



HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

33rd Report of Session 2022–23

Drawn to the special attention of the House:

Health and Social Care Act 2008 (Regulated Care Functions) Regulations 2023

**Correspondence on the Building Safety
(Leaseholder Protections) (England)
(Amendment) Regulations 2023**

Includes information paragraphs on:

One instrument related to COVID-19:

Valuation for Rating (Coronavirus)
(England) Regulations 2023

Draft Merchant Shipping (Fire Protection)
Regulations 2023

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Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as agreed on 12 May 2022, are set out on the website but are, in summary:

To report on draft instruments published under paragraph 14 of Schedule 8 to the European Union (Withdrawal) Act 2018; to report on draft instruments and memoranda laid before Parliament under sections 8 and 23(1) of the European Union (Withdrawal) Act 2018 and section 31 of the European Union (Future Relationship) Act 2020.

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

Lord De Mauley

Baroness Harris of Richmond

Lord Hunt of Wirral (Chair)

Lord Hutton of Furness

Baroness Lea of Lymm

Lord Powell of Bayswater

Baroness Randerson

Baroness Ritchie of Downpatrick

Lord Rowlands

Lord Russell of Liverpool

Lord Thomas of Cwmgedd

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 <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/>

Committee Staff

The staff of the Committee are Christine Salmon Percival (Clerk), Philipp Mende (Adviser), Chris Smith (Adviser), Jane White (Adviser) and Glenn Chapman (Committee Operations Officer).

Further Information

Further information about the Committee is available at <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/>

The progress of statutory instruments can be followed at <https://statutoryinstruments.parliament.uk/>

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

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.

Thirty Third Report

INSTRUMENTS UNDER THE EUROPEAN UNION (WITHDRAWAL) ACT 2018

Consideration of published draft instruments under Schedule 8 to the European Union (Withdrawal) Act 2018

Published draft on which the Committee makes no recommendations

- Financial Services and Markets Act 2000 (Commodity Derivatives and Emission Allowances) Order 2023.

DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Health and Social Care Act 2008 (Regulated Care Functions) Regulations 2023 (SI 2023/238)

Date laid: 2 March 2023

Parliamentary procedure: negative

This instrument implements one of the measures from the Health and Care Act 2022 by setting out which adult social care functions the Care Quality Commission (CQC) will regulate in respect of local authorities. The policy objective is to gather data on the current position, so that reforms can be appropriately targeted, to assess the value for money of different solutions, and to highlight both good practice and where improvements need to be made. The change responds to the findings of several reviews which found a lack of oversight of local authority commissioning and spending inhibited both the response to the pandemic and forward planning.

*The Explanatory Memorandum (EM) provided was minimalist, not even indicating the topics that will be regulated by the CQC and explaining neither the context nor financial arrangements for this significant change in policy despite the fact that it is due to come into effect on 1 April. The EM gave the House no basis on which to evaluate how or whether the appropriate local authority functions have been chosen for monitoring. Substantial additional material is included in this Report **and we have once again asked the Department of Health and Social Care (DHSC) to replace the EM it originally provided. We have also written to the DHSC Minister responsible for the quality of EMs to ask him to address this recurring problem.***

These Regulations are drawn 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 their policy objective and intended implementation.

1. This instrument implements one of the measures from the Health and Care Act 2022 by setting out which adult social care functions the Care Quality Commission (CQC) will regulate in respect of local authorities. CQC already inspects individual social care providers.
2. The policy objective is to gather data on the current position, so that reforms can be appropriately targeted, to assess the value for money of different solutions, and to highlight both good practice and where improvements need to be made. The Explanatory Memorandum (EM) produced was one of the weakest that this Committee has seen and provides no basis for evaluating whether these Regulations will implement that objective. We have therefore sought extensive additional information from the Department of Health and Social Care (DHSC).

Content

3. The EM includes no plain English explanation of the types of functions that will come under CQC supervision, so the House can consider if they are the appropriate ones. (Instead, the reader has to look to regulation 2 and then cross-refer to the Care Act 2014.) In additional information DHSC informed us that:

“CQC will review most Part 1 functions, which include all the general responsibilities of local authorities (for example, promoting individual wellbeing and providing information and advice) and key functions such as assessment of needs for care and support (for adults) or support (for carers), making charges for meeting needs for care and support, or support, and making assessments of financial resources for charging purposes.

A small number of Part 1 functions have been excluded from the Regulations to ensure that CQC’s remit is manageable. Excluded functions include, for example, functions related to deferred payment agreements (sections 34 and 35 of the Care Act 2014) and establishing a person’s ordinary residence (sections 39 and 40 of the Care Act 2014).

Part 1 functions that have not yet been commenced are also excluded from the Regulations, for example the cap on care costs (under section 15).”

Context

4. No reason is given why this change is necessary and the connection with the Health and Care Act 2022 is not mentioned until the section on impact assessment. Nor does DHSC explain what harms this new oversight provision is intended to cure, for example whether it is to address poor care or poor value for money, or both. In supplementary information DHSC explained that the policy was the result of a number of critical reports:

“The Covid-19 pandemic highlighted that the devolved structure of adult social care, in which it is the responsibility of individual local authorities to commission adult social care and oversee their local market, poses challenges for the management of national crises.

The March 2021 National Audit Office report entitled ‘*The adult social care market in England*’¹ highlighted a lack of oversight of local authorities’ delivery of their adult social care duties. In particular, the report highlights a lack of visibility of the effectiveness of local authority commissioning and states that the Department is unable to evaluate spending, or the extent of additional funding needed.

Similarly, the independent review by Baroness Cavendish published in 2022 entitled ‘*Social care: Independent report by Baroness Cavendish*’² highlights a gap in accountability for adult social care compared to regulation of schools and children’s services and recommends a new CQC inspection framework for adult social care.

As outlined in the December 2021 White Paper ‘*People at the Heart of Care: Adult Social Care Reform*’,³ assessment of local authorities’

1 National Audit Office, *The adult social care market in England* (March 2021): <https://www.nao.org.uk/wp-content/uploads/2021/03/The-adult-social-care-market-in-England.pdf> [accessed 14 March 2022].

2 Department of Health and Social Care, *Social care: Independent report by Baroness Cavendish* (February 2022): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1059888/social-care-reform-Baroness-Cavendish-report.pdf [accessed 14 March 2022].

3 Department of Health and Social Care, *People at the Heart of Care – Adult Social Care Reform White Paper* (December 2021): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1061870/people-at-the-heart-of-care-asc-reform-accessible-with-correction-slip.pdf [accessed 14 March 2023].

delivery of their functions under the Care Act 2014 is integral to the government's ambition for social care reform. The Department's aim is for CQC assessments to contribute to improved outcomes for people who draw on care and support. The new assessment regime will help to achieve this by providing a greater understanding of practice and provision at a local level. It will highlight where improvements need to be made and make good practice easier to spot and share nationally. This new duty will therefore make the quality of adult social care more transparent for the public, those working in the sector and for the government."

Impact

5. The EM simply cross-refers to the Impact Assessment prepared for the Health and Care Act 2022 without narrowing down where the relevant information may be found. Also, when considering imposing new duties on local authorities, the Government are expected to conduct a "New Burdens" assessment and compensate local authorities appropriately. Similarly, we would have expected to be told whether the CQC has sufficient resources to take on this additional duty. DHSC replied:

"The Department's intention has always been to ensure that regulation of local authorities is fair, proportionate and least burdensome. This has informed the approach to assessment, which will see LAs assessed on the existing duties set out in the Care Act 2014 rather than CQC assessing local authorities on new adult social care responsibilities. The Department published a full Impact Assessment to accompany section 163 of the Health and Care Act 2022, which amends the Health and Social Care Act 2008 by inserting a new section 46A to require CQC to assess local authorities.

However, now that CQC has further developed and tested their approach to regulation, including through piloting, we are undertaking a further cost- benefit analysis exercise to update the estimates contained in the original Impact Assessment. We are also undertaking a New Burdens assessment to ensure that all impacts and burdens have been thoroughly considered.

The Department is directly funding the CQC's development and operation of the local authority assessment framework through Grant In Aid (GIA) funding, as agreed through recent Spending Reviews. The CQC has indicated that these GIA funds, which currently run until 2024/25, cover the costs of establishing and running the assessment framework. Discussions on framework funding beyond 2024/25 are due to commence shortly, though similar consideration will be given to CQC's resource to deliver its assessment function.

Consultation

6. We are always disappointed when departments simply say that there is no statutory requirement to do a thing, since it usually implies that that thing has not been done. However, in this case DHSC does itself an injustice, in supplementary information it described extensive activity:

"Co-production has been a key principle underpinning development of the CQC assessment framework. We have met with working

level and senior representatives from CQC, the Local Government Association (LGA) and the Association of Directors of Adult Social Services (ADASS) for over two years, holding regular official level meetings. These meetings have been integral to the development of the framework, and key elements, such as the scope of assessments, have been extensively tested more widely with the sector. In addition, CQC has extensively engaged with the sector through a variety of forums, including its External Advisory Group, which includes representatives from local government, health and social care providers and people with lived experience.

In general, stakeholders, including from providers and local government, have been broadly accepting of the benefits of regulation, though local government stakeholders in particular have had concerns about the proposed implementation timetable and potential use of overall performance ratings. These concerns have been shared with Ministers and influenced our plans for rolling out the framework. We plan to publish further details on the framework and plans for roll out once we have concluded discussions with key stakeholders, including the Department for Levelling Up, Housing and Communities. “

Outputs

7. The EM says that these changes “will highlight where improvements need to be made and make good practice easier to spot and share nationally”. So we asked how this would be done, and DHSC replied:

“Section 46A of the Health and Social Care Act 2008, as inserted by section 163 of the Health and Care Act 2022, requires the CQC to publish a report of its assessment of local authorities’ performance of their Part 1 LA functions. Such assessment reports will provide enhanced transparency of local authority performance, allowing the Department and the sector to identify and share best practice in addition to performance issues and concerns.

We also expect CQC to publish findings summarising emerging trends and best practice regarding LA performance more generally in keynote publications such as their annual State of Care publication. Such publications would draw upon the findings of CQC assessment of local authorities.

As set out in the White Paper mentioned above the CQC’s assessment framework for local authorities is not being introduced in isolation. It is our intention for the introduction of the framework to be accompanied by an improved offer of support for the sector, funded by the Department. Local authorities will not be left on their own to improve performance but will be supported through this enhanced offer, and CQC assessments will allow us to target this support more effectively.”

8. The EM also states: “The new assessment regime will therefore make the quality of adult social care more transparent for people in their communities, those working in the sector and for the government.” Again, we asked through what mechanism. DHSC replied:

“CQC will draw upon a broad range of evidence to assess local authorities and summarise their findings for reports, which we expect to include a narrative section and a headline rating.

Assessment reports will provide enhanced transparency of local authority performance, allowing the Department and the sector to identify and share best practice in addition to performance issues and concerns. We also expect CQC to publish findings summarising emerging trends and best practice regarding LA performance more generally in keynote publications such as their annual State of Care publication. Such publications would draw upon the findings of CQC assessment of local authorities.”

9. This did not seem to meet our interpretation of “transparency for the community”, and so we asked how people living in a local authority area would be able to find out about the rating of either their local authority’s performance or that of an individual institution. DHSC replied:

“The legislation does not specify how assessment reports should be published, and we are still working through operational matters such as this with CQC and the sector. However, our expectation is that reports will be published on the CQC’s website, and therefore be accessible to communities in the same way that CQC reports of health and social care providers are. It is ours and CQC’s priority that assessment reports are easily accessible to the public.”

Conclusion

10. The EM provided was minimalist, not even indicating which functions will be regulated by the CQC and explaining neither the context nor financial arrangements for this significant change in policy. The additional information provided describes several of the key tasks required to implement this transition as “work in progress”, yet we note these Regulations take effect very soon, from 1 April 2023. **The House may wish to enquire further into the DHSC’s project plan for setting up this new regulatory system.**
11. The EM provided gave the House no basis on which to evaluate whether the local authority functions chosen for CQC oversight are the right ones. or whether this approach will deliver the policy intention as described. **We have once again asked DHSC to revise the EM it originally provided. We have also written to the DHSC Minister responsible for the quality of EMs to ask him to address this recurring problem.**

CORRESPONDENCE ON THE BUILDING SAFETY (LEASEHOLDER PROTECTIONS) (ENGLAND) (AMENDMENT) REGULATIONS 2023

12. These Regulations correct an error in a previous instrument to ensure that, when liability for the costs of remedying historical defects of a building is assessed, the consideration of the net worth of a landlord group under the Buildings Safety Act 2022 includes the value of any parent and sister companies, as originally intended. The previous instrument unintentionally excluded parent and sister companies from being considered as associated with the landlord. At least one parent company was able to avoid liability and was able to pass on liability to leaseholders as a result of this error.
13. We drew the Regulation to the special attention of the House in our 31st Report.⁴ While welcoming the correction, we expressed concerns about a lack of data on the number of landlords who may have benefited from the mistake and passed on costs to leaseholders, and about the Department for Levelling Up, Housing and Communities (DLUHC) not planning to identify and alert affected leaseholders to the possibility of appealing to the First-tier Tribunal to recover costs.
14. We also wrote to Lee Rowley MP, Parliamentary Under-Secretary of State for Local Government and Building Safety, to ask how the Department would ensure that such an error is avoided in future, whether it would be possible to rectify the error retrospectively through primary legislation to protect leaseholders from any liabilities, and whether this had been considered. The full correspondence is enclosed at Appendix 1.
15. While the Minister states in his response that the Department will “continue to work to ensure that our existing processes, that have long been in place, continue to provide high quality, correct legislation in the future” and refers to “discussions within the Department regarding the collective desire to minimise the risk of this happening in the future”, **we are disappointed that there is no commitment to any practical steps that the Department could take to improve quality assurance and avoid similar errors in future.**
16. The Minister’s response confirms that the Department considered the use of primary legislation but concludes that secondary legislation was “the fastest and most efficient way to correct the error”, and that in “the time necessary to pass primary legislation, we thought it likely that any affected leaseholders would have been able to recover their additional costs through the Tribunal before an Act was passed”. **We are disappointed, however, that the Minister did not address the concern raised in our report that affected leaseholders may not be aware of the appeal route. The House may wish to press the Minister further on these issues.**

4 [*31st Report*](#) (Session 2022–23, HL Paper 155).

INSTRUMENTS RELATED TO COVID-19

Valuation for Rating (Coronavirus) (England) Regulations 2023 (SI 2023/240)

17. This instrument ensures that the rateable values of non-domestic property on the new 2023 rating list cannot be challenged or changed on the ground that measures introduced to deal with the coronavirus pandemic, such as government guidance on business closures, constituted a ‘material change of circumstances’. Rateable values, in essence the annual rental value of a property, determine the business rates that ratepayers pay. They are updated through revaluations to ensure changes in the rental market are fairly reflected in the tax base. Revaluations currently take place every five years.⁵ In between revaluations, rateable values can only be changed to reflect ‘material changes of circumstances’, such as physical changes to a property or its use.
18. The Department for Levelling Up, Housing and Communities (DLUHC) explains that the pandemic led to many ratepayers attempting to challenge their valuations by arguing that the Government’s interventions concerning the use of property, such as businesses having to close or maintain social distancing, were material changes of circumstances. DLUHC says that if successful, the valuations of properties would have been impacted across a wide range of properties and sectors, leading to piecemeal valuations, unfair distribution of the tax burden and constant reassessment of relevant properties. The changes made by this instrument will therefore ensure that the Government’s policy on coronavirus will not lead to changes in rateable values between revaluations. According to DLUHC, this mirrors the policy in the Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act 2021, which made provision for dealing with coronavirus in relation to the 2017 rating list.

⁵ The Government intend to reduce the time between revaluations to three years, see the Rating Lists (Valuation Date) (England) Order 2023 ([SI 2023/231](#)).

INSTRUMENTS OF INTEREST

Draft Merchant Shipping (Fire Protection) Regulations 2023

19. Fire is regarded as one of the greatest risks to seafarers and passengers on ships. The International Maritime Organisation's (IMO) requirements on firefighting and fire protection matters were last implemented into UK law in 2003. Since when 20 further IMO resolutions have been agreed that apply to ships of more than 500 gross tons whether carrying cargo or passengers.⁶ (Provision for smaller ships is set out in the Merchant Shipping (Fire Protection: Small Ships) Regulations 1998.⁷)
20. The Department for Transport (DfT) states that there are 440 ships on the UK flag that are subject to the IMO requirements implemented by this instrument, of which 324 are wholly or partially UK owned. DfT adds that the routine surveys of these ships carried out by the Marine and Coastguard Agency have established that these ships are already "mostly in compliance" with the updated requirements, otherwise they could not trade internationally as they would risk detention in overseas ports. Only when these Regulations come into effect will the UK be able to enforce those same requirements on foreign-flagged ships in UK waters. **We note that DfT is gradually addressing its backlog of implementing international maritime legislation but these Regulations illustrate why we were so concerned that it was allowed to accumulate in the first place.**

⁶ The 20 resolutions are listed in the EM, the first dates back to June 2004 and relates to the stowage of dangerous goods below deck, others specify fire fighting equipment and passenger evacuation requirements.

⁷ Merchant Shipping (Fire Protection: Small Ships) Regulations 1998 ([SI 1998/1011](#)).

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Building (Public Bodies and Higher-Risk Building Work) (England) Regulations 2023

Merchant Shipping (Fire Protection) Regulations 2023

Instruments subject to annulment

SI 2023/209	Armed Forces (Driving Disqualification Orders) Regulations 2023
SI 2023/213	Police Pensions (Contributions and Pensionable Earnings) (Amendment) (England and Wales) Regulations 2023
SI 2023/217	Approved Country Lists (Animals and Animal Products) (Amendment) Regulations 2023
SI 2023/220	Personal Injuries (NHS Charges) (Amounts) (Amendment) Regulations 2023
SI 2023/223	National Health Service (Joint Working and Delegation Arrangements) (England) (Amendment) Regulations 2023
SI 2023/226	Loans For Mortgage Interest (Amendment) Regulations 2023
SI 2023/228	Oil and Gas Authority (Levy and Fees) Regulations 2023
SI 2023/229	Building Safety Act 2022 (Consequential Amendments and Prescribed Functions) and Architects Act 1997 (Amendment) Regulations 2023
SI 2023/230	Exotic Equine Disease (Compensation) (England) Order 2023
SI 2023/231	Rating Lists (Valuation Date) (England) Order 2023
SI 2023/232	Social Security Benefits (Claims and Payments) (Amendment) Regulations 2023
SI 2023/235	Genetically Modified Food and Feed (Authorisations and Modifications of Authorisations) (England) Regulations 2023
SI 2023/240	Valuation for Rating (Coronavirus) (England) Regulations 2023
SI 2023/244	National Health Service (Optical Charges and Payments) (Amendment) Regulations 2023

APPENDIX 1: CORRESPONDENCE ON THE BUILDING SAFETY (LEASEHOLDER PROTECTIONS) (ENGLAND) (AMENDMENT) REGULATIONS 2023

Letter from The Rt Hon. the Lord Hunt of Wirral MBE, Chair of the Secondary Legislation Scrutiny Committee, to Lee Rowley MP, Parliamentary Under Secretary of State, Department for Levelling Up, Housing and Communities

I am writing to you on the above instrument as Chair of the Secondary Legislation Scrutiny Committee. The Committee considered the Regulations at its meeting yesterday and will be drawing them to the special attention of the House in its next report which will be published on 2 March. When discussing the instrument, the Committee identified two particular concerns which I would like to raise with you.

First, the Committee is concerned that, as the error occurred when officials were drafting the clauses to the Building Safety Bill alongside the Building Safety (Leaseholder Protections) (England) Regulations 2022, this complex approach to legislation and a lack of resources may have contributed to the error that this instrument rectifies. How will the Department ensure that an error with such serious consequences is avoided in future?

Second, the Department states in the Explanatory Memorandum, which has been provided alongside the Regulations, that “we are unable to make retrospective provision through secondary legislation”. We understand that at least one landlord was able to avoid liability for historical building defects as a result of the Department’s error, and that remediation costs may therefore have been passed on to leaseholders. Would it be possible to rectify the error retrospectively through primary legislation to protect leaseholders from any liabilities? If so, has this been considered?

1 March 2023

Letter from Lee Rowley to Lord Hunt of Wirral

I am grateful for you getting in touch on behalf of the Committee; thank you for your helpful comments and highlighting your concerns. Regarding your first point on the error, this is, of course, something that we would prefer not to happen, and you are absolutely right to ask the question that you do. As I know the Committee will appreciate, the Government was keen to bring the leaseholder protections into full force as soon as possible last summer, so that leaseholders were afforded the financial protections under the Building Safety Act 2022 without delay, and so that essential work to remediate historical safety defects could start. The circumstances surrounding this legislation – particularly the speed of its preparation – were highly unusual and, despite strenuous attempts at the time to ensure the quality of the legislation, this may have been the reason for this error. Prior to your letter, there have been discussions within the Department regarding the collective desire to minimise the risk of this happening in the future and your letter is a timely one to reiterate that to us. We will continue to work to ensure that our existing processes, that have long been in place, continue to provide high quality, correct legislation in the future.

Regarding your question on the explanatory memorandum, we did consider whether to make this change in primary legislation but concluded that secondary legislation would be the fastest and most efficient way to correct the error, ensuring that qualifying leaseholders are fully protected where their landlord group, including parent and sister companies, meets the contribution condition. I also wanted to make sure you were aware that the Act enables leaseholders to apply to the First-tier Tribunal to recover costs, incurred or to be incurred in relation to the remediation of historical safety defects, including where they paid as a result of this error. Given the time necessary to pass primary legislation, we thought it likely that any affected leaseholders would have been able to recover their additional costs through the Tribunal before an Act was passed

9 March 2023

APPENDIX 2: INTERESTS AND ATTENDANCE

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 14 March 2023 and included in this report, Members declared no interests.

Attendance:

The meeting was attended by Lord Hunt of Wirral, Baroness Harris of Richmond, Lord Hutton of Furness, Baroness Lea of Lymm, Baroness Randerson, Baroness Ritchie of Downpatrick, Lord Rowlands and Lord Russell of Liverpool.