HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

33rd Report of Session 2012-13

National Health Service (Primary Dental Services) (Miscellaneous Amendments and Transitional Provisions) Regulations 2013

Social Security (Personal Independence Payment) (Amendment) Regulations 2013

National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013

Also includes 10 Information Paragraphs on 13 Instruments

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

The Committee has the following terms of reference:

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

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

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

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

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

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

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

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

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

(3) The exceptions are—

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

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

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

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

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

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Information about interests of Committee Members can be found in Appendix 6.

Publications

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

Information and Contacts

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

Statutory instruments

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

Thirty-Third Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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

A. National Health Service (Primary Dental Services) (Miscellaneous Amendments and Transitional Provisions) Regulations 2013 (SI 2013/364)

Date laid: 27 February
Parliamentary Procedure: negative

Summary: The Committee felt that there was insufficient information in the Explanatory Memorandum (EM) about the proposed extension of the pilot schemes on revised dental contracts. Standing instructions to Departments set out that where a review has taken place the EM should provide clear evidence to support the need for further legislation. The Department has acknowledged this deficiency and will be providing a revised EM to this instrument. The proposal that in the pilot areas a new Band 1A charge should be trialled also raised questions as the policy rationale was not explained and the provisions, as drafted, seemed open to exploitation. Departmental officials have now recognised that this legislation does not match their policy intention and we publish a letter from the Minister proposing to issue amending regulations to prevent advice alone, without "one of the more invasive treatments", being a chargeable treatment. We therefore draw this instrument to the special attention of the House on the ground that it may imperfectly achieve its policy objective but acknowledge the Department's intention to rectify the problems promptly.

These Regulations are drawn to the special attention of the House on the ground that they may imperfectly achieve their policy objective.

1. These Regulations have three main functions:

   - To make consequential amendments to the administration of general dental services contracts to reflect the abolition of Primary Care Trusts and the commencement of the NHS Commissioning Board from 1 April 2013;
   - To implement phase 2 of the Capitation and Quality Scheme which is being used to pilot new forms of contract and was a time-limited pilot that is now being extended to 31 March 2015; and
   - To introduce a new dental charge (the Band 1A charge) which will apply to persons receiving additional treatment from contractors participating in the Capitation and Quality Scheme 2.

2. The Committee felt that there was insufficient information in the Explanatory Memorandum about the latter two elements and requested additional material from the Department of Health. Standing instructions to Departments set out that where a review has taken place the EM should be able to provide clear evidence to support their conclusion that further

legislation is required. The Department has acknowledged this deficiency and will be providing a revised Explanatory Memorandum to this instrument.

3. The Committee also had a number of questions about the proposal that in the pilot areas a new Band 1A charge should be trialled. The policy justification for additional charging was not explained and the provisions, as drafted, seemed open to exploitation: under the list of activities in Schedule 3, a dentist could simply advise a patient not to drink fizzy drinks and floss regularly, and charge them £17.50. The Department replied that:

> "Band 1A courses of treatment may either be advice only as in the scenario given or include preventative care. Band A 1 courses of treatment that are advice only do not attract a patient charge (even if the patient is a charge payer). The scenario above is advice only so would be free to all patients"

4. That interpretation does not appear to correspond with the way the legislation is worded in pages 35-36 of the instrument which indicates that only d) mouthwash cannot be provided without another component on the list. The response also did not address the question of how exploitation of this new charge was to be prevented.

5. Departmental officials have now recognised that this legislation does not match their policy intention and the Minister wrote to the Committee on 18 March proposing to issue amending regulations to prevent advice alone, without "one of the more invasive treatments", being a chargeable treatment. That letter is published in Appendix 1.

6. We therefore draw the instrument to the special attention of the House on the ground that it may imperfectly achieve its policy objective but acknowledge the Department's intention to rectify the problems promptly.

B. Social Security (Personal Independence Payment) (Amendment) Regulations 2013 (SI 2013/455)

Date laid: 5 March
Parliamentary Procedure: negative

Summary: Our 23rd Report addressed a number of issues in relation to the main Regulations setting up Personal Independence Payments, including a specific concern, raised in evidence, about how claimants would be assessed, particularly in relation to the mobility test. In consultation, the words "safely, reliably, repeatedly and in a timely manner" were canvassed but did not appear in the final version. During the debate on 13 February 2013, the Minister promised that an amending regulation would be laid to make clear that consideration must be given to whether individuals can complete the assessment activities "safely, to an acceptable standard, repeatedly and in a reasonable time period". This instrument is intended to fulfil that undertaking. However, only three of the four terms are defined in the Regulations. Although the Department for Work and Pensions (DWP) has provided an explanation of why there is no definition of "to an acceptable standard", the Committee questions whether reliance on guidance to define this aspect of the Regulations is consistent with one of the objectives of this instrument, namely to allay concerns that terms with no legislative basis may be open to misinterpretation. The House will wish to consider the amending Regulations carefully, in particular whether DWP's approach to the

interpretation of the terms used is consistent and satisfies the stated need for legal clarity.

This instrument 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

7. These Regulations have been laid by the Department for Work and Pensions (DWP) accompanied by an Explanatory Memorandum (EM) to amend the main Social Security (Personal Independence Payment)(Amendment) Regulations 2013 (made as SI 2013/377). This Committee reported extensively on the issues of interest arising from those Regulations in its 23rd Report of the session.[1]

8. At the time that that Report was published, a specific concern was raised in the evidence that we received about how claimants would be assessed, particularly in relation to the mobility test. In consultation the words *"safely, reliably, repeatedly and in a timely manner"* were canvassed but did not appear in the final version. The Department explained in information published in paragraph 14 of our 23rd Report:

> "We needed to allow room within the assessment to be able to consider everyone as individuals, meaning that some flexibility around certain terms is necessary. For example, we consulted on whether we should include the terms *'safely, reliably, repeatedly and in a timely manner'* within the regulations or the guidance. Following feedback we concluded that including them in the regulations would be too prescriptive, so instead we have included the term *reliably* (which means safely, to a necessary and appropriate standard, repeatedly and in a timely manner) in the guidance, to ensure there is enough flexibility to achieve the policy intent."

9. However, a number of disability organisations expressed continuing concern and during the debate on the main Personal Independence Payment (PIP) Regulations on 13 February 2013 the Minister made an undertaking to the effect that "an amending regulation would be laid to make clear that consideration must be given to whether individuals can complete the assessment activities *"safely, to an acceptable standard, repeatedly and in a reasonable time period"*."[2] This instrument is intended to fulfil that undertaking.

10. Clarification of the meaning of "repeatedly" was requested in the debate and (at column 738) the Minister said: "currently it means as often as the activity being assessed is reasonably required to be completed, which makes the point that it will not be on a daily basis necessarily but will depend on the type of activity that we are talking about." This is reflected in the definitions set out in the instrument.

11. However, only three of the four terms are defined in the Regulations. We asked DWP to explain why no definition of "*to an acceptable standard*" was included, where the standard is set out and who is to be the judge of whether it is acceptable. DWP replied:

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[1] 23rd Report, session 2012-13 (HL Paper 101)

[2] HL Hansard, 13 February 2013, col 718

> "We have not included a definition of 'to an acceptable standard' in the Regulations. This term has proved very difficult to define in a way that applies to all of the twelve activities. As a result, we decided to leave 'acceptable standard' undefined in Regulations, which means it retains its normal meaning.
>
> However, we intend to produce detailed guidance, both for assessors and decision makers, to set out the Department's view of how this principle should apply. Both sets of guidance will give examples for each activity of what may or may not constitute an 'acceptable standard'.
>
> We have already shared our draft guidance for assessment providers on reliability (section 3.3 of the PIP Assessment Guide - http://www.dwp.gov.uk/docs/pip-assessment-guide.pdf). We are in the process of updating and expanding this guidance in light of the Amendment Regulations. We are also in the process of drafting the guidance for decision makers which will reflect the assessment guidance in this respect. Officials intend to discuss the content of this guidance informally with representatives of disability organisations next week. Final guidance will be made publicly available before PIP goes live on 8 April.
>
> The Health Professional conducting the assessment will advise on whether an individual can carry out the activities to an acceptable standard. However, as with all decisions on benefit entitlement, the final decision will rest with the Departmental Decision Maker."

12. The Committee notes DWP's explanation but questions whether reliance on guidance to define this aspect is consistent with one of the objectives of this amending instrument as set out in paragraph 7.2 of the EM:

> "... The Government had decided that it would be appropriate to use guidance, rather than secondary legislation to make clear that consideration must be given to whether individuals can complete the assessment activities "safely, to an acceptable standard, repeatedly and in a reasonable time period". However, following that decision, concern was expressed that as these terms had no legislative basis they may be open to misinterpretation or a failure to consider. The amendment made by this instrument therefore puts these terms directly into the secondary legislation to allay such concerns."

13. Although the amending Regulations should meet concerns about assessors failing to consider these aspects, **the House will wish to consider carefully whether DWP's approach to the interpretation of the terms used is consistent and satisfies the stated need for legal clarity.**

C. National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 (SI 2013/500)

Date laid: 11 March
Parliamentary Procedure: negative

Summary: To revoke the original Regulations, the substitute Regulations have to come into effect no later than 1 April. The compressed timetable inhibited the Committee's normal scrutiny process and, to enable the Committee to report before the House rises for the Easter recess, we conducted a short targeted consultation

addressed to the organisations which made submissions to us about the original Regulations. In addition, we received a number of unsolicited submissions from individuals. In spite of the very short deadline, we have received some constructive and thoughtful comments on the substitute Regulations for which we are grateful. They are published in full on the Committee website and quoted selectively below. We regret that some were unable to contribute because the timescale prevented them giving a considered view of some highly technical changes to the legislation. As we have made clear before, not least in our report on the Government's new approach to consultation,[3] the Committee has no doubt that policy-making is improved by effective and genuine consultation, and we are firmly of the view that the Department has allowed insufficient time to set this system up properly and enable thorough scrutiny.

These Regulations are drawn to the special attention of the House on the ground that they may imperfectly achieve their policy objective.

14. These Regulations have been laid by the Department of Health (DH) under the Health and Social Care Act 2012 ("the 2012 Act") accompanied by an Explanatory Memorandum (EM) and an Impact Assessment (IA). These Regulations ("the substitute Regulations") revoke and replace the National Health Service (Procurement, Patient Choice and Competition) Regulations 2013 (SI 2013/257 – "the original Regulations") on which we commented in our 30th Report.[4] Supplementary material from the Department of Health is published in Appendix 2.

Procedural explanation

15. The procedural issues associated with these Regulations are complex. The House may, therefore, find a brief explanation of assistance.

16. Both sets of Regulations are subject to the negative procedure. This means that members in either House have 40 sitting days (from the date the instrument was laid) to object to the Regulations, which is done by tabling a prayer motion. If no motion is tabled, there is no opportunity for the Regulations to be debated. The 40-day scrutiny period does not prevent the Regulations being brought into effect at any time. On this occasion, both sets of Regulations are due to come into force on 1 April. Media reporting may have caused some confusion: a negative instrument cannot be "withdrawn" or "paused", it can only be *revoked* (thereby cancelling the instrument entirely) or *amended* (to correct part or all of the previous text). Either action requires another instrument. In this case, the substitute Regulations(SI 2013/500) revoke the original Regulations (SI 2013/257) and present an amended version of the original legislation. Members will wish to note that a successful prayer motion solely on the substitute Regulations (SI 2013/500) would not prevent the original Regulations (SI 2013/257) from taking effect on 1 April.

Summary of the differences

17. The substitute Regulations are substantially the same as the original Regulations, with some alterations and deletions. The main changes are:

- A stronger emphasis on integration:

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[3] 22nd Report, session 2012-13, HL Paper 100

[4] 30th Report, session 2012-13, HL Paper 136

- in regulation 2, a new final line sets an additional procurement objective of providing services in an integrated way;
- regulation 3(4) (a) describes an improvement as providing services in a more integrated way;
- regulations 3(5)(a) and (b) also gain a reference to demonstrating how the contract promotes integration;

- the part of regulation 5 that restricted the award of a contract without competition to emergencies and technical reasons has been removed;
- a proviso is added into regulation 10(3) that a relevant body may not act in an anti-competitive way unless to do so is in the interests of people who use NHS healthcare services which may include
  - the services being provided in an integrated way or
  - by co-operation between the service providers to improve the quality of the services;
- the reference in regulation 10(3) to other domestic or EU competition legislation has been removed;
- an additional paragraph has been added, as regulation 15(2), to state explicitly that Monitor may not direct a relevant body to hold a competitive tender for a contract for the provision of health care services for the purposes of the NHS; and finally
- a new regulation 18 revokes the original Regulations (SI 2013/257).

Timetable

18. To revoke the original Regulations, the substitute Regulations have to come into effect no later than 1 April. The compressed timetable inhibited the Committee's normal scrutiny process and to enable the Committee to report before the House rises for the Easter recess, we conducted a short targeted consultation addressed to the organisations which made submissions to us about the original Regulations. In addition, we received a number of unsolicited submissions from individuals. In spite of the very short deadline, we have received some constructive and thoughtful comments on the substitute Regulations for which we are grateful. They are published in full on the Committee website and quoted selectively below. We regret that some were unable to contribute because the timescale prevented them giving a considered view of some highly technical changes to the legislation. The Committee has no doubt that policy-making is improved by effective and genuine consultation and this reinforces our view that the Department has allowed insufficient time to set this system up properly and enable thorough scrutiny.

19. As a general point, it seems to us that implementation of the policy underlying the Regulations has been left too close to the intended implementation date. The original Regulations were laid on 13 February, only seven and a half weeks before coming into operation and allowing little time for familiarisation and training staff, particularly when so many other changes are happening simultaneously. We are assured that the regulator, Monitor, which will be overseeing the operation of this legislation, intends to put its guidance out for consultation in March, but, at the time DH

responded to our questions on 14 March, that had not happened. The Monitor guidance may resolve or aggravate the doubts expressed but neither the Committee nor the health sector had access to the proposed guidance when considering the proposed legislation. We do not regard this as good practice.

Guidance

20. Although not apparently well known in the health sector, according to the Department, there is already guidance published by the NHS Commissioning Board:

> "The Department would draw again the Committee's attention to the guidance already published by the NHS Commissioning Board Authority on procurement including on single tender. It would be misleading to suggest that there has been no guidance to commissioners and also that the guidance is in some way different in substance to the existing guidance that was put in place by the previous administration. For ease of reference, the procurement guidance in March 2010 said that: *'PCT boards must act transparently and without discrimination and be able to demonstrate rationale for decisions on whether or not to competitively tender. In particular, where the commissioner decides to procure through single tender the rationale must demonstrate that there is only one capable provider to deliver the services and, therefore, that could provide better value for money.'* "

21. The Committee wonders, if there is "no difference in substance" to the existing procurement regime guidance, why these Regulations are needed at all. **If, as we understand, the key difference is in the oversight of commissioners' decisions by Monitor, then that argues that it is even more important for Monitor's guidance to be published for consideration alongside these Regulations and before the new system comes into operation.**

Mixed responses

22. The evidence we received in relation to the original Regulations was uniformly against the changes proposed. The comments offered on the substitute Regulations are more mixed. The majority see them as an improvement. Many, however, include questions about how the different provisions will interact and seek clarification about the meaning of some of them.

23. Those who submitted Template 3, for example, saw a potential conflict between the operation of new regulation 15(2) (the provision that forbids Monitor to direct a body to advertise a contract) and regulation 15(1)(e) (which allows Monitor to direct a commissioner to vary an arrangement for the provision of services for a failure to comply with regulation 10, which aims to prevent anti-competitive behaviour). An individual submission from Jim Pragnell made this point: "I welcome the fact that Monitor will no longer be allowed to direct a commissioner to hold a competitive tender for an NHS service, but how will Monitor react should a commissioner decide not do so remains as before. We simply do not know. Guidance in this important area is not complete."

Lack of clarity

24. A large number of the submissions offer alternative drafting suggestions which they feel would make the intention of the substitute Regulations clearer or bring them closer to their perception of the Minister's stated policy intention. Significantly, none of these independently given views is the same. This wide range of interpretations of the substitute Regulations is, we believe, likely to translate into uncertainty about how they will operate and will, in turn, result in commissioners conducting unnecessary tendering processes simply to ensure that their decision will be "safe" under the law.

Financial impact?

25. The impact assessment paragraph in the EM states that "the direct costs on the public sector will be negligible – there could be indirect costs associated with commissioners' compliance with statutory regulations instead of non-statutory rules. This is difficult to estimate and could be negligible given the regulations are consistent with EU and UK procurement law with which commissioners are already required to reply" (EM paragraph 10.2). This is in line with the Department's view that the effect of the substitute Regulations is minor and technical.

26. In contrast, submissions from those in the health sector indicate that, due to uncertainty, potential savings made from competitive tendering may be offset by the expense and delay of advertising. There is also widespread uncertainty about the renewal of existing contracts and whether they have to be advertised. It is common business practice to renew a contract with a provider that is providing a satisfactory service, subject to a review of terms, without wider tendering of the contract. Help the Hospices say that there "remains a presumption that a change of provider will bring benefits. For example clause 3(4) makes no reference to improvements in services being secured through work with existing providers, implying that such improvement can only be secured through new arrangements."

Burden of proof

27. Respondents believe that, in these circumstances, commissioners will feel compelled to advertise a contract simply to satisfy Monitor in the event of their decision being audited. Common considerations, such as preferring a local provider or one with a known track record over a cheaper one whose performance is unknown, are also capable of being called into question. While it is right that a commissioner should follow good procurement practice, the burden of proof that Monitor may require to support a decision is seen as a potentially heavy one.

28. There is a very urgent need for DH to clarify Monitor's interpretation of the requirements of the substitute Regulations, particularly regulation 10(2) (which prevents restriction of competition). The Royal College of Psychiatrists sums it up:

> "We are very concerned that regulation 5 still requires a relevant body awarding a contract to be "satisfied that the services to which the contract relates are capable of being provided only by that provider" if it is not to " advertise an intention to seek offers from providers in relation to that contract". The effect of the requirement to demonstrate that a service can be provided only by one single provider could be as onerous

> for Clinical Commissioning Groups (CCGs) as running a tendering process. There is thus a high risk that CCGs will be much more focused on reducing any potential for legal challenge on the grounds of anti-competitive behaviour than on what is actually best for patients."

29. Others, including the Royal College of General Practitioners and the TUC, make a similar point: that uncertainty will lead to unproductive activity by CCGs for fear of challenge from either Monitor or from private providers. **The Department states that "the burden of proof would be on Monitor not commissioners, to demonstrate that the commissioning of an integrated service was anti-competitive and, if so, that it was not in the interests of patients". That, however, is not immediately apparent from the Regulations.**

30. In additional material published in Appendix 2, the Department says that it "would wish the Committee to note a key point that, absent the regulations, procurement disputes would be resolved through the courts (under the Public Contract Regulations 2006) without the benefit of a health specific regulator with a duty to promote and protect the interests of patients in everything it does". The Department would have strengthened its case if it had provided figures of how many such court cases there have been over, say, the last five years.

The perception gap

31. The Department also reiterates its belief that these Regulations are in line with Ministerial undertakings given during the passage through Parliament of the Health and Social Care Bill and that the policy approach has been consistent:

> " The Department and Ministers have always been very clear that the regulations to be made under section 75 would cover the procurement of services including competitive tendering (paragraph 3 of the Committee's report refers) and not just anticompetitive behaviour. For example:
>
> - The Bill clauses debated during the passage of the Health and Social Care Bill, explicitly mention that the regulations may include requirements on good procurement practice and competitive tendering.
> - The Government's response to the NHS Future Forum Report stated that;
>
> 'We will narrow Monitor's powers over anti-competitive purchasing behaviour by the NHS Commissioning Board or clinical commissioning groups, so that these are more proportionate and focus on preventing abuses rather than promoting competition as though it were an end in itself. Monitor will also ensure the application of UK and EU procurement law by commissioners, currently reflected in the Principles and Rules of Cooperation and Competition.'
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> - The consultation document published by the Department was very clearly about the procurement of services by commissioners and the requirements in relation to procurement that would be set out in the regulations: http://www.dh.gov.uk/health/2012/08/consultation-commissioners/ "

32. Whilst this may be the Department's view, the evidence received by the Committee demonstrates that it is not one shared by the health sector and beyond; and the fact that the Department was equally assertive about the original Regulations, now being revoked, does not help its cause with the health community. As one submission, by an individual, Joan Stewart, said, "given the misleading nature of the previous Regulations, I would like more time to examine the revisions, moving beyond the rhetoric and repeated assurances, to determine whether CCGs will be able to exercise the autonomy they have been promised".

Conclusion

33. We regret that some organisations were unable to contribute because the very short time allowed prevented them from giving a considered view of some highly technical changes to the legislation. A number of the responses which we received suggested that the Department should revoke the original Regulations and conduct further consultations before introducing new legislation. We sympathise with that view. It is very clear that there is no common understanding in the health sector of the requirements of the procurement rules contained in the substitute Regulations. The Committee has no doubt that policy-making is improved by effective and genuine consultation, and we are firmly of the view that the Department has allowed insufficient time to set this system up properly and enable thorough scrutiny. The lack of guidance from the regulator, Monitor, on how it will interpret the legislation also presents a significant barrier to understanding. **Whilst it is open to the Government to impose on the health sector provisions that may not be popular, it cannot be good or effective policy-making to seek their immediate implementation when they are so widely misunderstood. On that basis, we reiterate the conclusion stated in our 30th Report that these Regulations should be drawn to the special attention of the House on the ground that they may imperfectly achieve their policy objective.**

OTHER INSTRUMENTS OF INTEREST

Draft Armed Forces and Reserve Forces (Compensation Scheme) (Consequential Provisions: Primary Legislation) Order 2013

Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2013 (SI 2013/436)

34. On 14 February of this year, the Minister of State at the Ministry of Defence made a Written Statement[5] about the introduction of the Armed Forces Independence Payment (AFIP) on 8 April 2013, which is intended to provide additional financial support to seriously injured service and ex-service personnel.[6] The payment will be £134.40 per week, equivalent to the enhanced rates of the daily living and mobility components of the Personal Independence Payment (PIP) which is being introduced by the Department for Work and Pensions to the same deadline.

35. Both these instruments relate to the AFIP. In amending an earlier instrument,[7] SI 2013/436 provides for the AFIP to be a new benefit under the Armed Forces Compensation Scheme. The draft Order contains provisions to ensure that service and ex-service personnel who qualify for AFIP have the same access as those who qualify for PIP to additional benefits, namely, payments for medical examination of applicants for an exemption from the wearing of seatbelts,[8] and allowances for carers and entitlement to Christmas bonus for pensioners.[9]

Draft CRC Energy Efficiency Scheme Order 2013

36. The Department for Energy and Climate Change (DECC) has laid this draft Order, with an Explanatory Memorandum (EM) and Impact Assessment (IA). In the EM, DECC explains that the Order provides for simplification of the CRC[10] Energy Efficiency Scheme ("the CRC Scheme"), which is a mandatory UK-wide trading reporting scheme introduced in April 2010, in order to improve energy efficiency and drive emission reductions in public and private sector organisations.

37. The Department states that, since the introduction of the scheme, stakeholders have argued that it is overly complex and administratively burdensome. In November 2010, the Government published initial simplification proposals; in January 2011, they published a set of discussion papers on a number of specific areas of possible simplification and invited views; and in June 2011, the Government published their intentions for a simplified scheme.

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5 HC Hansard, 14 February 2013: Column 60WS.

6 In the Written Statement, the Minister said that AFIP would be payable to personnel who have an Armed Forces Compensation Scheme (AFCS) award that includes a guaranteed income payment of 50% or higher. Details of the AFCS can be found at: http://www.veterans-uk.info/pensions/afcs_new.html

7 SI 2011/517: the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011.

8 Under s70 of the Transport Act 1982.

9 Under respectively s70 and s148 of the Social Security Contributions and Benefits Act 1992.

10 CRC means "carbon reduction commitment".

38. DECC states that the main climate change policy instruments affecting large private and public sector organisations are the Climate Change Levy (CCL), which is a tax on energy use; CCAs,[11] which are voluntary instruments allowing certain sectors a reduction on their CCL where agreed emission reduction targets are met; and the EU ETS,[12] which is a site-based trading scheme designed to drive emission reductions from upstream energy intensive facilities. The Department says that the CRC Scheme has been designed to avoid overlap with these instruments, and that the simplified scheme clarifies this further by simplifying the process to avoid double regulation.

39. We sought further information from DECC, which we are publishing in Appendix 3.

Draft Renewable Heat Incentive Scheme (Amendment) Regulations 2013

40. These Regulations are the second statutory instrument laid by the Department for Energy and Climate Change (DECC) to amend Regulations from 2011[13] which established the Renewable Heat Incentive Scheme ("the RHI scheme"). We question whether the Department's handling of consultation over changes to the Scheme may have given respondents too little time to make their views known.

41. In 2012, we reported to the House on amending Regulations[14] which DECC brought forward to introduce a mechanism restricting access to the RHI scheme if the forecast for total expenditure in respect of the scheme reached a certain point. In our Report,[15] we voiced concern that the 2011 Regulations had to be amended little more than six months after being made, in order to address a budgetary issue that should have been foreseen at the outset. We commented that a lack of forethought had seemingly constrained the Government's approach to consultation on the 2012 Regulations, which had been carried out over only four weeks.

42. DECC states that the latest Regulations establish a long-term financial control mechanism for the non-domestic RHI scheme for the remainder of this Spending Review period (i.e., until the end of March 2015). Under this new mechanism, tariffs will be reduced if the levels of renewable heat deployment exceed that needed to achieve the RHI scheme's renewables objectives. The consultation which DECC carried out in relation to these latest Regulations ran for eight weeks, from 20 July to 14 September 2012.

43. We note DECC's statement that it received 100 formal responses. However, we consider that conducting a consultation process over a traditional holiday period may well limit the ability of interested parties to respond. Since the Department laid these draft Regulations only in March of this year, it is not obvious that the timetable of the decision-making process made it necessary

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[11] CCA means a climate change agreement.

[12] EU ETS refers to the Emissions Trading System under EU Directive 2003/87.

[13] SI 2011/2860: the Renewable Heat Incentive Scheme Regulations 2011.

[14] SI 2012/1999: the Renewable Heat Incentive (Amendment) Regulations 2012.

[15] 5th Report, session 2012-13 (HL Paper 22)

to allow fewer than 12 weeks for a consultation that spanned the summer holiday period.

Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (SI 2013/380)

44. Following the making of the main Regulations on Universal Credit and Personal Independence Payments a number of negative instruments have been laid to support the proposed restructuring of the benefits system.

45. Key among these is the **Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013** (SI 2013/380) which set out all the practical aspects of claiming under the new system. They include, in particular, provision for most claims to be made online or by telephone, for them to be paid to a household and on a monthly in-arrears basis into a bank account, for mortgage interest to be paid directly to the lender and for certain deductions from benefits to be made according to a predetermined hierarchy. Our 24th Report[16] included a consideration of some of the practical aspects that the changes to the benefits system would encompass: paragraphs 22-24 raised issues about those who would have problems with the "*digital by default*" approach; paragraphs 27-28 dealt with the issues around monthly awards; and paragraphs 29-30 explained that if one member of a household did not comply with the claimant commitment then payments to the other member of a couple would also stop. Regulation 47(6) of these new Regulations sets out the circumstances in which a payment to a couple can be split. The legislation is supported by guidance for Alternative Payment Arrangements.[17] It states, for example, that eligible circumstances include: financial abuse where one partner mismanages the Universal Credit award; and some domestic violence situations where the couple decide to remain together in the same household and a separate claim to Universal Credit is not made. In these circumstances, the Department for Work and Pensions (DWP) is required first to consider paying the rent element directly to the landlord (where appropriate), before deciding on the proportion to be split between the couple.

Rent Officers (Universal Credit Functions) Order 2013 (SI 2013/382)

46. As part of the introduction of the Universal Credit system this Order replicates many of the existing functions of Rent Officers in connection to Housing Benefit: for example, their role in determining Broad Rental Market Areas to set local housing allowances for various categories of dwelling. Schedule 1 sets out the method of calculating the local housing allowance for the area which will be the lower of the rent at the 30th percentile of available rents or the previous year's rate up-rated by reference to the Consumer Prices Index for September. These functions are required to calculate the amount of a person's housing costs element for Universal Credit. In addition, the Order extends Rent Officers' existing role to the social sector so that, where the Secretary of State has requested it, the Rent Officer will

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16 24th Report (2012-13)(HL Paper 107)

17 Published on the DWP website on 11 February 2013: http://www.dwp.gov.uk/docs/personal-budgeting-support-guidance.pdf

determine whether payments in the social rented sector are reasonable and, if they are not, propose what is a reasonable amount by comparison with social sector rents for similar properties in the local authority area. The Department for Work and Pensions (DWP) states that it is not Government's intention to refer large number of social rents or to interfere with social rent setting (for instance, it will be assumed that assume that Affordable Rents in England are reasonable). DWP however state that this additional function is a way of protecting public money from potential abuse.

Social Security (Overpayments and Recovery) Regulations 2013 (SI 2013/384)

47. These Regulations set out the processes governing the calculation and recovery of overpayments of Universal Credit, certain Tax Credits and contributory Jobseeker's Allowance and Employment and Support Allowance. They also set out the rules for recovery of certain court costs, payments on account, hardship payments, administrative penalties and civil penalties. Under the new arrangements, the Department for Work and Pensions (DWP) will also be able to reclaim excess payments which arise from official error. Currently, DWP recovers debts through deductions from ongoing benefit entitlement. The problem arises that, if a debtor ceases to claim benefit, DWP is reliant on the debtor's voluntary compliance with repayment terms or, if the debtor fails to pay the money owed, has to take (often cost prohibitive) court action. Under these Regulations, DWP will be able to make Direct Earnings Attachments on its own authority without reference to the courts, potentially making recovery from a debtor's earnings a relatively simple, administratively attractive option. DWP states that there will be no overall impact on business as any increased administration costs will be offset by employers being able to charge the employee an additional £1 for each deduction from earnings that they make. There is a small benefit for the public sector as DWP anticipates increased recoveries of approximately £3 million per annum, and reduced administrative costs for the courts of approximately £0.5 million.

Personal Independence Payment (Transitional Provisions) Regulations 2013 (SI 2013/387) and two related instruments

48. These Regulations amend existing instruments to provide disability and carer benefits with the same residence and presence provisions as Personal Independence Payment (PIP). To receive one of the benefits, people will need to:

- be present in Great Britain
- be habitually resident in the Common Travel Area[18]
- have been present in Great Britain for 104 weeks out of the last 156 weeks.

49. The Department for Work and Pensions (DWP) states that adoption of the habitual residence test will simplify matters because claimants who have already qualified for an income-related benefit will not then be subject to a different test when claiming a disability or carer benefit. The increase in the length of the past presence test will mean that claimants will have to

[18] That comprises: the United Kingdom, the Republic of Ireland the Isle of Man or the Channel Islands

demonstrate a substantial link with Great Britain. This change is made in response to a number of recent European court cases.[19] DWP states that it is intended to deliver greater fairness for the taxpayer as the benefits are non-contributory, non means-tested and paid for out of general taxation. Similarly, the decrease from 26 to 13 weeks in the time Disability Living Allowance (DLA) and Attendance Allowance claimants are able to go abroad without their benefit being affected is intended to prevent people spending half the year living in other countries at the British tax payers' expense. This instrument also implements a Spending Review 2010 decision concerning the removal of an existing extension of payment of DLA higher rate mobility that is only granted to hospital in-patients with a Motability vehicle, amends the upper age limit for claiming DLA to be consistent with the forthcoming changes to State Pension age and seeks to avoid a duplication of provision in care homes following a Court of Appeal ruling.

50. The **Personal Independence Payment (Transitional Provisions) Regulations 2013 (SI 2013/387)** set out how, from 8 April, existing DLA recipients will be invited to apply for PIP on receipt of a written notification from the Secretary of State. The transition will be in stages and certain groups (for example those aged 65 or over on 8 April 2013) will be excluded (regulation 3). On receipt of such a notification, the default period for claiming PIP is 28 days although that period can be extended by the Secretary of State (regulations 7 and 8).

51. The **Personal Independence Payment (Supplementary Provisions and Consequential Amendments) Regulations 2013 (SI 2013/388)** also contribute to the implementation of PIP by amending primary and secondary legislation to ensure that wherever possible PIP claimants will be able to benefit from the same passporting arrangements as those receiving DLA.

Late Payment of Commercial Debts Regulations 2013 (SI 2013/395)

52. The Department for Business, Innovation & Skills (BIS) has laid these Regulations, which amend the provisions governing the late payment of commercial debts. They set limits on payment periods for commercial debts to a maximum of 60 days in most cases and 30 days for those incurred by public authorities, limit the amount of time for purchasers to verify the conformity of goods or services with the contract to 30 days in most cases and permit suppliers to recover their reasonable costs in recovering debts. The Regulations implement Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions.

53. We sought further information on two aspects of the Regulations: their geographical scope; and the timeliness with which the Government have provided guidance. BIS has now provided a response, which we are publishing as Appendix 4. In relation to the explanation that the Regulations cover England, Wales and Northern Ireland only, we understand that they apply to contracts agreed under the laws of those countries. Other Member States have their own legislation in place in order to implement Directive 2011/7/EU so that, for example, a British company with a contract with a German authority would be able to proceed similarly in relation to commercial debts under legislative provision made in Germany.

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[19] For example : Case C-503/09, Lucy Stewart v Secretary of State for Work and Pensions, http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0503:EN:HTML

Health and Safety (Miscellaneous Repeals, Revocations and Amendments) Regulations 2013 (SI 2013/448)

54. These Regulations repeal one Act and revoke twelve instruments as well as a related provision in the Factories Act 1961. They all concern health and safety provisions that have been overtaken by more up-to-date Regulations, are redundant or do not deliver the intended benefits. The instrument follows up recommendations in Professor Löfstedt's independent review of health and safety legislation.[20] It also forms part of a wider programme intended to make the legislative framework simpler and easier to understand in order to improve compliance, while maintaining the same standards of protection for those in the workplace or affected by work activities. The Committee notes that, even though the provisions identified in these Regulations have been earmarked as redundant or otherwise no longer of use, there has been consultation with the relevant industries to ensure that no necessary protections are inadvertently removed. We commend this approach and also the clear and proportionate justification for each associated group of regulations given in the Explanatory Memorandum.

Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) (Amendment) Regulations 2013 (SI 2013/465)

55. The Valuation Tribunal for England (VTE) was established by the Local Government and Public Involvement in Health Act 2007, replacing the 56 valuation tribunals that existed previously in England; the VTE hears certain appeals relating to council tax and non-domestic rating liabilities.

56. The Department for Communities and Local Government (DCLG) has laid these Regulations. In the accompanying Explanatory Memorandum, the Department states that the Regulations will help deliver the changes required to enable the VTE to handle local council tax reduction appeals in the most cost-effective manner consistent with ensuring justice.

57. DCLG formally consulted the Administrative Justice & Tribunals Council (AJTC) on a draft of the Regulations in February of this year. We were subsequently told by the AJTC of concerns that it had raised with DCLG in responding, over the timing of the consultation, and the need for guidance. We were particularly struck by the statement by the AJTC that DCLG allowed the Council approximately three and a half working days to consider the Regulations. Unless there are reasons of exceptional urgency, we can see no justification for giving consultees so little time to express their views. We sought further information from DCLG, which we are publishing in Appendix 5.

[20] Reclaiming health and safety for all' (http://www.dwp.gov.uk/docs/lofstedtreport.pdf) published November 2011

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

Armed Forces and Reserve Forces (Compensation Scheme) (Consequential Provisions: Primary Legislation) Order 2013

Companies Act 2006 (Amendment of Part 18) Regulations 2013

CRC Energy Efficiency Scheme Order 2013

Renewable Heat Incentive Scheme (Amendment) Regulations 2013

Instruments subject to annulment

SI 2013/380	Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013
SI 2013/382	Rent Officers (Universal Credit Functions) Order 2013
SI 2013/384	Social Security (Overpayments and Recovery) Regulations 2013
SI 2013/387	Personal Independence Payment (Transitional Provisions) Regulations 2013
SI 2013/388	Personal Independence Payment (Supplementary Provisions and Consequential Amendments) Regulations 2013
SI 2013/389	Social Security (Disability Living Allowance, Attendance Allowance and Carer's Allowance) (Amendment) Regulations 2013
SI 2013/395	Late Payment of Commercial Debts Regulations 2013
SI 2013/413	National Health Service Pension Scheme, Additional Voluntary Contributions and Injury Benefits (Amendment) Regulations 2013
SI 2013/415	Civil Courts (Amendment) Order 2013
SI 2013/421	Allocation and Transfer of Proceedings (Amendment) Order 2013
SI 2013/429	Payment to Treasury of Penalties Regulations 2013
SI 2013/431	Financial Services and Markets Act 2000 (Exercise of Powers under Part 4A) (Consultation with Home State Regulators) Regulations 2013
SI 2013/436	Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2013

SI 2013/439	Financial Services and Markets Act 2000 (EEA Passport Rights) (Amendment) Regulations 2013
SI 2013/440	Financial Services Act 2012 (Transitional Provisions) (Permission and Approval) Order 2013
SI 2013/441	Financial Services Act 2012 (Transitional Provisions) (Enforcement) Order 2013
SI 2013/442	Financial Services Act 2012 (Transitional Provisions) (Miscellaneous Provisions) Order 2013
SI 2013/443	Social Security (Miscellaneous Amendments) Regulations 2013
SI 2013/446	Care Standards Act 2000 (Registration) (England) (Amendment) Regulations 2013
SI 2013/447	Smoke Control Areas (Authorised Fuels) (England) Regulations 2013
SI 2013/448	Health and Safety (Miscellaneous Repeals, Revocations and Amendments) Regulations 2013
SI 2013/449	Identification and Traceability of Explosives Regulations 2013
SI 2013/451	Civil Legal Aid (Connected Matters) Regulations 2013
SI 2013/454	Social Security (Information-sharing in relation to Welfare Services etc.) Amendment and Prescribed Bodies Regulations 2013
SI 2013/456	Social Security (Claims and Payments) Amendment Regulations 2013
SI 2013/458	Council Tax Benefit Abolition (Consequential Provision) Regulations 2013
SI 2013/459	Occupational and Stakeholder Pension Schemes (Miscellaneous Amendments) Regulations 2013
SI 2013/461	National Health Service (Optical Charges and Payments) Regulations 2013
SI 2013/462	Smoke Control Areas (Exempted Fireplaces) (England) Order 2013
SI 2013/465	Valuation Tribunal for England (Council Tax and Rating Appeals) (Procedure) (Amendment) Regulations 2013
SI 2013/466	Food (Miscellaneous Amendment and Revocation) (England) Regulations 2013
SI 2013/467	Council Tax (Alteration of Lists and Appeals) (England) (Amendment) Regulations 2013
SI 2013/468	Non-Domestic Rating and Council Tax (Definition of Domestic Property and Dwelling) (England) Order 2013
SI 2013/469	Functions of the National Health Service Commissioning Board and the NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) (Primary Dental Services) (England) Regulations 2013

SI 2013/471	Criminal Legal Aid (Financial Resources) Regulations 2013
SI 2013/475	National Health Services (Charges for Drugs and Appliances) (Dental Charges) and (Travel Expenses and Remission of Charges) (Amendment) Regulations 2013
SI 2013/477	Tribunal Procedure (Amendment) Rules 2013
SI 2013/478	Enterprise Act 2002 (Part 8) (Designation of the Financial Conduct Authority as a Designated Enforcer) Order 2013
SI 2013/480	Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013
SI 2013/481	European Parliamentary (United Kingdom Representatives) Pensions (Amendment) Order 2013
SI 2013/482	Managed Motorway (Actively Managed Hard Shoulder and Variable Speed Limits) (Miscellaneous Amendments) Regulations 2013
SI 2013/483	Criminal Legal (Contribution Orders) Regulations 2013
SI 2013/484	Judicial Pensions (Contributions) (Amendment) Regulations 2013
SI 2013/487	Police Pensions (Amendment) Regulations 2013
SI 2013/495	Electricity (Applications for Consent) Amendment (England and Wales) Regulations 2013
SI 2013/503	Civil Legal Aid (Statutory Charge) Regulations 2013
SI 2013/509	Animals (Scientific Procedures) Act 1986 (Fees) Order 2013
SI 2013/519	Warm Home Discount (Reconciliation) (Amendment) Regulations 2013

Instruments subject to annulment (Northern Ireland)

SR 2013/48	Identification and Traceability of Explosives Regulations (Northern Ireland) 2013

APPENDIX 1: NATIONAL HEALTH SERVICE (PRIMARY DENTAL SERVICES) (MISCELLANEOUS AMENDMENTS AND TRANSITIONAL PROVISIONS) REGULATIONS 2013 (SI 2013/364)

Letter from Earl Howe, Parliamentary Under-Secretary of State, Department of Health, to Lord Goodlad

These Regulations, amongst other things, establish the second wave of dental pilots and introduce a new (band 1A) patient charge for patients in the pilots. They are due to come into force on 1st April 2013.

Unfortunately, it has become apparent that there is an error in the charge as drafted. The new Band 1A patient charge covers care delivered at 'interim care appointments', a concept new to the dental pilots and the new prevention focussed patient (clinical) pathway being piloted. They focus on preventative care and advice. The regulations amend the existing dental charges regulations to allow interim care to be treated as a separate course of treatment and a new course of treatment with its own patient charge (band 1A) was created.

Some interim care 'treatments' include hands on care, others are simply advice. The intention is that only where there is hands on treatment would the interim care be chargeable at this pilot stage. The willingness of patients to pay for advice only and at what level is untested and introducing a charge for advice-only at this stage risked skewing the clinical learning on whether patients benefit from such preventative appointments. Therefore, the intention is that band 1A courses of treatment which only include advice are not chargeable. The wording of the regulations as laid however meant that even if the treatment delivered within the interim care course of treatment comprised advice only, it would be chargeable.

To correct this I propose to lay as soon as possible an amending SI which revises the provision on the new band 1A charge in the pilots. I intend at the same time to provide a further full Explanatory Memorandum that will set out in fuller detail the policy for extending the pilots and how the new charge will operate. In advance of making the new amending SI I will conduct a short targeted consultation with the British Dental Association.

I do apologise for the need for this correction. I hope this letter provides reassurance about the approach we intend to take.

Earl Howe

18 March 2013

APPENDIX 2: NATIONAL HEALTH SERVICE (PROCUREMENT, PATIENT CHOICE AND COMPETITION) (NO. 2) REGULATIONS 2013 (SI 2013/500): ADDITIONAL INFORMATION

Department of Health answers to further questions from the Secondary Legislation Scrutiny Committee:

Consultation

Q1: In the statement Earl Howe said he was intending to speak to some of the royal colleges. Has the redrafted version been shown to/agreed by any or all of the Royal Colleges – if so which?

Has it been shown to the National Commissioning Board?

Anyone else?

A1: Earl Howe discussed proposed revisions to the regulations with a number of stakeholders. These included the:

- Academy of Medical Royal Colleges
- The Royal College of Physicians
- The British Medical Association
- Royal College of Nursing

To confirm that the proposed revisions were also discussed by officials with the NHS Commissioning Board.

Guidance

Q2: What is the timetable for Monitor's guidance being a) consulted on b) issued? Has that changed?

Will the Commissioning Board briefing papers referred to in your previous supplementary note now need revision? When will any revised guidance be published?

A2: Monitor still expects to publish guidance for consultation in March. The NHS Commissioning Board and Monitor still expects to publish a briefing paper on the Choice and Competition Framework in March. These will of course take account of the changes to the regulations.

The Department would draw again the Committee's attention to the guidance already published by the NHS Commissioning Board Authority on procurement including on single tender. It would be misleading to suggest that there has been no guidance to commissioners and also that the guidance is in some way different in substance to the existing guidance that was put in place by the previous administration. For ease of reference, the procurement guidance in March 2010 said that:

> 'PCT boards must act transparently and without discrimination and be able to demonstrate rationale for decisions on whether or not to competitively tender. In particular, where the commissioner decides to procure through single tender the rationale must demonstrate that there is only one capable provider to deliver the services and, therefore, that could provide better value for money.'

Furthermore:

> 'Where there is only one capable provider for a particular bundle of services or the objective of the procurement is to secure services to meet an immediate interim clinical need there will be a case for Single Tender Action (ie uncontested procurement). By definition, an immediate or urgent scenario will be exceptional and likely to only to arise on clinical safety grounds or for example, where existing services have been suspended following intervention by the Care Quality Commission.'

Concerns from the evidence received.

Q3: A number of the revisions made to the regulations support the promotion of integration in services – is that seen as a means of providing a defence for CCGs against challenges by companies that seek to cherry-pick the easier or more lucrative services. (This was a significant concern in many of the submissions we received)

A3: The revised regulations provide greater certainty for commissioners that integration of services is a key tool that can be used to improve the quality of care for patients.

As under the Principles and Rules for Cooperation and Competition, the overriding concern when considering anticompetitive behaviour is what is in the patient interest. We have provided greater clarity through the revised regulations that integrated care and cooperation are two ways in which benefits to patients may be achieved. There is therefore additional comfort for commissioners that, in integrating services in order to improve them, they should not be breaching the regulations.

The Committee would be right in an assumption that the revised regulations would provide greater certainty for commissioners facing pressure from providers to unbundle services. Commissioners will decide how best to integrate services and where this was in the interests of patients, they could not be forced to fragment services (ie unbundle them).

The burden of proof would be on Monitor, not commissioners, to demonstrate that the commissioning of an integrated service was anticompetitive and, if so, that it was not in the interests of patients (which Monitor has a duty to protect and promote).

Q4: Does this version of the regulations remove any (perceived) problem with the position of Hospices as outlined in para 16 of our 30th report?

What would happen if you had more than one Hospice bidding in a CCG area? - I would assume that this is where patient choice would operate - but would be grateful if you could confirm their position under these regs.

A4: The power to give funding through grants, including to Hospices, is unaffected by these regulations. This would not be a relevant tendering situation.

Clinical Commissioning Groups (CCGs) will have a power to make grants under section 14Z6 of the NHS Act 2006 (inserted by section 26 of the Health and Social Care Act 2012). This provides that:

> 'A clinical commissioning group may make payments by way of grant or loan to a voluntary organisation which provides or arranges for the provision of services which are similar to the services in respect of which the group has functions.'

Q5: Does the Department have any response to the comments about the recommendations in the Francis Report (see para 18 of our 30th report)

A5: The Department will formally respond to the Francis Report later in March.

The recommendations from the Francis Report that have been raised with the committee (124-127, 129-132) concern commissioners appropriately setting and monitoring the quality of services delivered by providers. The Department considers that the regulations are entirely consistent with the intention of these recommendations. Rather than in some way hindering their implementation, as has been suggested to the Committee, we would expect the regulations to help secure these goals. This is because the objective of commissioners in procuring NHS services under the regulations is to improve the quality of those services.

DH response to 30th report

Q6: The EM has not changed significantly - Is there any short statement/ additional material that DH would wish to provide to present its view to the House?

A6: Further information on the changes to the regulations is available from the below link:

https://www.wp.dh.gov.uk/publications/files/2013/03/Changes-to-the-National-Health-Service-Regulations-2013.pdf

Further to the earlier memo provided by the Department there is some additional information we would consider it would be helpful for the Committee to have further to its written report. In particular:

The Department and Ministers have always been very clear that the regulations to be made under section 75 would cover the procurement of services including competitive tendering (paragraph 3 of the Committee's report refers) and not just anticompetitive behaviour. For example:

- The Bill clauses debated during the passage of the Health and Social Care Bill, explicitly mention that the regulations may include requirements on good procurement practice and competitive tendering.
- The Government's response to the NHS Future Forum Report stated that;

  'We will narrow Monitor's powers over anti-competitive purchasing behaviour by the NHS Commissioning Board or clinical commissioning groups, so that these are more proportionate and focus on preventing abuses rather than promoting competition as though it were an end in itself. Monitor will also ensure the application of UK and EU procurement law by commissioners, currently reflected in the Principles and Rules of Cooperation and Competition.'
- The consultation document published by the Department was very clearly about the procurement of services by commissioners and the requirements in relation to procurement that would be set out in the regulations: http://www.dh.gov.uk/health/2012/08/consultation-commissioners/

A number of examples were included in the Committee's report where the Committee may find it helpful to have further information.

The Committee notes an example given by the Royal College of Midwives of circumstances in which it is most effective that services are commissioned from

one provider to deliver care across a pathway. This would not be ruled out as the RCM suggest. The RCM notes that there are limited providers who are capable of delivering such care. In circumstances where there was only one provider that could meet the commissioners' requirements there would be the case for a single tender. Alternatively, the commissioner would be able to specify the integrated pathway of care required and tender that specification so that the provider best able to meet the needs of their patients delivers the integrated care required.

The Committee notes a concern from the Royal College of Nursing about price competition and that quality may be a 'secondary consideration'. The regulations do not introduce or require competition on price. Quality could not be a secondary consideration under the regulations as the objective of any procurement must be to improve the quality of services for patients (regulation 2). Commissioners must record how their actions have met their duties as to quality, effectiveness and the promotion of the integration of services.

The Department would also wish the Committee to note a key point that, absent the regulations, procurement disputes would be resolved through the courts (under the Public Contract Regulations 2006) without the benefit of a health specific regulator with a duty to promote and protect the interests of patients in everything it does (paragraph 10 of the committee's report refers).

Finally, the Committee notes in its conclusion that there has been a 'significant change' in the policy on competitive tendering as a result of the regulations. The Department would reiterate that the policy on the use of competitive tendering and, in particular, the circumstances in which a single tender may be pursued, has not changed from the procurement guidance published as far back as March 2010. The revised regulations make this clear.

14 March 2013

APPENDIX 3: DRAFT CRC ENERGY EFFICIENCY SCHEME ORDER 2013: ADDITIONAL INFORMATION

Information from the Department for Energy and Climate Change

Q1: The Explanatory Memorandum to the Order says: "The main climate change policy instruments affecting large private and public sector organisations are the Climate Change Levy (CCL), CCAs and the EU ETS…The CRC Scheme has been designed to avoid overlap with these instruments and the simplified scheme clarifies this further by simplifying the process to avoid double regulation." Could you provide more information, for the Committee, on the working of these other policy instruments, and the way in which the CRC Energy Efficiency Scheme will work in parallel without overlap?

A1: The main climate change policy instruments affecting large private and public sector organisations are the Climate Change Levy (CCL), CCAs and the EU ETS.

The CCL is a tax on the taxable supply of specified energy products for use as fuels for lighting, heating and power by business consumers. CCAs are voluntary instruments allowing certain sectors a reduction on their CCL where agreed emission reduction targets are met. 51 sectors are covered by Climate Change Agreements. The EU ETS is a site-based trading scheme designed to drive emission reductions from upstream energy intensive facilities. The UK has 1,100 EU ETS participants, which account for around 50% of the UK's carbon emissions.

The CRC was designed to target emissions from large non-energy intensive public and private sector organisations which are not regulated under either the EU ETS or CCAs. Organisations covered by the CRC are responsible for around 10% of the UK's emissions. As the CCAs and EU ETS apply only to facilities and installations where regulated activities are carried out (and to "Directly Associated Activities"), and not necessarily to the entire site or organisation, there are organisations which are subject to more than one regulatory instrument.

While the CRC scheme was designed to avoid double regulation, in practice it was recognised that the processes put in place to ensure this introduced significant complexity for organisations. Under current CRC rules, organisations are required to report their CCA and EU ETS emissions in their CRC footprint report, which proved administratively burdensome for participants. They must also consider electricity supplies to their CCA facilities and EU ETS installations when assessing whether they qualify for CRC participation.

CRC simplification reduces overlap between the policies, by removing from the scope of the scheme all energy supplies to CCA facilities and EU ETS installations, as defined in the CRC Order. In the simplified scheme, organisations will no longer have any CRC obligations in respect of energy supplied to CCA facilities or EU installations: they will neither need to report on, nor surrender CRC allowances in respect of, electricity supplied to EU ETS or CCA facilities. Electricity supplies to CCA facilities and EU ETS installations will no longer need to be considered when assessing CRC qualification, which will allow for the removal of the three exemptions currently available for CCA participants, which have been recognised as introducing significant complexity.

Q2: The Impact Assessment contains the following: "There is a reduction in benefits of £183m through a loss of energy savings brought about by removing CCA and EU ETS overlaps with the CRC and by reducing the number of fuels which participants are required to report on. Air quality benefits fall by £3m and changes to emissions savings

result in a fall in benefits of £41m." Given these apparently large reductions in benefits from the changes being made, can you set out more clearly why the Government consider that there is a continuing case for the CRC Energy Efficiency Scheme?

A2: While removal of CCA and EU ETS overlaps and reducing the number of fuels covered will lead to a reduction in benefits, this is offset by a significant reduction in administrative and capital costs as a result of simplification (estimated to be £285m). Overall, the net benefit of CRC simplification is estimated to be £77m. In addition, the revenue generated from the sale of allowances within the CRC Scheme will continue to support the Government's commitment to address the UK's deficit.

14 March 2013

APPENDIX 4: LATE PAYMENT OF COMMERCIAL DEBTS REGULATIONS 2013 (SI 2013/395): ADDITIONAL INFORMATION

Information from Department for Business, Innovation & Skills

Q1: On scope, the Committee would like to know whether the provisions of the Regulations apply only to transactions within the UK, or more widely across the EU.

A1: The Regulations cover England, Wales and Northern Ireland only. Late payment is a devolved matter for Scotland and the Scottish Government will introduce legislation to transpose the Directive to cover that country (based on the SI prepared for the rest of the UK).

For information: The European Commission considers late/prompt payment to be a European Union wide issue and are closely following transposition of the Directive in all member states. They view its implementation as one of the corner stones of the Single Market and European Commission Vice President Tajani, responsible for Industry and Entrepreneurship, is leading the late payment campaign across Europe. The European Commission believes that, once introduced by all EU member states, the new rules could mean an extra £150 billion being made available to businesses across Europe, helping to relieve cash flow problems. You may be interested to learn that the Commission has concentrated its efforts on European Member States where late/prompt payment issues, especially by the state, are particularly high, leaving the UK and Nordic states to last.

Q2: On guidance, the Committee noted the statement in the Explanatory Memorandum:

"Guidance on the new Regulations will be placed on the BIS website by the end of February 2013. The Regulations come into force on 16 March 2013 so there will be a period of time for those affected to familiarise themselves with the Regulations."

The Committee considered that the period from end-February to 16 March was in fact not long for companies etc to familiarise themselves with the Regulations.

A2: The Directive is based largely upon UK legislation that has been in place since 1998 and the UK is recognised by the Commission as an exemplar across Member States, including for the measures it has introduced to drive a culture of paying according to agreed terms (the Prompt Payment Code, improved guidance for suppliers and speedy public sector payment). The changes to domestic legislation are small and harmonise our legislation with the recast Directive. However, since 2010, current Whitehall Government practice actually goes much further than the provisions in this and previous Directives.

We have highlighted the changes since last September, where we discussed them in the Consultation document and we produced a table that formed part of the accompanying Impact Assessment, that showed the current state of play against the changes in the Directive (see page 8 of the IA: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32706/12-1132-impact-directive-on-combating-late-payment.pdf).

This went out to nearly 300 Trade Associations and business representative bodies; local authorities and other public sector bodies as well as business and other interested parties. Business has welcomed the Guide. Michael Fallon, BIS Minister of State for Business and Enterprise has been leading a prompt payment

campaign since late 2012, getting FTSE companies to sign up to the prompt payment code, whilst promoting changes to the Directive.

13 March 2013

APPENDIX 5: VALUATION TRIBUNAL FOR ENGLAND (COUNCIL TAX AND RATING APPEALS) (PROCEDURE) (AMENDMENT) REGULATIONS 2013 (SI 2013/465): ADDITIONAL INFORMATION

Information from Department for Communities and Local Government

Q1: We have received from the Chief Executive of the Administrative Justice & Tribunals Council (AJTC) a copy of the AJTC's letter of 26 February 2013 to DCLG, setting out a response to the draft Regulations sent to them. The letter contains the following:

"The AJTC must first set on record how it has proven particularly difficult to meet the Department's expectations in respect of the timings of this consultation. The time allotted to us to consider the Regulations was extremely short, being approximately three and a half working days in total. Members of the Council have found it very difficult to give the Regulations proper consideration within the time provided. We note that we were able to see a previous draft of the Regulations in an informal capacity, for which we are grateful, but it is not clear why they could not have been consulted upon some time ago."

Is this an accurate account of the timeframe which DCLG allowed for consultation on the draft Regulations? If so, what justification did DCLG have for so short a timeframe?

A1: We are very conscious of the short time that we were able to give the AJTC for formal consultation and are very grateful that they were able to look at the final draft Regulations rapidly and provide us with helpful comments. We regret that we were not able to formally consult sooner but there were some policy issues which took a considerable time to resolve before the content of the Regulations could be finalised. We also felt that it was important to have the Regulations in place by 1 April when council tax reduction schemes (and consequent appeals) first take effect. Following the submission of the AJTC's evidence to the Communites and Local Government Select Committee (relating to their examination of welfare reform by local authorities), we met AJTC officials on 29th January to discuss their concerns. Following this meeting we consulted informally with them on 7th February on a draft of the Regulations - and the AJTC provided us with a comprehensive informal response on 12 February. We then sent them a letter to formally consult on 21 February in which they provided a formal response on 26 February. The AJTC's formal response was in line with their earlier response (albeit that there were some changes to the draft Regulations taking account of their earlier comments).

Q2: The letter also contains the following:

"Given the fundamental nature of the distinction for the question of whether or not the appellant will be able to obtain access to the tribunal, it is in our view especially important that prospective appellants should be provided with as much information and support as can reasonably be given to assist them in navigating the new arrangements. Local authorities should therefore provide information in plain, simple English about the right of appeal to the VTE, including by offering particular advice about what is and is not appealable in relation to the workings of Reduction Schemes. Whilst this may ultimately be the responsibility of individual billing authorities, we believe that DCLG has its own role to play in recommending good practice and mitigating the complications of the new regime, the effects of which on poorer citizens currently in receipt of Council Tax Benefit are as yet largely unknown."

There is reference to guidance at 9 of the Explanatory Memorandum. Does this address the concerns of the AJTC?

A2: Yes - the Q & A guidance referred to in paragraph 9 of the EM (which is guidance for billing authorities) is intended to address the concerns raised by the AJTC.

8 March 2013

APPENDIX 6: 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 19 March 2013 Members declared no interests.

Attendance:

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