

HOUSE OF LORDS

Merits of Statutory Instruments Committee

13th Report of Session 2009-10

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The Select Committee on the Merits of Statutory Instruments

The Committee has the following terms of reference:

- (1) The Committee shall, subject to the exceptions in paragraph (2), consider—
 - (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
 - (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (3).
- (2) The exceptions are—
 - (a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
 - (b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;
 - (c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.
- (3) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—
 - (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
 - (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
 - (c) that it may inappropriately implement European Union legislation;
 - (d) that it may imperfectly achieve its policy objectives.
- (4) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (3) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

The members of the Committee are:

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

Registered interests

Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from the Stationery Office.

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.

Thirteenth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

None.

OTHER INSTRUMENTS OF INTEREST

Draft Additional Paternity Leave Regulations 2010 and five related instruments¹

1. These six affirmative instruments introduce Additional Paternity Leave and Pay. They are complemented by a further five negative instruments which were identified as other instruments of interest by the Committee in the 11th Report of this Session (published 25 February 2010). The instruments give eligible employees (usually fathers) under certain circumstances (see Explanatory Memorandum paragraph 2.1 to 2.5) a right to up to six months leave to care for a child. The Government stated its intention in its 2005 Manifesto to give fathers more opportunities to spend time with their children. The Work and Families Act 2006 was then introduced to make provision for statutory rights to leave and pay in connection with the birth or adoption of children. The Government then consulted on these proposals in 2006, 2007, 2008 and 2009.

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

2. These draft Regulations provide for the enforcement of an EC Regulation from 2002 dealing with counter-terrorist financial restrictions against those persons associated with Al-Qaida and Taliban. The EC Regulation is directly applicable in UK law but penalties for its breach require UK secondary legislation. The draft Regulations incorporate an ambulatory reference which allows for amendments to the list of designated persons in Annex 1 of the EC Regulation to take immediate effect in the UK. These draft Regulations follow the Supreme Court's Order of 4 February 2010, in the case of *HM Treasury v Ahmed and others* quashing the Al-Qaida and Taliban (United Nations Measures) Order 2006 and the Terrorism (United Nations Measures) Order 2006. The Terrorist Asset-Freezing (Temporary Provisions) Act 2010, which came into effect on 10 February, makes provision for the temporary validity of certain Orders in Council which effectively maintains on a temporary basis the terrorist asset-freezing regime under those Orders.

¹ Draft Additional Paternity Leave (Adoptions from Overseas) Regulations 2010, Draft Additional Statutory Paternity Pay (Adoptions from Overseas) Regulations 2010, Draft Additional Statutory Paternity Pay (Weekly Rates) Regulations 2010, Draft Additional Statutory Paternity Pay (General) Regulations 2010 and Draft Employment Rights Act 1996 (Application of Section 80BB to Adoptions from Overseas) Regulations 2010

***Draft Electoral Law Act (Northern Ireland) 1962 (Amendment)
Order 2010***

***Draft European Parliamentary Elections (Northern Ireland)
(Amendment) Regulations 2010***

3. These affirmative SIs amend the way in which vacancies arising during term time in district council seats and European Parliamentary seats in Northern Ireland are filled. In respect of district councils, the proposal is for vacancies to be filled by a replacement nominated by the nominating officer(s) of the party or parties in whose name the vacating member stood when elected. European Parliamentary seats currently can only be filled by by-election, but the proposal is for vacant seats to be filled through a system of party nomination or substitution with by-elections held only if these processes fail. Although the Explanatory Memoranda (EM) for these draft SIs suggests these changes are uncontroversial (paragraph 8.1 of each EM), the House may be interested to note these unusual electoral changes.

***Draft Jobseeker's Allowance (Work for Your Benefit Pilot Scheme)
Regulations 2010***

4. This instrument introduces a two year pilot for the Work for Your Benefit scheme outlined in the Welfare Reform Act 2009. In four areas, two rural and two urban, the pilot will test whether mandatory work experience coupled with job search support helps the long-term unemployed find sustained work. It is intended as a follow-up measure for those who have completed the Flexible New Deal scheme without securing a job. Information on the type of work experience is not yet available, but it will be for 30 hours a week combined with up to 10 hours per week job search. It will be run in parallel with the normal Jobseeker's Allowance regime and another pilot of an Enhanced Support Period which will include a more intensive personal support from Jobcentre advisers. Selection of candidates will be on a random basis and sanctions will apply for non-compliance. An evaluation of the outcome will be published around the end of 2013 but interim results will be available in Summer 2011. Further information supplied to the Committee by the Department for Work and Pensions is printed at Appendix 1.

Childcare (Fees) (Amendment) Regulations 2010 (SI 2010/307)

5. These Regulations increase the fees payable to Her Majesty's Chief Inspector of Education, Children's Services and Skills in respect of registration by childcare providers in the early years register (EYR). They increase, from 1 September 2010, the fee to accompany any application for registration in the EYR and the annual fee payable by providers registered in the EYR. Although the EM says (paragraph 3.2) that the rises themselves are modest (either £5 or £20 depending on the band into which the provider falls) and they do not believe that the fee increases will have any impact on single parents wishing to return to the labour market, the Committee notes that the Impact Assessment did not specifically consider the fee increases in relation to rural or gender impacts (see Appendix 2).

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

6. The main Regulations (the Environmental Noise (England) Regulations 2006 as amended) transpose the requirements of an EC Directive relating to the assessment and management of environmental noise (“the Directive”). The purpose of this particular instrument is to limit the scope of the ambulatory reference inserted in the main Regulations by amending Regulations in 2009 (“the 2009 Regulations”), so that it only applies to specified technical aspects of the Directive. The 2009 Regulations, and in particular, the broad use of the ambulatory reference in those Regulations, were drawn to the special attention of the House by the Committee on the ground that they were politically and legally important (25th Report, Session 2008-09). In subsequent correspondence the Government undertook to amend the main Regulations so as to limit the ambit of the ambulatory reference to technical matters contained in the Annexes to the Directive (27th Report, Session 2008-09).

Community Task Force (Miscellaneous Provisions) Order 2010 (SI 2010/349)

Social Security (Community Task Force) Regulations 2010 (SI 2010/354)

7. The Community Task Force was set up as a voluntary scheme in January and becomes a mandatory element of the Jobseekers’ Allowance (JSA) regime from 26 April 2010. It is a national scheme that will apply to all claimants aged 18-24 and is designed to encourage participants back into the habits of a normal working environment. Claimants may volunteer for the scheme from 6 months and may be obliged to participate after 10 months (with benefit sanctions should they refuse to cooperate). The claimants will spend 25 hours a week on projects of help to the local community plus five hours a week in job search activity.

Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2007 (Amendment) Order 2010 (SI 2010/360)

Police and Criminal Evidence (Application to Revenue and Customs) Order (Northern Ireland) 2007 (Amendment) Order 2010 (SI 2010/42)

8. The purpose of these amending Orders is to apply certain additional provisions of the Police and Criminal Evidence Act 1984 (PACE) and the Police and Criminal Evidence (Northern Ireland) Order 1989 (PACE (NI)) to relevant criminal investigations conducted by officers of Revenue and Customs, and to extend the application of PACE/PACE (NI) to National Minimum Wage (NMW) investigations². The House may be interested in the expansion of HMRC’s powers to enter premises to arrest an individual when in possession of an arrest warrant or to arrest a person who is unlawfully at large. HMRC describe this and the other amendments as being minor in nature (see Appendix 3) and did not therefore feel that consultation was necessary. The House may wish to consider whether the amendments in these Orders justify this approach.

² Background to NMW investigations has been provided by HMRC and can be found in Appendix 3

DRAFTING QUALITY OF RECENT DEPARTMENT OF HEALTH STATUTORY INSTRUMENTS: CORRESPONDENCE

9. On 9 February the Committee sent a letter to the Department of Health (DH) outlining their concerns about the quality of the statutory instruments recently laid by the Department. The Committee received a response from the DH on 25 February. Both letters are printed at Appendix 4.

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 Additional Paternity Leave (Adoptions from Overseas) Regulations 2010

Draft Additional Paternity Leave Regulations 2010

Draft Additional Statutory Paternity Pay (Adoptions from Overseas) Regulations 2010

Draft Additional Statutory Paternity Pay (Weekly Rates) Regulations 2010

Draft Additional Statutory Paternity Pay (General) Regulations 2010

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

Draft Electoral Law Act (Northern Ireland) 1962 (Amendment) Order 2010

Draft Employment Rights Act 1996 (Application of Section 80BB to Adoptions from Overseas) Regulations 2010

Draft European Parliamentary Elections (Northern Ireland) (Amendment) Regulations 2010

Draft Jobseeker's Allowance (Work for Your Benefit Pilot Scheme) Regulations 2010

Draft National Assembly for Wales (Legislative Competence) (Culture and Other Fields) Order 2010

Draft National Assembly for Wales (Legislative Competence) (Education) Order 2010

Instruments subject to annulment

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

- SI 2010/344 Schools Forums (England) Regulations 2010
- SI 2010/345 Armed Forces (Redundancy, Resettlement and Gratuity Earnings Scheme) Order 2010
- SI 2010/349 Community Task Force (Miscellaneous Provisions) Order 2010
- SI 2010/354 Social Security (Community Task Force) Regulations 2010
- SI 2010/360 Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2007 (Amendment) Order 2010
- SI 2010/385 Social Security (Credits) (Amendment) Regulations 2010
- SI 2010/403 Business Rate Supplements (Accounting) (England) Regulations 2010
- SI 2010/405 National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) (Amendment) Regulations 2010
- SI 2010/408 Non-Domestic Rating (Unoccupied Property) (England) (Amendment) Regulations 2010
- SI 2010/411 Electricity (Exemption from the Requirement for a Generation Licence) (Keadby) (England and Wales) Order 2010
- SI 2010/412 National Health Service (Performers Lists) Amendment Regulations 2010
- SI 2010/413 Electricity (Exemption from the Requirement for a Generation Licence) (Millennium and Kilbraur) (Scotland) Order 2010
- SI 2010/418 Police Authorities (Particular Functions and Transitional Provisions) (Amendment) Order 2010
- SI 2010/419 Audiovisual Media Services Regulations 2010
- SI 2010/421 Police Authority (Community Engagement and Membership) Regulations 2010
- SI 2010/422 Policing Plan (Amendment) Regulations 2010
- SI 2010/423 National Health Service (Strategic Health Authorities: Further Duty to Involve Users) Regulations 2010
- SI 2010/424 Welfare Reform Act 2009 (Section 26) (Consequential Amendments) Regulations 2010
- SI 2010/426 Social Security (Maximum Additional Pension) Regulations 2010
- SI 2010/430 Severn Bridges (Amendment) Regulations 2010
- SI 2010/431 Police Pensions (Amendment) Regulations 2010
- SI 2010/436 Trade Union Ballots and Elections (Independent Scrutineer Qualifications) (Amendment) Order 2010
- SI 2010/437 Recognition and Derecognition Ballots (Qualified Persons) (Amendment) Order 2010

SI 2010/458 London Skills and Employment Board (Specified Functions) Order 2010

Instruments subject to annulment (Northern Ireland)

SR 2010/30 Safeguarding Vulnerable Groups (Regulated Activity, Devolution Alignment and Miscellaneous Provisions) Order (Northern Ireland) 2010

SR 2010/31 Safeguarding Vulnerable Groups (Prescribed Criteria and Miscellaneous Provisions) (Amendment) Regulations (Northern Ireland) 2010

SR 2010/42 Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order (Northern Ireland) 2007 (Amendment) Order 2010

APPENDIX 1: DRAFT JOBSEEKER'S ALLOWANCE (WORK FOR YOUR BENEFIT PILOT SCHEME) REGULATIONS 2010

Information from the Department for Work and Pensions

Q. *What will the Dept will be doing to ensure the scheme is not used as a source of cheap labour?*

How will the Dept ensure the scheme does not displace genuine jobs?

A. Throughout the design of the Work for Your Benefit initiative it has been one of our main principles that these placements must not be misused for a source of cheap labour and must not displace genuine vacancies within the labour market. Participants are likely to have multiple and overlapping barriers to work and will require significant support in their placements, from providers and host organisations. Therefore we think the risk of providers using this as a source of cheap labour is low.

We have a robust contract management strategy in place which includes continuously improving the performance, and crucially, the quality of the contract. In the case of Work for Your Benefit this will include ensuring that the following principles are strictly adhered to:

Placements should form part of a programme of employment support for the participant and they should receive appropriate help, support and training from the host organisation (and/ or provider);

Participants should be engaged in a healthy and safe working environment;

The host organisation should understand what is expected of them; and that

The host organisation is required to declare that the placement does not displace existing jobs and is in addition to any vacancies the organisation currently has or expects to have -

If the host organisation has a vacancy that it expects to fill with the participant then the position should be offered as a work-trial (for up to a maximum of 6 weeks) rather than work-experience as part of a Work for Your Benefit programme.

These principles form part of the contract and our evaluation strategy for the pilots includes looking at how placements have been sourced and whether these principles have been adhered to.

Q. *What type of work experience placements will customers be participating in?*

A. Our initial design and the WfYB ItT specification makes it clear that we will not prescribe the particular types of work experience that customers will undertake since we want to ensure that customers are doing work experience that is relevant to their individual needs and aspirations. Therefore identifying appropriate work experience should be a collaborative effort between a provider and the person participating in the programme and should include an element of skills-matching within the first 4 weeks of programme participation.

March 2010

APPENDIX 2: CHILDCARE (FEES) (AMENDMENT) REGULATIONS 2010 (SI 2010/307)

Information from the Department for Children, Schools and Families

Q. *The Committee is aware that there have been a number of recent SIs which aim to encourage single parents (the majority of which are female) to go back to work: the main SI with this policy aim being the Social Security (Lone Parents and Miscellaneous Amendments) Regulations 2008. The Committee would like to know the extent to which your SI was Impact Assessed in this broader policy context, and in particular, the extent to which it was (i) gender impact assessed, and (ii) rural impact assessed.*

A. The Impact Assessment did not specifically consider the fee increases in relation to rural or gender impacts. But in considering the impact of the increases- which equate to 10 pence a week for childminders and fifty pence a week for childcare on non domestic premises -the Department came to the view that there was no evidence that the increase will reduce provider numbers or the availability of childcare places across the country or deter new providers from registering either in urban or in rural areas. We do not, therefore, believe that the fee increases will have any impact on single parents wishing to return to the labour market. There were similar small increases in 2008 and 2009 and DCSF has not received representations about rural or gender impacts.

March 2010

APPENDIX 3: POLICE AND CRIMINAL EVIDENCE ACT 1984 (APPLICATION TO REVENUE AND CUSTOMS) ORDER 2007 (AMENDMENT) ORDER 2010 (SI 2010/360) AND POLICE AND CRIMINAL EVIDENCE (APPLICATION TO REVENUE AND CUSTOMS) ORDER (NORTHERN IRELAND) 2007 (AMENDMENT) ORDER 2010 (SI 2010/42)

Information from HM Revenue and Customs

Consultation

The amendments are minor in nature, in that:

The provisions in relation to HMRC's powers to enter and search for the purpose of arrest are an extension of our existing PACE powers to enter and search under s.17 of PACE 1984.

We already have the power to enter and search premises to arrest someone for an indictable offence, and these amendments now extend that to where we have a warrant to arrest an individual or where they are unlawfully at large.

The addition of s.24(5) and (6), which specify the 'necessity criteria' in relation to arrest have been added for completeness as s.24(2) - a power of arrest is already applied to us.

s.22(7), clarifies that if someone accompanies us on a s.8 warrant, having been named on the warrant - a power we already possess, anything they seize can be retained as long as necessary for the purpose of the investigation. This is the same as if an officer of HMRC seized the item.

Given the minor nature of these changes, which in general are linked to existing powers e.g. entry, search, seizure and the lack of impact on business; we did not feel that consultation was necessary. The changes in relation to entry and search, will allow us to place less reliance on the police to enter and search premises in these specific circumstances i.e. to execute a judicially issued arrest warrant, supports previous emphasis from the Office of Criminal Justice Reform for agencies to manage their own arrest warrants. Both the Home Office Police Powers and Protection Team and Northern Ireland Office are aware and content with these minor amendments. We are not aware of any dissatisfaction with the proposals and we already have extensive training and standard operating procedures in place in relation to the use of these types of powers.

NMW

Whilst the Department for Business Innovation and Skills is the owning Department for NMW policy and legislation, HMRC is the enforcing agency. DBIS pay for criminal investigation resource within HMRC, in order to create a deterrent effect. S.11 and 12 of the Employment Act 2008 amended the Finance Act 2007, to remove the NMW from the list of former Inland Revenue Matter to which HMRC's PACE did not apply. In order for effect to be given to this primary legislation, our PACE application Orders, need to be amended.

As a result HMRC has responsibility to criminally investigate NMW offences in line with agreed priorities with DBIS. Prior to the Employment Act 2008 and these changes we had very limited powers to undertake NMW criminal investigation; hence DBIS introduced primary legislation to amend this, so that we could be more effective in our enforcement activity. We have agreed to carry out 6 NMW related criminal investigations per year, as a minimum, obviously involving serious breaches of NMW requirements. The majority of NMW compliance activity is carried out by HMRC's Local Compliance staff.

Sections 31(1)-(6) of the National Minimum Wage Act 1998 set out the criminal offences in relation to non-compliance with National Minimum Wage. These include offences in relation to:

- 1) Wilful neglect to pay the NMW;
- 2) Failure to keep records
- 3) Keeping materially false records
- 4) Producing false records
- 5) Obstructing enforcement
- 6) Refusal or neglecting to provide records

In order to effectively investigate these matters, HMRC needs the ability to enter and search premises, require the production of documents, the ability to effectively question suspects, potentially following arrest and the powers of search that can be triggered following an arrest under PACE 1984.

February 2010

APPENDIX 4: CORRESPONDENCE WITH THE DEPARTMENT OF HEALTH REGARDING RECENT POOR DRAFTING

Letter from Lord Rosser to the Department of Health

I am writing, at the Committee's request, to enquire what steps your Department is taking to improve the quality of the statutory instruments it lays before the House. We have this week received a revised draft of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 which was originally considered by the Committee at its meeting of 10 November 2009. We understand that this instrument has had to be revised and re-laid due to a combination of drafting errors and policy clarifications.

We have previously had cause to comment on this issue: for example in our 21st report of session 2008-09 (see annex) when we saw three versions of the Human Fertilisation and Embryology (Special Exemption) Regulations in rapid succession. We have also noticed a comparatively high number of negative instruments amending errors or omissions.³ The Committee feel it would be better use of Parliament's time if more of these errors were eliminated before they left your Department and we are seeking your assurances that this will be undertaken.

9 February 2010

Letter from Mike O'Brien QC MP, Minister of State for Health Services, to Lord Rosser

Thank you for your letter of 9 February about the quality of the statutory instruments my Department lays before the House.

Between January 2009 and February 2010 our lawyers were responsible for drafting 125 statutory instruments which were subject to the Parliamentary process as well as 80 other pieces of secondary legislation. Nevertheless, we are disappointed with any failure to meet the high standards we set ourselves to get it right first time and we are committed to improving our performance.

Turning to your specific points on the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010, there were undoubtedly some places where the drafting was improved by the changes we made to these regulations. However, the key reason for change was a direct result of the view the JCSI took about offences in a regulatory context.

I want to assure you that we have taken the lessons learned very much to heart undertaking further training on evaluation of legal risk, ensuring that we make earlier contact with MoJ where appropriate and further tightening of our processes around drafting, and second and third checks on SIs.

25 February 2010

³ For example SIs 2010/49, SI 2010/47, SI2009/1768, SI2009/834, SI 2009/580. SI 2009/29