Merits of Statutory Instruments Committee

25th Report of Session 2008-09

Drawing special attention to:

Environmental Noise (England) (Amendment) Regulations 2009

Community Legal Service (Funding) (Counsel in Family Proceedings) (Amendment) Order 2009

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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 Lord Crisp KCB
The Baroness Deech DBE
The Viscount Eccles CBE
The Lord Filkin CBE (Chairman)
The Lord Hart of Chilton
The Lord James of Blackheath CBE
The Lord Lucas
The Baroness Maddock
The Lord Rosser
The Baroness Thomas of Winchester

Registered interests
Members’ registered interests may be examined in the online Register of Lords’ Interests at www.publications.parliament.uk/pa/jd/jdreg.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.
INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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


Summary: These Regulations were laid by the Department for Environment, Food and Rural Affairs (Defra) and amend the Environmental Noise (England) Regulations 2006 (“the 2006 Regulations”). The 2006 Regulations implement an EC Directive relating to the assessment and management of environmental noise (“the END”). Since the 2006 Regulations came into force, there have been significant changes in the intended approach to implementing certain aspects of the END in England. This instrument gives effect to those changes. This instrument also inserts an ambulatory reference into the 2006 Regulations by exercising the power contained in paragraph 1A of Schedule 2 to the European Communities Act 1972 (Explanatory Memorandum paragraph 7.6). The ambulatory reference added into the 2006 Regulations means that future changes to the END will be directly applicable in the UK. (Hitherto an amending statutory instrument, subject to Parliamentary procedure, has been needed to implement any changes to the Directive.) Future changes to the END might be minor and technical. They might, however, constitute a significant rewriting. All such changes would be...
captured by the ambulatory reference. The power to create ambulatory references was enacted by Section 28 of the Legislative and Regulatory Reform Act 2006. It was drawn to the special attention of the House by the Delegated Powers and Regulatory Reform Committee (“the DPRR”) during the passage of that legislation. The DPRR reported the power because it removed the need for amending instruments, and hence the automatic opportunity for debate of such instruments in Parliament (20th Report of Session 2005-06, HL Paper 192, p. 20). The power has since been used by a number of departments in relation to technical amendments to EU legislation. However, this is the first use of the power of which the Merits Committee is aware that could allow for substantive changes to an EC Directive to be directly applicable to the UK. Although in the Lords debates on the Legislative and Regulatory Reform Bill there was some discussion about ensuring transparent transposition of EC obligations [e.g. HL Deb 26 October 2006, Cols 1375 to 1383], it is not clear to this Committee that the House is fully sighted on the implications of this power.

3. Lord Roper, as Chair of the Select Committee on the European Union, has previously written to Caroline Flint MP (the then Minister for Europe) on the issue of ambulatory references (see letter of 27 March 2009 attached at the Appendix). He set out the general issue of concern of the Merits Committee and the EU Select Committee, that as a Statutory Instrument may be used to implement automatically future amendments to an existing EC Directive, the absence of further domestic legislation to implement an amending directive means that there will be nothing in domestic law for the Merits Committee or the House to scrutinise. The initial scrutiny of EC instruments by the EU Committee is therefore all the more important as it will be the only opportunity for Parliamentary scrutiny in such cases. Lord Roper stressed the importance of alerting the EU Committee to the implications of the use of an ambulatory reference in the relevant Explanatory Memorandum (i.e. the Government Memorandum on the relevant proposal for a piece of EU legislation).

4. In this case, Defra considers that the use of the power is justified. They have set out their full reasons in the note attached at the Appendix. Defra acknowledge that the ambulatory reference could cover substantive matters, and these might impact on costs for public authorities and the timescales over which actions are required to be taken. However, the department says that in practice the reference can be expected to cover only technical changes to the annexes. They also say that they would give appropriate publicity to any changes, and that those changes could be scrutinised by the European Scrutiny Committee and the EU Select Committee. Defra also refer to the cross Whitehall position on the use of the powers. The Department’s note of this Government position is also attached at the Appendix. Essentially the Government’s policy is that care should be taken before the power to make an ambulatory reference is used, and departments should properly publicise any substantive changes to the law.

5. The Explanatory Memorandum for this instrument aims to identify the possible impact of the ambulatory reference. Paragraph 7.6 says that there is a possibility that there will be changes to the END in the future, “such as updating of technical annexes or the possibility of other changes”. It also says that “there is a proposed amendment that alters the definition of the END in regulation 2 of the 2006 Regulations to include any future amendments of the END. This change will remove the need for further amendments to the
Regulations if the Directive is changed” (paragraph 7.6). However, the Committee considers that, as the reference could allow substantive changes to the EC Directive to be directly applicable to the UK, the Explanatory Memorandum should have given greater explanation as to why such a broad reference was employed. The further information from the Department shows the potential impact of the reference, and given this context, the brevity of paragraph 7.6 could be seen to be misleading. The Committee also questions why such a broad reference was employed if the Department expects it only to cover technical changes to the annexes.

6. The Government is clearly entitled to exercise the power contained in paragraph 1A of Schedule 2 to the European Communities Act 1972. However, as the ambulatory reference inserted by these Regulations could allow substantive changes to an EC Directive to be directly applicable to the UK this appears to be a significant development in the Government’s use of the power. The House may therefore wish to satisfy itself that the full implications of the use of ambulatory references are properly understood, including the reduction in Parliament’s ability to scrutinise the implementation of amendments to Directives, and that it is comfortable with the cross-Whitehall policy on their use.

B. Community Legal Service (Funding) (Counsel in Family Proceedings) (Amendment) Order 2009 (SI 2009/1854)

Summary: The Order makes changes to the legal aid family barrister fee scheme, called the Family Graduated Fee Scheme. It increases by approximately 17% the basic rate paid to counsel for public law children cases and reduces or abolishes certain special issue payments currently paid in these and other family proceedings cases. However the proposals for a new family fee scheme to replace these arrangements is proving very controversial and has been the subject of a report from the House of Commons’ Justice Committee: “the consistent message from evidence received on legal aid reform is that the Commission is proceeding at speed with inconsistent data, a weak evidence-base and a poor understanding of the shape, the cost drivers, other motivating factors, and the structure of its supplier market”. In the light of these comments the House may wish to seek further information from the Ministry of Justice on the robustness of the assumptions that underpin the current Order, both in terms of likely savings and the profession’s willingness to deliver a service under its terms.

This Order 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.

7. The Ministry of Justice (MoJ) has laid these Regulations under section 6(4) of the Access to Justice Act 1999, together with an Explanatory Memorandum (EM).

8. The Order makes changes to the legal aid family barrister fee scheme, called the Family Graduated Fee Scheme. It increases the basic rate paid to counsel for public law children cases by approximately 17% and reduces or abolishes certain special issue payments currently paid in these and other family proceedings cases. It also introduces a requirement on counsel to provide information in support of a claim for a fee for any special preparation work done in a case.

9. The Committee was concerned that no impact assessment was provided and sought further information; we are informed one is available at page 23 of the
consultation response document on the Legal Services Commission website.\(^1\) Such information should be included routinely in the EM. The Ministry told us that family barrister fees are nearly £100m per year, representing over 10% of the £800m spent on civil legal aid, within which over £500m is spent on family legal aid. The savings expected as a result of this instrument will allow the MoJ to live within budget; the Order is designed to save £6.5m per year net, with some additional savings reinvested into the basic fees for child protection work. The savings will apply each year, but the Ministry has proposed a new family fee scheme to take effect in April 2010. If that proceeds (which will require separate instruments), then the existing family barrister scheme (to which these reductions apply) will be abolished.

10. However the proposed new family fee scheme is proving very controversial and has been the subject of a report from the House of Commons’ Justice Committee.\(^2\) Although their Inquiry refers to the consultation on future arrangements, the Justice Committee sets this in context of the significant programme of reform in Legal Aid that has rolled out since 2006:

   The Legal Services Commission is running a substantial and complex consultation programme of inter-related initiatives aimed at shifting legal aid onto the footing identified by Lord Carter as the most cost-effective way forward. There have been more than 30 consultations launched since 2006. More reform is inevitable. However, the consistent message from evidence received on legal aid reform is that the Commission is proceeding at speed with inconsistent data, a weak evidence-base and a poor understanding of the shape, the cost drivers, other motivating factors, and the structure of its supplier market. In addition, as Lord Carter himself emphasised strongly, this fundamental reform of legal aid provision—for 60 years the pride of the justice system in this country—requires the cooperation of those who deliver the services. (paragraph 67)

11. In the light of these comments the House may wish to seek further information from the MoJ on the robustness of the assumptions that underpin the current Order, both in terms of likely savings and the profession’s willingness to deliver a service under its terms.

**OTHER INSTRUMENTS OF INTEREST**

*Adult Skills (Specified Qualifications) Regulations 2009 (SI 2009/1602)*

12. These Regulations are made as part of the implementation of the Education and Skills Act 2008 (“the 2008 Act”). The primary purpose of the regulations is to make clear which qualifications are relevant for the duties which are placed on the Learning and Skills Council (LSC) to secure the provision of proper facilities and to ensure free tuition in respect of certain

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\(^2\) [Family Legal Aid Reform, 8th report Commons Justice Committee (HC 714) published 15 July 2009 http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/714/71402.htm](http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/714/71402.htm)
education and training for adult learners. The Regulations come into force on 1st August 2009. However, the Committee notes that they are unlikely to remain in force very long. The Apprenticeship, Skills Children and Learning Bill, which is currently before Parliament, will replace the LSC with the Skills Funding Agency. It is not anticipated that the provisions concerning the Skills Funding Agency will come into force until April 2010. At that time it will be necessary to make a new set of regulations under the relevant powers in the Bill. It is intended that these will be based closely on these Regulations.

**Horse Passports Regulations 2009 (SI 2009/1611)**

13. The Horse Passports (England) Regulations 2004 (“the 2004 Regulations”) have been in force since 2004. Those Regulations implemented two EC decisions concerning the identification of horses. Essentially they required all owners to obtain a passport for all equine animals (including ponies, donkeys and other equidae) as a human health measure to ensure that horses do not enter the food chain if they have been treated with veterinary medicines harmful to human health. The 2004 Regulations were the subject of significant debate in the House at the time. These Regulations will replace the 2004 Regulations. The stated aim is to improve the system for the identification of equidae through implementing Commission Regulation (EC) No 504/2008. The main change under the proposed legislation is the requirement for the passport to be linked to the animal by implantation of an electronic microchip, containing a ‘unique life number’ with the passport and microchip details recorded on a database. The EM (paragraph 7.1) estimates that 277,500 horses are likely to be identified in accordance with these Regulations, with a further 25,000 foals each year required to be micro-chipped as a result of the Regulations.

**Social Security (Deemed Income from Capital) Regulations 2009 (SI 2009/1676)**

14. From November 2009 this instrument increases the threshold at which capital starts to be taken into account for the purposes of Pension Credit, Housing Benefit and Housing Tax Benefit. It will raise the current threshold of £6,000 to £10,000, so that pensioners’ savings will be subject to the same limit whether they are residing permanently in a care home or not. This fulfils an undertaking given in the 2009 Budget. The effect will be to remove the capital of the vast majority of those pensioners claiming these benefits from the calculations. However, for some Pension Credit customers who are receiving Savings Credit only (those with an income above £130 per week) this may lead to a small loss of up to £1.60 per week. This group, estimated to be less than 2,000 clients, will receive a one-off compensation payment of £40 to carry them over until the rates are adjusted in April 2010.


15. The Common Agricultural Policy Single Payment Scheme (SPS) was introduced in 2005, and is the main support payment paid to farmers in the EU. When the scheme was introduced, land used for permanent fruit and vegetables, nurseries and vines was deemed to be ineligible for scheme purposes. However, subsequent EU reforms changed this, and gave Member
States the option of allocating new SPS payment entitlements to farmers in respect of land used for these crops. The Government has decided to take up this option in England, and these Regulations provide for the allocation of the new SPS payment entitlements. Farmers will have the opportunity to claim annual payments under the SPS estimated to be worth approximately £7.4 million per annum over the years 2010 to 2012 inclusive. The Committee notes that there will also be significant administrative costs, estimated in the first year to be equal to the likely additional annual payments to farmers - £7.4 million (but decreasing thereafter). The Rural Payments Agency is responsible for delivering the SPS in England. The Committee is aware that this Agency had significant problems when the SPS was introduced in 2005, but Defra is confident that a subsequent programme of work has improved the situation.

**Criminal Defence Service (Funding) (Amendment) Order 2009 (SI 2009/1843)**

16. The Criminal Defence Service (Funding) (Amendment) Order 2009 corrects an anomaly in cases that cease to be classified under the Very High Cost Cases (VHCC) scheme to provide for payments for preparation made under the VHCC scheme to be deducted from the graduated fee scheme to which it has been downgraded, except for a fee for administrative work done to comply with the terms of the VHCC contract. It also makes a number of changes to the way litigators are paid in publicly funded cases in the Crown Court, following an interim review of the litigator graduated fee scheme by the Legal Services Commission.


17. In response to feedback on the prescribed forms set out in the original 2007 regulations, this instrument simplifies the language and content of the Lasting Power of Attorney forms to make them easier to use. The new forms are reduced from 28 pages to just 12 and the format has been drawn up in consultation with a number of user groups and a Senior Judge of the Court of Protection. Existing forms will remain valid, and can be registered if signed before April 2011, but new arrangements made after that date will only be accepted on the new-style forms.

**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 District Electoral Areas Commissioner (Northern Ireland) (Amendment) Order 2009
Draft Electoral Law Act (Northern Ireland) 1962 (Amendment) Order 2009

Draft instruments subject to annulment
Draft Guidance issued under section 182 of the Licensing Act 2003

Instruments subject to annulment
SI 2009/1602 Adult Skills (Specified Qualifications) Regulations 2009
SI 2009/1611 Horse Passports Regulations 2009
SI 2009/1631 M57 Motorway Junction 7 (Switch Island) (Speed Limits) Regulations 2009
SI 2009/1675 Lyme Bay Designated Area (Fishing Restrictions) (Amendment) Order 2009
SI 2009/1676 Social Security (Deemed Income from Capital) Regulations 2009
SI 2009/1677 Data Protection (Notification and Notification Fees) (Amendment) Order 2009
SI 2009/1768 Local Authority Social Services and National Health Service Complaints (England) (Amendment) Regulations 2009
SI 2009/1773 Control of Trade in Endangered Species (Enforcement) (Amendment) Regulations 2009
SI 2009/1798 Police Act 1997 (Criminal Records) (Disclosure) (Amendment) Regulations (Northern Ireland) 2009
SI 2009/1806 Road Vehicles (Construction and Use) (Amendment) (No. 2) Regulations 2009
SI 2009/1808 General Dental Council (Constitution) Order 2009

SI 2009/1814 Motorways Traffic (M42 Motorway) (Junctions 10 to 11 Northbound) (Restriction on Use of Offside Lane) Regulations 2009


SI 2009/1825 Assured and Protected Tenancies (Lettings to Students) (Amendment) (England) Regulations 2009

SI 2009/1829 Working Tax Credit (Entitlement and Maximum Rate) (Amendment) Regulations 2009

SI 2009/1833 Limited Liability Partnerships (Amendment) Regulations 2009


SI 2009/1843 Criminal Defence Service (Funding) (Amendment) Order 2009

SI 2009/1846 General and Specialist Medical Practice (Education, Training and Qualifications) Amendment Order 2009

SI 2009/1853 Criminal Defence Service (General) (No. 2) (Amendment) Regulations 2009

SI 2009/1854 Community Legal Service (Funding) (Counsel in Family Proceedings) (Amendment) Order 2009

SI 2009/1848 Housing Benefit and Council Tax Benefit (Child Benefit Disregard and Child Care Charges) Regulations 2009

SI 2009/1852 Export Control (Amendment) (No. 2) Order 2009


**Instruments subject to annulment (Northern Ireland)**

SR 2009/248 Manufacture and Storage of Explosives (Amendment) Regulations (Northern Ireland) 2009

SR 2009/264 Rules of the Supreme Court (Northern Ireland) (Amendment No. 3) 2009
APPENDIX 1: DRAFT ENVIRONMENTAL NOISE (ENGLAND) (AMENDMENT) REGULATIONS 2009

Letter from Lord Roper to Caroline Flint MP

AMBULATORY REFERENCES AND SUBSIDIARITY

The Select Committee recently considered two matters affecting scrutiny generally and I should be grateful if you would arrange to bring the following comments to the attention of Government Departments.

EU measures implemented by ambulatory references


Both of these Statutory Instruments include “ambulatory references” and illustrate a general issue of concern to the Merits Committee and the Select Committee, namely that, since the amendment of section 2(2) of the European Communities Act 1972 by the Legislative and Regulatory Reform Act 2006, an SI may be used to implement automatically future amendments of an existing EC Directive. The absence of further domestic legislation to implement an amending directive means that there will be nothing in domestic law for the Merits Committee or the House to scrutinise. This renders the initial scrutiny of EC instruments undertaken by the EU Committee more important since it will be the only opportunity for Parliamentary scrutiny in these cases.

With this in mind, the EU Committee would like to emphasise the importance of alerting the Committee, in any Explanatory Memorandum in respect of a proposal to amend existing EU legislation, that the proposal will have effect in domestic law without any further amendment of the original SI implementing the existing Directive i.e. without further recourse to Parliamentary procedure. This should be dealt with in the section of the Explanatory Memorandum dealing with the impact on UK law.

Subsidiarity

The importance of subsidiarity as part of scrutiny is recognised by the inclusion of a heading for this subject in the template which Departments must use for Explanatory Memoranda commenting on documents deposited for scrutiny. The EU Committee and its Sub-Committees consider the adequacy of the comments presented under this head, having regard to the definition of subsidiarity in Article 5 TEC and the guidelines set out in the Protocol on the application of that principle. Where the comments in an EM show insufficient consideration of the principle, the Department will be made aware of the Committee’s view either by contact between the Clerk and the departmental Scrutiny Coordinator or, if the case warrants, by letter to the Minister.

My officials have alerted Cabinet Office staff that I would be writing in these terms, and I gather they stand ready to communicate these matters to departmental scrutiny coordinators, should you so require.

27 March 2009
Information from the Department for Environment, Food and Rural Affairs

The power to make secondary legislation that includes ambulatory references to Community instruments is contained in Paragraph 1A of Schedule 2 to the European Communities Act. Our view is that we are entitled to use these powers and maintain that regulation 3(3) of the Regulations remain as drafted, on the grounds set out below:

1. In previous correspondence with the Committee (attached for ease of reference) the Department informed the Committee that there was a cross Whitehall position on using paragraph 1A of Schedule 2 to the European Communities Act.

2. The original 2006 Regulations impose obligations on public authorities in respect of adopting maps and plans, and do not impose obligations on citizens or businesses (other than airports). The 2009 regulations do not affect this position. In particular the provisions do not relate to any criminal offences, and so there is no suggestion that offences could be extended by the use of a paragraph 1A ambulatory reference. Similarly there is no suggestion that new obligations would be imposed on citizens or businesses by future amendments to the Directive.

3. We agree the inclusion of the words “as amended from time to time” in regulation 3(3) could be interpreted as referring to both the definition and content of the Noise Directive. However, the European scrutiny Committee and EU Select Committee would be able to scrutinise any changes, and the Department would give appropriate publicity to changes to ensure those affected were informed. In the event of repeal and substitution by a further Community instrument(s), the ambulatory references would not apply; so new statutory instruments implementing such replacement Community instrument(s) would be subject to scrutiny by the Committee in any event.

4. Whilst this ambulatory reference can be expected in practice to cover technical changes to annexes, it is conceivable that it could cover substantive matters which might impact on costs for public authorities and the timescales over which actions are required to be taken.

5. Where changes are proposed to the technical annexes of the Directive, Defra would be a party to negotiations and would be aware of the likely cost implications of such proposed amendments and related timing/implementation issues for competent authorities. Looking at the regulations, some of the issues that are subject to referential drafting in relation to the Directive (and which would thus update automatically by virtue of the ambulatory reference) include: noise indicators and supplementary noise indicators (Annex I of the Directive); objectives of the Directive (Article 1(c)); minimum requirements for information to be displayed for strategic noise mapping (Annex VI); assessment methods for noise indicators (Annex IV); and the minimum requirements for action plans (Annex V).

6. Defra considers that this is an appropriate case to rely on paragraph 1A and provide for ambulatory references.

July 09
Further Information from the Department for Environment, Food and Rural Affairs

Since we corresponded on ambulatory references and the publication of the Committee’s 5th Report, my attention has been drawn to the fact that there is an agreed Whitehall position.

The agreed position is that care should be taken before the power to make ambulatory references is used. Particular care is needed before a criminal offence or other penalty is involved. This is highlighted because of the effect that an ambulatory reference may have and that it will catch all future amendments to the Community instruments, and not just technical ones. Such future amendments may be significant, and may not necessarily be foreseen at the time of making the ambulatory reference. To minimise the risk of any unintended results Departments are asked to note that the ambulatory reference can apply to only certain sections or parts of a Community instrument e.g. an Annex.

Further it is noted that transparency is important, and so if an ambulatory reference brings in a substantial change in the law, it is good practice for the responsible department to publicise it, in order to draw it to the attention of people affected by it. For example, an updated transposition note can be put on the departmental website or a press release issued.

May 09