

HOUSE OF LORDS

Merits of Statutory Instruments Committee

10th Report of Session 2009-10

Export Control (Iran) (Amendment) Order 2010

Correspondence:

What happened next? A study of Post- Implementation Reviews of secondary legislation

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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 4.

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.

Tenth Report

INSTRUMENTS REPORTED

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

Export Control (Iran) (Amendment) Order 2010 (SI 2010/144)

Summary: This SI contains provisions to give effect to a recent Council amending Regulation which updates the restrictive measures in respect of the supply, sale or transfer of goods and technology to Iran which could contribute to Iran's nuclear activities. The Regulation also 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. The Department for Business, Innovation and Skills (BIS) have said that they do not think this amendment causes problems in practice and have explained that the nature of an amendment to an Annex would determine whether they would lay a new SI or not. As the Annexes will be directly applicable to the UK, the House may therefore wish to satisfy itself that there are sufficient safeguards in place around this extended power of the Commission.

This instrument is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

1. This SI makes provision with regard to Council Regulation (EU) No 1228/2009 of 15 December 2009 ("the 2009 amending Regulation") amending Council Regulation (EC) No 423/2007 ("the 2007 Regulation") concerning restrictive measures against Iran. It also updates the reference in the Export Control (Iran) Order 2007 ("the 2007 Order") to the Common Military List of the European Union. The 2007 Regulations contain a number of Annexes which list the goods and technology which are either prohibited or restricted for supply, sale or transfer to Iran as they could contribute to Iran's nuclear activities.
2. The Government considers that in order to give effect to the UK's European obligations in respect of Iran, it is necessary for this SI to come into force as soon as possible (see Explanatory Memorandum (EM) paragraph 3.2). Department for Business, Innovation and Skills (BIS) explain (see Appendix 1) that although the 2007 Regulation is directly applicable in all EU Member States, national implementation legislation is required in relation to licensing, enforcement, offences and penalties. The 2009 amending Regulation makes changes to the Annexes in the 2007 Regulation and this SI is therefore required to ensure that the references to EU documents in national legislation are up to date.
3. The House may be interested in the statement in paragraph 4.1 of the EM which says that the 2009 amending Regulation amends the provision in the 2007 Regulation by which the Commission can amend the Annexes without

reference to the Council. The effect of this is that the Commission will be able to amend the Annexes (which are directly applicable in the UK) without reference to the Council, on the basis of information supplied to them by 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 2007 Regulation. BIS explain that although sanctions Regulations often give the Commission some scope for amending Annexes, this current amendment gives the Commission a broader power than usual (see Appendix 1). BIS say that they do not think this amendment causes problems in practice and list a number of reasons why they believe this to be the case (Appendix 1). BIS have explained that the nature of an amendment to an Annex would determine whether they would lay a new SI or not.

4. The House will be aware of the issues surrounding the Iranian nuclear programme and may well understand the EU's wish for expediency on export controls. However, it is unusual for the Commission to have this much power to amend EU legislation which is directly applicable in Member States, and the House may therefore wish to satisfy itself that there are sufficient safeguards in place around this extended power of the Commission.

OTHER INSTRUMENTS OF INTEREST

Draft Children Act 2004 Information Database (England) (Amendment) Regulations 2010

5. These draft Regulations amend the main Regulations which made provision in relation to the establishment and operation of the database known as "ContactPoint". The main Regulations were drawn to the special attention of the House by this Committee in its 27th Report of Session 2006-07, which included oral evidence from the Department for Children, Schools and Families, and written evidence from various stakeholders. The Committee's conclusions in that Report included that: the Government had not in the Committee's view demonstrated that a universal database was a proportionate response to the problem; and, the scale and importance of the scheme increases the risk of an accidental or deliberate security breach. The database provides a way for authorised practitioners in different services to find out who else is working with the same child in order to allow them to work together. The policy intention is for the database to hold basic identifying information on all children who live in England, or attend school in England (including home educated children), until they reach the age of 18. The Explanatory Memorandum (EM) says (paragraph 7.4 and 7.5) that these draft Regulations make a number of practical adjustments in the light of experience of using "ContactPoint", but do not affect the fundamental principles and design of the database. The key changes proposed by these Regulations are: they allow the database to hold information on all children in England, not just those ordinarily resident in England; they allow the database to hold information on all parents of a child not just those with parental responsibility or care of the child; and they replace reference to "specialist and targeted services" with the term "additional services". The EM shows (paragraphs 8.1 to 8.4) some mixed responses to these changes

and the House may wish to use the debate on this draft instrument to explore the reasons behind this.

Draft Health Protection (Part 2A Orders) Regulations 2010 and two related instruments¹

6. The Public Health (Control of Disease) Act 1984 and regulations made under it have provided a legislative framework for health protection in England and Wales for many decades (the 1984 Act is itself a consolidation of legislation dating back to 1936). The Health and Social Care Act 2008 contained provisions to modernise this legislation and to widen its scope to enable the protection of the public not only from infectious disease but also from health hazards arising from contamination from chemicals or radiation. These instruments include powers for local authorities, sometimes with the authority of a magistrate, to impose restrictions or requirements on people, or the decontamination of premises. This is part of a planned programme of updating and is not a specific response to pandemic flu. It is understood that the powers are used only where voluntary cooperation cannot be obtained, and its use in recent years has been limited to restricting the movements of a few individuals with infectious Tuberculosis. Further information on the safeguards that protect the individuals subject to such an order are given at Appendix 2.

Draft Human Fertilisation and Embryology (Disclosure of Information for Research Purposes) Regulations 2010

7. This affirmative instrument proposes a process by which research bodies working within the fields of health and social care, carrying out research involving assisted reproduction treatments and services, may apply to the Human Fertilisation and Embryology Authority (HFEA) to access identifying information held on the HFEA database about treated patients and any resulting offspring. The Regulations set a number of tests before access to such information may be granted including the requirement for the research body to explain why it is not practicable to use anonymised data or to obtain consent from the persons to whom the information relates. Regulation 7(1) sets out certain conditions under which the HFEA “must” refuse to grant an application. Somewhat surprisingly, regulation 7(3)(b) provides that the HFEA “may” (but is not therefore required to) refuse to grant an application if it is not ‘necessary or expedient in the public interest or in the interests of improving patient care’. The House may wish to ask the Department of Health to explain why the HFEA should ever be entitled to grant an application if it considers it is not in the public interest or will not improve patient care.

Draft Licensing Act 2003 (Mandatory Licensing Conditions) Order 2010

8. The draft SI specifies five mandatory licensing conditions to be added to all licences and club premises certificates of those who supply or sell alcohol by retail. These include: a bar on irresponsible promotions, e.g. games which encourage an individual to drink as much as possible; ensuring that free tap

¹ Draft Health Protection (Local Authority Powers) Regulations 2010 and Draft Health and Social Care Act 2008 (Consequential Amendments) Order 2010

water is provided; and the requirement to operate an age verification policy. The Home Office says that the draft SI seeks to meet the objectives under the Licensing Act 2003, namely: to reduce alcohol-related crime and disorder, public nuisance, harm to children and risks to public safety (Explanatory Memorandum (EM) paragraph 2.1). There was a high response to the consultation (over 2,000 responses from the public, licensing authorities, enforcement agencies, health groups and the licensed trade) with strong support for the introduction of a mandatory code (EM paragraph 8.1 and 7.6).

Draft National Assembly for Wales (Legislative Competence) (Housing) (Fire Safety) Order 2010

9. This draft Order would confer legislative competence on the National Assembly for Wales to enable the Assembly to legislate about the provision of automatic fire suppression systems (such as sprinklers) in new residential premises. This could include a requirement that such systems are fitted in all of the following: newly built residential premises including flats/apartments; existing premises that are either subdivided or amalgamated so as to convert them to use as one or more new residences; and existing buildings that are converted from a non-residential use to a residential use (e.g. office space converted to flats). The draft Order has been subject to pre-legislative scrutiny by both the National Assembly and Parliament. The Committee notes that there is currently no legal requirement for residential properties in England to have automatic fire suppression systems, and that the House may well see a benefit in this legislation.

Draft Political Parties, Elections and Referendums (Civil Sanctions) Order 2010

10. Following concerns over the compliance of political parties with the rules on fund raising, expenditure on campaigning etc, the Political Parties and Elections Act 2009 supplemented Schedule 19C of the Political Parties Elections and Referendums Act 2000 Act to give the Electoral Commission new powers to apply a range of civil sanctions to offences and breaches under the 2000 Act. This Order sets out the detail of which offences, restrictions and requirements will be prescribed and therefore punishable with civil sanctions. However, where there is evidence of deliberate intent to evade the rules or evidence of a person knowingly or recklessly acting in a way that contravenes the legislation, such offences will remain liable for criminal prosecution. The House will note that any offence that occurs wholly or partly before the commencement date of 1 July will not be subject to the new civil sanctions: this new legislation will therefore not apply to arrangements for the forthcoming election.

Draft Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2010

11. This draft SI provides for the continuation of the powers in the Prevention of Terrorism Act 2005 which allow for a control order to be made against an individual where the Secretary of State has reasonable grounds for suspecting that individual is or has been involved in terrorism related activity. The fifth annual report on the operation of the control order system by the independent reviewer, Lord Carlile of Berriew QC, was laid before

Parliament on the same day as this draft instrument. Lord Carlile's key conclusions included that the control order system functioned reasonably well in 2009 and remains essential, but is only appropriate for a small number of cases. He also said that in his view, control orders are no longer suitable for cases where the main objective is to prevent travel abroad, and in such cases, after further legislation, there should be available a Travel Restriction Order, with a limited range of obligations.

Draft Renewables Obligation (Amendment) Order 2010

12. This affirmative instrument makes a number of changes to the Renewables Obligation ("RO"). The RO is the Government's main policy measure to encourage the development of electricity generation capacity using renewable sources of energy in the UK. The specific changes to the RO include: extending the RO date by an extra 10 years to 2037; increasing the level of support for new offshore wind generation that meets specific criteria following evidence that costs have risen; and makes provision for certain micro and other generators who will be covered by a new scheme from April 2010. The EM says (paragraph 7.1) that the changes are needed to help drive the increased deployment required to meet the UK's binding renewable targets set by the EU. Microgeneration is defined as an output of under 50 kilowatts (kW). Regarding solar photovoltaics, generation over 5 megawatts (MW) falls under the RO, generation under 50 kW will be transferred to the new feed-in tariff (FIT) scheme once it is established, but new generation between 50kW and 5 MW will be given a one off choice between FIT and RO.

Draft Safeguarding Vulnerable Groups Act 2006 (Regulated Activity, Devolution and Miscellaneous Provisions) Order 2010

13. This draft Order makes a number of amendments to the scope of the new Vetting and Barring Scheme (VBS) as defined by the Safeguarding Vulnerable Groups Act 2006 ("the 2006 Act"). The barring provisions under the 2006 Act were brought into force from 12 October 2009. The proposed changes to the VBS in this SI include: extending the scope of regulated activity to cover a range of inspection and review functions, users of the "ContactPoint" database, and part-time Pupil Referral Units. The changes which may be of most interest to the House are in Articles 10 and 11, which are the Government's response to Sir Roger Singleton's report² on where to draw the line on when the VBS will require an individual to become registered with the Independent Safeguarding Authority (ISA). The effect of these changes and the forthcoming guidance will be a significant reduction in the number of people required to register with ISA: the Explanatory Memorandum (EM) says (paragraph 10.1) that this is expected to fall from 11.3 million to between nine and nine and a half million. There is no detailed assessment of the impact of the changes on the protection of children and vulnerable adults in the EM, and the House may wish to use the debate on this draft SI to explore the merits of such a significant reduction in the scope of this relatively new scheme.

² "Drawing the Line": Sir Roger Singleton; 14 December 2009. The report is available with the Government response on the DCSF website

Criminal Procedure Rules 2010 (SI 2010/60)

14. In accordance with the programme adopted by the Criminal Procedure Rule Committee when it was first appointed, these Rules consolidate the Criminal Procedure Rules 2005 and all the subsequent amendments. In addition this instrument makes the regular half yearly sweep of consequential amendments arising from recent legislation and a number of changes as a result of case law or ongoing review. We commend the efforts made to render the Criminal Procedure Rules as clear and as user-friendly as possible.

Video Recordings (Labelling) Regulations 2010 (SI 2010/115)

15. These Regulations set out the requirements for labelling video recordings, such as DVDs and video tapes, with information regarding their age classification. In August 2009, during preparations for the Digital Economy Bill, it was identified that certain provisions of the Video Recordings Act 1984 and subsequent labelling regulations were unenforceable due to a procedural flaw in the way the originating Directive was transposed. In order to remedy this the Department notified the content of the 1984 Act and the 1985 Regulations as draft measures to the European Commission in September 2009. The 3 month standstill expired on 11 December 2009 and the Department received no comments from the Commission or Member States on the content of the provisions. On 21 January, the Video Recordings Act 2010 which had been passed under fast track procedures, received Royal Assent: it repealed and then immediately brought back into force (revived) the notified provisions of the 1984 Act, with the effect of making them enforceable against individuals in UK courts. Given the urgent need to restore the public protection of the video classification regime, these Regulations were made the following day and came into force the day after they were laid, to ensure that the loophole is closed.

Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010 (SI 2010/123)

16. An earlier version of this SI (SI 2009/3404) was drawn to the special attention of the House by the Committee in the 6th Report of Session 2009-10 along with a number of other SIs under the Regulation of Investigatory Powers Act 2000 (RIPA) which are due for debate by the House on 23 February 2010. This Order corrects a number of drafting errors in the earlier version. The purpose of this Order is to make provision in relation to the authorisation of the use or conduct of covert human intelligence sources under RIPA to obtain, provide access to or disclose matters subject to legal privilege. The Order has been brought in response to the House of Lords judgement *In re McE* which set out how public authorities can be authorised to carry out covert surveillance of legal consultations compatibly with the European Convention on Human Rights (ECHR). The House may wish to satisfy itself that this Order maintains a level of client privilege which is compatible with ECHR.

Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010 (SI 2010/137)

17. Following a review, these Regulations simplify and update the form used for the medical statement (also known as a medical certificate or sick note) that is provided by a doctor to help support a person's claim to a health-related

benefit, such as Employment and Support Allowance or Statutory Sick Pay. In its present format, the medical statement requires a doctor to describe, in brief terms, an individual's condition and indicate whether they should or should not refrain from work. The revised form provides an opportunity for doctors to provide basic advice about what steps, if any, individuals and their employers could take to help facilitate an early return to work although it is not mandatory for an employer to do so.

WHAT HAPPENED NEXT? A STUDY OF POST-IMPLEMENTATION REVIEWS OF SECONDARY LEGISLATION: FURTHER CORRESPONDENCE

18. On 12 November 2009 the Committee published a report on the degree to which government departments evaluate the effects of statutory instruments³. In January, the Committee received a Government response to the inquiry, which was published in the Committee's 8th Report of this session. In light of the Government response, the Committee wrote to the Minister for Business and Regulatory Reform seeking clarification on a number of aspects. A letter of response was received by Ian Lucas MP on 5 February. Both letters are printed at Appendix 3.

INSTRUMENTS NOT REPORTED

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 Children Act 2004 Information Database (England) (Amendment) Regulations 2010

Draft Criminal Defence Service (Information Requests) (Amendment) Regulations 2010

Draft Criminal Defence Service (Representation Orders: Appeals etc.) (Amendment) Regulations 2010

Draft Environmental Permitting (England and Wales) Regulations 2010

Draft Health and Social Care Act 2008 (Consequential Amendments) Order 2010

Draft Health Protection (Local Authority Powers) Regulations 2010

Draft Health Protection (Part 2A) Regulations 2010

Draft Human Fertilisation and Embryology (Disclosure of Information for Research Purposes) Regulations 2010

³ HL Paper 180, Session 2008-09

Draft Human Fertilisation and Embryology (Parental Orders) Regulations 2010

Draft Human Fertilisation and Embryology (Parental Orders) (Consequential, Transitional and Saving Provisions) Order 2010

Draft Licensing Act 2003 (Mandatory Licensing Conditions) Order 2010

Draft Mesothelioma Lump Sum Payments (Conditions and Amounts) (Amendment) Regulations 2010 (JW)

Draft National Assembly for Wales (Legislative Competence) (Housing) (Fire Safety) Order 2010

Draft Political Parties, Elections and Referendums (Civil Sanctions) Order 2010

Draft Pneumoconiosis etc. (Workers' Compensation) (Payment of Claims) (Amendment) Regulations 2010

Draft Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2010

Draft Protection from Tobacco (Sales from Vending Machines) (England) Regulations 2010

Draft Renewables Obligation (Amendment) Order 2010

Draft Representation of the People (Scotland) (Amendment) Regulations 2010

Draft Safeguarding Vulnerable Groups Act 2006 (Regulated Activity, Devolution and Miscellaneous Provisions) Order 2010

Draft Service Voters' Registration Period Order 2010

Draft Social Security Benefits Up-rating Order 2010

Draft Social Security (Contributions) (Amendment) Regulations 2010

Draft Tobacco Advertising and Promotion (Display of Prices) (England) Regulations 2010

Draft Welsh Zone (Boundaries and Transfer of Functions) Order 2010

Instruments subject to annulment

SI 2010/60 Criminal Procedure Rules 2010

SI 2010/95 Community Legal Service (Funding) (Amendment) Order 2010

SI 2010/96 Community Legal Service (Financial) (Amendment) Regulations 2010

SI 2010/109 South East Derbyshire College (Dissolution) Order 2010

SI 2010/115 Video Recordings (Labelling) Regulations 2010

SI 2010/121 Export Control (Amendment) Order 2010

- SI 2010/123 Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010
- SI 2010/124 Planning Act 2008 (Railways Designation) Order 2010
- SI 2010/130 Football Spectators (2010 World Cup Control Period) Order 2010
- SI 2010/131 Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2010
- SI 2010/132 Export Control (North Korea) (Amendment) Order 2010
- SI 2010/137 Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010
- SI 2010/141 Criminal Defence Service (Information Requests) (Prescribed Benefits) (Amendment) Regulations 2010
- SI 2010/142 Criminal Defence Service (Contribution Orders) (Amendment) Regulations 2010

Draft Instruments subject to annulment

Amended Guidance issued under section 182 of the Licensing Act 2003

Instruments subject to annulment (Northern Ireland)

- SR 2010/9 Legal Aid (Scope) Regulations (Northern Ireland) 2010
- SR 2010/10 Legal Advice and Assistance (Amendment) Regulations (Northern Ireland) 2010

APPENDIX 1: EXPORT CONTROL (IRAN) (AMENDMENT) ORDER 2010 (SI 2010/144)

Information from the Department for Business, Innovation and Skills

Q1. *When did you first know the amending EC Regulation was going to come into force?*

A1. We became aware of the amending Regulation around 17th December unfortunately this was a particularly busy time and we were not able to commence action on drafting a legal instrument until early January;

Q2. *Paragraph 7.2: what is the effect of the changes? The EC Regulation is directly applicable so what exactly does the SI add?*

A2. The changes to the 2007 Regulation correct the text of some entries in Annex IA to the Regulation (which are items whose export is prohibited) and replace the list of goods in Annex II (which are goods subject to export authorisation). Although the Regulation is directly applicable in all EU Member States, national implementation legislation is required in relation to licensing, enforcement, offences and penalties. Prior to the 2010 Order, the national legislation's references to EU documents were out of date and, although this did not affect the status of the Regulation itself, it might have created difficulties with how the Regulation's controls were administered in the UK (but only in relation to items affected by the changes;

Q3. *Paragraph 4.1: I have never seen before a provision which allows the Commission to amend the Annexes without reference to the Council. How common is it? What is the legal basis for it? What are the safeguards?*

A4. Sanctions Regulations often give the Commission some scope for amending Annexes (it is common to allow them to make alterations on the basis of changes to UN sanctions, for example). Although the current amendment gives the Commission a slightly broader power than usual, we do not think this causes problems in practice. This is because the wording of Articles 2(1)(a)(iii) and 3(2) of the 2007 Regulation set out limits for what the Annexes can include (broadly, only items with WMD end-uses can be listed), the Commission needs information from Member States before it can act, and Member States already apply export controls to a range of items with potential WMD utility on a case-by-case basis under existing EU legislation. It is also fair to say that because the legal base for these sanctions Regulations (Art. 215 Treaty on the Functioning of the European Union) depends on there being a need to implement a Decision within the framework of the Common Foreign and Security Policy (under Chapter 2 of Title V Treaty on European Union), the Council is in ultimate control of the process.

February 2010

APPENDIX 2: DRAFT HEALTH PROTECTION (PART 2A ORDERS) REGULATIONS 2010

Information from the Department of Health

Q1 *On the matter of not informing the parent – the Committee understand that usual policy is that where a parent is not informed there is another guardian in place. What would be the position for a child below 18 and below Gillick competence who has to be sequestered in this way but for whom it is judged the parents should not be informed – who would act in loco parentis for the duration and take on the duties set out in 8(4)? What would the parents be told?*

A1. Firstly, we would make the point that the use of these powers in relation to a child under 18 would be considered only very rarely and as a last resort.

Under regulation 3(4)(b) of the Part 2A Orders Regulations, the local authority is obliged to notify a person with parental responsibility of an application for an order in respect of a child under 18. Regulation 3(9) provides an exception to that obligation. If exceptional circumstances exist which mean that this would not be in the child's best interests, the local authority is not required to make such a notification.

We would expect this exception for "best interests" to apply only in very rare circumstances. Where a child is not "Gillick competent", we consider that it would be very unlikely to apply. We will make this point clear in guidance.

Regulation 3(9) is more likely to be relevant in a situation where a Gillick competent child is living away from those with parental responsibility for him or her, and there are reasons why notification of an application for an order would not be in the child's best interests. We accept the example cited by the human rights group Liberty in its response to the consultation on the Regulations as a possible, if very unlikely, scenario. This hypothesised an application for an order related to the sexual health of a 16 -18 year-old, and we assume they had Gillick competence in mind. In the unlikely event that an application for an order were contemplated in such a case, the best interests of the child might be better served by not alerting a person with parental responsibility at that stage. Again, we will draw out this point in guidance.

Therefore, regulation 3(9) provides a simple, but narrow, exception to the obligation to notify a person with parental responsibility. However, it is important to note that in the rare event of a local authority not notifying a person with parental responsibility under regulation 3(9), it is not precluded from notifying another party in place of such a person, if they consider it appropriate to do so. It would not be feasible to specify in regulations who such a person might be, as the individual circumstances will vary. We think it is better to leave this to the discretion of the local authority. An appropriate person might be an adult with whom the child is living but who does not have parental responsibility for that child; or could be another party who can provide such support as the child might need.

Regulation 8(4) requires a local authority to provide information to a person with parental responsibility where an order imposing restrictions or requirements on a person has been made in respect of a person under 18 years. This is in the context of a duty on local authorities to ensure that the order is properly understood. Regulation 8(2) obliges the local authority to ensure that when an order has been made the person concerned understands the effect of the order, the reason for it and the power under which it was made, and their right to appeal against it; and to provide information about any relevant support services available.

This regulation is intended as a protection for people who are subject to mandatory restrictions or requirements pursuant to a judicial order. It does so by putting in place a

formal mechanism to ensure the person affected or those legally responsible for them know their rights. There are no exceptions to this “information” requirement, and the best interests test in regulation 3(9) does not apply. Therefore in all cases where an order is made in respect of a child a person with parental responsibility must be given this information.

On balance we preferred this blanket application of the “information” duty, because it seemed important to us that once an order had been imposed on an under-18 year old that an adult should be involved. This is all the more so bearing in mind that breach of an order made under Part 2A is a criminal offence. As in the case of regulation 3(9), it would not be feasible to specify in regulations who might be an alternative person to a person with parental responsibility. In these circumstances, given the importance of securing adult involvement, we considered that providing for an exception was not the best solution, and therefore framed the duty to apply to a person with parental responsibility in all cases.

It is recognised that this could theoretically allow a situation where a person with parental responsibility is not notified of an application for an order under the exception in regulation 3(9), but is provided with information under regulation 8(4) once an order has been made. However there is a crucial difference in these situations, which we think requires different approaches in legislation. A notification of an application is an initial stage in a process, which may need to be conducted in private, while an order places restrictions or requirements on the child under judicial powers.

Q2 *The Committee also asked about the appeal mechanism – 8(2)(a) indicates that the Local Authority has to inform the subject of the Order (P) of their right to apply for revocation, but who is that appeal to?*

A2. Section 45M of the Public Health (Control of Disease) Act 1984, as amended, provides that a Part 2A order may be varied or revoked by a Justice of the Peace (JP) on the application of an “affected person”. Section 45M(6) goes on to define who are “affected persons” in the case of an order relating to a person (“P”). Under section 45M(6)(a), “P” is an affected person and may therefore apply to the JP for variation or revocation of a Part 2A order.

Q3 *How is a person able to appeal if he is quarantined?*

A3. A person who is quarantined by a Part 2A order will be given information about any relevant support services available, under the provisions of regulation 8(2)(b). In addition, an order for quarantine attracts the provisions of regulation 9, which requires the local authority to have regard to the impact of the order on the person’s welfare, and that of any dependants. We would expect that this requirement would cover assistance to lodge an appeal, should that be necessary. In such circumstances a JP would not expect the person to appear in person to make their case.

Q4 *Who would represent the interest of a normally competent adult if, they are not competent due to the sickness, and have no next of kin (as defined)?*

A4. We have not made specific provision in the Regulations for a competent adult to be represented in the event of temporary incompetence through sickness; indeed there is no power to do so. While section 45M(6)(e) allows regulations to prescribe other persons (than those already specified) as “affected persons”, we do not consider that this can reasonably be taken to mean people who are not themselves personally affected by the order.

In any event, we do not think it is desirable to impose in legislation a formal process for a person to be represented by other parties in their dealings with a JP about a Part 2A order. That would inevitably be a complex matter and impose further administrative burdens on

local authorities and the courts. We do not expect this to be a problem in practice as any such difficulties would be managed, or accommodated, by the local authority and/or the court. There is no issue here which is peculiar to this legislation, as this situation can arise in other contexts.

A person's next of kin, as defined, have rights under regulation 6 in respect of an order relating to a body or human remains, but not in other circumstances.

Q5 *How is an owner of a building able to appeal against the Local Authority charging him for the decontamination of his building if he either thinks the charge is excessive or contests that someone else is responsible for the object that has caused the contamination?*

A5. Regulation 7(3) specifies that the amount of charge levied in such circumstances must not exceed the actual costs, and must be reasonable in the circumstances. The local authority is therefore bound by this requirement and would be acting ultra vires if they did not comply. The actual costs would be a matter of fact, and should be demonstrable in the event of a dispute. The local authority's decision to levy a charge is one that can be subject to judicial review, so that the test of whether a charge is reasonable would ultimately be for a court to decide if such action were taken.

We do not accept that fault is necessarily a relevant factor, although local authorities may take that into account if they wish. We do not think there is a viable alternative to allowing the charge to be imposed on the owner, because it is not always possible to say where the "fault" lies in a case of infection or contamination, and it would be very difficult to specify in regulations how a local authority might levy a charge on that basis. We think it is reasonable for responsibility for the safety of a building to lie with the owner of it, even if he or she were not responsible for the problem. The owner might seek redress, but that is not a matter for this legislation.

General points

The intention of the Regulations is to provide a straightforward framework for protecting people who are the subject of an application for a Part 2A order, which allows decisions to be made at local level as far as possible. The circumstances which lead to an application for a Part 2A order will vary markedly and we cannot realistically legislate for each and every scenario. But this is against a backdrop of local authorities having great expertise in the sympathetic management of cases relating to infections and contamination, and in all matters relating to children. Local authorities are aware of the need (and will be reminded in guidance) to take into account the individual factors of each case and to act accordingly. We are confident that local authorities are competent to do this and will exercise appropriate judgement within the framework provided by these Regulations and their wider obligations.

February 2010

APPENDIX 3: WHAT HAPPENED NEXT? A STUDY OF POST-IMPLEMENTATION REVIEWS OF SECONDARY LEGISLATION: FURTHER CORRESPONDENCE

Letter from Lord Rosser to Ian Lucas MP, Minister for Business and Regulatory Reform

Thank you for your letter of 21 January enclosing a copy of the Government's response to our report *What happened Next? A study of Post-Implementation Reviews of secondary legislation*.

The Committee found the response to be broadly positive: you agree that better coordination and clearer instructions for Departments are required and I think we can all subscribe to the general principles set out in part 1 of your reply:

- Post-implementation review should be integrated into the policy making process as part of policy evaluation;
- The resources devoted to the review should be proportionate to the likely benefit; and
- Reviews should be transparent, in order to further engagement with stakeholders.

However the Committee has asked me to seek a further response from you on your interpretation of 'proportionality'. You propose to set the threshold for formal Post-Implementation Review (PIR) at policies imposing burdens above £50m per year. This appears to be a very high threshold and we would be interested to have more information on why you propose setting it at that level. You do not indicate what percentage of SIs you expect to exceed this threshold⁴. Nor does the response give any indication of the average cost of conducting a formal PIR exercise, so we have no data on which to judge what sum might be proportionate. Similarly the response makes no reference to the offsetting benefits such a review might identify.

The setting of the threshold illustrates a difference in terminology that runs throughout the Government response. You appear to interpret PIR as a specific labour-intensive process akin to an Impact Assessment, whereas we have used it as a generic term for evaluation. This difference is illustrated by your rejection of Recommendation 7 on the grounds that making all SIs subject PIR would take up disproportionate resource. However all the recommendation actually says is the EM should include "an explanation of the department's plans to review the SI ... in all cases." From our perspective simple plans to monitor any increase in applications or decrease in accident statistics could be a perfectly adequate response, depending on the context.

This misunderstanding is also evident in relation to the rejected limb of Recommendation 3 which says "Even if conducted as part of a broader review the impact of each SI should be clearly identified and assessed"- the answer that an instrument is simply a consequential amendment and therefore has no impact in its own right would be acceptable. We fully agree that resources might sometimes be better expended by bundling associated SIs together, but this proposal stems from the Committee's observation that some principles that were fully endorsed in primary legislation have been rendered expensive or burdensome when the detail has come out in secondary legislation: evaluating primary legislation (PLS) without properly considering the way it has been implemented through secondary legislation could miss some important lessons.

⁴ The study of 196 IAs you quote indicated only that about 3% exceeded £100m equivalent annual costs

Recommendation 10: “Wherever fees are not increased annually by a fixed increment such as RPI or inflation, a review should be mandatory after a maximum of three years.” is also rejected on the grounds of disproportion. This again appears to be the result of the Department’s misconception that by review we always mean a formal PIR rather than an official sitting down for a couple of hours to work out how the fee income compares with the costs of the scheme and proposing appropriate amendments. This is fully in line with the principle that evaluation should be proportionate so we were surprised that it has been rejected.

Your response does state that “Policies imposing small costs should be subject to much less intensive review... the Government will update the Impact Assessment guidance to clarify expectations of the type of review that is appropriate in different circumstances”. It proposes that these lesser evaluations should focus on the core question: is the policy working? This would be acceptable in some cases but would not necessarily address the pertinent question of whether the policy is working as cost effectively as possible.

So while the Committee fully endorses the principle of proportionality it appears that there may be some differences over its interpretation and it is currently difficult to tell how acceptable the Government guidance will be without better information.

You propose an alternative solution to Recommendation 14 by setting up a central service on the OPSI website that will allow primary and secondary legislation to be searchable by the name of the Department. This would seem to be an acceptable alternative for most purposes, however it would not appear to address the very real difficulties that the NAO experienced in their research for us when trying to follow up an instrument when Departmental responsibilities have altered. So we would be interested to hear what will happen to the OPSI record when there are machinery of government changes.

As set out above, the Committee felt that the Government’s response was at points based on the misconception that we are seeking a Rolls Royce standard of review on all occasions. What we are seeking is a more consistent approach to evaluation and that Departments consider and publish their plans for reviewing the effectiveness of a policy at the time it is being devised and in a form that is commensurate with the impact of the instrument.

I therefore wonder if you have anything to add to the Government’s response in the light of this clarification. I would be grateful for a prompt reply as we hope to debate the report in the House shortly.

26 January 2010

Letter from Ian Lucas MP to Lord Rosser

Thank you for your letter of 26 January responding to mine of 21 January. I am pleased that we have a shared view on the key principles underpinning post-implementation review (PIR). I believe that PIR is of critical importance for policy-making across Government.

The first two principles in the Government response are that PIR should be fully integrated into the policymaking process and that the resources devoted to PIR should be proportionate to the likely benefit. The complexity of the policy landscape does not lend itself to a prescriptive or ‘one-size-fits-all’ approach. Our response therefore describes a framework that allows the decisions on detailed implementation to rest with individual Departments.

Part of the challenge in our response has been to describe a framework which:

- responds flexibly to the issue to be evaluated;
- empowers those closest to the policy (i.e. Departments) to judge how to carry out the PIR;
- avoids creating a “tick-box” mentality in which PIR is seen as just a process to be undertaken rather than something that helps improve policy outcomes;
- by increasing transparency, makes Departments publicly accountable for the decisions they make. It will be for Departments to integrate the principles we have set out into their policy-making process; and for stakeholders including your Committee, the NAO, individual Select Committees and others to hold them to account for their performance in this area.

Turning to your detailed points, I think there may be a misunderstanding about the £50m threshold. We were not suggesting that policies with costs below £50m a year should be outside the scope of the PIR policy. Rather, we were indicating our expectation that for policies with costs above £50m it would be proportionate to carry out a full review that involves a formal information-gathering exercise or stakeholder consultation. We also indicated that policies involving small costs may be subject to a less intensive review. We were seeking to illustrate examples of a proportionate approach at both ends of the policy spectrum.

You ask about the appropriate level of resource to be committed to a PIR. Some policy interventions will be relatively straightforward to evaluate; others will be much more complex, for example where they are looking to make an impact on a complex social issue with multiple causes. The Government is currently engaged in large-scale evaluations of the Companies Act 2006 and the 2002 NHS reforms. Significant resources are devoted to the review of these high-impact policies; as appropriate to their importance. It would be inappropriate to require this kind of full-scope inquiry for lower-impact policies, particularly at a time of tight expenditure constraints. Like you, the Government sees the kind of “desktop review” that you mention later in your letter as an appropriate form of PIR at the low-impact end of the scale.

I believe it is for individual Departments to decide what scale of PIR is appropriate, within the guidance we shall be providing them. A fundamental component of our approach is that, where Departments choose not to carry out any form of PIR against a published IA, they need to explain the reasons publicly.

Turning to Recommendation 7 and explanatory memoranda (EMs), our interpretation of the Committee’s recommendation was that the Committee expected the Government to set out a review plan for each and every Statutory Instrument (SI). The Government sees no merit in requiring blanket scrutiny of all measures. We expect the Impact Assessment (IA) that is carried out before the Explanatory Memorandum (EM) is produced to set out the approach that is to be taken towards review (recognising that in some cases it may be sensible to review several SIs together). The EM should reproduce or cross-refer to that information. The Government response also makes clear that where there is no intention to carry out a PIR for a particular SI, the reasons should be set out in the IA and in the EM.

On Recommendation 3, the Government agrees that evaluating primary legislation without considering the way it has been implemented could miss important lessons. We rejected the first limb of this recommendation not because we believe that secondary legislation should be out of scope, but because we expect that it will often be sensible for a number of SIs to be bundled together as part of a wider review. This is why the Government has committed, in response to your report, to clarify the relationship between Post Legislative Scrutiny, Post Implementation Review and evaluation.

On the subject of discretionary fee increases (Recommendation 10), the Government believes that the same principles applying to other policies should apply to reviews of discretionary fee increases. We draw a distinction between changes in fee structures, where PIR may be appropriate, and changes in fees driven by costs.

The Government agrees with the Committee that a key question for PIR is whether the policy is working as cost-effectively as possible; by considering, at an appropriate level of detail, the anticipated costs and benefits and the policy outcomes.

Lastly, when machinery of Government changes occur, the Office of Public Sector Information (OPSI) will need to ensure that the legislative database reflects the changes. In practice IAs will still be associated with their relevant legislation and searchable by Department name.

I welcome the Merits Committee Report and am pleased that we all want to achieve a real improvement in PIR across Government. The Government's work over the next few months will clarify our approach by strengthening the guidance. It is very important to me personally that we see the fruits of this in the quality of policy-making.

5 February 2010

APPENDIX 4: 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 9 February 2010 the following Members declared interests on the following instruments of interest:

Draft Health Protection (Part 2A Orders) Regulations 2010

Lord Rosser: as a Justice of the Peace.

Draft Human Fertilisation and Embryology (Disclosure of Information for Research Purposes) Regulations 2010

Baroness Deech: as a former chair of the Human Fertilisation and Embryology Authority.