

HOUSE OF LORDS

Merits of Statutory Instruments Committee

4th Report of Session 2008-09

Drawing special attention to:

**Draft Freedom of Information
(Parliament) Order 2009**

**Rent Officers (Housing Benefit Functions)
Amendment (No. 2) Order 2008**

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

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.

Fourth Report

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.

A. Draft Freedom of Information (Parliament) Order 2009

Summary: This Order amends the provisions of the Freedom of Information Act in relation to the publication of expenses claimed by or paid to Members of either House. It limits the information that must be provided to an annual gross figure (not including any money spent on security arrangements) in respect of each Member. No justification is given in the EM why these additional measures are required over and above SI 2008/1967 rushed through in July 2008 in response to MPs' concerns about their personal security. Members may well wish to ask the Government why the Order is necessary, what is its policy objective and what is the explanation for the exceptional hurry which has limited the normal scrutiny process. (The Order was laid on 14 January and is scheduled to be debated on 22 January.)

This Order is drawn to the special attention of the House on the ground that it may imperfectly achieve its policy objectives.

1. The Ministry of Justice have laid these Regulations under section 7(3)(a) and (b) of the Freedom of Information Act 2000, together with an Explanatory Memorandum (EM).
2. This Order amends the provisions of the Freedom of Information Act in relation to the publication of expenses claimed by or paid to Members of either House. It limits the information that must be provided to an annual gross figure (not including any money spent on security arrangements) in respect of each Member.
3. The Committee notes that the Order affects a large number of Members of this House, and of the other place. We have none the less sought to deal with the Order in exactly the same way as any other instrument coming before the Committee.
4. The supporting material is deficient: no justification is given in the EM why these additional measures are required over and above the previous SI, rushed through in July 2008¹, which was intended to deal in particular with MPs' concerns about their personal security. The EM states the purpose of the Order is to change the scope of the application of the Act but does not set out the policy objective this change is designed to implement. This absence of clarity makes it impossible for the Committee to make a judgement whether the Order actually achieves its policy objectives. **When the Order is debated Members will wish to seek an explanation from the Government why the Order is necessary and what its objective is.**

¹ Freedom Of Information (Parliament And National Assembly For Wales) Order 2008 (SI 2008/1967) – laid in draft on 15 July, made on 22 July, came into effect on 23 July 2008

5. The Committee also records its dissatisfaction with the accelerated timetable imposed², which has prevented us from seeking any evidence on the Order, and limits our ability to make a considered report to the House. We would have wished to seek views from interested parties such as the Committee on Standards in Public Life, whose Chairman was reported in the press as saying “MPs above all should be subject to the Freedom of Information law since they are the ones who made it. I do not think that anyone has really made the case for this change.” Similarly Maurice Frankel, director of the Campaign for Freedom of Information, is reported as commenting on the disparity this instrument would introduce, saying “Chief Constables, local authority chief executives and others have to release individual expenses claims” and arguing that MPs should be treated the same as other public figures. **Members may well therefore also wish to seek an explanation for the haste which has limited the normal scrutiny process.**
6. Paragraph 8.2 of the EM indicates that the House of Commons will consider a motion alongside the instrument setting out some categories of information which might be published on a voluntary basis. In the past the House of Lords has published more than the minimal information that would be required by this Order³ and it is understood that the House Committee is to consider what approach it will wish to take in the light of this new Order at its meeting on 10 February. However whatever agreements either House may come to about additional information that they may volunteer, only failure to produce the level of information set out in the Order can be subject to judicial review.

B. Rent Officers (Housing Benefit Functions) Amendment (No.2) Order 2008 (SI 2008/3156)

*Summary: This Order sets out the way that Broad Rental Market Areas are to be constructed for the purpose of setting Housing Benefit rates for claimants living in privately rented accommodation. It seeks to restore the original policy intention following a recent House of Lords judgment in *Heffernan v the Rent Service*. We note with concern the very short consultation period on this proposal and the fact that a significant degree of disagreement with the policy remains.*

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 Department for Work and Pensions have laid this Order under sections 122(1) and (6) of the Housing Act 1996, together with an Explanatory Memorandum (EM).
8. This Order sets out the way that Broad Rental Market Areas are to be constructed for the purpose of setting Housing Benefit rates for claimants living in privately rented accommodation. It seeks to restore the original policy intention following a recent House of Lords judgment in *Heffernan v the Rent Service*⁴.

² The instrument was laid on 14 January and is scheduled to be debated on 22 January in both Houses

³ http://www.parliament.uk/about_lords/holallowances/hol_expenses04.cfm

⁴ *Heffernan v the Rent Service*, 30 July 2008, Session 2007-08, [2008] UKHL 58, an appeal from [2007] EWCA Civ 544.

9. Broad Rental Market Areas provide local reference rents which are calculated by Rent Officers according to the statutory framework. If applied nationally the effect of the Heffernan judgment, which related to the Sheffield area, would be to significantly increase the costs of administering the benefit, as it would result in the number of these rent reference areas (known as “localities”) increasing from the current 193 to over 4,000. The Government state that reducing the size of the localities would create a differential in the amounts of benefit paid that would be to the detriment of those living in poorer areas. These Regulations modify the legal framework to maintain the original policy intention that the areas should be large enough to include a range of both higher and lower rent accommodation. We note with concern the very short consultation period on this proposal and the fact that a significant degree of disagreement with the policy remains.

OTHER INSTRUMENTS OF INTEREST

Draft European Parliamentary Elections (Loans and Related Transactions and Miscellaneous Provisions) (United Kingdom and Gibraltar) Order 2009

10. This Order continues the series of instruments being laid to ensure that the election legislation is fully up to date prior to the forthcoming local and European Parliament elections. This Order applies in a modified form to Gibraltar some provisions of the Electoral Administration Act 2006, in particular the restrictions on the loans and related transactions that political parties may enter into. This is because, for the purposes of voting at European Parliament elections, Gibraltar forms part of the “combined region” along with the South West of England.

UK Borders Act 2007 (Code of Practice on Children) Order 2008 (SI 2008/3158)

11. This Order fulfils a duty in section 21 (1) of the UK Borders Act 2007 for the Home Office to issue a Code of Practice designed to ensure that in exercising their functions, staff of the UK Border Agency (UKBA) take appropriate steps to ensure that while children are in the UK they are safe from harm. This is in addition to more specific risks that may arise for children in transit for example from trafficking or other forms of exploitation, where UKBA staff are given explicit training on identifying problems and referring them to specialist authorities. We look forward to these measures being further strengthened when the Convention on Trafficking comes into effect in April 2009.
 12. Both Houses accepted that a Code of Practice provided a way in which the UKBA could discharge a duty towards children that contributed to their safety and protection whilst in the UK. But the Government has subsequently agreed to introduce a duty equivalent to that in section 11 of the Children Act 2004, in the next immigration bill so that children from overseas are subject to the same standard of safeguarding as children in Britain. The Code of Practice seeks to pave the way for this intention by anticipating the forthcoming legislation as much as possible. When that
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amended duty to children comes into force, section 21 of the UK Borders Act 2007 will be repealed and the current code of practice will cease to have effect.

Employment and Support Allowance (Up-rating Modification) (Transitional) Regulations 2008 (SI 2008/3270)

13. The Welfare Reform Act 2007 introduced the Employment and Support Allowance (ESA) for new claimants from 27 October 2008. It was the Government's original intention to transfer existing claimants for incapacity benefit over to ESA in the period 2010-13 and, to facilitate the alignment of differing rates of benefit, those with an age addition were to have their benefits frozen. However, as the Government now intend to align the rates more slowly than originally planned, people whose age addition will be phased out will now have their personal allowances increased by at least half the Rossi index, ensuring an overall increase in their benefits until they are moved across to ESA.

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

Alterations to the Northern Ireland Criminal Injuries Compensation Scheme 2002

Child Trust Funds (Amendment) Regulations 2009

Criminal Damage (Compensation) (Amendment) (Northern Ireland) Order 2009

Criminal Justice and Police Act 2001 (Amendment) Order 2009

European Parliamentary Elections (Loans and Related Transactions and Miscellaneous Provisions) (United Kingdom and Gibraltar) Order 2009

Health and Social Care Act 2008 (Registration of Regulated Activities) Regulations 2009

Northern Ireland Criminal Injuries Compensation Scheme 2009

Welsh Ministers (Transfer of Functions) (No. 2) Order 2008

Instruments subject to annulment

SI 2008/3125 Air Navigation (Overseas Territories) (Amendment) Order 2008

SI 2008/3158 UK Border Act 2007 (Code of Practice on Children) Order 2008

- SI 2008/3196 Zoonoses and Animal By-Products (Fees) (England) (No. 2) Regulations 2008
- SI 2008/3202 Town and Country Planning (Trees) (Amendment No. 2) (England) Regulations 2008
- SI 2008/3206 Spirit Drinks Regulations 2008
- SI 2008/3229 Companies (Model Articles) Regulations 2008
- SI 2008/3231 Export Control Order 2008
- SI 2008/3233 Plant Health (Import Inspection Fees) (England) (Amendment) Regulations 2008
- SI 2008/3240 Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2008
- SI 2008/3245 Local Government Pension Scheme (Administration) (Amendment) Regulations 2008
- SI 2008/3252 Beef and Veal Labelling Regulations 2008
- SI 2008/3256 General Teaching Council for England (Disciplinary Functions) (Amendment) Regulations 2008
- SI 2008/3264 Council Tax and Non-Domestic Rating (Demand Notices) (England) (Amendment) (No. 2) Regulations 2008
- SI 2008/3265 Safeguarding Vulnerable Groups Act 2006 (Prescribed Information) Regulations 2008
- SI 2008/3269 Criminal Procedure (Amendment No. 2) Rules 2008
- SI 2008/3270 Employment and Support Allowance (Up-rating Modification) (Transitional) Regulations 2008
- SI 2008/3295 Transmissible Spongiform Encephalopathies (England) (Amendment) Regulations 2008
- SI 2008/3297 Penalties for Disorderly Behaviour (Amount of Penalty) (Amendment) Order 2008
- SI 2008/3327 Civil Procedure (Amendment No. 3) Rules 2008
- SI 2009/5 Local Government (Structural Changes) (Further Financial Provisions and Amendment) Regulations 2009
- SI 2009/6 Conservation (Natural Habitats, &c.) (Amendment) (England and Wales) Regulations 2009
- SI 2009/7 Offshore Marine Conservation (Natural Habitats, &c.) (Amendment) Regulations 2009
- SI 2009/11 5875 – 5905 MHz Frequency Band (Management) Regulations 2009

Instruments subject to annulment (Northern Ireland)

- SR 2008/491 Explosives (Amendment) Regulations (Northern Ireland) 2008
- SR 2008/505 Crown Court (Amendment) Rules (Northern Ireland) 2008