

EXPLANATORY MEMORANDUM TO

THE HEALTH AND SOCIAL CARE ACT 2008 (REGULATED CARE FUNCTIONS) REGULATIONS 2023

2023 No. 238

1. Introduction

- 1.1 This Explanatory Memorandum has been prepared by the Department of Health and Social Care (“the Department”) and is laid before Parliament by Command of His Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument sets out local authority functions under Part 1 of the Care Act 2014 (“the 2014 Act”) which must be reviewed and assessed by the Care Quality Commission (“the Commission”) under section 46A of the Health and Social Care Act 2008 (“the 2008 Act”).

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This Explanatory Memorandum has been revised in response to a request made by the Secondary Legislation Scrutiny Committee and contains information with a view to facilitating a clearer understanding about the policy objective and intended implementation.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.
- 4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 Part 1 of the 2014 Act sets out a range of functions that local authorities exercise in their delivery of adult social care.
- 6.2 The 2008 Act established the Commission as the regulator for health and social care services in England.
- 6.3 Section 163 of the Health and Care Act 2022 (“the 2022 Act”), which is intended to come into force on 1 April 2023, inserts section 46A into the 2008 Act which places a new duty on the Commission to review and assess local authorities’ delivery of such

of their adult social care functions under Part 1 of the 2014 Act as may be set out in regulations. This instrument sets out those functions.

- 6.4 The functions to be reviewed include all the general responsibilities of local authorities under sections 1 to 7 (for example promoting individual wellbeing (section 1) and providing information and advice (section 4), key functions such as assessments of needs for care and support under sections 9 to 13, making charges for meeting needs for care and support, or support under certain provisions of section 14, making assessments of financial resources for charging purposes under certain provisions of section 17, meeting needs under certain provisions of sections 18 to 20, direct payments under sections 31 to 33, continuity of care and support under certain provisions of sections 37 and 38, safeguarding under sections 42 and 43, provider failure under section 48, transition for children under sections 58 to 65, independent advocacy support under sections 67 and 68 and certain miscellaneous functions under sections 77 to 79. A small number of Part 1 functions have been excluded from the instrument in order to help ensure that the remit of the regime is manageable for the Commission and local authorities. Excluded functions include, for example, functions related to deferred payment agreements (sections 34 and 35) and establishing a person's ordinary residence (sections 39 and 40). Part 1 functions that have not yet been commenced are also excluded from the instrument, for example the cap on care costs (section 15).
- 6.5 Section 46A of the 2008 Act requires the Commission to publish a report of its assessment of local authorities' performance of their Part 1 functions.

7. Policy background

What is being done and why?

- 7.1 Section 46A of the Health and Social Care Act 2008, as inserted by section 163 of the Health and Care Act 2022, places a new duty on the Commission to review and assess local authorities' delivery of such of their adult social care functions under Part 1 of the Care Act 2014 as may be set out in regulations.
- 7.2 The overarching policy objective is for the new assessment duty to assess how Local Authorities are providing care and support for people in their area, by providing a greater understanding of practice and provision at a local level. It will highlight where improvements need to be made and make good practice easier to spot and share nationally. The new assessment regime will therefore make the quality of adult social care more transparent for people in their communities, those working in the sector and for the government. The change responds to the findings of several reviews which found a lack of oversight of local authorities' delivery of duties related to adult social care, such as commissioning inhibited both the response to the pandemic and forward planning.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.3 Part 1 of the Care Act 2014 sets out a range of functions that local authorities exercise in their delivery of adult social care. Local authorities are accountable to their populations and responsible for their own performance in relation to these functions. Whilst the Commission already inspects providers of adult social care, there is no

independent oversight by a regulator of local authorities' delivery of their adult social care responsibilities.

Why is it being changed?

- 7.4 The Covid-19 pandemic highlighted that the devolved structure of adult social care, in which it is the responsibility of individual local authorities to commission adult social care and oversee their local market, poses challenges for the management of national crises. The March 2021 National Audit Office report¹ entitled “the adult social care market in England” highlighted a lack of oversight of local authorities' delivery of their adult social care duties. In particular, the report highlights a lack of visibility of the effectiveness of local authority commissioning. Similarly, the independent review² by Baroness Cavendish published in 2022 entitled “Social care: Independent report by Baroness Cavendish” highlights a gap in accountability for adult social care compared to regulation of schools and children's services and recommends a new inspection framework by the Commission for adult social care.
- 7.5 As outlined in the December 2021 White Paper “People at the Heart of Care: Adult Social Care Reform”³, assessment of local authorities' delivery of their functions under the 2014 Act is also integral to the government's ambition for social care reform. The Department's aim is for assessments by the Commission to contribute to improved outcomes for people who draw on care and support. The new assessment regime will help to achieve this by providing a greater understanding of practice and provision at a local level.

What will it now do?

- 7.6 As mentioned above the Commission will review a range of functions set out in Part 1 of the 2014 Act including all the general responsibilities of local authorities, for example, promoting individual wellbeing, providing information and advice, assessments of needs for care and support or support, making charges for meeting needs for care and support, or support and making assessments of financial resources for charging purposes. A small number of Part 1 functions are excluded in order to ensure that the Commission's remit is manageable, for example, functions related to deferred payment agreements, establishing a person's ordinary residence and Part 1 functions that have not yet been commenced, for example the cap on care costs.
- 7.7 The reports which the Commission is required, by section 46A of the 2008 Act, to publish (of its assessment of local authorities' performance of Part 1 functions), will contain performance ratings, based on the Commission's assessment of local authority performance.
- 7.8 It is the intention that such assessment reports will provide enhanced transparency of local authority performance, allowing the Department and the sector to identify and

¹ [The adult social care market in England \(nao.org.uk\) https://www.nao.org.uk/wp-content/uploads/2021/03/The-adult-social-care-market-in-England.pdf](https://www.nao.org.uk/wp-content/uploads/2021/03/The-adult-social-care-market-in-England.pdf)

² [Social care: Independent report by Baroness Cavendish \(publishing.service.gov.uk\) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1059888/social-care-reform-Baroness-Cavendish-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1059888/social-care-reform-Baroness-Cavendish-report.pdf)

³ [People at the Heart of Care – Adult Social Care Reform White Paper \(publishing.service.gov.uk\) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1061870/people-at-the-heart-of-care-asc-reform-accessible-with-correction-slip.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1061870/people-at-the-heart-of-care-asc-reform-accessible-with-correction-slip.pdf)

share best practice in addition to performance issues and concerns. Our expectation is that reports will be published on the Commission's website in the same way as the Commission reports on health and social care providers and will therefore be accessible to communities. It is the Department's and the Commission's priority that assessment reports are easily accessible to the public.

- 7.9 As set out in the White Paper mentioned above ("People at the heart of care") the Commission's assessment framework for local authorities is not being introduced in isolation. It is the Department's intention for the introduction of the framework to be accompanied by an improved offer of support for the sector, funded by the Department. Local authorities will not be left on their own to improve performance but will be supported through this enhanced offer, and the Commission's assessments will allow us to target this support more effectively.
- 7.10 It is the intention that the new assessment duty will support improved outcomes for people who draw on care and support by providing a greater understanding of practice and provision at a local level. The Commission will draw upon a broad range of evidence to assess local authorities and summarise their findings for reports, which we expect to include a narrative section and a headline rating. The report will highlight where improvements need to be made and make good practice easier to spot and share nationally. The new assessment regime will therefore make the quality of adult social care and local authority performance more transparent for people in their communities, those working in the sector and for the government. It will allow the Department and the sector to identify and share best practice in addition to performance issues and concerns.
- 7.11 There will be a phased roll-out of assessments, starting with an initial evidence gathering and piloting phase (April-September 2023). This will provide the Commission with an opportunity to better understand local authority performance trends, identify any gaps in data and evidence, and further develop its methodology ahead of formal assessments commencing in September 2023.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union/ trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 This instrument does not consolidate any legislation.

10. Consultation outcome

- 10.1 There is no statutory requirement to consult on the instrument.
- 10.2 However, co-production has been a key principle underpinning the development of the Commission's assessment framework. The Department has met with working level and senior representatives from the Commission, the Local Government Association and the Association of Directors of Adult Social Services for over two years, holding regular official level meetings. These meetings have been integral to the development of the framework, and key elements, such as the scope of assessments, have been extensively tested more widely with the sector. In addition, the Commission has extensively engaged with the sector through a variety of forums, including its External Advisory Group, which includes representatives from local

government, health and social care providers and people with lived experience of social care.

- 10.3 In general, stakeholders, including from providers and local government, have been broadly accepting of the benefits of regulation, though local government stakeholders in particular have had concerns about the proposed implementation timetable and potential use of overall performance ratings. These concerns have been shared with Ministers and influenced the assessment approach, including for there to be a phased approach to rolling out the framework. Further details on the framework and plans for roll out will be published in due course.

11. Guidance

- 11.1 Guidance is not required.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument because this instrument is part of a package of legislative measures and the relevant impact assessment, published 4 Nov 2022, is available online at <https://www.gov.uk/government/publications/health-and-care-act-2022-combined-impact-assessments>
- 12.4 The Department's intention has always been to ensure that regulation of local authorities is fair, proportionate and least burdensome. This has informed the approach to assessment, which will see local authorities assessed on their performance of their existing functions set out in the 2014 Act. The Department published a full Impact Assessment to accompany section 163 of the 2022 Act, which inserts section 46A into the 2008 Act to require the Commission to assess local authorities. However, now that the Commission has further developed and tested their approach to regulation, including through piloting, the Department is undertaking a further cost-benefit analysis exercise to update the estimates contained in the original Impact Assessment. We are also undertaking a New Burdens assessment to ensure that all impacts and burdens have been thoroughly considered.
- 12.5 The Department is directly funding the Commission's development and operation of the local authority assessment framework through Grant In Aid (GIA) funding, as agreed through recent Spending Reviews. The Commission has indicated that Departmental funding, which currently runs until 2024/25, covers the costs of establishing and running the assessment framework. Discussions on framework funding beyond 2024/25 will be considered and similar consideration will be given to the Commission's resource to deliver its assessment function.

13. Regulating small business

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The instrument will be reviewed in light of policy developments, such as additional Care Act duties commencing.

15. Contact

- 15.1 Rohan Saravanamuttu, Policy Lead for Adult Social Care Assurance, at the Department of Health and Social Care: rohan.saravanamuttu@dhsc.gov.uk, can be contacted with any queries regarding the instrument.
- 15.2 Christina Bankes and Julie Laughton (Jobshare), Deputy Director for Data, Assurance and Sector Support, Adult Social Care, at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Helen Whately MP, Minister of State for Social Care at the Department of Health and Social Care can confirm that this Explanatory Memorandum meets the required standard.