

# HOUSE OF LORDS

## Secondary Legislation Scrutiny Committee

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### 47th Report of Session 2017–19

#### Includes information paragraphs on:

Draft International Road Passenger  
Transport (Amendment) (Northern  
Ireland) (EU Exit) Regulations 2019

National Health Service  
Commissioning Board and  
Clinical Commissioning Groups  
(Responsibilities and Standing Rules)  
(Amendment) Regulations 2019

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### *Secondary Legislation Scrutiny Committee*

The Committee's terms of reference, as amended on 11 July 2018, are set out on the website but are, broadly:

To report on draft instruments and memoranda laid before Parliament under sections 8, 9 and 23(1) of the European Withdrawal Act 2018.

And, to 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 the terms of reference.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

### *Members*

Rt Hon. Lord Chartres	Lord Goddard of Stockport	Baroness O'Loan
Rt Hon. Lord Cunningham of Felling	Lord Haskel	Lord Sherbourne of Didsbury
Lord Faulkner of Worcester	Rt Hon. Lord Janvrin	Rt Hon. Lord Trefgarne (Chairman)
Baroness Finn	Lord Kirkwood of Kirkhope	

### *Registered interests*

Information about interests of Committee Members can be found in the last Appendix to this report.

### *Publications*

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

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at <http://www.legislation.gov.uk/uksi>

### *Committee Staff*

The staff of the Committee are Christine Salmon Percival (Clerk), Helen Gahir (Adviser), Nadine McNally (Adviser), Philipp Mende (Adviser), Jane White (Adviser), Louise Andrews (Committee Assistant), Ben Dunleavy (Committee Assistant) and Paul Bristow (Specialist Adviser).

### *Information and Contacts*

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is [hlseclegscrutiny@parliament.uk](mailto:hlseclegscrutiny@parliament.uk).

# Forty Seventh Report

## INSTRUMENTS OF INTEREST

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### **Draft International Road Passenger Transport (Amendment) (Northern Ireland) (EU Exit) Regulations 2019**

1. The purpose of these draft Regulations is to ensure that current access rights for EU bus and coach operators into, and within, Northern Ireland remain in place after the UK's withdrawal from the EU. In view of the potential impact of the proposals on cross-border bus and coach services in Northern Ireland, Secondary Legislation Scrutiny Committee Sub-Committee B recommended an upgrade of the Regulations to the affirmative procedure when they were initially laid as a proposed negative instrument.<sup>1</sup> The recommendation has been accepted. The Department for Infrastructure in Northern Ireland (DfI) explains that as reciprocal rights for UK operators in the EU market cannot be guaranteed after EU exit, the UK will join the Interbus Agreement (“Interbus”) as a contracting party in its own right if it leaves the EU without an agreement.<sup>2</sup> While Interbus does not currently cover “regular” (scheduled) and “special regular” international coach services (for example, services that take specific passengers to school or work), the EU has agreed temporary contingency measures to enable operators licensed by the UK to carry passengers between the UK and an EU Member State if the withdrawal agreement is not adopted before the UK leaves the EU. This will enable existing “regular” and “special regular” services delivered by UK operators in the EU to continue until 31 December 2019. Interbus also does not cover cabotage services (the operation of domestic journeys in one contracting party by an operator based in another), but the EU agreement will allow UK operators limited cabotage operations in the border regions of Ireland until 30 September 2019. DfI explains that, with regard to more permanent arrangements, the scope of Interbus is in the process of being extended to cover “regular” and “special regular” services. If this extension is not agreed, DfI will “look to negotiate an extension with the EU or seek to put in place bilateral arrangements with specific countries to secure the access needed to keep UK passenger transport operators moving” and that, with regard to cabotage, it “will continue to work ... with the European Commission and the Republic of Ireland to ensure that any future UK-EU transport arrangements take into account the unique transport demands on the island of Ireland”.

### **National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) (Amendment) Regulations 2019 (SI 2019/789)**

2. This instrument increases the rates that the NHS pays to care homes to cover the costs of services that must be carried out by a registered nurse (“the FNC rate”). Accommodation and social care costs are the responsibility of either the local authority and/or the individual (subject to the outcome of a

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1 Secondary Legislation Scrutiny Committee (Sub-Committee B), [22nd Report](#), Session 2017-19 (HL Paper 327).

2 Interbus is a multilateral treaty between the EU, Albania, Bosnia and Herzegovina, North Macedonia, Montenegro, Republic of Moldova, Turkey and Ukraine that allows for “occasional” international coach travel, such as coach holidays and tours, between the contracting parties.

needs assessment and financial assessment). The 4.7% increase this year is influenced by the outcome of a Supreme Court case on the Welsh FNC rate and by a subsequent review by LaingBuisson (further information on these are included in Appendix 1 of this Report). We note that the rate set includes a 3.1% “efficiency expectation” of nursing home providers and, given recent reports in the press about financial instability in the care home sector, we wonder how realistic that assumption is. Because these changes will take effect on 26 April 2019, rather than 1 April as is usual, the Department for Health and Social Care published a statement on 5 April which said:

“The findings of the study were delayed, following requests to improve the robustness of the data collected and an increase to the sample size of surveyed nursing homes. With an overall budget of approximately £675m for NHS-funded Nursing Care in 2018-19, any changes to the NHS-funded Nursing Care rates have significant financial consequences for both the NHS and nursing home providers.”

## **INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE**

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### **Draft instruments subject to affirmative approval**

International Road Passenger Transport (Amendment)  
(Northern Ireland) (EU Exit) Regulations 2019

### **Instruments subject to annulment**

- SI 2019/789 National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) (Amendment) Regulations 2019
- SI 2019/790 North Devon District Council Harbour Authority (Removal of Pilotage Functions) Order 2019
- SI 2019/798 Ilfracombe Harbour Revision Order 2019
- SI 2019/815 Ilfracombe Harbour Revision (No. 2) Order 2019
- SI 2019/849 Regulated Products (Amendment) (Northern Ireland) (EU Exit) Regulations 2019
- SI 2019/853 Air Navigation (Overseas Territories) (Amendment) Order 2019
- SI 2019/867 Child Benefit and Child Tax Credit (Amendment) (EU Exit) Regulations 2019
- SI 2019/879 Equality Act (Age Exceptions for Pension Schemes) (Amendment) Order 2019

## APPENDIX 1: NATIONAL HEALTH SERVICE COMMISSIONING BOARD AND CLINICAL COMMISSIONING GROUPS (RESPONSIBILITIES AND STANDING RULES) (AMENDMENT) REGULATIONS 2019

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### Additional information from the Department for Health and Social Care (DHSC)

*Q1: Please summarise the Supreme Court's verdict on the Welsh FNC rate*

A1: In August 2017, the Supreme Court ruled against the Welsh Local Health Boards on how they had set the FNC rate in Wales.<sup>3</sup> The administration and operation of the Welsh FNC rate is separate from the FNC rate in England, however, as the basis for FNC in legislation is very similar in Wales and England, the judgment of the Supreme Court also impacts on how the Secretary of State for Health must set the FNC rate in England.

The Supreme Court judgment set out an expanded definition of what constitutes 'nursing care by a registered nurse' and that the FNC rate should pay for the costs of everything within that definition:

- (a) direct and indirect time on nursing care, i.e. care which can only be provided by a registered nurse
- (b) paid breaks
- (c) time receiving supervision
- (d) stand-by time
- (e) time spent on providing, planning, supervising or delegating the provision of other types of care which in all the circumstances ought to be provided by a registered nurse because they are ancillary to or closely connected with or part and parcel of the nursing care which she has to provide.

*Q2: How robust are the assumptions mentioned at paragraph 7.4 of the Explanatory Memorandum? In particular the 3.1% efficiency expectation?*

A2: The efficiency expectation is in line with the published NHS national tariff, which sets out the prices paid to NHS providers for commissioned services. Within this each year there is an overall uplift to account for increasing costs, as well as an efficiency factor to account for providers being able to deliver services more efficiently.

This is being applied to the FNC rate in the context of the LaingBuisson study which has shown that FNC costs have continued to increase at a sustained and above inflation rate since the last full study of FNC in 2016. Since 2016 we have also been using the pay component of the national tariff to apply inflationary uplifts to the FNC rate, so we believe it is appropriate to now accompany this with the efficiency factor. Whilst we appreciate that these efficiency asks will be challenging for nursing home providers, we believe they are achievable within the overall increase to the FNC rate of 4.7%, which remains a substantial increase.

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<sup>3</sup> See: The Supreme Court, *R (on the application of Forge Care Homes Ltd and others) (Appellants) v Cardiff and Vale University Health Board and others (Respondents)*: <https://www.supremecourt.uk/cases/uksc-2016-0054.html> [accessed 8 May 2019].

*Q3: If these amounts were last upgraded in 2018 what is the justification for an above inflation increase of 4.7%?*

A3: Because the FNC rate is based upon the LaingBuisson study, which has shown a larger than inflation increase in costs. The FNC rate must be based upon the best available evidence to the Department of Health and Social Care, and the study is that evidence. Whilst in previous years only an inflationary uplift is applied, we have committed to undertaking a full cost study of the FNC rate at least every 5 years in order for it to remain accurate and in line with changes in the nursing home market. This year the study was also undertaken due to the Supreme Court judgment in Wales, and any potential impact this might have on the FNC rate in England.

**1 May 2019**

## **APPENDIX 2: INTERESTS AND ATTENDANCE**

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Committee Members' registered interests may be examined in the online Register of Lords' Interests at <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 7 May 2019, Members declared no interests.

### **Attendance:**

The meeting was attended by Lord Chartres, Lord Cunningham of Felling, Lord Faulkner of Worcester, Baroness Finn, Lord Goddard of Stockport, Lord Janvrin, Lord Kirkwood of Kirkhope, Lord Sherbourne of Didsbury and Lord Trefgarne.