

HOUSE OF LORDS

Merits of Statutory Instruments Committee

15th Report of Session 2009-10

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The Select Committee on the Merits of Statutory Instruments

The Committee has the following terms of reference:

- (1) The Committee shall, subject to the exceptions in paragraph (2), consider—
 - (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 (3).
- (2) 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.
- (3) 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.
- (4) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (3) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

The members of the Committee are:

Rt Hon. the Baroness Butler-Sloss GBE	The Baroness Morris of Yardley
The Baroness Deech DBE	The Lord Norton of Louth
The Lord Hart of Chilton	The Lord Rosser (<i>Chairman</i>)
The Lord James of Blackheath CBE	The Lord Scott of Foscote
The Lord Lucas	The Baroness Thomas of Winchester
The Lord Methuen	

Registered interests

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 House of Lords Record Office and is available for purchase from the Stationery Office.

Declared interests for this Report are in Appendix 2.

Publications

The Committee's Reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/parliamentary_committees/merits.cfm

Contacts

If you have a query about the Committee or its work, please contact the Clerk of the Merits of Statutory Instruments Committee, Delegated Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email merits@parliament.uk. The Committee's website, www.parliament.uk, has guidance for the public on how to contact the Committee if you have a concern or opinion about any new item of secondary legislation.

Statutory instruments

The Government's Office of Public Sector Information publishes statutory instruments on the internet at www.opsi.gov.uk/stat.htm, together with an explanatory memorandum (a short, plain-English explanation of what the instrument does) for each instrument.

Fifteenth Report

INSTRUMENT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

None.

OTHER INSTRUMENTS OF INTEREST

Postgraduate Medical Education and Training Order of Council 2010 (SI 2010/473)

1. This Order is part of a sequence of statutory instruments relating to the abolition of the Postgraduate Medical Education and Training Board and the transfer of its functions to the General Medical Council (GMC). The provisions of this Order reflect those currently in the General and Specialist Medical Practice (Education, Training and Qualifications) Order 2003 (S.I.2003/1250), which prescribes the categories of registered medical practitioners who are eligible for entry into the General Practitioner and Specialist Registers. The eligibility criteria reflect the content of Directive 2005/36/EC concerning the recognition of professional qualifications. This includes those who are on the list of visiting medical practitioners from the EU who are practising in this country on a temporary and occasional basis. The Committee noted that the registration requirements do not include any test or evidence of the practitioner's proficiency in English. The Department of Health explained that this is covered by the NHS (Performers Lists) Regulations 2004 which require the employer, generally the Primary Care Trust, to satisfy itself that the practitioner has the necessary level of English to perform the relevant services. Where a PCT refuses to admit a doctor to the Performers List or it is made aware of concerns over a doctor's ability to perform his duties it must notify the GMC. Interested Members of the House may wish to note that the Commons Select Committee on Health is currently taking evidence on use of overseas doctors in providing out-of-hours services.¹

General Medical Council (Registration Appeals Panels Procedure) Rules Order of Council 2010 (SI 2010/476)

2. Following the transfer of the statutory functions relating to the regulation of postgraduate medical education and training to the GMC, a number of new categories of appeal need to be added to the decisions the GMC can make. The Rules in the Schedule to this Order set out the procedures to be followed both for those appeals and for all other registration appeals to the Registration Appeals Panel of the GMC. This Committee had some concerns that the policy intention expressed in the Explanatory Memorandum will not be fully delivered by the Rules as currently drafted. For example, paragraph 7.21 of the EM states that the default position will be that all oral appeals will be heard in public, but written appeals will be in

¹ <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhealth/uc441/uc44102.htm>

private; Rule 16 does not appear to deliver that intention. Rules 16(2) specifies that the Panel must deliberate in the absence of the parties, but fails to make provision about the absence of the public. The GMC acknowledged in its consultation documents that it might not get the requirements right first time and have undertaken to review the procedures once they have been in operation for six months.

Social Security (Work-focused Interviews etc.) (Equalisation of State Pension Age) Amendment Regulations 2010 (SI 2010/563)

3. The existing rules make it a condition for receiving certain social security benefits that people must take part in compulsory work-focused activities up to age 59, where appropriate. Currently all work-focused activities become voluntary once a person has reached age 60. These regulations gradually extend benefit conditionality and the full range of mandatory programmes designed to help people return to work to those aged 60-64. The instrument changes the cut off to “pensionable age” and defines it for the transitional period to mean that a man born before 6 April 1955 reaches “pension age” when a woman born on the same day reaches her new pension age date. The move has been welcomed by those representing the interests of the older generation, but we note that, as one of a number of recent initiatives, this will further increase the demands on Jobcentre Plus staff.

Wildlife and Countryside Act 1981 (Variation of Schedule 9) (England and Wales) Order 2010 (SI 2010/609)

4. This Order makes a number of amendments to Schedule 9 to the Wildlife and Countryside Act 1981 which lists the animals which may not be released or allowed to escape into the wild, and the plants which may not be planted or otherwise caused to grow in the wild. The Order adds 61 new entries and removes 8 entries. New additions include: wild boar; Chinese water deer; and Black swan. The Order has been laid with an Impact Assessment which sets out the rationale for each of the decisions. The Explanatory Memorandum (EM) says that the responses to the public consultation indicated strong support for the amendments to Schedule 9.

Feed-in Tariffs (Specified Maximum Capacity and Functions) Order 2010 (SI 2010/678)

5. This Order makes provision for the purposes of a Feed-in Tariffs (FITs) scheme (“the scheme”) under which licensed electricity suppliers will pay small-scale generators of renewable electricity at prescribed tariffs for the amounts of electricity that they export to the distribution network. This Order gives functions to Ofgem and the Secretary of State to administer the scheme and sets the specified maximum capacity for support under the scheme for small scale low-carbon electricity generation at 5MW. The Impact Assessment (IA) says that the scheme will enable broad participation of individuals and communities, as well as energy professionals, in the “big energy shift” to a low carbon economy (IA page 5).

Criminal Defence Service (Funding) (Amendment) Order 2010 (SI 2010/679)

6. The EM to this Order explains that the Ministry of Justice (MoJ) is required to contribute £1bn of efficiency savings towards wider Government savings

targets, and this includes savings from legal aid. As part of a broader suite of proposals, this Order amends the fees payable to litigators (primarily solicitors) for representing individuals in the magistrates' court whose cases are then committed to the Crown Court for trial. The single fixed fee of £318 excluding VAT for this work, as part of the Litigators Graduated Fee Scheme, aims to remove an element of duplication and also to reflect the fact that committal proceedings in the magistrates' court are, in general, less substantive than in the past. The new arrangements are similar to those that apply to indictable only cases that are sent to the Crown Court without any committal proceedings. The response to the consultation was broadly negative and the impact assessment notes that the median annual reduction in fees for solicitors would be £2559 or 29% of the old committal fees.

Criminal Defence Service (Funding) (Police Station Advice and Assistance) Order 2010 (SI 2010/681)

7. The Access to Justice Act requires the Legal Services Commission (LSC) to fund appropriate advice and assistance to individuals detained at police stations or attending them voluntarily in relation to investigations. The LSC currently spends about £180m on this, with the fees for each area being negotiated separately and currently ranging from £140 to £340 excluding VAT per matter. MoJ are aware that there are inefficiencies in the scheme and are currently piloting alternative tendering methods. As part of the overall need to make savings in the Legal Aid budget, this Order reduces the fees in about 60% of the country where applications from solicitors to participate in the service are most heavily subscribed. The maximum reduction in the fees for those areas will be about 8%. A Funding Order is needed for the new fees to apply during the period before the current contracts between the LSC and legal aid providers expire in July 2010. The revised fees will then be set out in the contracts which will apply from July. The response to consultation was broadly negative in particular about the use of the power to change contracts mid-term, and that the cuts were not made across the whole country.

Insolvency (Amendment) Rules 2010 (SI 2010/686)

Insolvency (Scotland) Amendment Rules 2010 (SI 2010/688)

8. These two linked instruments aim to modernise the main set of insolvency rules (SI 1986/1925 Insolvency Rules 1986 and SI 1986/1915 Insolvency (Scotland) Rules 1986 ("the 1986 Rules")) to better meet the needs of users of insolvency law. The Explanatory Memorandum (EM) for SI 2010/686 says that the amendments modernise and simplify the procedures in the 1986 Rules to enable insolvency cases to be administered more efficiently and by modern means, with greater control and transparency being given to creditors in some areas (paragraph 4.2). Key changes include: to allow meetings that are required to be held within the insolvency process to be held other than at a physical venue; some of the communications through the insolvency process may be by electronic means; and new authentication procedures are provided to facilitate electronic delivery of documents.

Train Driving Licences and Certificates Regulations 2010 (SI 2010/724)

9. These Regulations transpose EU Directive 2007/59/EC that introduces harmonised train driving licences because there is a perceived need to have common standards across the EU to regulate the increasing number of cross-border services. A train driver on the mainline rail system will be required to hold a licence attesting to his general fitness and train driving knowledge, and a certificate attesting his competence to drive specific types of rolling stock and on different types of infrastructure. The harmonised licenses will also make it easier for qualified drivers to move between states and between railway undertakings. We note that, in contrast to the position for doctors, an English proficiency test is included in the qualifications Regulations (see Schedule 4(8)). The provisions will be introduced into the UK over an 8 year transition period. The Regulations come into effect in three phases; new cross-border drivers will need to be licensed from October 2011; new domestic drivers from 2013 and existing drivers from October 2018. The licence will be valid for 10 years subject to periodic medical assessment and it is the employer's responsibility to ensure that the drivers they engage hold valid and appropriate licences and certificates.

**DRAFT CONDITIONAL FEE AGREEMENTS (AMENDMENT)
ORDER 2010: CORRESPONDENCE**

10. On 17 March the Committee published a report drawing the special attention of the House to the Draft Conditional Fee Agreements (Amendment) Order 2010 (14th Report of this Session, HL 94). The Committee has since received an item of correspondence from the Society of Editors relating to the Order. As it may be of assistance to the House this is printed at Appendix 1.

**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 requiring affirmative approval

Al-Qaida and Taliban (Asset-Freezing) Regulations 2010

Draft Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2010

Draft Financial Services and Markets Act 2000 (Liability of Issuers) Regulations 2010

Youth Rehabilitation Order (Review by Specified Courts) Order 2010

Instruments subject to annulment

- SI 2010/473 Postgraduate Medical Education and Training Order of Council 2010
- SI 2010/476 General Medical Council (Registration Appeals Panels Procedure) Rules Order of Council 2010
- SI 2010/490 Conservation of Habitats and Species Regulations 2010
- SI 2010/491 Offshore Marine Conservation (Natural Habitats, &c.) (Amendment) Regulations 2010
- SI 2010/502 Charities (Exception from Registration) Regulations 2010
- SI 2010/560 Pension Protection Fund (Miscellaneous Amendments) Regulations 2010
- SI 2010/563 Social Security (Work-focused Interviews etc.) (Equalisation of State Pension Age) Amendment Regulations 2010
- SI 2010/567 Town and Country Planning (General Development Procedure) (Amendment) (England) Order 2010
- SI 2010/568 Planning (Listed Buildings and Conservation Areas) (Amendment) (England) Regulations 2010
- SI 2010/569 Town and Country Planning (London Borough of Camden) Special Development (Amendment and Revocation) Order 2010
- SI 2010/575 Policing of Aerodromes (Belfast International Airport) Order 2010
- SI 2010/576 Smoke Control Areas (Authorised Fuels) (England) (Amendment) Regulations 2010
- SI 2010/577 Smoke Control Areas (Exempted Fireplaces) (England) Order 2010
- SI 2010/579 Health and Safety (Fees) Regulations 2010
- SI 2010/587 Environmental Damage (Prevention and Remediation) (Amendment) Regulations 2010
- SI 2010/590 Children's Trust Board (Relevant Partners) (Exceptions) (England) Regulations 2010
- SI 2010/591 Children's Trust Board (Children and Young Person's Plan) (England) Regulations 2010
- SI 2010/596 A1 (M) Motorway (County of Durham) (Restriction on Use of Off-side Lanes) (Southbound) Regulations 2010
- SI 2010/598 Young People's Learning Agency for England (Specified Charges) Regulations 2010
- SI 2010/599 Learning and Skills Council for England (Transfer Schemes) (Permitted Transferees) Order 2010
- SI 2010/601 Local Democracy, Economic Development and Construction Act 2009 (Consequential Amendments) (England) Order 2010

- SI 2010/602 Town and Country Planning (Regional Strategy) (England) Regulations 2010
- SI 2010/603 Marine Management Organisation (Prescription of Powers to Fix Fees and Charges) Order 2010
- SI 2010/604 Education (School Day and School Year) (England) (Amendment) Regulations 2010
- SI 2010/607 Houses in Multiple Occupation (Specified Educational Establishments) (England) Regulations 2010
- SI 2010/609 Wildlife and Countryside Act 1981 (Variation of Schedule 9) (England and Wales) Order 2010
- SI 2010/615 Export Control (Uzbekistan) Order 2010
- SI 2010/616 Crime and Disorder (Overview and Scrutiny) (Amendment) Regulations 2010
- SI 2010/617 Her Majesty's Chief Inspector of Education, Children's Services and Skills (Fees and Frequency of Inspections) (Children's Homes etc) (Amendment) Regulations 2010
- SI 2010/620 National Health Service (Travel Expenses and Remission of Charges) Amendment Regulations 2010
- SI 2010/621 Civil Procedure (Amendment) Rules 2010
- SI 2010/622 Local Safeguarding Children Boards (Amendment) Regulations 2010
- SI 2010/623 South Kent College, Folkestone (Dissolution) Order 2010
- SI 2010/624 Initial Sixth Form College Corporation Designation (England) Order 2010
- SI 2010/625 Specified Sixth Form College Corporation Order 2010
- SI 2010/629 Merchant Shipping (Light Dues) (Amendment) Regulations 2010
- SI 2010/630 Marine and Coastal Access Act 2009 (Commencement No. 1, Consequential, Transitional and Savings Provisions) (England and Wales) Order 2010
- SI 2010/631 North Western and North Wales Sea Fisheries District (Consequential and Transitional Provisions) Order 2010
- SI 2010/633 First-tier Tribunal (Gambling) Fees (Amendment) Order 2010
- SI 2010/634 National Health Service (Miscellaneous Amendments Relating to Ophthalmic Services) Regulations 2010
- SI 2010/635 National Health Service (Standing Advisory Committees) Amendment Order 2010
- SI 2010/639 Water Resources (Control of Pollution) (Silage, Slurry and Agricultural Fuel Oil) (England) Regulations 2010
- SI 2010/640 Communications (Television Licensing) (Amendment) Regulations 2010

- SI 2010/641 Social Security (Miscellaneous Amendments) (No. 2) Regulations 2010
- SI 2010/646 Social Security (Contributions) (Amendment No. 3) Regulations 2010
- SI 2010/647 Crime and Disorder (Formulation and Implementation of Strategy) (Amendment) Regulations 2010
- SI 2010/648 Crime and Disorder (Formulation and Implementation of Strategy) (Wales) (Amendment) Regulations 2010
- SI 2010/649 Gangmasters Licensing (Exclusions) Regulations 2010
- SI 2010/654 Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2010
- SI 2010/655 Town and Country Planning (Compensation) (England) Regulations 2010
- SI 2010/656 Crime and Disorder (Prescribed Information) (Amendment) Regulations 2010
- SI 2010/659 Health Protection (Notification) Regulations 2010
- SI 2010/661 Education (Student Loans) (Repayment) (Amendment) Regulations 2010
- SI 2010/671 Housing and Regeneration Act 2008 (Consequential Provisions) (No. 2) Order 2010
- SI 2010/672 Authorisation of Frequency Use for the Provision of Mobile Satellite Services (European Union) Regulations 2010
- SI 2010/674 Harbours Act 1964 (Delegation of Functions) Order 2010
- SI 2010/677 Apprenticeships, Skills, Children and Learning Act 2009, Parts 7 and 8 (Consequential Amendments) Order 2010
- SI 2010/678 Feed-in Tariffs (Specified Maximum Capacity and Functions) Order 2010
- SI 2010/679 Criminal Defence Service (Funding) (Amendment) Order 2010
- SI 2010/680 Merchant Shipping (Passenger Ships) (Safety Code for UK Categorised Waters) Regulations 2010
- SI 2010/681 Criminal Defence Service (Funding) (Police Station Advice and Assistance) Order 2010
- SI 2010/686 Insolvency (Amendment) Rules 2010
- SI 2010/688 Insolvency (Scotland) Amendment Rules 2010
- SI 2010/689 Civil Enforcement of Parking Contraventions Designation (No. 2) (West Sussex) (Chichester and Crawley) Order 2010
- SI 2010/690 Children Act 1989 (Contact Activity Directions and Conditions: Financial Assistance) (Revocation and Transitional Provision) (England) Regulations 2010
- SI 2010/708 Health and Social Care Act 2008 (Commencement No. 15, Consequential Amendments and Transitional and Savings Provisions) Order 2010

- SI 2010/719 Building and Approved Inspectors (Amendment) Regulations 2010
- SI 2010/721 Social Security (Contributions) (Amendment No. 4) Regulations 2010
- SI 2010/724 Train Driving Licences and Certificates Regulations 2010
- SI 2010/731 Magistrates' Courts Fees (Amendment) Order 2010
- SI 2010/733 Adult Skills (Specified Qualifications) Regulations 2010
- SI 2010/734 Insolvency (Amendment) (No. 2) Rules 2010
- SI 2010/737 Merchant Shipping (Maritime Labour Convention) (Medical Certification) Regulations 2010
- SI 2010/747 Tribunal Procedure (Upper Tribunal) (Amendment) Rules 2010

Instruments subject to annulment (Northern Ireland)

- SR 2010/76 Mental Health Review Tribunal (Amendment) Rules (Northern Ireland) 2010
- SR 2010/77 Charity Tribunal Rules (Northern Ireland) 2010
- SR 2010/90 Juries (Amendment) Regulations (Northern Ireland) 2010
- SR 2010/93 Legal Aid (General) (Amendment) Regulations (Northern Ireland) 2010

APPENDIX 1: CONDITIONAL FEE AGREEMENTS (AMENDMENT) ORDER 2010: CORRESPONDENCE

Correspondence from the Society of Editors

Questions have been raised about the government's plans to reduce success fees in conditional fee agreements. The House of Lords' Merits committee says the Government's proposal to limit success fees in CFA cases should be debated by the Lords. Below are the concerns raised by the committee's report and highlighted in bold are the facts behind the proposal.

1. The committee says there is some consensus that the costs are bearing unfairly on the losing party

In fact there is overwhelming concern that well intentioned legislation has misfired because it has led to cases being settled not on their merits but on purely financial grounds. One distinguished law professor told LJ Jackson's inquiry that claimant lawyers were making 130 per cent profits as a result of CFAs

2. Insufficient time has been allowed to produce a solution.

The MOJ has recognised the urgency of a situation where the cost of defending a single article can cost millions. This has a chilling effect. This matter has been the subject of several consultations since 2007 and a full scale inquiry by Lord Justice Jackson. There is wealth of detailed evidence that has convinced the Justice Secretary and the House of Commons CMS committee not only of the need for reform but that action could not await the long debates following the Jackson report.

3. The underlying principle is that the successes offset the failures.

The clear evidence is that most cases are settled because of the enormous costs rather than the merits of the case. In addition it is difficult to provide evidence of the chilling effect on freedom of expression because authors and journalists are deterred from publishing in the public interest by the potentially devastating level of costs. By contrast claimant lawyers – despite the submission from Carter Ruck – have consistently failed to respond to requests to provide evidence to support their argument because they rarely lose a case, therefore there is little risk to justify 100 per uplifts.

4. The committee is concerned about the possible side effects of reducing uplift fees.

The real and existing side effects are already deterring reporting and comment not just by the media but by authors, scientists and doctors. The chilling effect on regional and local newspapers has been particularly highlighted.

5. Staggering the fee uplift according to the amount of work done, are already in voluntary operation.

One legal firm, Carter Ruck and one newspaper, The Times, attempted to reach agreement. This was not accepted by the rest of the media and it is not seen as relevant to many defamation actions. The agreement was that Carter Ruck would not apply success fees in any matter involving an NI title if an offer of amends was made with 14 days which is extremely early in defamation proceedings. It has been used only two or three times and not at all in the last year. If there is not a complete agreement to settle in 14 days success fees are then applied, although on a sliding scale.

6. Some responses query the reason for taking this interim proposal through when it is not consistent with the proposals made in Lord Justice Jackson's report.

The issue is so serious and urgent that it cannot await the deliberations following Lord Justice Jackson's report that covers the whole of civil litigation. He was quite clear on the issue of CFAs

7. The House may wish to consider whether a 10 per cent uplift swings the pendulum too far the other way.

The figure has been reached after careful consideration over a long period. If it proved to be a problem it could be re evaluated in primary legislation that will follow Lord Justice Jackson's report. Lord Justice Jackson has proposed that success fees should no longer be recoverable from defendants---however, the proposed SI recognizes the need for an "urgent interim solution".

8. Insufficient time has been allowed to produce a solution based on more robust evidence or on which there is broad agreement.

The evidence of the MLA supported by other organisations is overwhelming. There IS broad agreement except from a small number of claimant lawyers who have a vested interest in maintaining their bloated fees and who dress up their arguments on the need for access to justice.

9. More time might allow for an agreement that would better meet the policy objective.

The policy objective is clear and simple. It has been recognised by Government that the fees are too high and have a disproportionate effect on freedom of expression. There is cross-party support for this.

10. The Merits Committee suggests the views of the Commons' Culture Media and Sport Committee are mixed.

The Committee sees no justification for lawyers to continue to demand 100 per cent success fees it recommends that the recovery of success fees from the losing party should be limited to no more than 10 per cent, leaving the balance to be agreed between solicitor and client.

Committee chairman John Whittingdale said: "Until this is addressed it will continue to have a stifling effect on press freedom and the Government should now act swiftly to do so."

March 2010

APPENDIX 2: INTERESTS

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 House of Lords Record Office and is available for purchase from The Stationery Office.

For the meeting on 23 March 2010 the following Members declared interests on the following instrument of interest:

Feed-in Tariffs (Specified Maximum Capacity and Functions) Order 2010 (SI 2010/678)

Baroness Butler-Sloss and Lord Scott of Foscote: as having installed solar panels.