

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

47th Report of Session 2019–21

Drawn to the special attention of the House:

Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021

Includes information paragraphs on:

4 instruments relating to COVID-19

Fowey Harbour Revision Order 2021

Newport (Isle of Wight) Harbour Revision
Order 2021

Ordered to be printed 2 March 2021 and published 4 March 2021

Published by the Authority of the House of Lords

HL Paper 234

Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as amended on 22 February 2021, are set out on the website but are, broadly:

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

<u>Baroness Bakewell of Hardington Mandeville</u>	<u>Viscount Hanworth</u>	<u>The Earl of Lindsay</u>
<u>Rt Hon. Lord Chartres</u>	<u>Lord Hodgson of Astley Abbotts</u>	<u>Lord Lisvane</u>
<u>Rt Hon. Lord Cunningham of Felling</u>	(Chair)	<u>Lord Sherbourne of Didsbury</u>
<u>Lord German</u>	<u>Lord Liddle</u>	<u>Baroness Watkins of Tavistock</u>

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), Jane White (Adviser) and Ben Dunleavy (Committee Assistant).

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.

Forty Seventh Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 (SI 2021/161)

Date laid: 19 February 2021

Parliamentary procedure: negative

*This instrument prohibits the placement of looked after children under the age of 16 in independent and semi-independent settings which are not required to register with Ofsted, to ensure that they are instead placed in Ofsted-regulated children’s homes or foster care. Local authorities will have six months to find suitable placements for around 100 under 16-year-olds who are currently in unregulated settings. While the Children’s Commissioner for England and others have called for an outright ban on unregulated provision for all looked after children, the Department for Education maintains that there is a place for independent and semi-independent provision for older children. The Department has committed, however, to introduce national standards for such providers which are to be overseen by an Ofsted-led registration and inspection regime. **Given the serious concerns raised by the Children’s Commissioner about unregulated settings, the vulnerability of looked after children at the age of 16 to 17 and the risk of low-quality provision as a consequence of the significant financial pressures on many local authorities, we urge the House to seek assurance from the Minister that any legislation needed to introduce the additional protections for older children to which the Government have committed is introduced at the earliest opportunity.***

The instrument is drawn to the special attention of the House on the ground that it is politically or legally important and gives rise to issues of public policy likely to be of interest to the House.

1. This instrument has been laid by the Department for Education (DfE) with an Explanatory Memorandum (EM). The instrument prohibits the placement of looked after children under the age of 16 in independent and semi-independent settings¹ which are not required to register with Ofsted.

Background

2. According to DfE, there were 80,080 looked after children as of 31 March 2020, of whom 80% lived in settings regulated by Ofsted, such as foster care and children’s homes. Over the last few years, a growing number of children have been placed in so-called ‘other arrangements’ under section 22C(6) (d) of the Children Act 1989 (“the Act”): as of 31 March 2020, 6,490 (8%) children were placed in ‘other arrangements’, up from 5% as of 31 March 2015. The remaining 12% were placed for adoption, with parents and other

¹ Semi-independent settings include for example, hostels, lodgings, flats and bedsits where supervisory staff or advice workers are specifically employed and available to provide advice and support to the residents but do not have to live on the premises. Independent settings may be flats, lodgings, bedsits, B&Bs or with friends where a young person is living independently. Visiting support may be included as part of the package but no formal support structure is provided as part of the accommodation.

residential settings including NHS settings, which are regulated by the Care Quality Commission (CQC), and youth custody.

3. DfE says that ‘other arrangements’ typically involve placements in independent and semi-independent settings that are not required to register with Ofsted. While these settings are sometimes referred to as ‘unregulated provision’ they may also include placements in alternative regulated settings such as residential schools or hospitals some of which may be regulated by the CQC rather than Ofsted. According to DfE, the vast majority of children placed in independent and semi-independent settings are aged 16 and 17 but there were around 100 children aged under 16 placed in such unregulated settings as of 31 March 2019. According to the Children’s Commissioner, 651 children in an unregulated placement during 2018/19 began their placement while under 16.² There is a mix of voluntary and private providers of these unregulated settings, with the majority (73%) being privately run.³

Changes made by this instrument

4. DfE explains that placements in independent and semi-independent settings are intended to prepare young people to transition to adulthood ahead of leaving the care system only when they are ready to live with the level of independence that these settings afford. The Department says that such placements are not considered appropriate for children under 16. This instrument therefore prohibits the placement of looked after children under the age of 16 in these unregulated settings to ensure that they are placed in Ofsted-regulated children’s homes or foster care instead. DfE says that while this aims to deal with the growing number of under 16-year-olds in unregulated settings before this becomes a large-scale concern, it is not intended to create “an arbitrary point at which children and young people move into semi-independent or independent provision once they reach 16 years of age”. DfE emphasises that local authorities “must continue to make placement decisions based on meeting the individual needs of the child in line with their existing statutory duties”.
5. The instrument continues to allow placements in certain alternative regulated settings which qualify as ‘other arrangements’ by exemption. The exemption covers, for example, “residential establishments” which are the equivalent of children’s homes and foster placements provided by the Scottish Public Fostering Service. This is to ensure that cross-border placements can continue to happen where this is appropriate for the child. Fostering and children’s homes placements in Scotland are currently classified as ‘other arrangements’ and would be banned by this instrument without an exemption. The instrument also includes specific exemptions for other regulated settings, such as care homes, hospitals, residential family centres, residential schools (which are not registered as children’s homes) and residential holiday schemes for disabled children which are all currently classified as ‘other arrangements’.
6. In addition to these settings, the instrument provides a time limited exemption where an unaccompanied asylum-seeking child (UASC), whose age is not

2 Children’s Commissioner for England, *Unregulated — Children in care living in semi-independent accommodation*, Children’s Commissioner for England (September 2020): <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/09/cco-unregulated-children-in-care-living-in-semi-independent-accommodation.pdf> [accessed 25 February 2021].

3 *Ibid.*

certain or documented, is claiming to be aged 16 or above at the time of placement. This is to allow local authorities to have the same placement options for an UASC who has a claimed age of 16 or 17 as for other looked after children who are 16 or 17. If the child is subsequently found to be under 16 following an age assessment, the instrument provides that local authorities have 10 working days to find a suitable alternative placement for the child following the completion of the age assessment.

7. The instrument will come into force on 9 September 2021, giving local authorities six months to find suitable alternative placements for those under 16-year olds who are currently in independent and semi-independent settings.

Concerns

8. DfE says that while more than 80% of respondents, including local authorities, supported the ban on placing looked after children under 16 in unregulated settings during consultation,⁴ some stakeholders called for the ban to be extended to all looked after children. The Department maintains that while placements in independent and semi-independent settings are:

“not suitable for children under the age of 16 and for many older children who may have more complex needs that would be better met in a children’s home or foster care placement, there is a place for independent and semi-independent provision where it is of high quality and such a placement is desired by the older child and would be consistent with their welfare”.

9. The Children’s Commissioner for England has called for a ban on unregulated provision for all looked after children,⁵ highlighting serious concerns, including about “the experiences of children in unregulated provision, with high proportions placed out of area, experiencing repeated placement moves and recorded as going missing” and a highly variable quality of accommodation. She concludes that: “No child under the age of 18 should be placed in an unregulated setting. All children aged under 18 should receive care, rather than support. As such, there should be a requirement that any setting they are placed in is regulated as a children’s home.”⁶
10. While the Department acknowledges these concerns, the EM refers at paragraph 7.11 to the Government’s commitment to introduce “national standards for unregulated settings that will ensure older children who are ready to live with the level of independence that these settings are able to afford, have access to safe and secure provision that meets their needs”. These standards are to be overseen by an Ofsted-led registration and inspection

4 DfE, *Reforms to unregulated provision for children in care and care leavers*, Government consultation response (February 2021): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962686/Unregulated_government_response_Final.pdf [accessed 25 February 2021].

5 *Unregulated — Children in care living in semi-independent accommodation*, Children’s Commissioner for England: <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2020/09/cco-unregulated-children-in-care-living-in-semi-independent-accommodation.pdf>

6 *Ibid.*

regime. DfE says that the national standards and Ofsted-led regime will be consulted on this year.⁷

11. The Government have also committed to give Ofsted powers to issue enforcement notices to settings which deliver care wholly or mainly for children but have not registered as children's homes and are therefore operating illegally. While Ofsted will retain its powers to prosecute such settings, the intention is for the new enforcement powers to enable Ofsted to take much quicker action against illegal providers, as prosecution can take a long time, forcing them to close, register their service if appropriate, or face some form of penalty.
12. **We welcome the Department's commitment to introducing national standards for unregulated settings to be overseen by an Ofsted-led registration and inspection regime. This is particularly important as there is a risk of low-quality provision given the significant financial pressures on many local authorities and the considerable costs of high-quality support for children.**

Conclusion

13. **The Children's Commissioner has raised serious concerns about unregulated settings. This instrument bans such settings for children under the age of 16, but not for 16 to 17-year-olds, who, despite being older, remain highly vulnerable. We are particularly concerned about the risk of low-quality provision as a result of the significant financial pressures on many local authorities. We therefore urge the House to seek assurance from the Minister that any legislation needed to introduce the additional protections for older children to which the Government have committed, is introduced at the earliest opportunity. The instrument is drawn to the special attention of the House on the ground that it is politically or legally important and gives rise to issues of public policy likely to be of interest to the House.**

⁷ DfE, *Reforms to unregulated provision for children in care and care leavers, Government consultation response* (February 2021): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/962686/Unregulated_government_response_Final.pdf [accessed 25 February 2021].

INSTRUMENTS RELATING TO COVID-19

Travel

Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 8) Regulations 2021 (SI 2021/166)

14. These Regulations amend the International Travel Regulations⁸ to redistribute into three categories the vocational exemptions from the self-isolation requirement for arrivals who have not been in a high-risk country in the previous 10 days. Those in Categories A and B (broadly for energy, infrastructure, medicines and sports roles, and non-UK residents employed in the transport sector) will now be required to self-isolate when not carrying out the relevant work activity. Those in Category C (mainly diplomats and security staff) remain exempt from the self-isolation requirement.
15. The Regulations also simplify the notification requirement for the negative test taken shortly before arriving in England. Feedback from stakeholders indicated that the majority of test certificates being presented did not give details of the type of the test device used. The change now only requires that the test used is a polymerase chain reaction test (which uses a nose or throat swab, or saliva alone and meets a very high standard.)
16. **The Explanatory Memorandum (EM) provided with this instrument was particularly poor; we asked the Department for Transport to replace it immediately, and the Department has done so.** We reiterate the point made in our Interim Report⁹ that when instruments are brought into effect immediately, it is even more important that their intention and effect are made clear to both Parliament and the public. **The replacement EM makes it much clearer which vocational roles are exempt from the need to self-isolate and the House may wish to ask the rationale for the inclusion of certain groups.**

Public services

National Health Service (Charges and Pharmaceutical and Local Pharmaceutical Services) (Coronavirus) (Amendment) Regulations 2021 (SI 2021/169)

17. This instrument makes a **permanent change** to broaden the existing arrangements for the supply of prescription items for pandemic disease or in other serious emergencies. It allows specified medicines to be issued free of charge either on prescription or in response to a patient group direction (PGD), a pandemic treatment protocol (PTP) or serious shortage protocol (SSP) authorised by the Department for Health and Social Care. This instrument also makes provision for pandemic supplies to be issued in response to a PGD where the pharmacy or dispensing doctor receives an approved electronic message, for example via a service linked to NHS 111.
18. These arrangements are intended to support maximum take-up of the treatment in question, make the distribution of the product easier, and limit the administrative burdens. The Regulations are being made now so that, if one of the current trials identifies a treatment for COVID-19 that is suitable for use outside hospitals, the medicine can be rapidly distributed.

⁸ Health Protection (Coronavirus, International Travel) (England) Regulations 2020 ([SI 2020/568](#)).

⁹ *Interim report on the Work of the Committee in Session 2019–21*, 39th Report, Session 2019–21 (HL Paper 200).

Law and Order

Family Procedure (Amendment) Rules 2021 (SI 2021/155)

19. These Rules insert a new rule 36.3 into the Family Procedure Rules 2010.¹⁰ This is a **permanent change** to enable procedure to be modified or disapplied by Practice Directions during a public emergency such as the coronavirus pandemic. (This mirrors a change already made by new rule 51.3 in the Civil Procedure Rules 1998.) The instrument also corrects an error in rule 6.43, which makes provision for cases where documents are to be served on a respondent outside of the UK.

Public Health (Coronavirus) (Protection from Eviction) (England) (No. 2) Regulations 2021 (SI 2021/164)

20. This instrument further extends, until the end of 31 March 2021, existing restrictions on the enforcement of evictions of residential tenants. The last iteration, the Public Health (Coronavirus) (Protection from Eviction) (England) Regulations 2021,¹¹ expired on 21 February 2021 and restricted evictions to unoccupied premises, trespassers, tenants with anti-social behaviour or rent arrears of at least six months. These restrictions have been extended incrementally during the pandemic to prevent evictions at a time of high infection and to avoid overburdening local authorities.

¹⁰ Family Procedure Rules 2010 ([SI 2010/2955](#)).

¹¹ Public Health (Coronavirus) (Protection from Eviction) (England) Regulations 2021 ([SI 2021/15](#)).

INSTRUMENTS OF INTEREST

Fowey Harbour Revision Order 2021 (SI 2021/130)

Newport (Isle of Wight) Harbour Revision Order 2021 (SI 2021/139)

21. These two instruments modernise and clarify the statutory powers for the harbour authority in each port. As part of this process they are required to provide an illustrative map of the harbour area on their respective websites within 30 days of the Order coming into force. We suggested to the Marine Management Organisation (MMO) that this reduces the transparency of the legislation as the maps would not necessarily be available during the scrutiny period for the statutory instrument. We welcome the MMO's response, it has asked each of the ports instead to place the map on their website on the day that their Order comes into effect. The MMO has also undertaken to ensure that these illustrative maps are provided at an earlier stage in future Harbour Revision Orders.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Made instruments subject to affirmative approval

SI 2021/164 Public Health (Coronavirus) (Protection from Eviction) (England) (No. 2) Regulations 2021

Instruments subject to annulment

SI 2021/129 Dart Harbour and Navigation Harbour Revision Order 2021

SI 2021/130 Fowey Harbour Revision Order 2021

SI 2021/139 Newport (Isle of Wight) Harbour Revision Order 2021

SI 2021/145 Conflict Minerals (Compliance) (Northern Ireland) (EU Exit) (Amendment) Regulations 2021

SI 2021/153 European Grouping of Territorial Cooperation and Limited Liability Partnerships etc. (Revocations and Amendments) (EU Exit) Regulations 2021

SI 2021/155 Family Procedure (Amendment) Rules 2021

SI 2021/166 Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 8) Regulations 2021

SI 2021/168 Nutrition (Amendment) and Food for Specific Groups (Food For Special Medical Purposes For Infants, Infant Formula and Follow-On Formula) (Information and Compositional Requirements) (Amendment) Regulations 2021

SI 2021/169 National Health Service (Charges and Pharmaceutical and Local Pharmaceutical Services) (Coronavirus) (Amendment) Regulations 2021

APPENDIX 1: 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 2 March 2021, Members declared the following interests:

Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 (SI 2021/161)

Lord Liddle

Councillor, Cumbria County Council

Baroness Watkins of Tavistock

Member, Quality Committee, Outcomes First Group (formerly National Fostering Agency)

Attendance:

The meeting was attended by Baroness Bakewell of Hardington Mandeville, Lord Chartres, Lord Cunningham of Felling, Lord German, Viscount Hanworth, Lord Liddle, the Earl of Lindsay, Lord Lisvane, Lord Sherbourne of Didsbury and Baroness Watkins of Tavistock.

