

HOUSE OF LORDS

Merits of Statutory Instruments Committee

17th Report of Session 2009-10

Drawing special attention to:

Social Security (Claims and Payments) Amendment (No. 2) Regulations 2010

The work of the Committee in Session 2009-10

Ordered to be printed 6 April and published 9 April 2010

London : The Stationery Office Limited
£price

HL Paper 113

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	Baroness Morris of Yardley
The Baroness Deech DBE	Lord Norton of Louth
The Lord Hart of Chilton	The Lord Rosser (<i>Chairman</i>)
The Lord James of Blackheath CBE	Lord Scott of Foscote
The Lord Lucas	The Baroness Thomas of Winchester
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 the Appendix.

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.

Seventeenth Report

1. As well as containing the Committee's usual commentary on any statutory instruments likely to be of interest to the House identified at our weekly scrutiny meeting, this report contains a brief overview of the entire range of instruments we have considered in Session 2009-10.

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the following instrument and has determined that the special attention of the House should be drawn to them on the ground specified.

Social Security (Claims and Payments) Amendment (No. 2) Regulations 2010 (SI 2010/870)

Summary: The Department for Work and Pensions (DWP) and Her Majesty's Revenue and Customs (HMRC) are liaising to run a trial scheme to deduct tax debt from benefit claimants. To facilitate the pilot, these Regulations amend the legislation to allow customers to repay a tax credit overpayment or self assessment tax debt by voluntary deductions from their DWP income-related benefits. The maximum rate of recovery under the regulations is three times 5% of the Income Support (or relevant other income-related benefit) rate (currently $3 \times \pounds 3.25 = \pounds 9.75$). The Social Security Advisory Committee (SSAC) has issued a report on the proposal, and the DWP has agreed to address many of their concerns particularly about the need for clear information to the claimant. However the SSAC has reservations about whether the design of the scheme is sufficiently robust to provide evidence for the future development of the policy and also about the expansion of the use of deductions from benefit for non-essential purposes. We note that the concept of the trial has generally been welcomed and do not question the objective, but also have concerns as to whether the proposed format can deliver sufficiently meaningful data to support robust conclusions about its success or to support its extension. DWP should, by now, be aware of the level of evidence that the Committee expects to see with regulations and the House may wish to press for more detail.

These Regulations are drawn to the special attention of the House on the grounds that they give rise to issues of public policy likely to be of interest to the House.

2. The Department for Work and Pensions (DWP) has laid this instrument under the Social Security Administration Act 1992 along with an Explanatory Memorandum (EM). The instrument is accompanied by a paper responding to the comments made by the Social Security Advisory Committee (SSAC), a statutory consultee.
3. The DWP and Her Majesty's Revenue and Customs (HMRC) are liaising to run a trial scheme to deduct tax debt from benefit claimants. To facilitate the pilot, these Regulations amend legislation to allow customers to repay a tax credit overpayment or self assessment tax debt by voluntary deductions from their DWP income-related benefits. This is seen as particularly useful for those customers who have no bank account and who may wish to use a repayment method which incurs no charge.

4. The maximum rate of recovery under the regulations is three times 5% of the Income Support (or relevant other income-related benefit) rate (currently $3 \times \pounds 3.25 = \pounds 9.75$). This maximum rate is reduced by the existence of any other deductions and will be agreed voluntarily, between HMRC and the customer before the debt is referred to the DWP. HMRC debt is at the bottom of the current priority list so if the customer is already repaying another debt, no recovery of tax will be taken until that debt has been cleared. The Social Security Advisory Committee (SSAC) has issued a report on the proposal, and the DWP has agreed to address many of their concerns particularly about the need for clear information to the claimant. However the SSAC has reservations about whether the design of the scheme is sufficiently robust to provide evidence for the future development of the policy and also about the expansion of the use of deductions from benefit for non-essential purposes.
5. We have quite recently made clear to DWP the need to give a much stronger justification for its proposals in EMs, and to support its assertions with evidence¹. We are therefore disappointed that the Government's response to the SSAC's comments is limited to assertions that the methodology will be robust and the evaluation strategy will follow HMRC and DWP practice. The material in the EM is equally vague.
6. 5,000 eligible claimants will be invited to participate in the trial. Those who decline will become the control group, which does not suggest a rigorous approach. Nor are we clear how this correlates with the statement at paragraph 7.7 of the EM:

"If a customer does not wish to take part in the trial or no reply is received then no further action regarding the trial will be taken in respect of that customer."
7. We also note that if the trial is voluntary there is no guarantee that there will be a sufficiently large number of participants from which robust conclusions can be deduced. Other factors may also be pertinent, for example the number of weeks that the person's claim lasts.
8. The Committee recognises that the concept of the trial has generally been welcomed and we do not question the objective, but have concerns as to whether the proposed format can deliver sufficiently meaningful data to support robust conclusions about its success or to support its extension. DWP should, by now, be aware of the level of evidence that the Committee expects to see with regulations so that it can make its report to the House on the basis of a full picture. The House may wish to press for more detail.

OTHER INSTRUMENTS OF INTEREST

Draft Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2010

9. This draft Order amends the Communications Act 2003 so as to raise from $\pounds 50,000$ to $\pounds 2$ million the maximum penalty that Ofcom can impose under that Act in respect of persistent misuse of electronic communications

¹ 5th Report (with oral evidence) session 2009-10, in particular the Draft Jobseeker's Allowance (Skills Training Conditionality Pilot) Regulations on which we questioned whether the pilot data offered was sufficiently robust to justify an extension of the programme.

networks or electronic communications services. The Explanatory Memorandum (EM) says that the change has been requested by Ofcom as a deterrent to silent call persistent offenders (section 7). Silent calls were the issue of an Early Day Motion in March 2009 which received the signature of 64 MPs. The draft SI has been laid with an Impact Assessment setting out the Government's analysis of the silent calls problem.

Draft Misuse of Drugs Act 1971 (Amendment) Order 2010

10. This draft Order adds 4-methylmethcathinone (commonly known as mephedrone) and other cathinone derivatives to Part 2 of Schedule 2 to the Misuse of Drugs Act 1971 which specifies which drugs are subject to control as Class B drugs under the Act. It does not include cathinones and cathinone derivatives already controlled under the Act or bupropion. The Explanatory Memorandum (EM) says that the Advisory Council on the Misuse of Drugs (ACMD) undertook a full assessment of mephedrone and other cathinone derivatives and found that the harms associated with cathinones derivatives include: anxiety and paranoid states, and the risk of over-stimulating the heart and nervous system to cause fits and delusions as well as the risk of dependency (paragraph 7.1). Members of the House may be interested to note the topical question on this subject in the House of Commons on Tuesday last week (HC Deb, 30 March 2010, cols 639 to 646). The ACMD report is available on the Home Office website and the Government have made two further consequential SIs which are subject to the negative procedure. Given the speed with which the Government wishes this SI to proceed, the Committee has not had the opportunity to make any detailed assessment of the instrument.

Housing and Regeneration Act 2008 (Moratorium) (Prescribed Steps) Order 2010 (SI 2010/660)

11. The 2008 Act implemented the Cave Review's recommendations, making provision for the establishment of the Regulator of Social Housing known as the Tenant Services Authority ("TSA"). Section 144 of the 2008 Act is designed to ensure that the TSA receives warning that a registered provider is about to become insolvent. It does this by providing that certain prescribed steps – which might trigger insolvency – are not effective unless the TSA has first been notified. Similarly, section 145 of the 2008 Act provides that a moratorium begins as soon as certain prescribed steps are taken. This Order prescribes the steps for the purposes of those provisions as "any step to enforce a security over land held by a private registered provider of social housing." The Committee pointed out to DCLG that this wording was open to different interpretations but, despite our prompting, DCLG have not acted to remove the ambiguity.

Complaints against Schools (England) Regulations 2010 (SI 2010/853)

12. The Apprenticeships, Skills, Children and Learning Act 2009 ("the Act") extends the remit of the Commissioner for Local Administration in England, known as the Local Government Ombudsman ("the LGO") to enable investigation of certain complaints against a qualifying school. These Regulations prescribe matters for the implementation of the new complaints service, including: the functions of the head teacher that may be the subject

of a complaint; excluded complaints; and the prescribed period within which former registered pupils may be deemed pupils. The Explanatory Memorandum (EM) says that the new system follows a commitment in the Children's Plan to look at the way complaints are handled and where possible, improve and streamline the processes to ensure accountability and transparency (paragraph 7.1). The EM also states (paragraph 7.3) that the new system will be rolled out gradually, with the first phase beginning in April in four local authorities, and with an independent evaluation as part of the phased roll out (EM paragraph 12.1). The Committee hopes that the evaluation will consider carefully how the system can be operated in a way which does not unnecessarily drain schools' resources, in particular in dealing with unfounded complaints. The Committee also notes that the consultation on these Regulations was shorter than the recommended 12 weeks, and expects that any further consultations will respect the normal 12 week period for comments.

Assured Tenancies (Amendment) (England) Order 2010(SI 2010/908)

13. The Housing Act 1988 introduced assured tenancies for both private sector and housing association residential tenancies which offered certain protections unless they were for high value houses. The exemption threshold was originally set as a rateable value of £1,500 in Greater London and £750 elsewhere but, following the abolition of domestic rates, was changed in 1990 to a single annual rental threshold of £25,000. This threshold had not been amended since, but has now been increased by this Order to £100,000 following the Rugg Review by the Centre for Housing Policy at the University of York. (Although it should be noted the Rugg Review recommended £52,000, the higher threshold was strongly supported by respondents to the consultation exercise). Peers have expressed some concerns over the impact on housing, because there are no transitional arrangements and the conditions on landlords, such as the requirement to give two months notice and to participate in a tenancy deposit scheme, will apply to tenancy agreements that are already in effect. In response to an oral question (*HL Deb, 29 March 2010, cols 1184-6*) the Minister promised a help line by the end of the year, but participants noted that this negative Order will come into effect on 1 October 2010.

National Health Service (Reimbursement of the Cost of EEA Treatment) Regulations 2010 (SI 2010/915)

14. The purpose of these Regulations is to provide certainty and transparency following the *Watts*² judgment by the European Court of Justice. Their purpose is to make provision for the reimbursement of the cost of a health care service where a patient chooses to obtain that service in another EEA State under the provisions of Article 56 of the Treaty on the Functioning of the European Union. The *Watts* judgment established that the freedom to provide and receive services under Article 56 applies to non insurance-based health systems such as the NHS and includes the right for a patient to seek reimbursement of the costs of such treatment from their home health system. These Regulations also set out the circumstances in which prior

² Case C-372/04 *The Queen, on the application of Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health* ([2006] ECR I-4325)

authorisation may be required and when prior authorisation must be granted. The ECJ judgement made clear that for a system of prior authorisation to be justified it must be based on objective non-discriminatory criteria, which are known in advance and circumscribe the national authorities' discretion so that they are not used arbitrarily and capable of ensuring that a request will be dealt with impartially within a reasonable time.

Care Planning, Placement and Case Review (England) Regulations 2010 (SI 2010/959)

15. These Regulations bring together for the first time in one instrument provisions about the way local authorities plan and review the care of "looked after children". A looked after child is one in the care of a local authority by virtue of a care order or a child who is provided with accommodation by a local authority in the exercise of their social services functions (with some exceptions). The Explanatory Memorandum (EM) says that there are on average about 60,000 children who are looked after at any one time and the local authority expenditure on services for looked after children is over £2 billion (paragraphs 7.3 and 7.4). The Regulations include provisions about the placement of children, the planning of their care and the review of their cases. These areas were dealt with previously in different instruments, some of which are revoked by these Regulations. The EM says the objective of these Regulations is to improve outcomes for looked after children by improving the quality of care planning processes (paragraph 7.2). The Regulations will come into force on 1 April 2011, but given the recent reports of a shortage of social workers, the House may wish to satisfy itself that the Government's plans for the review and monitoring of the implementation of these Regulations (see EM section 12) are sufficiently thorough and robust.

Education (Student Support)(College of Europe) Regulations 2010 (SI 2010/960)

16. These Regulations provide support for up to 11 students taking designated postgraduate courses at the College of Europe in Bruges, Belgium or Natolin, Poland. The Regulations set out the eligibility criteria for grants, the application procedure and the method for calculating the amount of grant payable including contributions. These Regulations are linked to the European (Student Support)(European University Institute) Regulations 2010 (SI 2010/447) which the Committee recently drew to the special attention of the House [14th Report of this Session] on the ground that they give rise to issues of public policy likely to be of interest to the House and may imperfectly achieve their policy objective. Those Regulations had been developed without any consultation with key stakeholders and BIS had not presented any solid evidence to support the policy objectives of their funding decisions.

Crossrail (Devolution of Functions) Order 2010 (SI 2010/988)

17. This instrument devolves to Transport for London (TfL) the Secretary of State for Transport's powers for land acquisition in relation to the Crossrail project. Crossrail Limited's work involves an extensive land acquisition programme. Currently Crossrail Limited administers the programme of acquisitions with the advice of Transport for London Group Property, with

final approval from the Secretary of State for Transport, who procures advice from an independent consultancy service. Once acquired, ownership of the majority of the land is then transferred to TfL, which will be the long term owner of the new infrastructure. Devolution of the powers to acquire land to TfL will streamline the acquisition process, reducing the need for multiple approvals from different organisations and removing the step of transferring land ownership from the Secretary of State to TfL. In addition it will remove the need for the Department for Transport's procurement of independent advice, meaning a considerable saving on the Department's consultancy spend.

National Health Service (Direct Payments) Regulations 2010 (SI 2010/1000)

18. Following amendments made by the Health Act 2009 these negative Regulations allow the piloting of direct payments to patients to pay for their health care or mental health after-care. There is some evidence to suggest that offering patients a greater element of choice in their treatment improves outcomes. Pilots are already under way to test personal healthcare budgets run by the Primary Care Trust (PCT) or a third party (such as a voluntary organisation). These regulations add the option to test direct cash payments to the patient. The pilot programme currently involves 70 PCTs which are testing the suitability of different types of personal budgets for a range of health conditions and services. The outcome is being monitored by the University of Kent and an evaluation report is due at the end of 2012.

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

Draft Communications Act 2003 (Maximum Penalty for Persistent Misuse of Electronic Communications Network or Service) Order 2010

Draft Misuse of Drugs Act 1971 (Amendment) Order 2010

Draft Instruments subject to annulment

Draft Amended Guidance issued under section 182 of the Licensing Act 2003

Instruments subject to annulment

SI 2010/660 Housing and Regeneration Act 2008 (Moratorium) (Prescribed Steps) Order 2010

SI 2010/770 Air Navigation (Amendment) Order 2010

SI 2010/825 Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2010

- SI 2010/833 Social Security (Industrial Injuries) (Dependency) (Permitted Earnings Limits) Order 2010
- SI 2010/840 Social Security (Miscellaneous Amendments) (No. 3) Regulations 2010
- SI 2010/853 Complaints against Schools (England) Regulations 2010
- SI 2010/856 School Support Staff Negotiating Body (Excluded Persons) Regulations 2010
- SI 2010/865 Vehicle Drivers (Certificates of Professional Competence) (Amendment) Regulations 2010
- SI 2010/891 Immigration Services Commissioner (Designated Professional Body) (Fees) Order 2010
- SI 2010/892 Passenger and Goods Vehicles (Community Recording Equipment Regulation) Regulations 2010
- SI 2010/895 Merchant Shipping (Prevention of Air Pollution from Ships) (Amendment) Regulations 2010
- SI 2010/896 Natural Mineral Water, Spring Water and Bottled Drinking Water (England) (Amendment) (No. 2) Regulations 2010
- SI 2010/897 Merchant Shipping (Prevention of Pollution by Sewage and Garbage from Ships) (Amendment) Regulations 2010
- SI 2010/898 Local Authorities (Petitions) (England) Order 2010
- SI 2010/899 Police Pensions (Descriptions of Service) Order 2010
- SI 2010/902 Aviation Security Regulations 2010
- SI 2010/903 Redundancy Payments (Continuity of Employment in Local Government, etc.) (Modification) Order (Amendment) Order 2010
- SI 2010/905 Financial Services and Markets Act 2000 (Financial Production) (Amendment) Order 2010
- SI 2010/906 Credit Rating Agencies Regulations 2010
- SI 2010/908 Assured Tenancies (Amendment) (England) Order 2010
- SI 2010/909 European Parliamentary (United Kingdom Representatives) Pensions (Amendment) Order 2010
- SI 2010/912 Management of Offenders etc. (Scotland) Act 2005 (Disclosure of Information) Order 2010
- SI 2010/913 Hearing Aid Council (Transfer of Property, Rights and Liabilities) Order 2010
- SI 2010/914 National Health Service (Pharmaceutical Services and Local Pharmaceutical Services) (Amendment) Regulations 2010
- SI 2010/915 National Health Service (Reimbursement of the Cost of EEA Treatment) Regulations 2010
- SI 2010/916 Workmen's Compensation (Supplementation) (Amendment) Scheme 2010
- SI 2010/918 Working Tax Credit (Entitlement and Maximum Rate) (Amendment) Regulations 2010

- SI 2010/926 Recovery of Social Security Contributions Due in Other Member States Regulations 2010
- SI 2010/937 Freedom of Information (Additional Public Authorities) Order 2010
- SI 2010/939 Freedom of Information (Removal of References to Public Authorities) Order 2010
- SI 2010/959 Care Planning, Placement and Case Review (England) Regulations 2010
- SI 2010/960 Education (Student Support) (College of Europe) Regulations 2010
- SI 2010/964 Road Vehicles (Construction and Use) (Amendment) (No. 2) Regulations 2010
- SI 2010/970 Crime and Disorder Act 1998 (Responsible Authorities) Order 2010
- SI 2010/984 Biodiesel Duty (Biodiesel Produced from Waste Cooking Oil) (Relief) Regulations 2010
- SI 2010/988 Crossrail (Devolution of Functions) Order 2010
- SI 2010/992 Goods Infringing Intellectual Property Rights (Customs) (Amendment) (No. 2) Regulations 2010
- SI 2010/1000 National Health Service (Direct Payments) Regulations 2010
- SI 2010/1003 Motor Vehicles (Off Road Events) (Amendment) (England) Regulations 2010
- SI 2010/1004 Identification and Traceability of Explosives Regulations 2010
- SI 2010/1005 Motor Vehicles (Competition and Trials) (Amendment) (England) Regulations 2010
- SI 2010/1023 Chief Executive of Skills Funding (Strategy for Birmingham City Region) Order 2010
- SI 2010/1062 Public Guardian (Fees, etc.) (Amendment) Regulations 2010
- SI 2010/1063 Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2010
- SI 2010/1064 Family Proceedings (Amendment) (No. 2) Rules 2010
- SI 2010/1065 Family Proceedings Courts (Children Act 1989) (Amendment) (No. 2) Rules 2010

THE WORK OF THE COMMITTEE IN SESSION 2009-10

19. The Committee has had a busy session, considering 660 statutory instruments (SIs) in four months – 59% of the instruments that we scrutinised in the previous 12 month session. It was at times difficult to keep up with the high volume of statutory instruments, but we are pleased that the House has found the time to debate a significant number of the instruments that we had reported as being flawed or contentious. (Full statistics about our activities this session are set out in paragraphs 38 to 41 and the charts following them.)

The Pre-Election Avalanche

20. The Committee has commented before on the need for departments to improve the planning of their programme of secondary legislation³. In our view this brief session has clearly demonstrated why the centre of government needs to take a tougher line in managing the flow of instruments. After Christmas the number of affirmative instruments reached epidemic proportions. In January 2010, 69 affirmative instruments were laid: one third of the normal annual total for affirmatives. At one point there were 115 affirmative instruments awaiting consideration by the House.
21. The problem was largely caused by the desire to clear the decks ahead of the general election. But the timing of this election, at least, can have come as no real surprise, and the Committee saw little evidence that departments had attempted to bring forward a reasonable number of instruments to the latter part of 2009, to leave room for any last minute priorities in January/February 2010. Nor was there any apparent sign in the early months of 2010 of Ministers and their departments actively prioritising their material, and putting more routine instruments to one side to focus on their key priorities. The number of instruments coming before the Committee made it more difficult for us to fulfil our responsibility to the House to highlight potential problems or significant issues, and made it more difficult for both Houses to examine instruments with appropriate care.

Quality of Instruments

22. There were also clear signs that departments were not able to keep on top of their own workload, with an unusually high number of instruments being withdrawn and corrections being issued. For example, from January to March 2010, 26 affirmative instruments had to be withdrawn from Parliament by the department concerned up to the end of March. In the three months prior to that, just 4 instruments were withdrawn.
23. Unusually this has affected almost every major department, and the errors have not always been simple typographical ones. A significant number also reflected a mismatch between the policy intention and the legal text⁴. This matters. Departments should have sufficient respect for Parliament not to lay defective instruments before it. Avoidable errors in instruments needlessly increase the workload of the scrutiny committees. And if Parliament fails to

³ for example 13th report, Session 2007-08, paragraphs 19 to 25

⁴ for example the Draft Damages-Based Agreements Regulations 2010, the Draft Health and Social Care Act 2008 (Regulated Activities) Regulations 2010; or the Draft Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010

spot mistakes, they will pass into law. Departments must do more to ensure that their statutory instruments are prepared thoroughly and quality checked before they are laid before Parliament.

24. More than in any previous session we have had to comment on the lack of evidence provided to support significant policy proposals. Quite early in the session we held an oral evidence session on two DWP instruments: one which proposed to roll out a programme nationally before the results of a pilot were available; and another which proposed to amend the Support for Mortgage Interest Scheme, in relation to which the Minister admitted that it was difficult to tease out precisely how much of the improvement was attributable to DWP activity and how much was due to other initiatives⁵. Similarly, the Committee concluded that the Exeter and Norwich (Structural Changes) Orders lacked a clear, evidence-backed case for the proposals to create unitary authorities for the two cities⁶. In each case we are gratified that the House made use of our reports by taking them up in prayers and debates.

Lack of Transparency

25. Other signs of departments rushing through their legislation included badly drafted EMs, with particular weakness in setting out the results of any consultation⁷. This is not acceptable: a full analysis must be available at the time the instrument is laid so that Parliament has the means to conduct effective scrutiny.
26. Our research was several times inhibited this session by delays in electronic versions being posted on the Office of Public Sector Information (OPSI) website⁸. OPSI routinely post new instruments within 24 hours: we understand the delays were usually due to actions or omissions by the originating Departments. For example, the electronic versions of the highly controversial Exeter and Norwich (Structural Changes) Orders did not appear on the web until 6 days after the hard copies had been laid in Parliament. The Committee aims to report on instruments within 12-15 days of their laying, so such delays can hamper our enquiries to interested parties on instruments, which enhance the Committee's ability to understand the real consequences of the proposed legislation.

Post-Implementation Review

27. In November 2009 the Committee reported on the need to review secondary legislation after it has been implemented, to find out whether it is working as intended and to inform future policy development⁹. In recent years a consensus has developed around the need for post-legislative scrutiny of Acts of Parliament but, until now, much less attention has been paid to the secondary legislation which makes up the majority of the statute book.
28. Based on a survey by the National Audit Office (NAO) of the most significant SIs from 2005, we found that 46% had not been subject to any

⁵ Social Security (Housing Costs Special Arrangements) (Amendment) Regulations 2009 (SI 2009/ 3257) and Draft Jobseeker's Allowance (Skills Training Conditionality Pilot) Regulations 2010, 5th report, Session 2009-10

⁶ Draft Exeter and Devon (Structural Changes) Order 2010, Draft Norwich and Norfolk (Structural Changes) Order 2010, 12th report, Session 2009-10

⁷ for example the Statement of Changes in Immigration Rules (HC 367), 11th report, Session 2009-10

⁸ <http://www.opsi.gov.uk/stat.htm>

⁹ 30th report, Session 2008-09

evaluation after 4 years. More detailed case studies helped to highlight the impossibility of properly evaluating an instrument if the policy objective, and baseline data, are not set out clearly at the time the instrument is laid before Parliament.

29. In general the Committee welcomed the Government's constructive response to our report, their recognition that much more needs to be done, and their work since November to improve their systems for post-implementation review of SIs¹⁰.
30. However, there is an important difference of view between the Committee and the Government over the right focus for post-implementation reviews of SIs. The Government has made it clear that its focus is on the Impact Assessment process. They are developing a 'review' Impact Assessment, to go along with the other two IA phases for the policy development process. New guidance for departments is expected to be issued shortly.
31. This is welcome as far as it goes and, if departments follow the draft guidance seen by the Committee, it will be thorough. However, there are drawbacks to relying too heavily on IAs, foremost among them that Impact Assessments are only produced for a minority of SIs - around 20% at present. Many of the most important SIs, particularly from the public sector, will be excluded. Although current IA guidance requires one to be produced for public sector initiatives costing more than £5m, it is essentially up to the department whether or not to produce an IA. The Committee has seen several SIs where an IA would have been useful, but the department did not choose to produce one¹¹. In our experience it is often 'routine' SIs, without IAs and which Ministers and officials have not scrutinised carefully, which prompt the most serious questions. Given the limited coverage of IAs the Committee expects the EM that accompanies every instrument to include information about plans to review the instrument after implementation. (It is of course accepted that there will be occasions when a review would not be appropriate, but this needs to be explained so that the Committee can take a view.) We will issue revised guidance for departments early in the new Parliament.
32. The Committee's report found a very wide variation in the amount and quality of evaluation work conducted by departments, and recommended that a Government body, probably the Better Regulation Executive (BRE), should take a more active role in supervising evaluation work (recommendation 15). The Government did not accept this recommendation but have committed to a review of the new PIR process in 12 months time, which we will await with interest (HL Deb, 24 February 2010, GC 311).

Regulatory Policy Committee

33. Another new Government initiative is the Regulatory Policy Committee which was announced almost a year ago and started to produce its first reports in March 2010. Its initial commentaries have been encouraging – identifying weaknesses in options analysis and the cost/benefits analysis in IAs. However we have questions about how their recommendations are to be

¹⁰ Printed in 8th report, Session 2009-10. See also correspondence printed in 10th report

¹¹ A notable example of where the department chose not to provide an IA was the Social Security (Housing Costs Special Arrangements) (Amendment) Regulations 2009 (SI 2009/3257), 5th report, Session 2009-10

enforced and about timescales since the reports we have seen so far have appeared very late in the Parliamentary process when it has been too late to seek changes before legislation is passed. We hope that once they get into their stride the Committee will be a powerful stimulus to prompt departments to improve the way they go about formulating policy, though we retain our concerns that the impact will be limited if they only look at new legislation and SIs that have an IA since so many instruments do not.

Uncommon Procedures

34. The Legislative and Regulatory Reform Act 2006 gave the Government the power to make ambulatory references to European Community instruments. In Session 2008-09 the Committee drew attention to the fact that the use of ambulatory references in the Environmental Noise (England) (Amendment) Regulations 2009 would allow major changes to the underlying EC Directive to be directly applicable to the UK, bypassing any Parliamentary scrutiny. Having considered the Committee's concerns, the Government decided to amend the Regulations so that only technical changes would directly apply to the UK: any other changes to the EC law would still require scrutiny by the UK Parliament. In this Session, the Government laid secondary legislation¹² to give effect to this decision. The Committee advised departments about the importance of highlighting the use of ambulatory references in instruments, and in particular, setting out how any risks from their use would be managed.
35. The Committee drew the special attention of the House to the Export Control (Iran) (Amendment) Order 2010 (SI 2010/144) on the basis that it gave rise to issues of public policy likely to be of interest to the House¹³. The Committee highlighted that the underlying EU Regulation broadens the power of the Commission to amend the Regulation Annexes which detail the prohibited or restricted goods and materials. The Commission will now be able to amend these Annexes without reference to the Council, on the basis of information supplied to them by EU Member States, and not just on the basis of determinations made by either the UN Security Council or the UN Sanctions Committee as was the case under the previous Regulation. As the Annexes will be directly applicable to the UK, the Committee said that the House may wish to satisfy itself that there are sufficient safeguards in place around this extended power of the Commission.
36. The Committee requests that Parliamentary Clerks advise policy officials to highlight any similar uncommon procedures in secondary legislation. This is particularly pertinent if those procedures could be perceived by the House as impacting on its ability to scrutinise legislation.

Conclusion

37. We are keen that departments evaluate individual SIs to learn from them and see what works well and what needs improving. At the end of this session we hope that departments will also take an overarching view of how they plan and lay legislation, because there has been a clear drop in standards and both this Committee and the House have been seriously overburdened. Several departments seemed underprepared or unrealistic in what they expected to

¹² Environmental Noise (England) (Amendment) Regulations 2010 (SI 2010/340)

¹³ 10th report, Session 2009-10

achieve in this short final session of the Parliament. We hope that the government will take the opportunity to learn from the experience.

Statistical Section

38. We met 16 times in session 2009-10 and published 17 reports on a total of 660 instruments (138 affirmatives and 522 negatives). We drew 16 affirmatives and 21 negatives to the special attention of the House: a reporting rate of 12% for affirmatives and 4% for negative instruments. Of the negative instruments which we reported, 8 were debated by the House or the subject of a Lords Parliamentary Question: an engagement rate of 38%. We held one oral evidence session, and continue to welcome written submissions from members of the public as they help to broaden our understanding of the impact of the SIs.
39. Using our terms of reference, which are set out in full on the inside cover of all our reports, we have drawn 37 instruments (that is 6% of the total number considered) to the special attention of the House in this session as follows:
 - 28 instruments (76%) on the ground of political importance or public policy interest;
 - 5 (14%) on the ground of imperfectly achieving its policy objective;
 - 3 instruments (7%) on the ground of political importance or public policy interest and on the ground of imperfectly achieving its policy objective;
 - none on the ground of being inappropriate in view of changed circumstances since the enactment of the parent Act;
 - 1 (3%) on the ground of inappropriately implementing European Union legislation.
40. In deciding which instruments to draw to the special attention of the House, we have continued to limit our reports only to those on which we believe the House may wish to take action. In order to alert Members to other instruments which appear to be of interest, we have continued to include in our reports short overview paragraphs on instruments. In the session, we included 132 such paragraphs (20% of the total instruments), compared to 161 last session (14% of the total instruments).

Charts

41. The charts on the following pages cover the period from November 2009 to the end of March 2010:
 - Chart 1 sets out the number of instruments laid by month
 - Chart 2 sets out the number of instruments laid by year for the last five years
 - Chart 3 sets out the number of instruments reported on and the ground for reporting
 - Chart 4 sets out the number of correcting instruments by department
 - Chart 5 sets out the number of short paragraphs on other instruments of interest compared with last session

(Charts 1, 2, 3 and 4 refer only to affirmative and negative instruments laid before the House of Lords.)

Chart 1 – Number of instruments laid by month

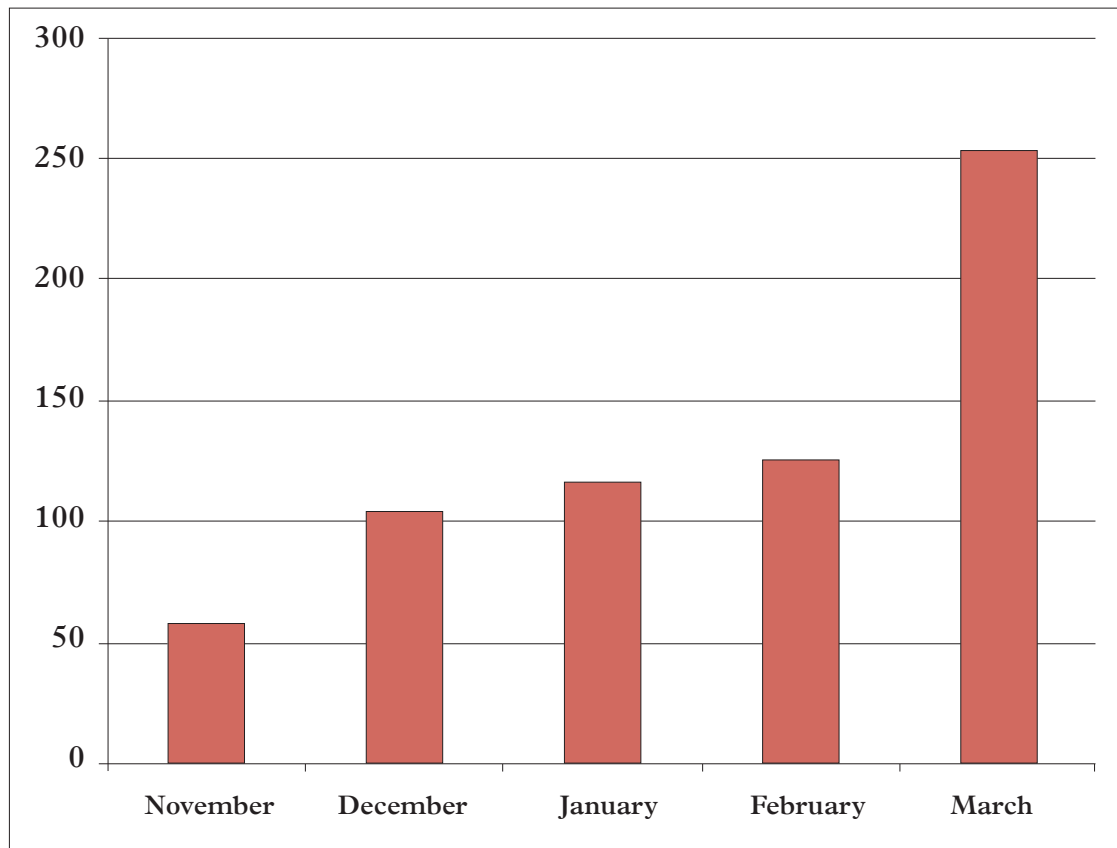


Chart 2 – Number of instruments laid each calendar year since 2005

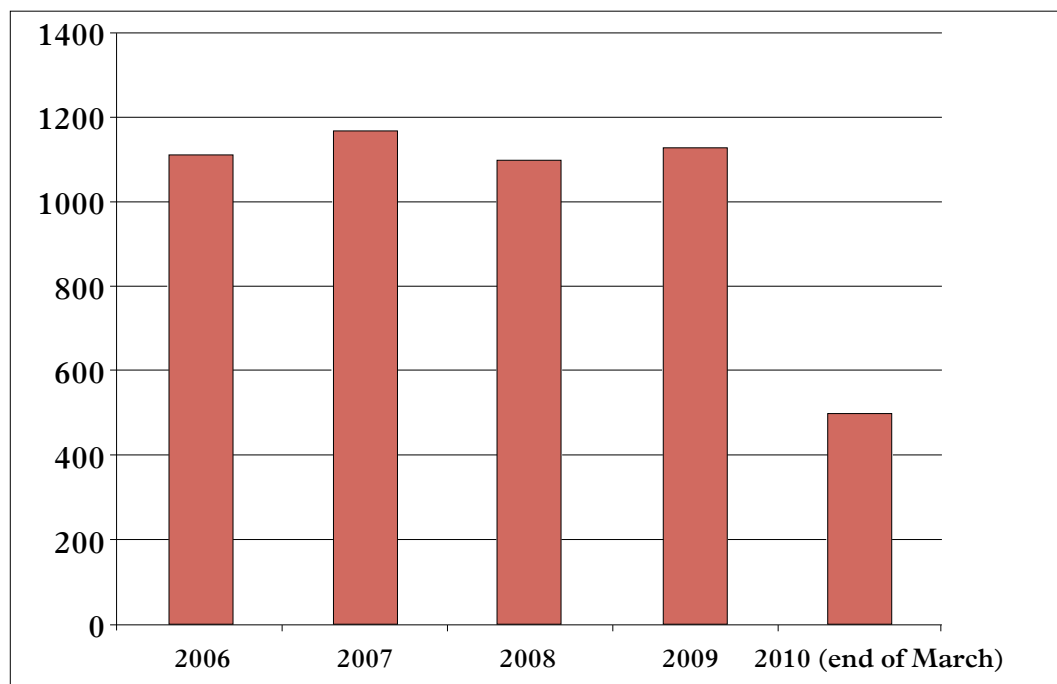


Chart 3 – Number of instruments reported on and the ground for reporting

DEPARTMENT	TOTAL	REPORTED AFFIRMATIVE	REPORTED NEGATIVE	a	b	c	d	a & d
Cabinet Office	9	0	0	0	0	0	0	0
DCLG	55	2	0	0	0	0	0	2
DCMS	16	0	0	0	0	0	0	0
DEFRA	52	0	1	1	0	0	0	0
BIS	67	1	3	3	0	0	0	1
DECC	11	1	0	1	0	0	0	0
DWP*	69	4	11	13	0	0	2	0
DCSF	34	0	1	1	0	0	0	0
FCO	1	0	0	0	0	0	0	0
Health**	66	1	0	1	0	0	0	0
Home Office	59	5	3	7	0	0	1	0
H of Commons	1	0	0	0	0	0	0	0
MOD	4	0	0	0	0	0	0	0
MoJ	77	2	0	0	0	0	2	0
NI Office	12	0	0	0	0	0	0	0
Privy Council	8	0	0	0	0	0	0	0
Scotland	3	0	0	0	0	0	0	0
Transport	65	0	1	0	0	1	0	0
Treasury***	40	0	1	1	0	0	0	0
Wales	11	0	0	0	0	0	0	0
TOTALS	660	16	21	28	0	1	5	3

* Includes Health and Safety Executive

** Includes Food Standards Agency

*** Includes HM Revenue and Customs

a = Reported on ground of political importance or public policy interest

b = Reported as inappropriate in view of changed circumstances since the enactment of the parent Act

c = Reported as inappropriately implementing EU legislation

d = Reported on ground that it may imperfectly achieve its policy objectives

Chart 4 – Number of correcting instruments laid (the number of negative instruments reprinted free of charge as a result of errors) and instruments withdrawn by their Departments

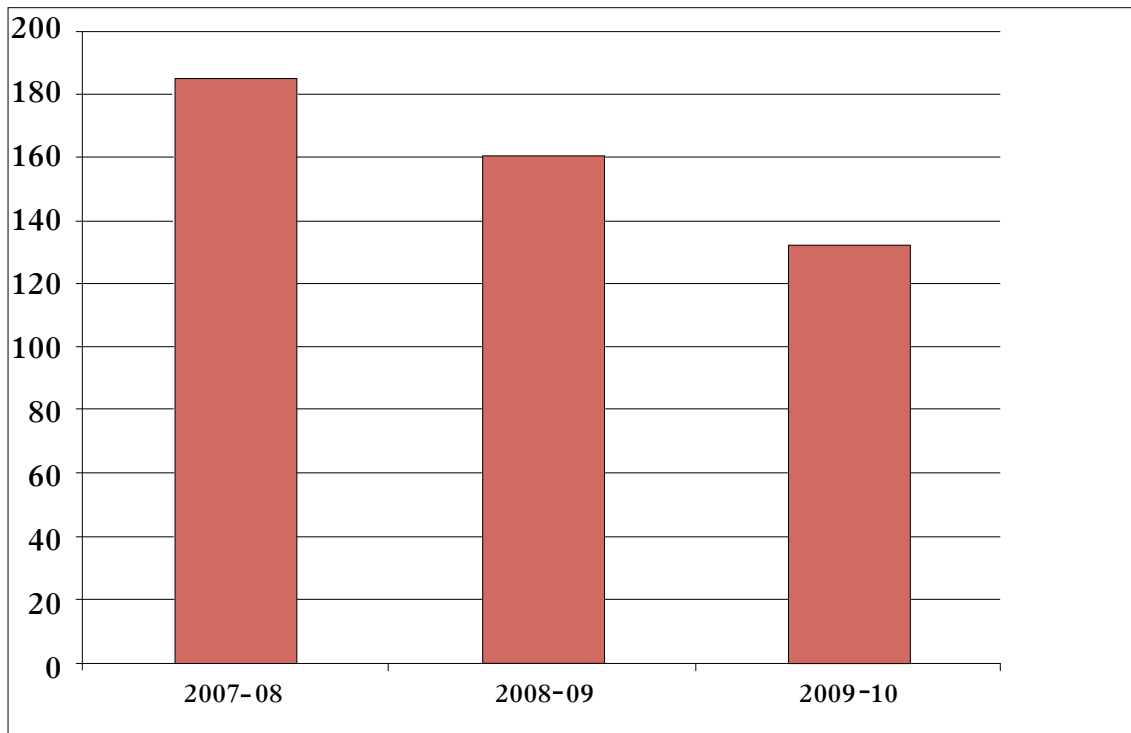
DEPARTMENT	TOTAL	STRAIGHT CORRECTIONS		INSTRUMENTS WITHDRAWN		OVERALL TOTAL OF INSTRUMENTS CORRECTED OR WITHDRAWN	
		NUMBER	% OF TOTAL	NUMBER	% OF TOTAL	NUMBER	% OF TOTAL
Cabinet Office	9	2	22	0	0	2	22
DCLG	55	0	0	1	2	1	2
DCMS	16	0	0	0	0	0	0
DEFRA	52	2	4	1	2	3	6
BIS	67	0	0	8	12	8	12
DECC	11	0	0	0	0	0	0
DWP*	69	1	1	2	3	3	4
DCSF	34	0	0	0	0	0	0
FCO	1	0	0	0	0	0	0
Health**	66	4	6	1	2	5	8
Home Office	59	1	2	5	8	6	10
H of Commons	1	0	0	0	0	0	0
MOD	4	1	25	0	0	1	25
MoJ	77	1	1	8	10	9	12
NI Office	12	3	25	0	0	3	25
Privy Council	8	0	0	0	0	0	0
Scotland	3	0	0	0	0	0	0
Transport	65	1	2	0	0	1	2
Treasury***	40	0	0	1	3	1	3
Wales	11	0	0	0	0	0	0
TOTALS	660	16	2	27	4	43	7

* Includes Health and Safety Executive

** Includes Food Standards Agency

*** Includes HM Revenue and Customs

Chart 5 – Number of short paragraphs on other instruments of interest compared with the last two sessions



APPENDIX: 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 6 April 2010 the following Members declared interests on the following instrument of interest:

Complaints against Schools (England) Regulations 2010 (SI 2010/853)

Baroness Butler-Sloss and Lord Norton of Louth: as school governors.