

EXPLANATORY MEMORANDUM TO
THE ADULT SOCIAL CARE INFORMATION (ENFORCEMENT) REGULATIONS
2022

2022 No. XXXX

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department of Health and Social Care (DHSC) and is laid before Parliament by Command of her Majesty.

2. Purpose of the instrument

- 2.1 This instrument creates a power for the Secretary of State to impose a financial penalty on certain adult social care providers, other than public bodies, who, without reasonable excuse, fail to comply with a requirement to provide information to the Secretary of State under section 277A(1) of the Health and Social Care Act 2012, or provide information that is false or misleading to a material extent.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

- 5.1 The Minister of State for Care and Mental Health, Gillian Keegan MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Adult Social Care Information (Enforcement) Regulations 2022 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 Section 99 of the Health and Care Act 2022 (the 2022 Act) inserted section 277A into the Health and Social Care Act 2012 (the 2012 Act). This enables the Secretary of State to require a relevant provider of adult social care services to provide the Secretary of State with information that relates to the provider, their activities in connection with the provision of adult social care in England. It also requires them to provide information relating to any person to whom they have provided adult social care in England, or adult social care, outside England, in pursuance of arrangements made by an English local authority. Section 277A defines a “relevant provider of adult social care services” as a person who is required to be registered under Chapter 2 of Part 1 of the Health and Social Care Act 2008. That registration concerns the carrying on of a regulated activity involving or connected with the provision of adult social care.

6.2 Section 100 of the 2022 Act inserted section 277E into the 2012 Act, which enables regulations to make provision conferring on the Secretary of State the power to impose a financial penalty on a person, other than a public body, who without reasonable excuse, fails to comply with a requirement to provide information imposed under section 277A(1) or provides information that is false or misleading to a material extent.

6.3 This instrument is made in exercise of the powers in section 277E.

7. Policy background

7.1 Prior to the Covid-19 pandemic, DHSC collected only a small amount of provider data, mainly on bed availability in care homes, which providers submitted voluntarily. DHSC relied on data from local authorities for sector oversight. The insight available from the local authority data was limited because it was only collected annually and in aggregate, generally six months in arrears and did not cover the entire adult social care market. The 2022 Act has now, for the first time, provided a statutory mechanism that enables DHSC to obtain regular data submissions directly from adult social care providers.

7.2 As outlined in the [People at the Heart of Care¹](https://www.gov.uk/government/publications/people-at-the-heart-of-care-adult-social-care-reform-white-paper/people-at-the-heart-of-care-adult-social-care-reform) white paper, access to reliable data is key to underpinning the government's ambition for social care reform. The Covid-19 pandemic has brought into sharp focus the need for high-quality data and information to be shared and used well. Prior to the pandemic, DHSC had no comprehensive national source of data from providers on capacity, workforce status or numbers of people in receipt of care. Emergency data measures taken in response to Covid-19 have given us near real-time data to manage the pandemic and shown us the benefits of using data to respond to emerging risks and issues. Data from social care providers has been critical to the Government's Covid-19 response and will continue to be crucial to help us to understand capacity and risk in the care system, to judge when and how to target support to providers and ultimately to help facilitate the care of individuals across the care system.

7.3 During the pandemic, providers voluntarily submitted information via the Capacity Tracker, a web-based digital insight tool. This data submission was linked to the Infection Control and Testing Fund which expired on 31 March 2022. Since then, the data has been put on a statutory footing.

7.4 New section 277A of the 2012 Act, inserted by section 99 of the 2022 Act, enables the Secretary of State to require information from all regulated providers of adult social care services relating to themselves, their activities in connection with the provision of adult social care in England or persons to whom they have provided such care.

7.5 This information would continue to be subject to restrictions under the Data Protection Act 2018 and the UK GDPR. DHSC's intention is that data collected will be shared appropriately with organisations who need the data across the adult social care sector (e.g., local authorities, the Care Quality Commission and integrated care systems) to guide delivery, policy development, and research in the area for purposes connected with the health or adult social care systems in England.

¹ <https://www.gov.uk/government/publications/people-at-the-heart-of-care-adult-social-care-reform-white-paper/people-at-the-heart-of-care-adult-social-care-reform>

- 7.6 Alongside statutory data collection, this instrument, under section 277E of the 2012 Act as inserted by section 100 of the 2022 Act, enables the Secretary of State to impose a financial penalty on private adult social care providers. This is when adult social care providers, without reasonable excuse, fail to comply with a requirement to provide information or provide false or misleading information.
- 7.7 Financial penalties will normally be a last step, where (1) a provider continues to be, or is persistently, in breach of their data obligations, and (2) the delivery partner (the NHS Business Services Authority) has reached out to offer guidance and support, but the provider is still not sharing their data, and has not made appropriate attempts to do so.
- 7.8 The level of the fines will be the same as a provider's [Care Quality Commission \(CQC\) registration fee](#)² which is scaled to the provider type and size.
- 7.9 The expectation is that from the first concern, the enforcement process will happen over a period of months, rather than weeks. A provider will always be given the opportunity to make representations as to why they have not supplied the required data and why a financial penalty should not be imposed.
- 7.10 A provider to whom a final penalty notice has been given will be able to appeal to the First-tier Tribunal.
- 7.11 There may be occasions where breaches may be unavoidable, therefore DHSC are building in a process (including provision for the making of representations) which allows for individual circumstances to be taken into account when there is a breach. If justified, notices will be withdrawn as appropriate.
- 7.12 Furthermore, there may be rare instances where some of the required information cannot be updated by a provider because the information is not relevant to their setting, or because the provider is no longer operating, in which case, enforcement action would not be anticipated.

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 2018.

9. Consolidation

- 9.1 This instrument does not consolidate any legislation.

10. Consultation outcome

- 10.1 In developing these regulations, remote engagement was conducted with adult social care provider representatives and providers. Engagement was carried out with over 200 providers on plans for data collection and enforcement. This was in addition to ongoing engagement with the sector in relation to the specific data that DHSC are seeking, which includes discussions about what data the sector requires.
- 10.2 The sector has significant concerns about the switch to statutory data collection with financial penalties for non-compliance. Some providers felt they have had little warning of the data clauses in the 2022 Act although they have been public since early

² https://www.cqc.org.uk/sites/default/files/20190326%20Fees_scheme_201920%20fees_FINAL.pdf

2021. They have flagged concerns including the burden of data collection especially in the absence of the Infection Control and Testing Fund (ICTF) and similar incentives, the duplication of data collection by central government, CQC, local government and local NHS partners, and have also questioned whether national government really needs all the data that it collects. The DHSC long-term data strategy will address many of these issues.

- 10.3 Providers expressed concerns that, for smaller providers in particular, fines would threaten their ability to continue to run services, and that the administrative burden of data submission would be unviable for many providers. They made clear that financial penalties need to be proportionate and that there needs to be sufficient support built into the system to support compliance as smaller providers will have less resource and digital capability.
- 10.4 In response to feedback, Ministers decided to put back the original planned laying date for the instrument to enable further engagement and to ease providers into the changes, and to revise the approach to data collection.
- 10.5 The scope and frequency of data collection has been reduced from weekly to monthly collections and will be regularly reviewed to keep the overall burden proportionate and to keep the frequency of collection to a minimum. DHSC also intend to give at least 3 months' notice, where possible, of any change to the mandated data or to the frequency of collection before making it a legal requirement. The move to monthly collections, together with sufficient notice of proposed changes, signal DHSC's commitment to balancing needs and burdens.
- 10.6 DHSC are improving the accessibility of the data available to providers and local government for benchmarking. DHSC will also consider any opportunity to link the Capacity Tracker data to other data sources, such as CQC data or local NHS information to support providers in the running of their business.
- 10.7 DHSC are building in significant support for adult social care providers at all stages of the process, in particular at the data collection stage, so that the number of cases needing to be escalated to enforcement action are minimised. DHSC will continue to resource North England Commissioning Support Unit (NECS) to support providers with data submission.
- 10.8 The process will emphasise support, encouragement and engagement, with recourse to financial penalties as a last resort, and where financial penalties prove necessary, providers will be able to make representations to explain non-compliance before a decision to impose a financial penalty is made. Where a penalty is given, providers will be able to appeal to the First-Tier Tribunal against the decision to impose that penalty or the amount of that penalty.

11. Guidance

- 11.1 The Government published operational guidance on data collection in July 2022 which also highlighted the upcoming enforcement regulations and what providers can expect the process to look like. The Government will publish operational guidance on enforcement by the time that, subject to approval from Parliament, regulations are made.
- 11.2 DHSC have written to providers with information on the data provisions and supplied a comprehensive FAQ document which addresses the questions received from

providers. DHSC will be engaging further with the sector through regional leads, provider representative groups, and other stakeholders.

12. Impact

- 12.1 DHSC have completed a Regulatory Triage Assessment for this policy and estimate that the upper bound for the cost to businesses is £1.4m. This assumes that fines will have the same effect on provider behaviour (non-compliance with data mandation) as the financial incentive provided by the 2021 ICTF. This is likely to be an over-estimate of the cost to the sector because we expect the deterrent effect of fines to be greater than the incentive effect of ICTF.
- 12.2 If levied, these fines will likely squeeze profit margins, felt most by those making a small profit or losing money due to other pressures on the system. However, DHSC are taking mitigating action such as placing an emphasis on supporting the sector to continue to provide data and intending to resort to financial penalties as a last resort in cases of persistent or serious non-compliance.
- 12.3 There is no, or no significant, impact on the public sector.
- 12.4 A full Impact Assessment has not been prepared for this instrument because the power to impose a financial penalty is a discretionary power which will be used for the most serious or persistent offenders, and the instrument will not have an impact to business of over £5million.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is proportionate to the size and type of provider which would be being fined, and providers will have the opportunity to make representations as to why they are unable to comply with requests for information, before a decision is made to issue or not issue a financial penalty.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is that the Secretary of State must carry out a review of the regulatory provision in the instrument and publish a report setting out the conclusions of the review within 5 years of when the instrument comes into force, and subsequently at 5-year intervals.

15. Contact

- 15.1 Edona Doci at the Department of Health and Social Care, email: AssuranceBriefingHub@dhsc.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Christina Bankes and Julie Laughton, Deputy Directors for the Assurance and Support Division, at the Department of Health and Social Care can confirm that this explanatory memorandum meets the required standard.
- 15.3 Gillian Keegan MP, Minister of State for Care and Mental Health at the Department of Health and Social Care can confirm that this explanatory memorandum meets the required standard.