

EXPLANATORY MEMORANDUM TO
THE LOCAL AUTHORITY SOCIAL SERVICES AND NATIONAL HEALTH
SERVICE COMPLAINTS (ENGLAND) (AMENDMENT) REGULATIONS 2009

2009 No. 1768

1. This Explanatory Memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments

2. Purpose of the instrument

- 2.1. These Regulations amend the procedure for the handling of complaints by Local Authorities, in respect of complaints about adult social care, and by NHS bodies, primary care providers and independent providers in respect of provision of NHS care. The main alteration relates to complaints about adult social care.

3. Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1. These Regulations amend the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 (S.I. 2009/309) (“the 2009 Regulations”). The Joint Committee on Statutory Instruments drew special attention to the 2009 Regulations in its Eleventh Report of Session 2008-09.
- 3.2. The first ground was that regulation 8 of the 2009 Regulations did not accord with proper drafting practice.
- 3.3. Regulation 8(1) specifies certain types of complaint that are not required to be dealt with in accordance with the Regulations. Regulation 8(2) provides for certain consequences where the responsible body handling the complaints decides that the complaint is a complaint specified in regulation 8(1).
- 3.4. In the Committee’s view, regulation 8(1) sets an objective test, whilst regulation 8(2) (which applies where the body makes a decision) applies a subjective test. As regulation 8(1) states that it is subject to regulation 8(2), then as regards the matters covered by regulation 8(2), the subjective test wholly overrides the objective test. The Committee considered that this in effect gives the body making the decision the benefit of the doubt in a borderline case; and that it is undesirably obscure to say that regulation 8(1) is subject to regulation 8(2) where the latter provision overrides the totality of the former.

Proposed amendments

- 3.5. It was intended that regulation 8(2) would only apply where the objective test under regulation 8(1) is satisfied and the body proceeds to make the decision in accordance with the regulation. Having regard to the Committee’s views, it is intended to alter regulation 8(2) so that it includes the objective test under regulation 8(1). The relevant amendment is to be made by regulation 4(3) of these Regulations.

- 3.6. With regard to regulation 8(2)(a), the purpose of this provision is that the responsible body is not required to consider a complaint, or consider it further, when it decides that the complaint is a complaint specified in regulation 8(1). However it is considered that this purpose is in any event fulfilled by regulation 8(1), whereby as a matter of law the body would not be required to deal with the types of complaint specified. It appears to the Department therefore that regulation 8(2)(a) is not necessary and should be removed.
- 3.7. With regard to the notification requirement under regulation 8(2)(b), this will be amended to include the objective test under regulation 8(1). It will therefore only apply (with one exception, as previously) where (a) a complaint is a complaint specified in regulation 8(1), and (b) a responsible body makes a decision to that effect.

Explanatory Note

- 3.8. The Committee also reported the Explanatory Note for being defectively drafted in failing to record the change from objective tests in the predecessor regulations to a subjective test in the 2009 Regulations. As indicated above, the Department had not intended to remove the objective test, and it was intended that regulation 8(2) would only apply where the objective test under regulation 8(1) was satisfied and the body proceeded to make the decision. The Department regrets the wording of regulation 8 which led the Committee to assume that such a change had been intended and omitted from the Explanatory Note.

4. Legislative Context

- 4.1. Reformed complaints procedures for NHS bodies and for Local Authorities, in respect of their adult social services functions, came into force on 1 April 2009 (The Local Authority Social Services and National Health Service Complaints (England) Regulations 2009). These replaced the National Health Service (Complaints) Regulations 2004, the National Health Service (Complaints) Amendment Regulations 2006 and the Local Authority Social Services Complaints (England) Regulations 2006 respectively.

5. Territorial Extent and Application

- 5.1. This instrument applies to England.

6. European Convention on Human Rights

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

7. Policy background

Services commissioned by Local Authorities

- 7.1. The regulations introduced with effect from 1 April 2009 made provision for a reformed, integrated statutory complaints procedure for the NHS and Local Authority adult social services. For the purpose of adult social services, it was the policy intention that services commissioned by Local Authorities – e.g. in care homes - should be within the scope of the reformed procedure, so that complaints about those services could be taken forward within the statutory Local Authority complaints procedure. The rationale was that if the Local Authority commissioned a service from a private provider, it had a duty to the service user if they were dissatisfied with the service. Complainants in those settings would also be able to use the provider's own procedure to complain, known as "care standards" complaints because regulated providers are required to operate effective complaints procedures under the Care Standards Act 2000.
- 7.2. However, following questions by some Local Authorities, the Department of Health established that the scope of complaints that Local Authorities are required to consider under the 2009 Regulations is inadvertently different from the scope of complaints under the previous regulations introduced in 2006. The effect is that Local Authorities are not required to consider complaints by people using services commissioned by the Local Authority. The Department regards this as unsatisfactory and there is therefore a need for the regulations to be amended to achieve the original policy intention.

Social care complaints

- 7.3. The 2009 Regulations require Local Authorities in certain circumstances to disclose information to providers of care services and to co-operate with them regarding the handling of the complaint. The current registration arrangements in respect of the care services concerned are to be replaced by new arrangements for which the new Care Quality Commission is to be responsible. The 2009 Regulations will apply to the current registration arrangements until 1st April 2010, when the new arrangements were expected to take effect. The new arrangements are now expected to take effect on 1st October 2010. The Regulations amend the 2009 Regulations to reflect this change.

Types of complaint not required to be dealt with under the Regulations

- 7.4. Regulation 8 of the 2009 Regulations was the subject of a Report by the Joint Committee on Statutory Instruments. The main point is that the regulation appeared to rely on the subjective view taken by the body considering a complaint under the Regulations. Paragraph 3 above deals in more detail with the Report, and with the amendments that have been made in the light of the Report.

8. Consultation Outcome

- 8.1. The Department of Health's public consultation (*Making Experiences Count* – June 2007) and its response (*Making Experiences Count – The proposed new arrangements for handling health and social care complaints Response to Consultation* - February 2008) were premised on the original policy intention which the regulations have been found not to have achieved. The Department has not therefore carried out a further consultation on amending the regulations.
- 8.2. However, Departmental officials have discussed this issue with some Local Authorities and with ADASS (the Association of Directors of Adult Social Services), and has communicated its plans to amend the regulations to Local Authorities the Department's plans formally via ADASS.

9. Guidance

- 9.1. The Department will confirm with ADASS when the amendments have been made. It has no current plans to issue guidance on these changes, but will keep under review the option of further guidance should a perceived need arise in the light of operational experience.

10. Impact

- 10.1. These Regulations are technical, and the original policy intention was reflected in the Impact Assessment for the Regulations of April 2009. There is no difference in the impact on business, charities or voluntary bodies compared to the minimal impact envisaged in the Impact Assessment. The Department therefore does not propose to produce a further Impact Assessment

11. Regulating small business

- 11.1. The legislation does not affect small business.

12. Monitoring & review

- 12.1. The Department of Health will monitor the operation of the regulations on an ongoing basis.

13. Contact

- 13.1. Chris Bostock at the Department of Health Tel: 0113 254 5130 or email: chris.bostock@dh.gsi.gov.uk can answer any queries regarding the instrument.