in the Statement of Changes in Immigration Rules HC 760 laid on 22 November 2012, was not issued free of charge.

As is standard practice for Statements of Changes in Immigration Rules, it was published free of charge, on 12 December 2012, at www.official-documents.gov.uk and on the UK Border Agency website. It could also be purchased in hard copy from The Stationery Office at £6.25 and, as it did not correct typographical errors in an earlier publication or replace a flawed publication, this was charged in the normal way. However, the Committee is right to emphasise that the public should not be expected to pay for a paper that solely or substantially corrects official error and we will keep that point in mind for the future, though we shall of course seek to avoid the need for this arising.

Second, you asked about consultation prior to the issue of Statements of Changes in Immigration Rules.

Statements of Changes making major changes in immigration policy normally follow consultation with stakeholders and the public, and often with the independent Migration Advisory Committee. These and other Statements of Changes also often reflect feedback on the practical operation of the rules from legal practitioners and other stakeholders and from UK Border Agency caseworkers. To that extent, their substance does reflect consultation with users of the rules and so we do not consider that formal consultation on the drafting of the Statement of Changes is proportionate.

In respect of the changes made to the Immigration Rules over the past year, HC 820 was unusual for making correcting or supplementary changes to the rules before changes in another Statement of Changes (HC 760) had been implemented. However, the need for this does not represent good practice and it is to be regretted that the changes made by HC 820 were not identified in the preparation of HC 760. It remains our objective to make changes to the Immigration Rules as accurately as possible on the first occasion that the change is introduced.

Third, you raised the issue of the impact of changes in the Immigration Rules on business and charities.

Even where a formal Impact Assessment is not required, the Committee is right to highlight the cumulative impact on business, charities and others which changes in the Immigration Rules may have. A number of our stakeholders have made similar representations. Over the past two years, the Government has made major reforms to the work, study and family immigration routes to bring net migration to the UK back towards sustainable levels and restore public confidence in the immigration system. While we will make further adjustments where these are needed to achieve the Government's objectives, we anticipate that, with the principal measures now in place, there should be a period of relative stability in policy and therefore in the Immigration Rules. I know this will be welcomed by many of our stakeholders. At the same time, we will need to make rules changes where policy change is desired, where legal judgements require or where stakeholders have raised practical issues. I shall endeavour to ensure this is done in an orderly manner.

Mark Harper MP

14 January 2013

APPENDIX 2: COUNCIL TAX (ADMINISTRATION AND ENFORCEMENT) (AMENDMENT) (NO. 2) (ENGLAND) REGULATIONS 2012 (SI 2012/3086) AND COUNCIL TAX (DEMAND NOTICES) (ENGLAND) (AMENDMENT) REGULATIONS 2012 (SI 2012/3087): ADDITIONAL INFORMATION

Additional information from the Department for Communities and Local Government

Q1: What information, previously sent out in printed form, will in future be available only by electronic means?

A1: The Regulations will allow billing authorities to publish the information set out in Schedule 2 of the Council Tax (Demand Notices) (England) Regulations 2011 to be published by electronic means. The information to be supplied is the gross expenditure and level of council tax requirement for each billing authority and relevant precepting body and a statement on the effect of the gross expenditure on the level of council tax set of the relevant year. The billing authority will be required to provide a hard copy of the information to the taxpayer if it is requested.

Q2: Why did the Government go with the majority view among consultation respondents on provision of information by electronic means, but go against the majority view among consultation respondents on payment of council tax by 12 instalments?

A2: The Government has carefully considered the views of respondents and is of the view that while, following consultation, the default should remain at ten months, it does believe that the case for a legal right to pay council tax in 12 instalments is compelling. This approach would allow council taxpayers greater flexibility to manage their finances, and may be particularly helpful to those on fixed incomes such as pensioners. The loss to councils' cash flow needs to be balanced with the interest of taxpayers, and the beneficial effects to taxpayers' cash flow from more flexible payments. The Government's response to the consultation is therefore to take forward its proposal to grant council taxpayers a legal right to pay by 12 instalments, and to ensure that they are informed of that right. Balanced against this, the default will remain at ten months.

DCLG

9 January 2013

APPENDIX 3: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 15 January 2013 Members declared no interests.

Attendance:

The meeting was attended by Lord Bichard, Lord Eames, Lord Goodlad, Baroness Hamwee, Lord Hart of Chilton, Lord Methuen, Baroness Morris of Yardley, Lord Plant of Highfield, Lord Norton of Louth and Lord Scott of Foscote.