EXPLANATORY MEMORANDUM TO

THE CONTRACTING OUT (LOCAL AUTHORITIES SOCIAL SERVICES FUNCTIONS) (ENGLAND) ORDER 2014

2014 No. [XXXX]

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

2. Purpose of the instrument

2.1. The purpose of The Contracting Out (Local Authorities Social Services Functions) (England) (Amendment) Order 2014 is to allow local authorities to contract specified adult social services functions to third parties.

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

3.1. None.

4. Legislative Context

4.1. Orders made under section 70 of the Deregulation and Contracting Out Act 1994 allow the contracting out of local authority functions. The Contracting Out (Local Authorities Social Services Functions) (England) Order 2011 permitted specified social services functions to be contracted out to third parties by local authorities participating in two government-funded pilot programmes – the adult Social Work Practice (SWP) and Right to Control pilot schemes.

4.2. The 2011 Order was extended in late 2012 to allow for the Right to Control scheme (led by the Department for Work and Pensions) to continue for a further 12 months, and to allow the SWP pilots (led by the Department of Health) to operate to 31 March 2014, to coincide with the anticipated publication of the final evaluation report for the scheme.

4.3. Following the receipt of the final evaluation report, and in preparation for the planned closure of the SWP pilot scheme in March 2014, the Government wishes to extend the power of delegation piloted by those participating in the scheme to all English local authorities.

4.4. Decisions on the future of the Right to Control pilot scheme have yet to be made, and hence no provisions are included in the new Order in this regard. This new Order therefore deals solely with Local Authorities social services functions.

4.5. The Care Bill, currently before Parliament, at clause 78 gives local authorities the power to delegate certain statutory functions, along the same lines as the powers conferred on the pilot sites by the 2011 Order. This is intended to be the long-term legal mechanism to enable delegation of social services functions to take place.

5. Territorial Extent and Application

5.1. This instrument applies to England only.

6. European Convention on Human Rights

The Minister of State for Care Services made the following statement regarding Human Rights:

In my view, the provisions of the Contracting Out (Local Authorities Social Services Functions) (England) Order 2014 are compatible with the Convention rights.

7. Policy background

Social Work Practices

7.1 Social Work Practices (SWPs) are social worker-led organisations that are autonomous of the local authority and provide social work services for specified groups of adults.

7.2 SWPs discharge functions of the local authority and are responsible for providing the support to people cared for, with the intention of achieving better experiences and outcomes. They have responsibility for undertaking delegated social work functions, managing day-to-day support, co-ordinating and monitoring service provision. The local authority maintains its strategic and corporate responsibilities, and manages the contract and partnership with the SWP. The DACO Act 1994 provides that the local authority remains responsible in law for any acts or omissions by the third party to whom functions have been contracted-out.

7.3 The SWP pilots were established in October 2011, to allow seven local authorities to delegate certain social services functions to social worker-led practices. The pilots were initially intended to run for two years, but were subsequently extended via a second Order, to allow further time for evaluation, reflecting the significant lead-in time for agreeing contracts with SWPs, which had delayed the start in some pilot areas.

Final Evaluation of the SWP programme

7.4 A draft of the final evaluation report from Kings College, London was received in mid-January. The final report is now undergoing a period of academic peer-review, as is standard with evaluation studies. We expect this process to be completed and the report ready for publication by April 2014.

7.5 The evaluation of the programme, as expected through regular contact with the evaluators as part of a support function for the scheme delivered by the Social Care Institute of Excellence (SCIE), was largely positive.

7.6 The main finding was that the success of the SWP in being more innovative, flexible, and less bureaucratic than traditional delivery methods, largely depended on the quality of contract and relationship with the parent local authority. Greater outcomes and satisfaction appears to be more evident in smaller, more specialised SWPs that focused on discrete client groups, rather than larger models of practice. There were no significant issues identified that would affect the long-term policy view of this kind of practice being more widely available to local authorities in the future.

7.7 The findings from the evaluation will also be beneficial in the production of statutory guidance to local authorities under provisions in the Care Bill regarding implementation of the proposed general power of delegation in the Bill.

7.8 In addition to the evidence from the SWP pilot programme, there has been significant interest in this area from the Cabinet Office Mutual Support Programme. The Programme (a £10m fund to support the creation and growth of public service mutual by contracting-out statutory functions) has found growing demand from local authority commissioners and staff interested in delivering statutory adult social care through delegated arrangements, ahead of the Care Bill. The proposed new Order will enable the delegation of functions so that such projects and others are able to mutualise statutory adult social care functions in advance of the Care Bill.

Why a new Order is required

7.9 The current pilot scheme expires on 31 March 2014, at which point the legal basis for the delegation of functions in the SWP local authority areas will cease. The Care Bill at clause 78 gives local authorities the power to delegate certain statutory functions, and this is intended to be the longer-term legal mechanism to provide powers for similar approaches in the future. However, since the Care Bill would not come into force until April 2015, subject to Parliamentary approval, this creates a gap, and means there would be no equivalent powers in place to bridge the 2014/15 year.

7.10 In light of the positive feedback in the SWP final evaluation report, increasing interest from local authorities looking to invest in such approaches as part of the mutuals agenda, and the long-term vision in the Care Bill, it is the Government's position that a new Order should be created to enable all local authorities to begin to delegate out specified adult social care functions from April 2014.

7.11 This new Order would allow the local authorities currently contracting-out functions in the pilot scheme to continue such arrangements lawfully until the implementation of the Care Bill. Not doing so would result in the SWP sites being forced back into local authority control, losing the progress that has been made under the pilot programme. This could have a significant impact in terms of administrative costs for the local authorities involved, if services are required to be re-integrated within local authorities, potentially for one year only. This may also risk effective delivery of services to individuals receiving care and support through the SWPs.

7.12 The new Order would also extend such powers to other English local authorities. This would support the Government's policy of expanding the SWP approach across England, and ensure a consistent policy message, enabling other authorities to begin the lengthy process of setting up similar arrangements. Regular requests from individual authorities demonstrate a desire for such flexibilities to be put in place. Moreover, discussions with local government suggest that such new powers could be a useful support for local authorities planning for implementation of the Bill, by allowing time to develop arrangements over 2014/15 which may help to improve outcomes and manage capacity for service delivery when the new statute comes into effect.

7.13 The proposed new Order is intended to reflect the arrangements permitted in the pilot sites under the current Order, so that SWPs may continue unaffected. In particular, requirements for delegated functions to be led by a social worker, or other suitably skilled individual, are retained.

7.14 The Order allows for delegation of specified social services functions (detailed in the Schedule). The permitted functions are intended to both ensure that SWPs can continue, and to match the equivalent functions which will be able to be delegated

under the Care Bill. In this way, the Order should have no impact on existing SWPs and those individuals receiving care and support; but it will also allow other local authorities to begin to make arrangements for delegation in a manner which is consistent with the powers that will be conferred on them by the Care Bill. For example, the Order does not permit delegation of existing powers to charge for the cost of non-residential care (under the Health and Social Services and Social Security Adjudications Act 1983), because the Care Bill (under clause 78(2)(c)) will not allow delegation of the equivalent new power. This should ensure no discrepancy with the new statute to be implemented in April 2015.

7.15 For the reasons above, the Government's view is that a new Order should be made as proposed, before the existing SWP pilot sites come to an end on 31 March 2014. We recognise, and apologise for, the short notice which this provides for the approval of the Order itself. The urgency of the current situation has been caused by an unexpected delay in production of the evaluation report, which has affected the ability to make a longer-term decision on the future of the SWP pilots. Sight of the draft evaluation report of the pilot scheme was delayed due to issues with gathering research findings, and was only made available to the Department in mid-January 2014. We have sought to respond to this situation, review the evaluation report and consult with stakeholders, as quickly as possible. Doing so has further demonstrated the additional benefits of extending the Order to other local authorities, and we wish to use this opportunity to make provision in that regard, rather than seeking a further new Order to do so.

8. Consultation outcome

8.1. Representatives in each of the SWP pilot sites have been consulted, and the proposal to extend the Order has been well received. In addition, the Department has consulted representatives of local government, including the Association of Directors of Adult Social Services, who have also been supportive of the proposed approach, and have in particular noted the potential benefits for local authorities considering options for preparing for implementation of the Care Bill.

8.2. The Department has also consulted widely on the Care Bill, including on the proposed general power of delegation, which this Order supports. Consultation and pre-legislative scrutiny on the draft Care and Support Bill (which also included the proposed power) was almost universally positive on extending such powers to local authorities. This has been reinforced through debates on the Care Bill, and demonstrates support for the policy intent which the Order seeks to implement in 2014/15.

8.3. Moreover, the Cabinet Office, through their programme of work to promote public sector mutuals, have been also contacted by several local authorities keen to gain a power of delegation on the same lines as the SWP pilots, before the Care Bill is enacted.

8.4. It is our view, therefore, that the broader policy principle of delegation has been subject to sufficient consultation, and has been shown to be supported. The views of the existing SWP pilots as to the continuation of delegated arrangements are also consistent with this direction. Following approval of the Order, subject to the views of Parliament, the Department of Health will also notify local authorities of the new Order and provide information from the evaluation report, to assist in the use of the powers in 2014/15.

9. Guidance

9.1 No statutory guidance is intended to be issued specific to the 2014 Order. However, the Department will notify local authorities of the new Order, and will communicate publication of the SWP evaluation report to provide authorities interested in delegating functions with insight and guidance on best practice from the experiences of the SWP pilots. In addition, authorities will be able to apply to the Cabinet Office Mutuals Support Fund for bespoke professional support.

9.2 Furthermore, the Department will shortly be consulting on draft statutory guidance to accompany the Care Bill. This will include formal guidance on the exercise of the general power of delegation in the Bill, and will draw on the evaluation of the pilot scheme. The consultation is planned for May 2014.

10. Impact

10.1. An impact assessment has not been prepared for this instrument, as the evaluation of SWPs showed no significant initial impact on private and voluntary sectors. Impact assessments have not been required for previous Orders relating to the SWP scheme. The proposed Order provides discretion for local authorities to delegate specific functions, but does not place any statutory requirements on them in this regard.

10.2. The Order will provide a power for local authorities which will extend for the 2014/15 year only, and which will be superseded by powers in the Care Bill from April 2015. Impact assessments relating to the new legal framework in the Care Bill have been produced and updated during passage of the Bill, and are available at: https://www.gov.uk/government/publications/the-government-published-a-series-of-impact-assessments-alongside-the-care-bill. Further impact assessments will be published alongside regulations and statutory guidance which support implementation of the Bill, when published for consultation in due course.

11. Regulating small business

11.1. The Order will have no bearing on the regulation of existing small businesses.

12. Monitoring and review

12.1. Councils who choose to exercise this power of delegation will monitor and review the work both they and the contracted organisations undertake.

13. Contact

Kevin Kitching at the Department of Health Tel: 0113 254 6745 or e-mail: Kevin.kitching@dh.gsi.gov.uk can answer any queries regarding the instrument.