Draft Health and Care Professions (Public Health Specialists and Miscellaneous Amendments) Order 2015


Local Government (Transparency Requirements) (England) Regulations 2015

Civil Enforcement of Parking Contraventions (England) General (Amendment) Regulations 2015

Includes 7 Information Paragraphs on 11 Instruments

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HL Paper 142
Secondary Legislation Scrutiny Committee (formerly Merits of Statutory Instruments Committee)

Historical Note

In January 2000, the Royal Commission on the Reform of the House of Lords said that there was a good case for enhanced Parliamentary scrutiny of secondary legislation and recommended establishing a “sifting” mechanism to identify those statutory instruments which merited further debate or consideration. The Merits of Statutory Instruments Committee was set up on 17 December 2003. At the start of the 2012–3 Session the Committee was renamed to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

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;
   e. that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument’s policy objective and intended implementation;
   f. that there appear to be inadequacies in the consultation process which relates to the instrument.

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.

Members
Baroness Andrews  Lord Eames  Baroness Stern
Lord Bichard  Rt Hon. Lord Goodlad (Chairman)  Lord Plant of Highfield
Lord Borwick  Baroness Hamwee  Lord Woolmer of Leeds
Lord Bowness  Baroness Humphreys

Registered interests
Information about interests of Committee Members can be found in Appendix 4.

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’s work, 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 hlseclegscrutiny@parliament.uk.

Statutory instruments
Thirtieth 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 Health and Care Professions (Public Health Specialists and Miscellaneous Amendments) Order 2015

Date laid: 4 March 2015

Parliamentary Procedure: affirmative

Summary: The Order introduces statutory regulation for public health specialists who are not regulated in that capacity by another statutory body, such as the General Medical Council or General Dental Council. Public health specialists manage health education programmes, promote healthy lifestyles, advise during outbreaks of infectious disease and may also be involved in the commissioning of clinical care services in their local area, including services for sexual health, and drug or alcohol misuse. Since 2003 there has been a voluntary registration scheme run by the UK Public Health Register (UKPHR) which, in a submission to the Committee, has raised a number of questions about the proposed system. The Department of Health argues that as these specialists are now drawn from a very wide range of disciplines, a statutory system is required. The House may wish to probe those aspects of the conversion which are not set out in the instrument but left for the regulator to address in the next 15 months.

The Committee is satisfied that the extended consultation period offered sufficient scope for interested parties to express their views but finds the summary provided in the Explanatory Memorandum to be defective and misleading in describing the support for the UKPHR continuing as regulator as “a significant minority”.

This Order is drawn 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.

1. This Order has been laid by the Department of Health (DH) under provisions of the Health Act 1999. It is accompanied by an Explanatory Memorandum (EM) and an Impact Assessment.

2. The Order introduces statutory regulation for public health specialists who are not regulated in that capacity by another statutory body, such as the General Medical Council (GMC) or General Dental Council (GDC). Public health specialists (amongst other things) manage health education programmes that promote healthy lifestyles, programmes to deal with drug and alcohol issues and plan for outbreaks of infectious disease. The Order also makes it an offence for a person to use the protected title “public health specialist” unless that person is registered with a statutory regulator.
Background

3. The EM states that public health was originally a medical specialty. In order to become a public health specialist, a doctor completed a five-year national training programme overseen by the GMC and the Faculty of Public Health. In 2000 the training programme was extended to professionals from backgrounds other than medicine with appropriate qualifications and experience. Public health specialist is now a multi-disciplinary domain: approximately 50% of specialists are from medical or dental backgrounds, the rest come from professional backgrounds including environmental health, nursing and microbiology.

4. As well as advising on health measures that could significantly affect the health of the local population, Directors in Public Health in local authorities are also involved in the commissioning of clinical care services in their local area, and for individuals with certain medical conditions – including services for sexual health, and drug or alcohol misuse. The Department argues that about 75% of these professionals are not currently subject to statutory regulation (EM paragraph 7.2).

5. The UK Public Health Register (UKPHR) was established in March 2003 as a voluntary registration system for public health specialists from backgrounds other than dentistry or medicine. In 2009 DH commissioned Dr Gabriel Scally to undertake a review of the regulation of non-medical public health specialists and his report made a number of recommendations. In particular it proposed that Health and Care Professions Council should regulate public health specialists in addition to the other professions under its remit, and this decision was announced in January 2012. The UKPHR and its Chairman have written to the Committee raising certain issues which are dealt with below. The full correspondence is published on this Committee’s website. The key points of their submissions and the DH response are set out below.

Protected title

6. UKPHR queried why the proposed protected title “registered public health specialist” used in the consultation document was changed at a very late stage. DH replied that “following publication of the Government response, DH received representations from the Health and Care Professions Council (HCPC) who were concerned that solely protecting a title with the ‘registered’ prefix would open the door to the potential for evasion of regulation. It would be perfectly lawful for someone to call themselves a ‘public health specialist’ without registration with any of the statutory regulators and the HCPC would be unable to take any action. After careful consideration Ministers accepted this argument and made a policy decision to protect the title ‘public health specialist’.”

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1 Review of the Regulation of Public Health Professionals (Nov 2010).
Public health specialists who are nurses and pharmacists

7. Having considered the responses to its consultation the Department has decided to exempt some registered nurses and registered pharmacists from having to register with HCPC while allowing them to use the new protected title recognised by an annotation on the register. This is achieved in Schedule 1 Part 1 paragraph 2 which inserts a new paragraph 1C into the 2001 Order (see in particular sub-paragraphs (c), (d) and (e)).

8. UKPHR however argues that there is a significant difference. The GMC’s specialist register and the GDC’s specialist list already exist as do the eligibility criteria for being on them. In the cases of the regulators of nurses and pharmacists the “annotation” referred to in the draft Order does not exist and nor are there recognised qualifications or competences attracting such annotation. The draft Order is silent on how these will be established.

9. The Department responded that it will be for individual regulators to decide whether or not to annotate a registrant’s entry in the register, based on whether it is satisfied that the standards and criteria for such annotation have been reached. If there is no annotation of the register by a regulator to denote that a registrant has public health speciality qualifications and competence, such registrants will not be able to use the protected title unless they register as a public health specialist with the HCPC.

10. The Faculty of Public Health will remain the UK-wide standard setting body for the public health specialty and the GMC will retain the responsibility for approving the curriculum for the national public health specialty training programme.

What tests will be used?

11. The UKPHR raised a number of questions about what tests will be used to judge competence and career progression from practitioner to specialist. DH stated that this was set out in the consultation document: it will be for the HCPC as the new regulator to consult on these issues once the necessary legislation is in place and it has confirmed that there is sufficient time for them to do this before July 2016 when the system is due to come into effect.

Consultation

12. The EM, at paragraph 8.1, simply mentions that DH ran a consultation from 4 September to 14 November 2014. The UKPHR letter explains that an initial consultation for six weeks was later extended by a further four weeks and asked two additional questions. DH explained that:

“as the policy decision had been first announced in January 2012, and repeated several times since then, the Department considered that a six week consultation was sufficient for stakeholders to consider the details of the draft Section 60 Order. However, shortly after the consultation document was published the Department received a letter before claim from lawyers acting on behalf of the UKPHR challenging the consultation on a number of grounds. These included the argument that the consultation document did not address the issue of ‘who’ should be the regulator and that six weeks was insufficient time for the UKPHR to prepare its response. To address these concerns the Department therefore decided to extend the consultation by four weeks and included questions addressing the ‘who’ issue.
The Department received 168 responses to the consultation. Of these responses 46 were from organisations and 122 were from individuals. There was no clear consensus to the question about who should be the regulator. 44 respondents agreed with proposal to regulate through the HCPC, 15 of which were stakeholder organisations and 29 were individuals. 56 respondents proposed the UKPHR should be the regulator, of which 7 were stakeholder organisations and 49 were individuals. A further 28 respondents suggested an alternative regulator or did not have a clear preference, and the remaining 40 respondents did not answer this question.”

13. The Committee is satisfied that the extended consultation period offered sufficient scope for interested parties to express their views but finds the summary provided in paragraph 8.2 of the EM to be defective and misleading in describing the support for the UKPHR as regulator as “a significant minority”.


Date laid: 4 March 2015

Parliamentary Procedure: affirmative

Summary: This Order, laid by the Department for Communities and Local Government using powers in the Housing Act 2004, specifies that, for an area to be designated as subject to selective licensing, it must contain a high proportion of properties in the private rented sector, in relation to the total housing accommodation in that area, and that these properties must be occupied under assured tenancies or licences to occupy. Further, the Order requires that one or more of the four additional sets of conditions must be satisfied. These relate to: poor property conditions; current or recent experience of large amounts of inward migration; areas which have a high level of deprivation; or areas which have high levels of crime.

We are concerned that the Department has failed to provide sufficient information about the evidence justifying these policy proposals, and about the impact that, if agreed, they would have on those likely to be affected. Moreover, we are not persuaded of the case for the proposed use of powers in the 2004 Act in relation to concerns that are current in 2015, and we consider that the Order may be inappropriate in view of changed circumstances since the enactment of the parent Act.

We draw this instrument to the special attention of the House on the grounds that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument’s policy objective; and that the instrument may be inappropriate in view of changed circumstances since the enactment of the parent Act.

14. The Department for Communities and Local Government (DCLG) has laid this Order with an Explanatory Memorandum (EM). DCLG explains that the Order specifies conditions; if a local authority considers that those conditions are satisfied in relation to an area, the authority is able to designate that area as subject to selective licensing. Such a designation would have the effect of requiring landlords of private rented sector properties in
the designated area to obtain a licence for their property from the local housing authority.

*Conditions specified in Order*

15. The Order specifies that, for an area to be designated as subject to selective licensing, it must contain a high proportion of properties in the private rented sector, in relation to the total housing accommodation in that area, and that these properties must be occupied under assured tenancies or licences to occupy. Further, the Order requires that one or more of the four additional sets of conditions must be satisfied. These relate to: poor property conditions; current or recent experience of large amounts of inward migration; areas which have a high level of deprivation; or areas which have high levels of crime.

16. DCLG says that the conditions specified in this Order are in addition to the two sets of general conditions under which an area can already be designated as subject to selective licensing, as contained in section 80 of the Housing Act 2004 (“the 2004 Act”). In explanation of the latter, DCLG says that, currently a designation may only be made if the area is either suffering from or likely to be an area of low housing demand or if the area is experiencing significant and persistent anti-social behaviour. Before making a designation the local housing authority must consult people likely to be affected by it, e.g. local landlords, tenants and owner occupiers. A designation can last for up to five years.

*Evidence*

17. We obtained further information from the Department, which we are publishing as Appendix 1. We asked what concrete evidence was available to DCLG to show that local authorities needed additional tools to deal with the specific problems mentioned in the EM. The Department has said that its “evidence is based on discussions we have had over a considerable period of time with local authorities, landlord organisations and others in the sector, e.g. housing charities. A clear and consistent message that we have received across the board is that the current criteria for selective licensing (low housing demand or anti-social behaviour) are not sufficient and do not enable local authorities to introduce licensing in areas where it is most needed and where they can target enforcement action.” However, in response to a question about whether the Department was aware that any local authorities plan specific action to make use of the powers that would be given by the Order, DCLG has said “no”.

*Consultation*

18. The Department has told us that it has not held a formal consultation in relation to its proposals, but that there has been extensive informal consultation. As stated in the EM, DCLG published a discussion paper “Review of Property Conditions in the Private Rented Sector” in February 2014, asking for responses by the end of March 2014. It received 299 substantive responses: more detail is given in the material in the Appendix. The draft Order was laid on 4 March: DCLG told us that it intended to publish a Government response to the discussion paper on 13 March. **It is unfortunate that the Department did not publish the discussion paper response at the time that it laid the draft Order.**
before Parliament: given that 11 months had elapsed since the deadline set for interested parties to respond to that paper, it should have been possible to publish the analysis in parallel with laying the Order.

Impact Assessment

19. It is normal practice for an Impact Assessment (IA) to be laid before Parliament alongside a statutory instrument. We asked DCLG why it had not done so in this case. The Department has said that the IA was not laid before Parliament with the Order “because it was only recently decided to extend the criteria and it takes a certain amount of time to prepare an Assessment”. DCLG has provided us with a copy of the Regulatory Triage Assessment in relation to the proposals in the Order. However, it is unsatisfactory that Parliament is being asked to consider the instrument before the Impact Assessment itself has been finalised and laid.

Insufficient information

20. We are concerned that the Department has failed to provide sufficient information about the evidence justifying these policy proposals, and about the impact that, if agreed, they would have on those likely to be affected. In our view, the explanatory material laid in support of the Order provides insufficient information to gain a clear understanding about the instrument’s policy objective and intended implementation.

Developments in private rented sector since Housing Act 2004

21. We note that, in the EM, DCLG says that, when licensing was introduced under the 2004 Act, the policy intention was that it should be targeted at specific and strictly defined parts of a local authority area with acute problems associated with low housing demand and anti-social behaviour, as it will often be the case that such problems do not span an entire local authority area. However, DCLG adds that the private rented sector has doubled in size over the past ten years and is now larger than the social rented sector; and that the demographic profile of renters is changing and the sector now houses a much wider cross-section of society than previously. It states that, while it wants to ensure that good landlords are not adversely affected by a blanket approach to licensing, it is also keen to ensure that local authorities have the right tools to help improve areas with relatively large numbers of privately rented properties, and which are characterised by poor property conditions, or which have current or recent experience of large amounts of inward migration, or which have a high level of deprivation, or high levels of crime. It therefore proposes to widen the criteria, as described above, to help to enable local authorities to target enforcement action in areas where it is most needed.

Changed circumstances

22. This explanation of developments since the 2004 Act was agreed highlights significant changes in the landscape of the private rented sector during the subsequent decade. The information provided by the Department has not persuaded us of the case for the proposed use of powers in the 2004 Act in relation to concerns that are current in 2015. We therefore consider that
the Order may be inappropriate in view of changed circumstances since the enactment of the Housing Act 2004.

External submission

23. We received a submission on the Order from Mr Constantinos Regas, setting out a number of concerns about it. We obtained a response from the Department to those concerns. We are publishing Mr Regas’ submission and the Department’s response as Appendix 2.


Date laid: 5 March 2015

Parliamentary Procedure: negative

Summary: These Regulations require local authorities in England to publish the information specified in the Local Government Transparency Code 2015 (“the Code”). The Government have decided that local housing authorities should be required to publish information about the value of their social housing assets, and the Code has therefore been revised to include a requirement to publish such information. We look to Government Departments to provide accurate and reliable information in support of the statutory instruments which they lay. We regret to say that we consider that the Department for Communities and Local Government has signally failed to do so in the Explanatory Memorandum to these Regulations, which purport to advance the Government’s transparency agenda.

We draw these Regulations to the special attention of the House on the ground that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument’s policy objective and intended implementation.

24. The Department for Communities and Local Government (DCLG) has laid these Regulations, with an Explanatory Memorandum (EM) and Impact Assessment, to require local authorities in England to publish the information specified in Part 2 of the Local Government Transparency Code 2015 (“the Code”). The Government have decided that local housing authorities should be required to publish information about the value of their social housing assets; the Code has therefore been revised to include a requirement to publish social housing assets values.

25. In October 2014, DCLG laid the Local Government (Transparency Requirements) (England) Regulations 2014 (“the 2014 Regulations”: SI 2014/2680), which required local authorities to publish the information specified in the 2014 Code. The 2014 Regulations are to be revoked by the latest instrument. We brought the 2014 Regulations to the special attention of the House in our 11th Report of the current Session, commenting that, in our view, neither the material which DCLG had laid in support of the Regulations nor the further information which it had provided presented hard evidence of direct economic benefit from the specific changes being made. We looked to Government to take a more rigorous approach to establishing an evidence base and to presenting the results to Parliament.
In the EM to the latest Regulations, DCLG says that the 2014 Code made data on social housing exempt from publication. It adds that, in total, local authorities own land and assets worth about £220 billion, and the value of a local housing authority's social housing stock is a key component of the amount of housing debt the authority can hold. Housing debt is debt which is held by local housing authorities in connection with the exercise of their functions relating to houses and other property within their Housing Revenue Account. The Government consider that information on the value of authorities’ social housing assets would be useful to local people.

In the EM, DCLG says that it consulted on this measure between 11 July and 8 August 2014 (four weeks); and that there were 34 respondents, a majority of whom agreed with the Government’s aim to increase the transparency of the value of the social housing stock held by local housing authorities. Some respondents queried the need for a separate mandatory requirement, given that local housing authorities are already required to publish some information about their housing assets under the Housing Revenue Account (Accounting Practices) Direction 2011 (“the 2011 Direction”); but the Department considered it preferable to require publication of this data as part of the Code to separate this information from accountancy practices and to ensure that it was seen as an element of the Government’s transparency agenda. DCLG published a summary of consultation responses in November 2014.

We obtained further information from the Department, which we are publishing as Appendix 3. We were particularly concerned to gain a better and more accurate understanding of the consultation process than emerges from the EM.

We asked DCLG whether it had considered mitigating action, in line with Cabinet Office consultation principles, given that the consultation ran for only four weeks and overlapped the traditional August holiday period (see Q2 in the Appendix). The Department has responded that it was considered that the period allowed provided sufficient time for interested parties (housing and other officers responsible for the Housing Revenue Accounts within local housing authorities) to provide a considered response. We would comment, however, that setting so short a period for consultation is in our eyes all the harder to justify since the Department then allowed itself over three months to publish a summary of consultation responses, and a further three months to lay these Regulations. DCLG has told us that, of the 34 responses received, only one, from Birmingham City Council, considered that the timing of the consultation was unfortunate. In our view, the Department should not assume that the silence of other respondents on this issue indicated assent to so short a consultation period: it might equally be attributable to an expectation on their part that offering criticism would be wasted effort.

We raised with DCLG the statement in the consultation summary that 55% of respondents were of the view that the 2011 Direction already required them to publish their valuation of the social housing stock, and that they questioned the need and added value of introducing a new mandatory

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requirement through a transparency code (see Q3). We asked whether, in the light of this, it considered that the statement in the EM that “some respondents queried the need for a separate mandatory requirement” was an accurate account of consultation responses. DCLG has responded that “it would also be accurate to say that 38% did not give a yes/no response, 35% of respondents were specifically opposed and 26% were specifically in support of the proposal. On balance, we therefore feel it is fair and appropriate to say ‘some views’ in the explanatory memorandum.” We disagree: it is clear that, in the account of consultation responses which it gave in the EM, DCLG chose not to quote actual percentages and that, if it had done so, it would have been clear that more respondents explicitly opposed the proposal than explicitly supported it.

31. In relation to the start-date for publication of the new category of information, we queried with DCLG why it made no mention in the EM of the 42% of consultation respondents who wanted a date of 1 April 2016, rather than the proposed start date of 1 April 2015 – as was set out in the November 2014 consultation summary (see Q4). We have not received a direct answer to this question. DCLG has told us that “given the numbers, the Government considers that a first publication by 1 September is a balanced approach. We have therefore made this the first publication date for the new dataset, following commencement of the regulations on the 1 April.” We see this as a further example of a selective approach to the presentation of material in an EM which fails to provide an accurate picture of consultation responses.

32. In our work of scrutiny of secondary legislation on behalf of the House, we look to Government Departments to provide accurate and reliable information in support of the statutory instruments which they lay. We regret to say that we consider that the DCLG has signally failed to do so in the EM to these Regulations, which purport to advance the Government’s transparency agenda.

D. Civil Enforcement of Parking Contraventions (England) General (Amendment) Regulations 2015 (SI 2015/561)

Date laid: 6 March 2015
Parliamentary Procedure: negative

Summary: These Regulations introduce a 10-minute grace period prior to the imposition of a Penalty Charge Notice for a parking contravention where the vehicle has been left in an on-street or off-street permitted parking place beyond the permitted parking period. In response to consultation, 52% of individuals supported the proposal, while 48% opposed it; 47% of organisations supported the proposal, while 53% opposed it. These numerical details are not included in the Explanatory Memorandum laid before Parliament, which says only that there was support for a limited grace period.

We draw this instrument to the special attention of the House on the ground that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument’s policy objective and intended implementation.
33. The Department for Communities and Local Government (DCLG) has laid these Regulations with an Explanatory Memorandum (EM). In amending an earlier instrument, the Regulations introduce a 10-minute grace period prior to the imposition of a Penalty Charge Notice for a parking contravention where the vehicle has been left in an on-street or off-street permitted parking place beyond the permitted parking period.

34. In the EM, DCLG says that the intention is to introduce a 10-minute grace period for paid-for and free on-street and off-street permitted parking; and that this has arisen from the Government’s concern that some local authorities appear not to be using their powers to meet the best interests of road users, communities and businesses.

35. DCLG states that these concerns were expressed in evidence to a Transport Select Committee in October 2013 during its inquiry into local authority parking enforcement. We note that the relevant recommendation in that Committee’s report was that “statutory guidance should stipulate that local authorities implement a grace period of 5 minutes after the expiry of paid for time on all paid parking places” (paragraph 11 of conclusions). This is not made clear in the EM.

36. The Department says in the EM that, following the Transport Select Committee’s recommendations, there was a 10-week consultation between 6 December 2013 and 14 February 2014, on a number of options for tackling “overzealous” parking enforcement; and that there was support for a limited grace period at the end of on-street and off-street paid-for parking and free parking periods. However, the majority of individuals (55%) and organisations (75%) disagreed with the proposal to extend grace periods to other areas such as yellow lines and loading bays, given concern that this could lead to confusion and encourage more anti-social and potentially dangerous parking.

37. The Government published a summary of consultation responses in June 2014. A total of 836 responses were received: 481 from individuals, and 324 from organisations (21 did not say). The summary gives numerical details of responses on grace periods for paid-for parking, which are not included in the EM. Responses were evenly split: 52% of individuals were in support, while 48% opposed it; 47% of organisations supported the proposal, while 53% opposed it.

38. It seems that the Government’s views on “over-zealous” parking enforcement have less resonance with the wider public than may have been expected. We hope that the lack of detailed information in the EM on levels of support for the proposal being implemented is not attributable to an attempt to present the outcome of consultation in an unjustifiably favourable light.

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4 7th Report, Session 2013–14, HC 118.
INSTRUMENTS OF INTEREST

Authority to Carry Scheme (Civil Penalties) Regulations 2015
Aviation Security Act 1982 (Civil Penalties) Regulations 2015
Counter-Terrorism and Security Act 2015 (Authority to Carry Scheme) Regulations 2015
Passenger, Crew and Service Information (Civil Penalties) Regulations 2015

39. The first Authority to Carry Scheme, which this Scheme replaces, was introduced in July 2012. It required a carrier who has been issued with a written requirement to provide advance passenger information to the UK Border Force to seek authority to carry to the UK all persons within the scope of the Scheme. A penalty not exceeding £10,000 was imposed for failure to do so. The Authority to Carry Scheme 2015, made under section 22 of the Counter-Terrorism and Security Act 2015 (“the Act”), covers a broader range of individuals. In particular, the new Scheme will capture outbound travel and those passengers with a right of abode in the UK who are subject to a Temporary Exclusion Order under Part 1 of the Act. The Authority to Carry Scheme (Civil Penalties) Regulations 2015, made under section 24(7) of the Act, raise the penalty to a sum not exceeding £50,000 where a carrier to whom the Scheme applies breaches (i) a requirement to seek authority to carry a person, (ii) a requirement to provide specified information by a specified time, (iii) a requirement to provide information in a specified manner and form, (iv) a requirement to be able to receive communications in a specified manner and form, or (v) a requirement not to carry a person when authority to carry has been refused. Guidance is to be provided to carriers on the implementation of the scheme.

Retention of Communications Data (Code of Practice) Order 2015
Regulation of Investigatory Powers (Acquisition and Disclosure of Communications Data: Code of Practice) Order 2015

40. On 8 April 2014 the European Court of Justice declared the Data Retention Directive (2006/24/EC) invalid. In response, in July 2014, the Government brought forward the Data Retention and Investigatory Powers Act 2014 (DRIPA) to maintain its existing powers. This was rapidly followed by Data Retention Regulations 2014 (made as SI 2014/2042), to provide further detail on the retention of such data. The Regulations added a requirement for a code of practice on data retention to the existing requirement for a code on acquisition, both of which set out how the legislation is to be implemented in practice. The Counter-Terrorism and Security Act 2015 amended DRIPA to allow some additional types of data – namely those which identify the IP address which belongs to the sender or recipient of a communication – to be retained.

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41. These two instruments bring the two codes into force. The new **retention code** covers the issue, review, variation and revocation of data retention notices; the communication service providers’ ability to recover their costs; data security; oversight by the Information Commissioner; and safeguards on the disclosure and use of retained data by communication service providers. It also outlines the scope and definitions of relevant communications data, including data that may be retained following provisions in the Counter-terrorism and Security Act. The main revisions to the **acquisition code** concern the provision of additional safeguards. Further changes include reflecting the additional requirements on local authorities to request communications data through a magistrate and the National Anti-Fraud Network; new record keeping requirements for public authorities; and aligning the code with best practice regarding providing communications data to the emergency services following an emergency call.

**Counter-Terrorism and Security Act 2015 (Risk of Being Drawn into Terrorism) (Amendment and Guidance) Regulations 2015**

42. Section 26(1) of the Counter-Terrorism and Security Act 2015 (“the Act”) imposes a duty on “specified authorities”, when exercising their functions, to have due regard to the need to prevent people from being drawn into terrorism. The specified authorities in England and Wales are listed in Schedule 6 to the Act. These Regulations amend the Act so that the equivalent Scottish bodies are also made subject to this duty. In addition Scottish local authorities are made subject to the duty placed by the Act on local authorities to ensure panels are in place to provide support to people who are identified as being vulnerable to being drawn into terrorism.

43. The Regulations also bring into effect two sets of “Prevent” guidance, one for Scotland and one for England and Wales, which explain what the specified authorities must do in order to comply with the duties in sections 26(1) and 29(2). The guidance also incorporates specific sectoral guidance for Local Authorities, Schools, Further and Higher Education establishments, the health sector prisons and probation and the Police. Although the consultation was for six weeks over Christmas there were over 1700 responses, many of them questioned the meanings of the terms “British values” and “extremism”, whilst others focused on the impact of the Prevent duty on freedom of speech. A number of responses also focused on practical matters of implementation, risk assessment, resources, training and roles.


44. These Regulations make provision to extend the oversight of the Independent Police Complaints Commission (IPCC) to contractors working for a local policing body (for example a police and crime commissioner) or a chief officer of police to provide services. Policing functions, including the detention or escort of persons in custody, operating emergency call centres, providing front counter services and providing business support services such as finance and procurement or human resources, may be provided by

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contractors. The extension of oversight mitigates the risk to the credibility of the complaints system as it removes the risk of the IPCC not being able, for example, to investigate a complaint made against a contractor carrying out a function where it could do so if the same function were being exercised by a police officer.

**Employment and Support Allowance (Repeat Assessments and Pending Appeal Awards) (Amendment) Regulations 2015 (SI 2015/437)**

45. When claimants for Employment and Support Allowance (ESA) are found fit for work their entitlement to benefit ends. Under current legislation they are able to make a repeat claim to ESA after six months, even where their health condition has not changed. This instrument removes the six month rule and provides that claimants previously found fit for work who make a repeat claim for ESA will not be entitled to benefit at the assessment rate pending determination of the claim unless they can demonstrate that there has been a significant deterioration in their health condition or a new health condition has developed. The instrument also provides that, if the claimant appeals, ESA payments will not be made to claimants previously found fit for work, who are also found to be fit for work on their repeat claim.

46. The Department for Work and Pensions did not conduct a formal consultation exercise but the Social Security Advisory Committee (a statutory consultee) did so. Their report, which contains 18 recommendations, was laid alongside the Regulations and raised particular concerns over those with mental health issues and fluctuating conditions. In consequence, the Government have decided to exclude from these Regulations those claimants whose claim ended because they failed to return the ESA50 form or failed to attend a Work Capability Assessment. The Department is also introducing an evidence-gathering letter to be sent to repeat claimants asking for more detail on how their health condition affects them differently from when they were last assessed.

**Insolvency (Amendment) Rules 2015 (SI 2015/443)**

47. The Department for Business, Innovation and Skills (BIS) has laid these Rules with an Explanatory Memorandum (EM) and Impact Assessment. The Rules serve two purposes. They enable the High Court to transfer winding-up cases to the County Court at Central London. BIS says that this follows a request to allow such transfers, since the Central London County Court has extra resource and the ability to deal with winding-up cases. The Rules also introduce a new requirement for an insolvency practitioner (IP) acting as the appointed office-holder in certain insolvency procedures to provide an estimate of the fees to creditors for approval, and to provide them with information regarding expenses they anticipate they will incur. BIS says that this will give creditors a better and earlier idea of the cost of dealing with an insolvency and allow them to exercise greater influence over the IP’s remuneration. BIS Ministers made a Written Statement about this.

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instrument on 3 March 2015, stating that these steps should provide creditors with greater confidence in the insolvency regime through increased transparency and accountability.

**Children’s Homes (England) Regulations 2015 (SI 2015/541)**

48. The Department for Education (DfE) has laid these Regulations with an Explanatory Memorandum (EM) and Impact Assessment. The instrument introduces a new regulatory framework for children’s homes: DfE says that it will no longer focus on minimum standards and detailed processes, but on aspirational quality standards (“the Quality Standards”) which are underpinned by requirements that homes must achieve to meet each Quality Standard. The aim is to drive up the quality of care in children’s homes, ensuring that professionals working with the children in their care tailor support to their individual needs, and that the care provided is centred on achieving high expectations and positive outcomes for each child.

49. DfE says that the Regulations are part of a broader programme of reform for children’s homes which has been introduced by the Government since 2012. Regulatory change was introduced in 2014 to strengthen children’s safeguarding. However, the Department states that, if improvements in outcomes for all children were to be secured, it was essential to introduce a fundamentally different regulatory regime which would encourage homes to have high aspirations for their children and to deliver high quality care; and that this is the purpose of the new Regulations. DfE carried consultation over eight weeks from September to November 2014. It says that, overall, both providers and local authorities welcomed the improved focus on children, the move away from minimum standards and the coherence offered by the new regulatory framework. It gives a more detailed account of views expressed in section 8 of the EM; a full analysis of consultation responses was published on 5 March 2015.

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9 HLWS302.


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

- Authority to Carry Scheme (Civil Penalties) Regulations 2015
- Aviation Security Act 1982 (Civil Penalties) Regulations 2015
- Counter-Terrorism and Security Act 2015 (Authority to Carry Scheme) Regulations 2015
- Counter-Terrorism and Security Act 2015 (Risk of Being Drawn into Terrorism) (Amendment and Guidance) Regulations 2015
- Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015
- Passenger, Crew and Service Information (Civil Penalties) Regulations 2015
- Retention of Communications Data (Code of Practice) Order 2015

Instruments subject to annulment

- SI 2015/118 Occupational Pension Schemes (Power to Amend Schemes to Reflect Abolition of Contracting-out) Regulations 2015
- SI 2015/255 Animal Feed (Composition, Marketing and Use) (England) Regulations 2015
- SI 2015/363 Health and Safety and Nuclear (Fees) Regulations 2015
- SI 2015/378 Delegation of Functions (Strategic Highways Companies) (England) Regulations 2015
- SI 2015/384 Street Works (Qualifications of Supervisors and Operatives) (England) (Amendment) Regulations 2015
- SI 2015/389 Social Security (Members of the Reserve Forces) (Amendment) Regulations 2015
<table>
<thead>
<tr>
<th>Order Number</th>
<th>Description</th>
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<tbody>
<tr>
<td>SI 2015/393</td>
<td>Rail Vehicle Accessibility (Non-Interoperable Rail System) (London Underground Northern Line 95TS Vehicles) Exemption Order 2015</td>
</tr>
<tr>
<td>SI 2015/400</td>
<td>Professional Standards Authority for Health and Social Care (Fees) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/402</td>
<td>Motor Vehicles (Wearing of Seat Belts by Children in Front Seats) (Amendment) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/403</td>
<td>Road Vehicles (Registration and Licensing) (Amendment) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/405</td>
<td>M275 and M27 Motorway (Speed Limit and Bus Lane) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/408</td>
<td>M1 Motorway (Junctions 39 to 42) (Variable Speed Limits) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/410</td>
<td>Merchant Shipping (Boatmasters’ Qualifications, Crew and Hours of Work) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/412</td>
<td>Motor Vehicles (Driving Licences) (Amendment) (No.2) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/413</td>
<td>Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2015</td>
</tr>
<tr>
<td>SI 2015/415</td>
<td>National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) (Amendment) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/416</td>
<td>National Health Service (Primary Dental Services and General Ophthalmic Services) (Miscellaneous Amendments and Transitional Provision) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/417</td>
<td>National Health Service (Charges, Payments and Remission of Charges) (Uprating, Miscellaneous Amendments and Transitional Provision) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/419</td>
<td>Clinical Thermometers (EEC Requirements) (Revocation) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/422</td>
<td>Payment Services (Amendment) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/426</td>
<td>Control of Waste (Dealing with Seized Property) (England and Wales) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/428</td>
<td>Financial Services (Banking Reform) Act 2013 (Commencement (No. 8) and Consequential Provisions) Order 2015</td>
</tr>
<tr>
<td>SI 2015/430</td>
<td>Ship Recycling Facilities Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/435</td>
<td>Dorset and Wiltshire Fire and Rescue Authority (Combination Scheme) Order 2015</td>
</tr>
<tr>
<td>SI 2015/437</td>
<td>Employment and Support Allowance (Repeat Assessments and Pending Appeal Awards) (Amendment) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/441</td>
<td>Salmon and Migratory Trout (Prohibition of Fishing and Landing) (England) Order 2015</td>
</tr>
<tr>
<td>SI 2015/442</td>
<td>Old Oak and Park Royal Development Corporation (Planning Functions) Order 2015</td>
</tr>
<tr>
<td>SI 2015/443</td>
<td>Insolvency (Amendment) Rules 2015</td>
</tr>
<tr>
<td>SI 2015/445</td>
<td>Police Pensions Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/446</td>
<td>Marine Works (Environmental Impact Assessment) (Amendment) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/453</td>
<td>Police (Promotion) (Amendment) Regulations 2015</td>
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<tr>
<td>SI 2015/454</td>
<td>Animal Feed (Hygiene, Sampling etc. and Enforcement) (England) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/455</td>
<td>Police (Amendment) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/458</td>
<td>Merchant Shipping (Light Dues) (Amendment) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/460</td>
<td>Reserve Forces (Call-out and Recall) (Financial Assistance) (Amendment) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/461</td>
<td>Special Constables (Amendment) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/465</td>
<td>Firefighters’ Pension Scheme (Amendment) (Governance) Regulations 2015</td>
</tr>
<tr>
<td>SI 2015/466</td>
<td>Armed Forces Pension Scheme and Early Departure Payments Scheme (Amendment) Regulations 2015</td>
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</tbody>
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SI 2015/474  Pedal Cycles (Construction and Use) (Amendment) Regulations 2015
SI 2015/477  Renewable Heat Incentive Scheme (Amendment) (No. 2) Regulations 2015
SI 2015/478  Social Security (Miscellaneous Amendments No. 2) Regulations 2015
SI 2015/479  Financial Assistance for Environmental Purposes (England and Wales) Order 2015
SI 2015/486  Deposit Guarantee Scheme Regulations 2015
SI 2015/487  Payment to Treasury of Penalties (Enforcement Costs of the Payment Systems Regulator) Order 2015
SI 2015/495  Care Planning and Fostering (Miscellaneous Amendments) (England) Regulations 2015
SI 2015/497  Armed Forces (Enhanced Learning Credit Scheme and Further and Higher Education Commitment Scheme) (Amendment) Order 2015
SI 2015/499  Social Security (Overpayments and Recovery) Amendment Regulations 2015
SI 2015/522  Childcare Payments Regulations 2015
SI 2015/523  Coast Protection (Variation of Excluded Waters) (England) Regulations 2015
SI 2015/524  Surface Waters and Water Resources (Miscellaneous Revocations) Regulations 2015
SI 2015/527  Young Carers (Needs Assessments) Regulations 2015
SI 2015/537  Childcare Payments Act 2014 (Amendment) Regulations 2015
SI 2015/541  Children’s Homes (England) Regulations 2015
SI 2015/543  Social Security (Contributions) (Amendment) Regulations 2015
SI 2015/545  Guardian’s Allowance Up-rating Regulations 2015
<table>
<thead>
<tr>
<th>SI 2015/550</th>
<th>Hydrocarbon Oil and Biofuels (Road Fuel in Defined Areas) (Reliefs) (Amendment) Regulations 2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>SI 2015/555</td>
<td>Personal Injuries (Civilians) Scheme (Amendment) Order 2015</td>
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</table>
APPENDIX 1: DRAFT SELECTIVE LICENSING OF HOUSES 
(ADDITIONAL CONDITIONS) (ENGLAND) ORDER 2015

Additional information from the Department for Communities and Local Government

Q1: The Explanatory Memorandum does little to explain why the Department has decided to lay this Order now, and with the effects that it embodies. The EM says that the Government are “keen to ensure that local authorities have the right tools to help improve areas with relatively large numbers of privately rented properties and which are characterised by poor property conditions, or which have current or recent experience of large amounts of inward migration, or which have a high level of deprivation, or high levels of crime.” What concrete evidence is available to the Department to show that local authorities need additional “tools” to deal with the specific problems mentioned in the EM?

A1: Our evidence is based on discussions we have had over a considerable period of time with local authorities, landlord organisations and others in the sector, e.g. housing charities. A clear and consistent message that we have received across the board is that the current criteria for selective licensing (low housing demand or anti-social behaviour) are not sufficient and do not enable local authorities to introduce licensing in areas where it is most needed and where they can target enforcement action.

Q2: Is the Department aware that any local authorities plan specific action to make use of the powers that would be given by the Order?

A2: No.

Q3: The EM says: “A discussion paper ‘Review of Property Conditions in the Private Rented Sector’ was published in February 2014...Amongst other things, it invited views on how to make licensing more effective while helping to ensure that good landlords were not adversely affected. It was clear from many of the responses that there was a need to extend the grounds on which a selective licensing scheme could be made and thereby help ensure that schemes are targeted more closely at areas with particularly complex problems.” What responses were received to the discussion paper, and from whom? Has the Department published an analysis of those responses? If so, what is the web-reference? If not, why not?

A3: We received 299 substantive responses to the discussion paper. A breakdown is as follows:

• 161 local authorities;
• 37 landlords, letting agents and representative bodies
• 7 MPs
• 10 charities
• 48 pressure groups
• 36 individuals

The Government response to the discussion paper will be published on 13 March.
**Q4: Has the Department formally consulted on the proposals in the Order? If not, why not?**

A4: We have not held a formal consultation. As noted above, there has been extensive informal consultation. Formal consultation is not a requirement and we are confident on the basis of our discussions with the sector that extending the criteria in this way will be welcomed as a positive step forward.

**Q5: The EM says: “An Impact Assessment has been prepared and will be submitted to the Regulatory Policy Committee shortly.” Why was the impact assessment not laid before Parliament with the Order?**

A5: A Regulatory Triage Assessment has been sent to the Regulatory Policy Committee. These documents are fast track Impact Assessments and are used when the cost to business is expected to be less than £1 million. A copy is attached but please note that it has yet to be validated by the RPC. The Assessment was not laid before Parliament with the Order because it was only recently decided to extend the criteria and it takes a certain amount of time to prepare an Assessment.

**11 March 2015**
APPENDIX 2: DRAFT SELECTIVE LICENSING OF HOUSES (ADDITIONAL CONDITIONS) (ENGLAND) ORDER 2015

Submission from Mr Constantinos Regas

Background

1. In general terms, the owner of a house in multiple occupation (“HMO”) in England which comprises three or more residential storeys and which contains five or more persons who form two or more households is required by statute to obtain a licence from the local housing authority (Housing Act 2004, Pt 2 and Licensing of Houses in Multiple Occupation (Prescribed Descriptions) (England) Order 2006, SI 2006/371). This is known as “mandatory licensing”.

2. The 2004 Act also permits local housing authorities to designate parts, or the whole, of their local government areas as areas subject to additional and/or selective licensing. In general terms, additional licensing applies to HMOs which are not subject to mandatory licensing (s.56). These small HMOs comprise 3 or more persons, forming more than one household and sharing amenities. Households are either single persons or members of the same family who live together. (By way of example, three unrelated students sharing a house would therefore be an HMO.) Poor tenancy management must be demonstrated before a designation can be made (s.56).

3. Selective licensing applies to privately rented houses which are not HMOs (i.e. those which are let as separate, or single, dwellings – ss.79, 99). Despite its name, selective licensing may be applied to a whole borough’s area, even if Parliamentary intention was for it to be used selectively to target antisocial behaviour or low housing demand (s.80) in restricted geographical areas.

4. If an authority does make a designation, the effect is to require landlords of properties specified in the designation, and within the area to which it applies, to apply for and obtain a licence, failure to do which is a criminal offence attracting a fine of up to £20,000 (Pt 2, ss.56–60 (additional) and Pt 3, ss.80–84 (selective)). Licences will incorporate licence conditions relating to the management of the property, failure to comply with which is also a criminal offence, with a fine of up to £5,000 (ss.67 and 90). Local housing authorities must impose some conditions set out in the Act (but they can exercise discretion and add further conditions).

5. Grant of a licence requires the applicant to pass a “fit and proper person” test (ss. 64 and 88). The licence therefore has both property conditions and character conditions (relating to the licence holder). Local housing authorities have powers to inspect any residential premises in their district with a view to determining whether and category 1 or 2 hazards exist on those premises (s.4) However, licences may be granted without any prior property inspection by the local housing authority.

6. Prior to 30 March 2010, local housing authorities were required to apply to the Secretary of State for confirmation of proposed designations for additional or selective licensing. On that date, the then Housing Minister issued a general approval (ss. 58 and 82), which allowed local housing authorities to designate areas within their districts or their entire districts,
provided that they had consulted persons affected by a proposed
designation for a period of not less than 10 weeks. Persons affected were set
out in guidance issues by the Secretary of State, Approval steps for additional
and selective licensing, dated February 2010. The guidance is still extant. A
recent judicial review successfully challenged the lawfulness of designations
for both additional and selective licensing made by the London Borough of
Enfield, covering the whole district of the borough. The High Court held
that the council had failed to consult the persons affected (including in
surrounding areas) and had not consulted for the requisite time. The
designations had been ultra vires and were therefore quashed.\textsuperscript{12}

\textbf{Draft SI and revision of General approval}

7. The 2004 Act allows an order to be made (such as this proposed
instrument) so that local housing authorities can introduce selective
licensing under broader reasons than antisocial behaviour or low housing
demand as set out in the Act (s.80(2)). No such provision exists for additional
licensing. The General Approval applies to both types of
designation.

8. The current Housing Minister (Brandon Lewis MP) proposes to make an
order under s.80(2). In addition, he proposes to amend his General
Approval. These proposals would therefore only effect legislative changes in
respect of selective licensing. The draft SI would expand the criteria under
which local housing authorities can make selective licensing designations so
that the full set becomes:

\begin{itemize}
  \item i. Low housing demand (existing s.80(3))
  \item ii. Antisocial behaviour (existing s.80(6))
  \item iii. Housing conditions
  \item iv. Migration
  \item v. Deprivation
  \item vi. Crime
\end{itemize}

9. No \textbf{impact assessment} has been made available. The Department for
Communities and Local Government (DCLG) states that the impact
assessment is currently being considered by the Regulatory Policy
Committee. DCLG does not maintain a central record of existing or
proposed designations. The schemes potentially have very different
conditions and costs.

10. The \textbf{draft General Approval} is not available. However, a letter from the
Housing Minister to all local council leaders, states that the general
approval will apply unless a proposed scheme exceeds 20\% of a local
housing authority's area or 20\% of privately rented homes within the
authority’s area. If these thresholds are exceeded, confirmation will be
required by the Secretary of State (see attached letter of 11 March 2015).

\textsuperscript{12} \textsc{R(Regas) v London Borough of Enfield [2014] EWHC 4173 (Admin)}
Discussion – Wider policy considerations

11. Licensing, particularly if it does not involve any inspection or enforcement, is potentially a poorly targeted intervention. It is arguable that the requirement for landlords to sign up means that local housing authorities can target any efforts at bad (unregistered) landlords. But this is potentially an expensive registration scheme. At costs of up to £1,000 a year (authorities can determine whether they issue a licence for one year at a time), this is a significant financial and regulatory burden. The financial costs are likely to be passed on to tenants.

12. It seems incongruous to make amendments to the legislative framework which address only selective licensing and not additional licensing. In particular, if councils designate areas of their borough under the arguably less stringent grounds for selective licensing, landlords would have an incentive to switch their properties from letting to single households to HMO. This could create a perverse incentive to evict families to make way for HMO use, since HMOs would potentially be outside the scope of licensing in a given area.

13. Using their planning powers, local authorities could make an Article 4 Direction to require change of use applications from C3 Dwelling House to C4 House in Multiple Occupation. This would make it more difficult, but not impossible, to make the switch described above.

14. However, ring-fencing the housing stock by placing such limitations is risky. It is more likely to result in inefficient utilisation of housing and perverse behaviours due to the complex interaction of housing benefit rates, planning law and housing law.

15. There is no requirement in the existing General Approval for evidence of poor tenancy management for HMOs to be directly attributed to properties in the private rented sector. This could allow local housing authorities to adopt pseudo-scientific approaches to establishing correlations which are not causal. For example, if there is increased fly-tipping, this in an area near a block of flats that is mainly occupied by private tenants, the fly-tipping may not have been caused by the tenants themselves. In the Regas case the council asserted “association by proximity”. If a council is then aware of who the perpetrators are, it may beg the question of why enforcement action is not being taken against those individuals, rather than burdening a whole area with regulation.

16. The draft instrument does not explicitly state the geographical extent of consultation. The judgment in Regas advocated adoption of the Sedley principles, which were endorsed in a previous case by the Supreme Court and described by the Court of Appeal as a “prescription for fairness”.

   i. Consultation must be at a time when proposals are still at a formative stage;

   ii. The proposer must give sufficient reasons for any proposal to permit intelligent consideration and response;

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13 Article 4, Town and Country Planning (General Permitted Development) Order 1995
14 R(Moseley) v London Borough of Haringey [2014] UKSC 56: summary and judgment
iii. Adequate time must be given for consideration and response; and
iv. The product of consultation must be conscientiously taken into account in finalising any statutory proposals.

The Committee may wish to consider whether the Sedley principles should be codified in the draft instrument and, indeed, whether additional principles should cover geographical extent (e.g. all wards in the borough and one ward in all directions around a borough boundary, or more if a designation area is near a borough boundary).

17. The legislative framework would maintain the status quo in allowing designations to be made (even within the same borough) with different sets of licence conditions. It could be arguable that areas might have specific problems which a scheme might seek to address. The Committee may wish to consider whether it would be unfair on tenants (and landlords) to allow a situation where conditions are a postcode lottery and, if so, whether there should be a mandatory standard set of conditions.

18. The Committee may wish to consider whether:
   i. The “20% test” would potentially allow local housing authorities to designate too large an area.
   ii. The Minister should use his General Approval to apply the “20%” limits to additional licensing, as well as to selective licensing, either individually or combined;
   iii. The wording of the General Approval (as surmised from the Minister’s letter) should explicitly state that the 20% is on a cumulative basis, to prevent local housing authorities from making many designations at 20% of area or private homes;
   iv. The General Approval should specify that additional licensing designations made on the basis of poor tenancy management should have to causally and directly attribute purported symptoms of poor tenancy management to privately rented properties;
   v. The relevant planning law (such as on Article 4 directions) should be considered together with the proposed draft order; and
   vi. The additional conditions proposed in the draft instrument are ultra vires, given that the primary legislation intended for selective licensing to target areas of low housing demand and/or antisocial behaviour. Issues such as migration (Article 5 of draft SI) were arguably not envisaged by Parliament in 2004. As currently drafted, the revised legislative framework would allow licensing designations on the basis of low demand or high demand (due to migration).
Discussion – Specific considerations

19. There is currently no provision in the draft instrument for the Secretary of State to be required to issue statutory guidance. This leaves the status of occasional guidance unclear. The Committee may wish to consider whether the order should include a provision for the Secretary of State to be required to issue guidance, which a local housing authority would be required to follow.

20. Article 3 requires that a local housing authority must consider that “the area contains a high proportion of properties in the private rented sector, in relation to the total number of properties in the area”. This “high proportion” is not defined. The Committee may wish to consider whether a “high proportion” test which is not specified in legislation and where there is no statutory guidance, is open to abuse.

21. Article 4 is the first extra condition under which a local housing authority can make a selective licensing designation. Article 4(b) states that a “local housing authority intends to carry out such inspections” to ascertain whether properties are hazardous (emphasis added). There is a huge difference between “intends” and “must”. As currently formulated a local authority would have the option to draw up a plan to inspect (thereby showing intent) and then abandon that plan. The Committee may wish to consider whether the new “housing conditions” test is too broad and whether it would make inappropriate designation powers available to local authorities.

22. Articles 5 and 6 relate to migration and deprivation, respectively. Article 5(b) refers to “a significant number of the properties”, whereas Article 6(a) refers to “a significant number of the occupiers of properties”. The Committee may wish to consider the definition of “significant” and whether any ambiguity arising, coupled with the lack of statutory guidance, could potentially lead to abuse of powers by local housing authorities.

23. In relation to deprivation, Article 6(2) lists a number of factors that, “the local housing authority may have regard to. There has been a relatively recent run of plain English interpretations by the Court of Appeal (particularly leading judgments by Lewison LJ), including of the word “may”, which was interpreted as permitting, rather than directing an action. The Committee may wish to consider whether “may have regard” ought to be replaced by “must have regard”. Furthermore, the Committee should consider whether the absolute figures should be considered, or whether these should be evaluated on a relative scale or compared to other areas, for example.

24. Article 7 relates to crime. “High levels of crime” are not defined. The Committee may wish to consider whether the definition of crime levels is ambiguous and whether this creates scope for abuse of powers.

15 http://nearlylegal.co.uk/blog/2015/02/lord-justice-lewison-return-english/
25. The draft instrument contains no appeal mechanism and any challenge would again result in judicial review. **The Committee may wish to consider whether the General Approval should contain provisions that, where designations are made by local housing authorities under the General Approval, there should be a standstill period during which objectors may contact the Secretary of State. Any objections made but not withdrawn would then render a proposed designation subject to the Secretary of State’s confirmation process.** A suggestion is that a competent body (such as the Planning Inspectorate) could exercise this function on behalf of the Secretary of State. Alternatively, the Residential Property Tribunal, which may hear appeals when a local housing authority refuses to grant an individual licence, could be involved in the designation process. The Committee may also wish to bear in mind another judicial review, where it was shown that a local authority misled the Secretary of State.

**Discussion – Interaction with other SIs**

26. There is no explicit requirement in the draft instrument for local housing authorities to comply with the **Provision of Services Regulations 2009** (also known as the European Services Directive), which would ensure that regulation is necessary and proportionate. It is arguable that the regulations are engaged because landlords can be self-employed businesses. Article 22(3)(c) of the Regulations requires that, in relation to authorisation schemes “it must not be possible to replace those requirements with other, less restrictive measures that attain the same result.” The Regulations would therefore reduce the likelihood of onerous conditions being added by local housing authorities to their own licences.

27. The Regulations also provide some protection over what licensing fees can be charged by local housing authorities. Since fees are likely to be passed on to tenants, this is an indirect benefit to tenants too. In that regard, it would be useful for the instrument to set out examples of activities which constitute authorisation, compliance and enforcement for the purposes of the Regulations. In relation to fees, the Regulations are currently the subject of a Supreme Court case. It is important to note that the Department for Business, Innovation and Skills (in its capacity as UK Point of Single Contact for the single market) considers that the Regulations already apply to the mandatory HMO licensing regime. **The Committee should consider whether the Provision of Services Regulations 2009 are applicable to the draft instrument.**

28. The 2004 Act and the draft instrument do not explicitly require local housing authorities to undertake safety inspections, wither before a licence is issued or during the licence period. If the Provision of Services Regulations 2009 are engaged, consent is granted tacitly after a specified
period of time, unless there is an “overriding reason relating to the public interest” (ORRPI). One such ORRPI is safety. However, a local housing authority could potentially make a designation and grant a licence without making any safety inspections in the 5 years of a licence period. (Indeed this has been standard practice in many schemes to date.) The Committee may wish to consider whether the absence of property inspections prior to the grant of a licence could be perverse and dangerous, and whether the absence of such a condition in the draft instrument could allow a local housing authority to give a seal of approval to dangerous premises.

16 March 2015

The Department’s responses to Mr Regas’ submission [shown in bold and italics] are as follows:

The Committee may wish to consider whether the Sedley principles should be codified in the draft instrument and, indeed, whether additional principles should cover geographical extent (e.g. all wards in the borough and one ward in all directions around a borough boundary, or more if a designation area is near a borough boundary).

Section 80(9) of the Housing Act 2004 requires a local housing authority to take reasonable steps to consult persons likely to be affected by the designation and to consider any representations made in accordance with the consultation and not withdrawn, before making a selective licensing designation. However, the Department agrees that local authorities should be expected to adopt the Sedley principles when consulting and if a local authority does not do this they are at risk of challenge. The General Approval requires all consultations to take place for a period of at least ten weeks. Where selective licensing applications come to the Secretary of State for confirmation, the Secretary of State will need to be content that a proper consultation has been carried out, and the forthcoming guidance will make this clear to local authorities.

No Impact Assessment has been made available

The Impact Assessment for this Order is currently being considered by the Regulatory Policy Committee. A draft of this document has been made available to the Committee and the document will be laid in Parliament. We will ensure a copy is shared with Mr Regas as soon as it has been finalised.

The Draft General Approval is not available

The General Approval is currently being drafted. This is an administrative document which is not subject to Parliamentary Approval. If the Statutory Instrument is passed a revised General Approval will be published before 1 April.
i The “20% test” would potentially allow local housing authorities to designate too large an area.

ii The Minister should use his General Approval to apply the “20%” limits to additional licensing, as well as to selective licensing, either individually or combined;

iii The wording of the General Approval (as surmised from the Minister’s letter) should explicitly state that the 20% is on a cumulative basis, to prevent local housing authorities from making many designations at 20% of area or private homes.

Section 80(1) of the Housing Act 2004 sets out that a local housing authority may designate either: “(a) the area of their district, or (b) an area in their district, as subject to selective licensing, if the requirements of subsections (2) and (9) are met.”

This statutory instrument introduces additional sets of conditions in relation to selective licensing, in accordance with section 80(2)(b) of the Housing Act 2004. The Secretary of State does not have equivalent powers under section 56(2) of the Housing Act 2004 to introduce additional conditions in relation to additional licensing.

The General Approval is designed to cover schemes on a cumulative basis preventing local authorities making multiple sub 20% designations, unless they come to the Secretary of State for approval.

Assuming that the draft statutory instrument obtains Parliamentary approval, the Secretary of State intends to amend the General Approval from 1st April 2015, to provide that proposed selective licensing designations covering more than 20% of a local authority’s geographical area or affecting more than 20% of privately rented homes in the local authority area are required to apply to the Secretary of State for confirmation of the designation, in accordance with section 82(1) of the Housing Act 2004.

iv. The General Approval should specify that additional licensing designations made on the basis of poor tenancy management should have to causally and directly attribute purported symptoms of poor tenancy management to privately rented properties;

v. The relevant planning law (such as on Article 4 directions) should be considered together with the proposed draft order

Article 4 directions require that planning permission is obtained before a building can be converted into a HMO. They are not relevant to this order.

The draft Order does not refer to antisocial behaviour. The Department considers that the drafting of article 4 of the Order makes it sufficiently clear that the poor housing conditions referred to should be found within the private rented sector. Article 5, 6 and 7 of the Order also set out that there should be a link between the particular condition referred to in that article and the occupation of properties in the private rented sector. However, it is not necessary for a particular condition to have an exclusive link to the private rented sector – for example, whilst we consider that a local authority would need to show that criminal activity is affecting those living in the private rented sector in order to make a designation in relation to the ‘crime’ condition in article 7 of the Order, we do not consider that it would be appropriate to specify that all the criminal activity in the area needs to
relate to the private rented sector, or that criminal activity cannot affect any others living or working in the area.

_The Committee may wish to consider whether the order should include a provision for the Secretary of State to be required to issue guidance, which a local housing authority would be required to follow._

The Department will publish guidance in time for when the new selective licensing statutory instrument to comes into force, subject to it being approved by Parliament.

_The Committee may wish to consider whether a “high proportion” test which is not specified in legislation and where there is no statutory guidance, is open to abuse._

The Department considers that local authorities are best placed to decide whether the ‘high proportion’ test has been met.

_There is a huge difference between “intends” and “must”. As currently formulated a local authority would have the option to draw up a plan to inspect (thereby showing intent) and then abandon that plan. The Committee may wish to consider whether the new “housing conditions” test is too broad and whether it would make inappropriate designation powers available to local authorities._

The duties of local authorities in relation to the inspection of properties and their assessment for hazards are set out in sections 4 to 7 of the Housing Act 2004. The statutory instrument contains a footnote referring to these provisions. The Department did not wish to create any confusion by seeking to reproduce these duties within the statutory instrument. Local authorities are required, under section 84 of the Housing Act 2004, to review from time to time the operation of any designations that they make, so where a local authority made a selective licensing designation on the basis of intending to carry out inspections, we would expect to see the designation revoked if in fact the local authority then abandoned its plans to inspect.

_Articles 5 and 6 relate to migration and deprivation, respectively. Article 5(b) refers to “a significant number of the properties”, whereas Article 6(a) refers to “a significant number of the occupiers of properties”. The Committee may wish to consider the definition of “significant” and whether any ambiguity arising, coupled with the lack of statutory guidance, could potentially lead to abuse of powers by local housing authorities._

The Department considers that local authorities are best placed to decide on the definition of ‘significant number of the properties’.

The Department does not believe this will result in any ambiguity.

The Department will publish guidance in time for when the new selective licensing statutory instrument to comes into force, subject to it being approved by Parliament.
The Committee may wish to consider whether “may have regard” ought to be replaced by “must have regard”. Furthermore, the Committee should consider whether the absolute figures should be considered, or whether these should be evaluated on a relative scale or compared to other areas, for example.

The wording “may have regard” is deliberately used here in order to make clear that local authorities are not required to have regard to each factor listed in article 6(2) of the statutory instrument. This allows some discretion on the part of the local authority to determine the factors that they consider to be relevant when determining levels of deprivation in their area. The drafting therefore provides some flexibility for local authorities have regard to the criteria that are most appropriate to their own circumstances.

The Committee may wish to consider whether the definition of crime levels is ambiguous and whether this creates scope for abuse of powers.

The Department considers that local authorities are best placed to decide on the definition of 'crime levels'.

The Committee may wish to consider whether the General Approval should contain provisions that, where designations are made by local housing authorities under the General Approval, there should be a standstill period during which objectors may contact the Secretary of State. Any objections made but not withdrawn would then render a proposed designation subject to the Secretary of State’s confirmation process.

The Department believes the 10 week consultation period is an adequate period of time to raise any objections.

16 March 2015
APPENDIX 3: LOCAL GOVERNMENT (TRANSPARENCY REQUIREMENTS) (ENGLAND) REGULATIONS 2015 (SI 2015/480)

Additional information from the Department for Communities and Local Government

Q1: The Explanatory Memorandum states that: “Between 11 July and 8 August 2014, the Government consulted on delivering greater transparency on the value of local housing authorities’ housing stock”. The Local Government (Transparency Requirements) (England) Regulations 2014 (SI 2014/2680) were laid before Parliament on 9 October 2014, and related to the Local Government Transparency Code 2014 issued on 3 October 2014 – two months after the LA housing stock consultation had ended. Why did DCLG not include in the transparency requirements information about the value of local housing authorities’ social housing assets then, rather than now?

A1: Transparency requirements about the value of social housing assets were not included in the Local Government Code 2014, published on 3 October, as at that time the Government was still considering its response to its consultation, particularly in relation to the specifics of what local authorities would be asked to publish and the publication model.

In analysing the consultation responses, the Government considered that publication of data should be done by postcode, as this would enable a better understanding of volume of social housing stock and value within any given area. However, this required careful consideration in order to be satisfied that there were no data protection issues, including the need to consider ways to mitigate the possibility of individual property values becoming disclosive.

This required consideration of the implications at different levels of postcode specificity, as well as some further testing in relation to council areas where postal code sector gives a number of households lower than 2,500 households. This work allowed us to form an opinion as to whether, in particular areas, the postcode level should be set higher.

As result of this extra work, we were not ready to publish the Government response to the consultation until 26 November.

Q2: The consultation process in relation to transparency on the value of local housing authorities’ housing stock ran from 11 July to 8 August 2014, a period of 4 weeks overlapping the traditional August holiday period. The Cabinet Office’s consultation principles say: “Timeframes for consultation should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response and where the consultation spans all or part of a holiday period policy makers should consider what if any impact there may be and take appropriate mitigating action.” Did DCLG consider taking mitigating action in this case? If not, why not? Did DCLG receive any complaints about the timing of the consultation process?

A2: A four-week consultation was deemed sufficient given the very specific nature of the matter under consideration and that this was of relevance only to local housing authorities in England.

The consultation exercise ran from 11 July until 8 August, only partially into the August holiday season. As such it was considered that it provided sufficient time for interested parties (housing and other officers responsible for the Housing
Revenue Accounts within local housing authorities) to provide a considered response.

Of the 34 responses received only one, from Birmingham City Council, considered that the timing of the consultation was unfortunate.

No complaints have been received from any party regarding the timing or length of the consultation period.

Q3: The Government analysis of responses of November 2014 says the following: “A large proportion of respondents (about 40%) were supportive of the proposal to introduce a mandatory requirement for local authorities to publish their stock valuations through a transparency code. However, some (55% of respondents were of the view that the Housing Revenue Account (Accounting Practices) Direction 2011 already requires them to publish their valuation of the social housing stock (including the total balance sheet value of their land, houses and other property and the vacant possession value of dwellings within the authority’s Housing Revenue Account). Hence, they questioned the need and added value of introducing a new mandatory requirement through a transparency code. In their view, this will lead to duplication of information, with the attached administrative burden and costs.” Is it the case that, when the EM refers at 8.4 to the fact that “there were some views raised by respondents about the need to have a separate mandatory requirement”, this is a reference to the 55% of respondents mentioned in the quotation from the analysis of responses? If so, does DCLG consider that the statement quoted from 8.4 of the EM is an accurate account of consultation responses?

A3: Respondents to the consultation largely agreed with the Government’s aim to increase transparency in the value of local housing authorities’ social housing stock, even among those respondents that raised concerns about the need to introduce a new requirement.

In the Government consultation response, we set out that 55 per cent of the respondents were of the view that the Housing Revenue Account (Accounting Practices) Direction 2011 already requires them to publish their valuation of the social housing stock and therefore a transparency code mandatory requirement would lead to duplication of information, with an associated administrative burden and cost. This was based on those respondents who answered the specific question and referred to the existing Accountancy Practices in their response.

However, as is often the case with consultations, the numbers are not clear cut when looking at the details. Of the 34 responses:

- 2 responses did not answer this specific question;
- 4 responses can be summarised as being unclear about the purpose and/or value of the proposal but without specifically opposing it;
- 7 provided narrative responses that were not easy to categorise, for example “does it need to be if Government issue a directive to do so?”;
- 9 responses supported a new mandatory requirement, for example citing the benefits for benchmarking; and
- 12 responses opposed a new mandatory requirement, with nine citing the existing accounting practices.

From this detailed breakdown, it would also be accurate to say that 38 per cent did not give a yes/no response, 35 per cent of respondents were specifically opposed and 26 per cent were specifically in support of the proposal.
On balance, we therefore feel it is fair and appropriate to say “some views” in the explanatory memorandum.

Q4: The November 2014 analysis of responses contains the following: “There was a mixed view regarding the proposed start date of 1 April 2015 for local authorities to publish their stock valuations. Although some respondents recognised that they already publish stock valuations as part of their Annual Statements of Accounts and could therefore meet the proposed date, they felt this was conditional on having more clarity on the type and level of information required. About 42% of the respondents indicated 1 April 2016 as a more realistic date given the technical nature of the proposals.” How many consultation respondents explicitly supported the proposed start date of 1 April 2015? Why is there no mention in the EM of 42% of consultation respondents who wanted a later start date?

A4: Around 48 per cent of the respondents indicated that, as they already publish stock valuations as part of their Annual Statements of Accounts, they could therefore meet the proposed start date of 1 April 2015. However, they indicated that this was conditional on having more clarity on the type and level of information required. About 42 per cent of the respondents indicated 1 April 2016 as a more realistic date given the technical nature of the proposals.

Given the numbers, the Government considers that a first publication by 1 September is a balanced approach. We have therefore made this the first publication date for the new dataset, following commencement of the regulations on the 1 April.

11 March 2015
APPENDIX 4: 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 17 March 2015 Members declared the following interests:

Draft Health and Care Professions (Public Health Specialists and Miscellaneous Amendments) Order 2015

Lord Eames
The Member’s wife is a Lay Member of the General Medical Council


Lord Borwick
The Member is a trustee of a charity that owns rental properties

Draft Counter-Terrorism and Security Act 2015 (Risk of Being Drawn into Terrorism) (Amendment and Guidance) Regulations 2015

Lord Plant
Employee of higher education institutes

Old Oak and Park Royal Development Corporation (Planning Functions) Order 2015 (SI 2015/442)

Lord Borwick
The Member’s wife is a member of the Greater London Authority and is one of the Statutory Deputy Mayors of London; she is also an elected Councillor for the Royal Borough of Kensington and Chelsea

Police Pensions Regulations 2015 (SI 2015/445)

Police (Promotion) (Amendment) Regulations 2015 (SI 2015/453)

Police (Amendment) Regulations 2015 (SI 2015/455)

Lord Bowness
The Member’s daughter is a Police Officer

Attendance:

The meeting was attended by Baroness Andrews, Lord Borwick, Lord Bowness, Lord Eames, Lord Goodlad, Baroness Hamwee, Baroness Humphreys, Lord Plant of Highfield, Baroness Stern and Lord Woolmer of Leeds.