HOUSE OF LORDS

Merits of Statutory Instruments Committee

30th Report of Session 2008-09

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

Report with evidence

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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.

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The members of the Committee are:

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The Lord Crisp KCB
The Baroness Deech DBE
The Viscount Eccles CBE
The Lord Filkin CBE (*Chairman*)
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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.

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(p) refers to a page of written evidence

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

Introduction

1. Secondary legislation makes up the majority of the law of this country. When implemented it affects every sphere of activity. This Committee has become increasingly concerned that Government concentrates too much on the creation of new secondary legislation, and does not properly review what is already in place and whether it works or not.

2. Secondary legislation is made more easily, and therefore more frequently, than Acts, and a large proportion of the regulations that the Merits Committee see amend a previous statutory instrument. When setting up a completely new scheme, policy officials obviously have to make assumptions about likely take-up or cost, and to determine whether the intended benefits will outweigh the costs, but once a system is established do departments actually review regulations to see whether they are working as anticipated and whether their original estimates were correct?

3. Such reviews are necessary to find out whether the secondary legislation is achieving its objectives (and whether there are any unintended consequences); and departments need to use the information they gain both to inform future policy development and to learn what approaches deliver the best results.

4. This report follows up observations in our schools report, and earlier inquiries,[1] which identified post-implementation review as an area of weakness. Because the quality and accuracy of the information provided in Explanatory Memoranda and Impact Assessments are vital to our scrutiny work, we set out to find out how often Government departments actually do check on regulations to find out what happened next.

[1] 29th Report, Session 2005-06, HL Paper 149; 13th Report, Session 2007-08, HL Paper 70; *Cumulative impact of statutory instruments on schools*, 9th Report, Session 2008-09, HL Paper 45

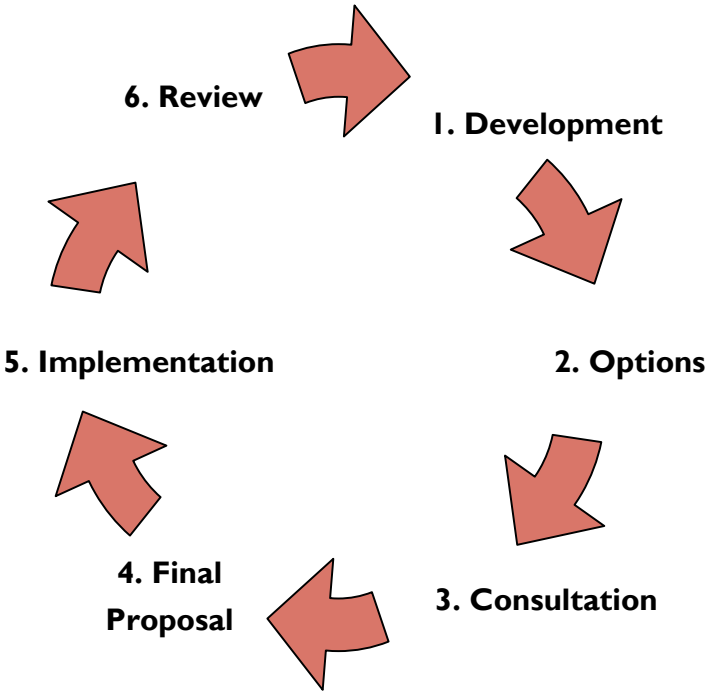

Figure 1: The policy cycle, as set out in Better Regulation Executive guidance

5. The full policy cycle, including post-implementation review, as shown above, has been taught to civil servants for many years and is included in Better Regulation Executive (BRE) guidance to policy makers.[2] But the start of the process (stages 1 to 4) still appears to receive more attention than the evaluation phase (stages 5 to 6 to 1). It is right to focus major effort on early stages, trying not to impose unnecessary burdens, but how do policy makers know if their assumptions were correct and the outcome as predicted if they do not review it afterwards? How do they become better at making policy? As figure 1 demonstrates, new legislation is often built on existing regulations so policy officials need to be aware of the strengths and weaknesses of the current situation before complicating it further.

6. In summary, the Committee considers that post-implementation review (PIR) of secondary legislation is important:

- to identify whether the policy change is achieving the desired results;
- to identify whether costs and benefits are in line with expectations;
- to inform future policy development;
- to improve delivery methods; and
- to develop the techniques used to assess the impact of policy interventions.

[2] BRE Impact Assessment guidance http://www.berr.gov.uk/files/file44544.pdf

Form of the inquiry

7. The evidence to the inquiry had two main strands:

- It is accepted good practice to review the implementation of a policy, usually three years after it has taken effect. We therefore asked the National Audit Office (NAO) to conduct a quantitative survey of a sample of Statutory Instruments (SIs) from 2005 to see how many have been reviewed. We are grateful to the NAO for their assistance for this inquiry. Their full report is published on both the NAO and the Merits Committee's websites, and we refer to it extensively in this report.[3]
- We also selected a few SIs for more detailed review, seeking feedback from the relevant department and also from those affected by the regulations. The instruments were drawn from our early reports or had attracted media attention at the time they were presented. The key messages from the evidence on these items are contained in Appendix 2. Evidence submitted is reproduced in the 'Written Evidence' section of this Report.

8. As ever we are grateful to those people who have taken the time to write to us – in a number of cases evidence from the public has highlighted issues that would not otherwise have been apparent - they have been influential in the development of this report.

Why secondary legislation should be reviewed

9. There is a general consensus that review of existing legislation is good practice in policy making but specific measures to encourage its use have been very slow in coming forward.[4] What progress there has been is on primary, not secondary, legislation. The Law Commission's report on *Post-legislative scrutiny* was published in October 2006.[5] The Government's response, made nearly 18 months later, agreed that a new approach was needed and proposed that "the department currently responsible for a particular Act should in most cases – generally between 3 and 5 years have elapsed after Royal Assent – publish a Memorandum, for submission to the relevant [Commons] departmental select committee".[6] Recently published Cabinet Office guidance on the style of the Memorandum to be submitted, adds:

> "The new process applies only to primary legislation, in the sense that there is no separate process for post-legislative review of individual statutory instruments. However … the preliminary assessment of the Act would cover

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[3] NAO website: http://www.nao.org.uk/publications.aspx

[4] Many reports have recommended the practice, from the Rippon Commission 1992 (Hansard Society, *Making the Law*, 1992), to the House of Commons Regulatory Reform Committee (*Themes and Trends in Regulatory Reform*, 9th Report, Session 2008-09, HC 329)

[5] Law Com paper No 302

[6] *Post Legislative Scrutiny – The Government's Approach,* Cm 7320, March 2008, para 16

how the principal delegated legislation under the Act has worked in practice." [7]

10. This high-level approach is fine as far as it goes but does not touch the many SIs that will continue to be made after the scheduled reviews, nor the many made under the stock of existing Acts that have been in place for some time (one of the case studies in this report, the Railways (Penalty Fares) (Amendment) Regulations 2005 were made under section 130 of the Railways Act 1993, some 12 years later). Nor will it capture a number of significant items of secondary legislation that implement EU directives.

11. In any case a broad general overview of an Act is unlikely to give sufficient detail about the implementation of individual SIs – some rather thorny trees might well be overlooked in an overall appreciation of the wood. Acts usually lay down broad principles on which consensus can be achieved, but the problems generally arrive in the proposals for the delivery mechanisms, fees, and enforcement of those principles, which tend to be the province of secondary legislation. Taking ID cards as an example, initial polls showed 60-80% support for the principle but this declined rapidly when more details including the likely cost of the card were made known.[8]

12. The volume of secondary legislation has increased significantly over recent years, and has gained in importance as a legislative vehicle.[9] The setting up of the Merits Committee in 2003 recognised this, because the sheer volume of SIs means that much would otherwise pass under the average Parliamentarian's line of sight. For this reason, **it is crucial that there should be robust systems for the review of secondary legislation as well as primary legislation.** The next section of the report examines to what extent this is currently happening.

What the NAO study found

Stage 1: a statistical survey

13. The first stage was a quantitative survey of departments to establish the action promised, and taken, for all relevant Regulatory Impact Assessments (RIA) supporting Statutory Instruments published in 2005 (this date was chosen to allow time for departments to have carried out a review).[10] The resulting sample size was 233 (18 %) of the 1282 SIs considered by the Committee that year – responses were received on 229 of them. Having an RIA implies a degree of significance but in 2005 an RIA was only required for instruments that impacted on the business sector, therefore the sample under-represents public sector legislation.

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[7] Cabinet Office guidance on the Post legislative scrutiny of Acts posted 8 July 2009: http://www.cabinetoffice.gov.uk/secretariats/economic_and_domestic/legislative_programme/guide_html/post-legislative_scrutiny.aspx , para 41.23

[8] MORI poll in April 2004 found 80% support for compulsory ID cards, a YouGov online survey found 61% support in May 2004. ICM polls found 47% support in February 2008 and 38% in October 2009

[9] Latest available figures indicate there were 11,868 pages of SIs in 2005 compared to 2,712 pages of Acts

[10] The sample was drawn from two Command papers: Regulatory Impact Assessments: 1st January to 30th June 2005 (CM6685) and Regulatory Impact Assessments: 1st July to 31st December 2005 (CM6987): http://www.berr.gov.uk/files/file45054.pdf and http://www.berr.gov.uk/files/file45055.pdf

14. The NAO study found:

- 45% per cent of these 229 RIAs included a commitment to conduct a full post-implementation evaluation or review, but to date only half of these had been done;
- a further 5% of the 229 cases had also undertaken PIR. Therefore in total 29% of all those who responded to the survey had completed PIR;
- in total some sort of evaluation work (ranging from simple statistics to full post-implementation review) had been carried out in 54% of cases.

15. These overall figures hide significant variations. Certain departments were much better prepared for PIR than others. The Department for the Environment, Food and Rural Affairs (DEFRA) had completed the highest proportion of formal post-implementation reviews, having completed one for 33% of its SIs included in the sample. At the Department of Health (DH), fewer formal post-implementation reviews had been carried out, 13% of its SIs in the sample, but it had conducted some kind of evaluation on 63%.

16. Other departments were less well prepared and, although the NAO obtained information on 98% of the SIs in the sample this was as a result of considerable persistence (the response rate by the initial deadline for returns was only around 40%).

Stage 2: more detailed inquiries

17. The second stage of the NAO review was a sample of 12 instruments drawn from our early reports or which attracted media attention at the time they were presented. For these the NAO asked for more detail about the nature of the review undertaken, established what the departments concerned consider the impact of the SI to have been and explored what factors had influenced the degree of evaluation that had been carried out. An analysis of the key messages from the evidence on these instruments is contained in Appendix 2.

18. The main findings from these interviews were:

- In all three cases where a post-implementation review had been promised, it had been carried out. The completed reviews had been used:
  - to establish outcomes from the regulation, some of which have been unexpected;
  - to update guidance to improve enforcement; and
  - to help in making amendments to the existing legislation.
- In the other nine cases a post-implementation review had not been carried out. The main reasons for no review being performed were one or more or the following:
  - the department already had in place alternative monitoring processes over the function addressed by the instrument, and continued to use these;

- the instrument had limited impact, in either financial or sensitivity terms, and departments did not feel the review was necessary; or
- there had been subsequent legislation, or the wider framework is under review within the UK or EU, and the Department was delaying review until the outcome of these was known.

19. Evidence from both parts of the NAO survey revealed that there is no clear methodology for doing PIR. While some departments seem to have a good grasp of the process (e.g. DEFRA, DH), others have no tracking system or means of overseeing the process. Compliance with EU requirements was a major driver for review, but domestic government influence appeared minimal. **There needs to be a stronger Government impetus to help departments establish a methodical PIR system. This would help ensure that departments used the learning gained from PIR reviews to inform both the content and the delivery mechanisms of their secondary legislation.** Our report makes recommendations designed to achieve this.

What should post-implementation reviews entail?

20. There does not seem to be a clear definition of what a post-implementation review of a statutory instrument should entail. There is guidance on the BRE website but it is minimal, simply listing a wide range of possible topics, but giving no indication of how the review should be undertaken or in what form.[11] This is in stark contrast to the Impact Assessment toolkit which has 47 web pages, many with embedded links to further material.[12]

21. We have seen some excellent models of PIR, such as the Health and Safety Executive's Control of Asbestos Regulations 2006 (SI 2006/2739),[13] which reassessed the actual risks in the light of experience, removed a small area from legislation in consequence, gave a measurable definition to a legal term that was difficult for industry to apply with certainty and checked benefits. This, however, was a major resource effort that would not be appropriate in all cases.

22. The NAO survey revealed that Departments use a number of different processes to evaluate the impact of SIs. These include compliance reviews, ongoing internal monitoring and stakeholder consultation. As was noted in paragraph 9, SIs may sometimes also be reviewed as part of a wider post-legislative scrutiny process involving their parent Act. All of these different methods could be appropriate and proportionate in the right circumstances and the Committee does not suggest a 'one size fits all' approach. However it is crucial that any review does not simply endorse the action the SI is taking but examines it critically (in the best sense of the word, for there are lessons to be learned from 'successful' legislation as well as from legislation that

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[11] BRE Impact Assessment toolkit – post-implementation review:
http://www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44231.html

[12] BRE Impact Assessment toolkit – index page http://www.berr.gov.uk/whatwedo/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44199.html/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44199.html

[13] Merits Committee, 47th Report, Session 2005-06, HL Paper 263

failed to meet its target). The Committee's key concerns are that **for every SI reviewed, the following criteria should be met:**

- **even if conducted as part of a broader review the impact of each SI should be clearly identified and assessed;**
- **the review should assess the extent to which the SI has achieved its objectives;**
- **the review should examine how the outcome compares with the success criteria set out in the IA;**
- **the review should assess the costs and benefits compared with original estimates; and**
- **the review should identify whether there have been any unintended consequences.**

Case study 1: Licensing Act 2003 (Transitional Provisions) Order 2005 (SI 2005/40)

The Department for Culture, Media and Sport reviewed the regulations as part of a wider review of the Act. In the NAO report they concluded that the transitional period had been a difficult one but that all licences were in place by the start of the new regime and that arrangements had settled down well. The memorandum provided by the City of London Corporation not only endorses the difficulties experienced during the transitional period but points to a number of continuing ambiguities and difficulties with the licensing process where even applicants' solicitors disagree about what information needs to be included.

23. The Licensing Order case study, like much of the correspondence we have received on individual SIs, indicates that the public's view of how effective the legislation has been in practice often differs from that of the department. The correspondence often focuses on weaknesses in how the legislation was implemented, more than on the final outcome. **This shows how important it is for departments to consider the delivery mechanism as well as the policy intent in the review and we recommend that the views of those affected by the legislation should usually be sought when assessing its performance.**

Establishing a baseline for PIR

24. Key to both Parliamentary scrutiny and PIR is a statement of what the policy intention of the SI is, and what degree of difference departments expect it to make. The NAO survey found that in 85% of cases departments reported that they had set out policy objectives and success criteria. However, the departments' perception does not tally with our experience of reading the same instruments - in 2005 we found very few instruments with clearly stated objectives or measurable criteria.

25. By our *Management of Secondary Legislation: follow up* report in 2008 we were so frustrated by the lack of progress that we devoted an entire chapter to this issue, concluding that "the Minister for Better Regulation could do more to

publicise and encourage the setting of (measurable) policy objectives and success criteria, and the regular adoption of post-implementation review". [14]

Case study 2: Road Transport (Working Time) Regulations 2005 (SI 2005/639)

The Department for Transport's evaluation found no issues with the implementation but did find a need to change the guidance. Although generally supporting the legislation, the correspondence we received from the Road Haulage Association comments that late implementation led to a short term distortion of competition, and that the true costs and benefits of the change have not been identified and may be impossible to identify due to the lack of benchmarking data.

26. The Government made changes to the IA and Explanatory Memorandum(EM) formats in 2007-08, and the majority of the instruments that we consider now state their objectives far more clearly, but unless these statements are supported by sound evidence, they can lack credibility. As the case study above illustrates, proper review of the outcome may not be possible if baseline data is not provided to show the position at the time the legislation was made. **We recommend that the initial Impact Assessment should be aligned with the process for post-implementation review:**

    - **departments should ensure that all IAs include a clear statement of the current (baseline) position against which the change introduced by the legislation can be measured;**
    - **to facilitate comparison a PIR report should include many of the same headings as an IA: and**
    - **to make the process coherent the same branch of Government should provide a template and guidance on both.**

Which SIs should be evaluated?

27. Domestic triggers for conducting PIRs are currently weak – although Cabinet Office guidance issued in 2003 stressed their importance, it did not oblige departments to commit to one. New guidance issued during 2007 by the BRE required all new-style Impact Assessments to include a statement of when the proposed legislation would be reviewed, but BRE is not checking whether these reviews are being carried out.

[14] Merits Committee, 13th Report, Session 2007-08, HL Paper 70, para 38

Case study 3: Horse Passports (England) Regulations 2004 (SI 2004/1397)

These were a second attempt at regulation in this area. The instrument extended the time limit set by 2003 regulations because, 3 months before the relevant deadline, only 150,000 passports had been issued. Responses to this inquiry include reports of malpractice and ineffectiveness particularly in reliably distinguishing between two similar horses. Paragraph 7.1 of the EM to the 2009 Regulations[15] (which introduce a revised system) states that "horse population estimates for the UK range from 1-1.35million. Database records indicate that approximately 980,000 are passported with up to 370,000 horses yet to be identified". In other words, 5 years after introducing the requirement for all equidae to have a passport, over 25% still do not. Yet neither EM nor IA to the new regulations provide any assessment of how the existing system has been performing or what options have been considered to address its weaknesses.

28. Case study 3 indicates that, especially when amending regulations are being brought forward, an evaluation of how the existing legislation has performed is essential to show that there will be additional benefits to justify the disruption of change. The evaluation needs to be proportionate to the importance of the SI, so we suggest that **the criteria for undertaking a PIR should be similar to those for the production of an IA.** For example, it should not be required for SIs which increase fees by inflation or make minor clarifications to the legal drafting. **But PIR should not be solely linked to IAs.** Particularly for public services, significant changes can be made that do not incur major costs. Wherever an instrument changes policy, wherever it makes a choice about how that policy is implemented then a PIR should be done to see if the appropriate course was chosen. **There is already a *monitoring and review* heading in the EM and we now expect to see an explanation of the department's plans to review the SI set out there in all cases.**

29. Public sector departments are underrepresented in our sample, because until the changes made in 2008, there was no requirement for measures with no impact on business to have an IA. We welcome the inclusion of public sector instruments in the IA system, but in our routine scrutiny of SIs we see many different interpretations of the "£5m" threshold set out in the IA toolkit.[16] Instruments that have implemented policy changes costing many times that sum, particularly from the Department for Work and Pensions (DWP), have failed to provide an Impact Assessment.[17] BRE has agreed to our request to clarify their guidance but we note that even in its answers to our questions, BRE uses two different definitions[18]: at Question 8 the definition is "where proposed impacts exceed £5m"; at Question 9 it is stated that the £5m "relates to Average Annual Cost which spreads administrative costs and

[15] Horse Passports Regulations 2009 (SI 2009/1611)

[16] The NAO also found departments differed in the way they reported costs – see para 21 of the study report

[17] eg Social Security (Housing Costs Special Arrangements) (Amendment and Modification) Regulations 2008 (SI 2008/3195) 5th Report, Session 2008-09, HL Paper 27; Social Security (Flexible New Deal) Regulations 2009 (SI 2009/480) 12th Report, Session 2008-09, HL Paper 63; draft Census (England and Wales) Order 2009 29th Report, Session 2008-09, HL Paper 176

[18] Full response is included in Appendix 3 to this report

programme spend across the life of a policy" (Appendix 3). This second interpretation would exclude a significantly higher number of instruments, so we prefer the first one. In the current stringent economic climate where the budgets for public services will be squeezed **we believe it essential that good quality impact analysis is provided for the majority of public sector initiatives and that it is followed up with PIR so that departments can refine the efficiency of their delivery mechanisms and taxpayers can see whether their money is being spent to best effect.**

30. The NAO survey found a major reason for not completing a PIR was because the legislation had been superseded. Replacing an instrument does not necessarily mean its impact does not need to be evaluated, and ideally that should be done before replacement regulations are laid. Witnesses to our inquiry into the cumulative impact of SIs complained about departments' continual amending of legislation, repeatedly changing systems before they have had a chance to bed in,[19] and correspondence to this inquiry reiterates that view.[20] We express the hope that a more structured PIR mechanism might impose better discipline on departments, encouraging them to allow time for a piece of secondary legislation to bed in before bringing in amending regulations and, given the resource implications of PIR, perhaps to make fewer, better structured SIs.

Timing

31. The Government's proposed system for post-legislative scrutiny of Acts sets out that reviews should be done after 3-5 years. This seems a good general rule for SIs, but need not be mandatory.

Case study 4: Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (made as SI 2004/1511)

Evidence after 3 years appeared to support the initial concern expressed that the removal of anonymity would reduce the number of donors, but after 5 years donor numbers have risen again to above the previous levels. The stated objective of the measure - to give donor-created children the option to seek out information on their biological parent when they get to 18 – cannot be evaluated until 2023 at the earliest. However responses to this inquiry report an immediate benefit in better counselling of prospective parents about whether and what they may want to tell their donor-created offspring when they are old enough to understand.

32. As case study 4 illustrates, some initiatives take a long time to bed in. So for most cases a rigid timetable is probably not helpful. There may be other triggers for PIR than simply the time elapsed – for example a major change in the economic climate, the exchange rate or a major increase in the unemployment register could significantly alter the balance of cost and

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[19] *Cumulative impact of statutory instruments on schools*, 9th Report, Session 2008-09, HL Paper 45. See in particular paras 8 & 9 and paras 29-34

[20] See the letters from Ambler and Chittenden and City of London Corporation, p 1 and p 9

benefit. Departments should be open to the possibility of bringing forward reviews if circumstances change significantly.

33. **We propose that suggested arrangements for PIR should be part of the policy formulation and included in the consultation exercise. This would allow departments to seek endorsement of their proposals for a review that is appropriate and proportionate to the contents of the regulations.**

34. While there is no central stimulus to conduct evaluations, resources will continue to get diverted elsewhere. For example, we recently noted a number of problems with the Land Charges Fees Regulations, SI 2009/2494. The fees had not been reviewed since 2003 but, in the current economic conditions, the market could not stand an increase sufficient to bring the fees back up to full cost recovery levels. We regularly see similar examples, although the delay may give users an additional benefit from low cost services, the shortfall is often made up by the taxpayer: **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.**

35. We wonder if, in cases where Parliament wishes to ensure that resources are being used effectively, greater use might be made of sunset clauses for relevant delegated powers and secondary legislation made under it, particularly for those departments who are not making adequate efforts to evaluate outcomes on a voluntary basis.

Who should see the outcome?

36. The originating department should be the primary user of the information in PIRs. However we consider that all those affected by the legislation may have an interest, as may members of both Houses of Parliament. Yet the NAO found that only half of the completed PIRs identified in the survey were published (34 cases, that is 15% of the total sample of 229 SIs), and the majority of other evaluations appeared to be internal. To be fully transparent and accountable we therefore recommend that **all PIRs/evaluations on Statutory Instruments should be published online, alongside the original IA.**

37. The Committee was surprised to see that departments claimed to have conducted some sort of evaluation for 54% of the SIs in the sample, as this does not match our impression from our routine scrutiny activity. We would suggest that departments need to make it clearer when evaluation has been used to revise and develop policy, and recommend that **the Government should amend IA or EM templates so that they include an explicit prompt to give the results of any relevant PIR exercise (in the same way they currently do for the outcome of the consultation exercise).**

Case study 5: Work at Height Regulations 2005 (SI 2005/735)

These Regulations illustrate the need for broad evaluations of policy interventions. The correspondence we received agrees that the prime objective of reducing the number of falls has been achieved, and that in the workplace greater thought is now being given to safety when working at height. But the evidence provided indicates that there were a wide range of unintended consequences with unforeseen commercial impacts, and the misconception which arose that ladders are dangerous leading to inappropriate alternative equipment being used that may have actually led to accidents.

38. Case study 5 demonstrates how important external feedback can be in evaluation: – on Work at Height, HSE responded well to ease the consequences of the unforeseen events, but to alert others to such potential difficulties **lessons from good and bad practice should be disseminated more widely both within the department and across Whitehall.**

Better central oversight

39. There is widespread agreement that reviewing existing legislation is a good idea, but it is not a resource priority and there currently appears to be no systematic cross-Whitehall methodology or tracking system. Machinery of Government changes since 2005 created difficulties in identifying who had responsibility for some of the SIs within the current Government structure and responsibility for 4 SIs could not be traced within three months. The NAO also found that some current policy staff had limited knowledge about previous SIs. This applied even where departmental responsibilities had not been changed. **The Government should require each department to establish and maintain an online register of its legislative portfolio. This would enable departments to track and follow up PIR commitments, aid consolidation, and also to smooth transition when machinery of government changes are made.** The register should include links to completed IAs and PIRs.

40. PIR is complementary to the IA and a poor quality IA will limit the effectiveness of PIR. Over the last 5 years, NAO studies have found persistent weaknesses in IAs which have not been addressed by those departments or BRE. We understand that BRE staff currently only get directly involved with IAs likely to result in costs of over £20m and they do not see it as their role to police the use of the Impact Assessment guidance or template (Appendix 3 – answer to Q4). The most recent NAO survey of IAs recommended that BRE should provide departments with more external challenge to the development of regulations, ensure that minimum standards of scrutiny are met, and assess the standard of a sample of a department's IAs to develop an understanding of their strengths and weaknesses.[21] In a

[21] National Audit Office, *Delivering High Quality Impact Assessments,* HC 128, 28 January 2009, Recommendation 9e

recent report the Commons' Regulatory Reform Committee came to a similar conclusion.[22]

41. The same pattern appears to be evolving with PIR: An NAO report from 2003-04 commented that only 4 out of 10 IAs had mentioned their intention to conduct any sort of PIR. Evidence from our sample from 2005 shows that 29% of SIs which were accompanied by an IA have actually been reviewed. The most recent NAO report *Delivering High Quality Impact Assessment* states that only 20 per cent of IAs from the first half of 2008 included an implementation plan with arrangements for post-implementation review. The BRE believes that the changes to the IA template made in 2007 will reverse this trend, stating that 97% of IAs on their website in September 2009 indicated a review date. But BRE also states that its role is only to act as a critical friend and it is the responsibility of each department and external stakeholders to hold departments to account on the effectiveness of their policy making (Appendix 3).

42. It is not enough to set a date for review and expect departments to self-regulate: our evidence shows that only half of the commitments made in IAs to conduct a review have been fulfilled. Although we endorse the view that external stakeholders have a valuable role in holding departments to account, our evidence indicates that published evaluations were only available for 15% of the SIs in the sample, which significantly limits external bodies' ability to comment on the rest.

Case study 6: Railways (Penalty Fares) (Amendment) Regulations 2005 (SI 2005/1095)

These Regulations increased the penalty fare from £10 to £20 as it was thought the deterrent effect would have reduced over time. A recent newspaper article "10 ways to avoid penalty fares"[23] does not indicate the presence of good robust law. The DfT has not reviewed the operation of the penalty to find out whether it is an effective deterrent or whether the sum is still appropriate, and yet is about to bring forward extension regulations.

43. Someone needs to check that PIRs have been done when due and that they do more than rubber stamp the action taken. There is considerable resource already committed to Better Regulation (the BRE currently has 99 staff [24] and there is a Better Regulation Unit in every department over and above the policy staff and economists actually drafting the SI and supporting documentation). **We therefore endorse the suggestions made by other prominent commentators, that the Government should take a more active role in supervising both IA and PIR systems. The BRE seems the most obvious body to take on this role: it should move from its position of facilitator to enforcer.**

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[22] House of Commons Regulatory Reform Committee, *Themes and Trends in Regulatory Reform*, 9th Report, Session 2008-09, HC 329, para 53

[23] *Evening Standard*, 13 August 2009

[24] HC Debates, 6 May 2009, col 257W

Jam tomorrow?

44. On 2 April 2009 the Government announced two new Committees which would support Better Regulation:

> *"a new better regulation sub-committee of the National Economic Council … This Committee will scrutinise planned regulation and proposals for new regulation that will impact on business"* and
>
> *"a new external Regulatory Policy Committee .. to advise Government on whether it is doing all it can to accurately assess the costs and benefits of regulation"*[25]

45. The terms of reference for these Committees suggest that they will again be treading well-worn paths, focussing on business impact and new regulation. It appears that neither committee's remit will extend to the public sector, nor to the utility of the stock of existing regulations. Who will cater to those needs? The BRE's response indicates that the exclusion of public sector initiatives from the NEC is deliberate as there are other committees to scrutinise public sector functions, but their emphasis is on programme costs. The exact role of the Regulatory Policy Committee is currently under discussion (Appendix 3). **In setting up the Regulatory Policy Committee we would urge the Government to consider the role that PIR should play in informing the cost estimates for amending or replacement regulations and establish consistent methods for PIR and IAs**.

Conclusion

46. The Merits Committee's primary role is to sift through the new SIs being put forward and flag up those that may be of interest to the House or which may be flawed in their ability to deliver the stated policy objective. Our ability to do this depends on good quality information being provided. The mantra of government in recent years has been "evidence-based policy" – but we still see too many cases where little or no supporting evidence is provided.

47. This study has assessed the current benchmark levels of PIR. PIR was not mandatory for the statutory instruments in our sample, and in only 29% of cases has a review been conducted. (Although a lesser degree of evaluation has been undertaken in about half the cases, we cannot tell whether the degree is appropriate to the importance of the regulation concerned.) It is clear that this position is not going to improve without the system being kick-started by central Government.

48. Although we have seen some excellent examples of post-implementation review used to improve the effectiveness of legislation, these are the exception rather than the rule. We greatly welcomed the changes made in 2007-08 to IA and EM formats that make evaluation the default requirement, but if the Government is serious about using PIR to achieve real improvements in outcomes through better policy making and policy delivery, it must set out clear standards and guidance *now*. The first wave of PIRs promised in the revised IA format may not fall due until 2010-11, but each and every day new regulations are laid before the House which need to adopt a consistent and proportionate approach to PIR in their plans. Until the Government takes a better grasp on this aspect of the legislative process, departments will continue to waste opportunities to learn valuable lessons from the past.

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[25] HC Debates, 2 April 2009, col 74WS

Summary of recommendations

1. ***It is crucial that there should be robust systems for the review of secondary legislation as well as primary legislation. (paragraph 12)***
2. ***There needs to be a stronger Government impetus to help departments establish a methodical PIR system. This would help ensure that departments used the learning gained from PIR reviews to inform both the content and the delivery mechanisms of their secondary legislation. (paragraph 19)***
3. ***For every SI reviewed, the following criteria should be met:***
    - ***Even if conducted as part of a broader review the impact of each SI should be clearly identified and assessed***
    - ***The review should assess the extent to which the SI has achieved its objectives***
    - ***The review should examine how the outcome compares with the success criteria set out in the IA***
    - ***The review should assess the costs and benefits compared with original estimates***
    - ***The review should identify whether there have been any unintended consequences. (paragraph 22)***
4. ***It is important for departments to consider the delivery mechanism as well as the policy intent in the review and we recommend that the views of those affected by the legislation should usually be sought when assessing its performance. (paragraph 23)***
5. ***We recommend that the initial Impact Assessment should be aligned with the process for post-implementation review:***
    - ***departments should ensure that all IAs include a clear statement of the current (baseline) position against which the change introduced by the legislation can be measured;***
    - ***to facilitate comparison a PIR report should include many of the same headings as an IA: and***
    - ***to make the process coherent the same branch of Government should provide a template and guidance on both. (paragraph 26)***
6. ***The criteria for undertaking a PIR should be similar to those for the production of an IA, but PIR should not be solely linked to IAs. (paragraph 28)***
7. ***There is already a monitoring and review heading in the EM and the Committee now expects to see an explanation of the department's plans to review the SI set out there in all cases. (paragraph 28)***
8. ***We believe it essential that good quality impact analysis is provided for the majority of public sector initiatives and that it is followed up with PIR so that departments can refine the efficiency of their delivery mechanisms and taxpayers can see whether their money is being spent to best effect. (paragraph 29)***

9. ***Suggested arrangements for PIR should be part of the policy formulation and included in the consultation exercise. This would allow departments to seek endorsement of their proposals for a review that is appropriate and proportionate to the contents of the regulations. (paragraph 33)***

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. (paragraph 34)***

11. ***All PIRs/evaluations on Statutory Instruments should be published online, alongside the original IA. (paragraph 36)***

12. ***The Government should amend IA or EM templates so that they include an explicit prompt to give the results of any relevant PIR exercise (in the same way they currently do for the outcome of the consultation exercise). (paragraph 37)***

13. ***Lessons from good and bad practice should be disseminated more widely both within the department and across Whitehall. (paragraph 38)***

14. ***The Government should require each department to establish and maintain an online register of its legislative portfolio. This would enable departments to track and follow up PIR commitments, aid consolidation, and also to smooth transition when machinery of government changes are made. (paragraph 39)***

15. ***The Government should take a more active role in supervising both IA and PIR systems. The BRE seems the most obvious body to take on this role: it should move from its position of facilitator to enforcer. (paragraph 43)***

16. ***In setting up the Regulatory Policy Committee we would urge the Government to consider the role that PIR should play in informing the cost estimates for amending or replacement regulations and establish consistent methods for PIR and IAs. (paragraph 45)***

APPENDIX 1: MERITS OF STATUTORY INSTRUMENTS COMMITTEE

The members of the Committee that conducted this inquiry were—

Baroness Butler-Sloss

Lord Crisp

Baroness Deech

Viscount Eccles

Lord Filkin (*Chairman*)

Lord Hart of Chilton

Lord James of Blackheath

Lord Lucas

Baroness Maddock

Lord Rosser

Baroness Thomas of Winchester

Declarations of interest relevant to this inquiry

Baroness Butler-Sloss: part-ownership of a horse

A full list of Members' interests can be found in the Register of Lords interests: http://www.publications.parliament.uk/pa/ld/ldreg.htm

APPENDIX 2: SYNTHESIS OF EVIDENCE

Case Study 1: Licensing Act Transitional Provisions Order 2005 (SI 2005/40)

Policy Objective:

This Order set out the process whereby premises licensed under a range of different acts converted to the terms of the Licensing Act 2003. The instrument also clarified the details that must be provided with the Licence for the premises.

The transitional provisions order was part of the wider roll out of changes arising from the Act. The Department found it difficult to separate the costs of each instrument from the compliance costs associated with the Licensing Act 2003.

The Committee's view then:

The Committee first considered licensing in its 2nd Report of Session 2003-04. In commenting on the statutory guidance we noted that matters of particular interest to the House included "the fee structure and funding of the licensing regime, the definitions of what constituted licensable entertainment, and how guidance to licensing authorities would foster consistent decisions". The later secondary legislation, of which SI 2005/40 formed a part, set up the mechanics of the new licensing system and the fee regime but the Committee had to seek additional information from DCMS on its proposed management of the system (printed at Appendix 2 to the 7th Report, Session 2004-05). Whilst we welcomed the evidence it gave of the Department's efforts to produce and disseminate appropriate guidance, the Committee still had concerns whether all the necessary materials and training would be in place by the time the new system began on 7 February 2005, the date when they came into effect.

The Committee also questioned whether, given the uncertainties about the base data, the fee structure set out in associated regulations would achieve full cost recovery from the licensed sector without imposing costs on rate payers. (7th Report, Session 2004-05)

The NAO found:

The impact assessment did not commit to a formal post-implementation review on this particular SI on the grounds that the cost and benefits could not be measured in isolation from the whole Act itself, but did commit to monitoring the impact of licensing reform overall, including the transitional arrangements. The Licensing Act has been covered in several other reviews covering administration burdens and simplification of regulation. In particular:

- Scrutiny Council initiative brought in to monitor the implementation and how well the processes worked in the first six months.
- Review of fees levels by an independent panel.
- Department reviewed the guidance in the early stages.
- On-going statistics collection on the number of licenses processed.
- Full evaluation of the 2003 Act was published in March 2008, published on website http://www.culture.gov.uk/reference_library/publications/3574.aspx

The first three bullets relate to early reviews of aspects of the regime and, to a certain degree, would have looked at how the transition arrangements covered by this SI worked. In broad terms, the department's consensus was that the transitional period had been a

difficult one, but that all licences were in place by the start of the new regime and that arrangements had settled down well.

The overall conclusion from the main evaluation of the 2003 Act did not relate to aspects of process (such as those covered by the transitional arrangements). It found that the Act did not lead to the problems that some people had anticipated, but also that the full powers of the Act were not always being used to tackle alcohol related crime and disorder.

Responses to the call for evidence:[26]

Correspondence indicated that the transition had been achieved successfully but only with tremendous effort and there were some continuing problems. The timetable was very tight and put particular pressure on those required for hearings, particularly as the transition deadline fell at the end of July start of August which is the normal holiday period. Failure to hold a hearing was automatically deemed a refusal although there were occasions when this was nugatory and the resources could have been better deployed. The late publication of the regulations and scale of fees had exacerbated the problems (CLC, p 9).

Cost and ease of application:

"Many applicants found the forms to be long and more bureaucratic than the previous system with even applicants' solicitors disagreeing on what information needed to be included. This continues to be a problem" (CLC). Some of the instructions are ambiguous, for example difficulty in knowing when an application is deemed to have been made and hence from when the 28 day representation period runs. The fees are sufficient for basic administration but do not cover the full cost of the service provided by licensing officers, particularly additional activities such as officers' attendance at residents meetings as recommended in the Statutory Guidance (CLC, p 9). There are also problems around the revocation of licences.

The Committee's view now:

These regulations are part of a major initiative and it is inevitable that there will be some transitional difficulties, but there is a strong message that the timetable was too tight and therefore exacerbated them. Although the Department has conducted a number of overarching reviews of the working of the 2003 Act as a whole, this did not particularly examine the process aspects covered by the Transitional Regulations. We would suggest that a review of the transition process might be beneficial for informing the future roll out of major projects to Local Authorities.

Case Study 2: Road Transport (Working Time) Regulations 2005 (SI 2005/639)

Policy Objective:

These Regulations implemented the provisions of Council Directive 2002/15/EC. Their main effect was to restrict mobile workers, notably drivers of commercial goods and passenger vehicles, to an average working week of 48 hours The Regulations set down rules on the calculation of working time and minimum rest and break periods. They also set out what records employers must keep (for example tachograph records) and what information drivers must supply (for example work done for another employer). There are also provisions relating to retaining records and making them available to enforcement agencies.

[26] see submissions from the City of London Corporation and Ambler and Chittenden published at p 1 and p9

The Committee's view then:

The Committee received various representations from Earl Attlee, the Freight Transport Association and the Road Haulage Association (RHA). These were not outright objections to the content of the regulations, but rather to the short period of time to implement them. They cited problems such as additional record keeping, changes to IT systems and software, planning and scheduling of deliveries, the number of HGV drivers and vehicles available and negotiation with the workforce which would make it impossible to comply within the three weeks available for implementation. Earl Attlee concluded: "In the long run the regulations could be beneficial to drivers. However, the rapid implementation could cause serious supply chain or compliance difficulties."

While the DfT justifiably argued that the Directive had been known about since 2002 and they had been seeking to involve the industry in the development of the Regulations, the RHA, equally justifiably, argued that they needed to see the outcome of the exercise before they could commission appropriate and compliant changes to their IT software. The Road Haulage Association also said that "the time industry has had to adequately prepare for these regulations, following finalisation of Guidance and Regulations, has been woefully inadequate." … We are also extremely disappointed with the lack of communication to employers and to drivers about these regulations" The Committee concluded that the commendable efforts by the DfT to implement a difficult Directive sympathetically appeared to have been adversely affected by the last minute rush in producing them. (16th Report, Session 2004-05)

The NAO found:

The impact assessment did not specifically commit to a post-implementation review but was promised by Ministers at the time of implementation. In the event the review started in 2007: earlier than the usual 3 year period after implementation. A working group was set up by the DfT to assist the process of gathering and validating data. This working group consisted of trade associations, unions and the devolved administrations. The review was completed and the results published on 19th February 2008.

Essentially the review found little fundamentally wrong with the implementing Regulations, although as a result of the review DfT took forward two sets of actions:

- amending the associated guidance to provide further clarity particularly in relation to: existing interpretations, the treatment of annual leave; and the administrative burdens placed on industry;
- finding additional ways to disseminate its guidance and to raise awareness and understanding of the Regulations, through existing channels and new initiatives;

Vehicle and Operator Services Agency (VOSA) implemented a revised working time enforcement strategy; whilst enforcement remains primarily in response to complaints received, there is awareness raising and checks on the existence of working time records through operator visits for other enforcement reasons, and a move to formal action being taken against serious and/or persistent offenders.

Responses to the call for evidence:[27]

Correspondence from the Road Haulage Association endorses the view that there are no fundamental problems with the system now, but that lessons should be learned from the difficulties of transition. In particular they would like Government to ensure that guidance is published at least two months prior to Regulations coming into force or changing (not

[27] See submissions from Ambler and Chittenden and Road Haulage Association published at p 1 and p 11

the 7 days allowed on this occasion) and better publicity for employers and workers. There should be benchmarking evidence so that an assessment of post regulation cost and benefit can be made and to demonstrate that there has been an improvement in working conditions, health and safety and road safety, which RHA felt the 2007 review lacked. Enforcement also needed to be adequately prepared although at the time of implementation the RHA supported the "light touch" enforcement proposed to allow firms time to make arrangements, in retrospect they feel some firms exploited this to competitive advantage over those who sought to comply.

Cost and ease of application:

The review noted a slight reduction in paid hours for drivers for 2005/06, and beyond the administrative flurry caused by the late instructions the system appears to have bedded in well. Concerns remain about enforcement, although British firms are generally compliant "foreign" drivers are perceived as getting away with breaches of the legislation (p 11).

The Committee's view now:

As with the Licensing regulations in case study 1 this demonstrates that legislation can be made much faster than it can be applied and poorly thought through implementation can have consequences for industry. We trust that DfT will apply the lessons learned from their review more widely. We also note and endorse the RHA's concern that the review looked at the mechanics of the system but not the reason for introducing it in the first place – the health and safety benefits assumed have not been tested to see how effective this intervention has been. Confirmation of safety benefits might have demonstrated that the short term disruption experienced was worthwhile. This points us to a wider conclusion that all initial IAs should include sufficient data to show the position at the time the legislation was made against which the change introduced by the legislation can be measured when a review is done.

Case Study 3: Horse Passports (England) Regulations 2004 (SI 2004/1397)

Policy Objective:

The 2004 Regulations replaced and revoked SI 2003/2780 Horse Passports (England) Regulations 2003 when it became clear that only a minority of passports could be provided by the original deadline. In the Explanatory Memorandum accompanying the Regulations, the Department for Environment, Food and Rural Affairs (DEFRA) stated that there were two policy objectives behind the Commission Decisions being implemented:

- to protect the human food chain: the requirement that the administration of certain veterinary medicines is noted in the passport provides a record which will be checked before the animal is slaughtered. Any animal that has been administered medicines which should not be given to food-producing animals should not be slaughtered for food; and
- to protect and enhance the trade in pedigree horses: the identification of pedigree is one of a series of measures aimed at harmonising the registration of such horses in equine studbooks.

In the Final Regulatory Impact Assessment (RIA) also accompanying the Regulations, DEFRA identified two options for implementation of these objectives:

- complete implementation, that is, passports for all horses; and
- partial implementation, that is, passports for registered horses and for other horses only if and when the horse is presented at a slaughterhouse for human consumption.

As was the case with the 2003 Regulations, the 2004 Regulations opted for complete implementation because it fully implemented the Commission Decisions, had the support of the British Horse Industry Confederation, and might result in additional benefits to horse welfare and breeding.

Debates in the House:

The requirement that passports should be obtained for all horses attracted a good deal of controversy, and led to several debates in the House of Lords, all of them seeking to clarify the exact policy objective and how it related to the plans for implementation. On 2 June 2003, Viscount Astor initiated a debate when his comments included the following statement on the Government's plans[28]:

"It would be perfectly possible to prevent horses that have been given restricted drugs from entering the human food chain without introducing a universal horse passport scheme. The Government could simply stipulate that only horses with a passport could be presented at slaughterhouses for human consumption. As most British horses do not enter the human food chain, this would save thousands of owners across the country having to apply for passports and the industry as a whole many millions of pounds."

On 3 November 2003, in a debate on horses exported for slaughter, concerns were expressed about the likely effectiveness of the proposed horse passport scheme in improving horse welfare[29].

The Committee's view then:

The Committee noted that the 2004 Regulations eased some of the deadlines in the previous Regulations, however the Committee was concerned about the administrative practicalities. A survey at the end of March 2004 had suggested that at that date 150,000 horses had been issued with passports but DEFRA's proposals would require that new passports were issued for over 800,000 horses. We were also concerned that rather than pay out for passports a number of owners would simply abandon their animals, thus counteracting the potential welfare benefits. (10th Report, Session 2003-04)

The then Minister, Alun Michael wrote to the Committee to clarify why DEFRA felt that it was necessary for all horses to have passports in order to implement the EU legislation.[30]

In the intervening period between the original report and the Inquiry a new EC Regulation EC/504/2008 has been concluded that requires all foals born after 1 July 2009 and all older horses not previously identified to have a microchip implanted. Although the EC Regulation is directly applicable, DEFRA brought new regulations into force on 1 August 2009 – the Horse Passport Regulations 2009 (SI 2009/1611) – to provide for enforcement measures. The cost of having the horse professionally identified (or drawn)

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[28] HL Debates, 2 June 2003, col. 1114.

[29] HL Debates, 3 November 2003, col 518. See also HL Deb, 4 March 2004, col 767.

[30] letter published in Appendix 1: 13th Report, Session 2003-04

by a vet is estimated to cost £23; the requirement to have it microchipped costs about £60. It should be noted that certain breed and racing societies will require both.

The NAO found:

The impact assessment for this SI did not commit to a post-implementation review. DEFRA did not carry out a post-implementation review as the European Commission were putting into place their own piece of legislation. The European Commission legislation was delayed by eighteen months and during this time the Department refrained from performing a review whilst consultation continued within the Commission.

The adaptation of the EU Directive has led to reissuing of the Regulations in 2009. A review was performed by the department at this time to ensure that the best parts of the legislation were maintained in the 2009 Regulations.

DEFRA monitored the success of the original intervention through dialogue with key stakeholders which included industry and enforcement body involvement. In addition, the intervention was originally designed to be self monitoring by industry. It is seen as a successful policy by the Department and the use of these veterinary drugs is still legal and there have been no sanctions on the UK horse meat industry.

Responses to the call for evidence:[31]

The correspondence identified a number of problems with the administrative process; some bodies apparently issued passports at the sale ring, thus defeating the purpose of the system and undermining any potential deterrent from theft (Jarvis, p 13)). DEFRA's interpretation of which bodies could issue passports was too wide, including organisations outside the horse industry in contravention of the Directive (BHHS, p 12). There are 61 issuing bodies in England, consequently the data passed to the National Equine Database is of variable quality and accuracy – and it is suggested that these deficiencies have not been followed up and corrected. Each issuing body also uses its own numbering system resulting in the ID numbers issued not being necessarily unique. (Suggett, p 14). It is also suggested that even when correct the data is in itself insufficient to individually identify equines of approximately the same colour, sex and age (Suggett) and more than one document can be obtained for the same horse enabling its age to be disguised for commercial advantage (BHHS, Martin, p 12 and 14). Changes of ownership and deaths have not been reported in the majority of cases, but no prosecutions have followed as enforcement is under resourced. Compliant horse owners feel disadvantaged since there has been no enforcement of the requirement and comparatively few horses go into the food chain (Thornton, p 16).

Cost and ease of application:

The costs in the 2004 RIA indicated that the average cost for a passport would be about £20 with an additional £40-60 to have the required silhouette drawn by a vet. Over time some authorised identifiers or breeders have entered the market and the average price of such silhouettes, used in 30% of cases, is about £23. General indications are that application is variable with indications that the system is open to abuse.

The Committee's view now:

The Committee notes that the requirement to microchip in the 2009 Regulations may address some of the weaknesses in the current identification system but not necessarily the

[31] See submissions from Graham Suggett, British Hanoverian Horse Society, Christine Jarvis, Karen Martin, Patricia Aidley and Dawn Thronton published as Written Evidence

enforcement issues, many of which appear, from the limited information provided, to have been transferred to livery owners and vets. The exact objective of the scheme still remains unclear with a number of different interpretations arising from stakeholders (anti-theft, disease prevention, anti-fraud) none of which seem to relate to DEFRA's stated purpose of protection of the food chain. We note that the estimate of the number of horses entering the food chain in the original RIA was 6 – 10,000 per annum. In the IA to the 2009 Regulations the estimate is now down to 4,200 (compared with a total number of horse passports issued of nearly 1 million). We question at what point the balance will tip to make it more economic simply to ban the export of horsemeat for human consumption.

Whatever evaluation may have been performed to contribute to the negotiation of the new EU Regulations, neither EM nor IA to the new regulations provide any information about how the earlier system has been performing and how problems are to be addressed. This is regrettable given the intense interest in the system when it was introduced and the uncertainty about its objectives. We also query its effectiveness, since Paragraph 7.1 of the EM to the 2009 Regulations includes the information that "horse population estimates for the UK range from 1-1.35million. Database records indicate that approximately 980,000 are passported with up to 370,000 horses yet to be identified" – in other words 5 years after introducing the requirement for all equidae to have a passport, over 25% still do not.

Case Study 4: Draft Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (came into effect on 1 July 2004 as SI 2004/1511)

Policy Objective:

The Regulations seek to align the amount of information that can be provided to donor-conceived people more closely to that given to adopted people once they reach the age of 18. The information will only be supplied at the donor-conceived person's request and within the limits of his or her request: for example, just the donor's medical history. The instrument standardised the information that clinics must keep on donations made after 1 April 2005, to include information on the donor's physical appearance, ethnicity, occupation and family circumstances. The Regulations also authorised the release within these categories of any non-identifying information which the Human Fertilisation and Embryology Authority (HFEA) already held on its register prior to 1 April 2005 but preserved the anonymity of the donor.

The Committee's view then:

We noted that these Regulations fulfilled the stated Government policy of increasing transparency and allowing adopted and donor-conceived person's the same rights. We did, however, have doubts about whether the number of donors would be sustained if anonymity was removed. The Department of Health supported their assertions with data from their public consultation in 2002: 55% of respondents were in favour of removing anonymity, 30% were against and 15% were undecided. A separate consultation directly with clinics revealed 50% of donors who responded to the consultation said that they would continue to donate even if anonymity were removed. (8th Report, Session 2003-04)

In the intervening period between the original report and the Inquiry there have been a number of Press reports about a lack of donors and we therefore decided to seek information from the Department and interested parties on their perception of the outcome.

The NAO found:

The RIA did not commit to a formal post-implementation review and none was conducted. The Department commented that this topic is frequently discussed by Parliament and the public and the Department of Health is often asked by Parliament and through correspondence with Members to provide information on these regulations. Other monitoring is also undertaken by the HFEA. The Department felt that the resources used on ongoing work, such as donor recruitment campaigns and support for the National Gamete Donation Trust, were sufficient for monitoring and that a more formal review was unnecessary at this time.

The Department's view is that the disclosure of donor information has not had an impact on the number of volunteers, although this is difficult to measure for certain, as many different factors influence volunteering.

Responses to the call for evidence:[32]

Showed that the policy remains emotive but is supported by professionals and by donor-conceived adults. An immediate benefit seems to have been better counselling of prospective parents about whether and what they may want or need to tell their offspring which is generally seen as beneficial (PROGAR, p 16). Full evaluation of the success of the objective can only be made in the longer term as the first donor-created children automatically entitled to this information will not reach 18 until 2023 at the earliest (p 17). Even then evaluation may be difficult as up to 80% of the children may not have been told of the source of their conception. Although the PROGAR response states that initial surveys and experience of similar legislation in Sweden indicate that a higher number of parents have expressed the intention of telling their children in due course, IDOA say that the element of parental discretion makes the legislation ineffective and not fully in line with the rights of the adopted (whose status is given on their birth certificate). A&C point out that the original IA focuses on the rights of the donor-conceived children but without reference to the rights of the other parties to the equation the parents and the donor (p 2). This was one of the earliest instances of a recurring theme for the Committee: that when a Department reports the outcome of a consultation exercise it must reflect the views of all those likely to be affected.

All new donors registered

Year	Sperm Donors	Egg Donors
2002	275	1146
2003	247	1029
2004	224	1029
2005	250	923
2006	285	783
2007	364	956
2008	384	1084

[32] See submissions received from Christine Whipp, UK Donorlink, Louise Priday, PROGAR, British Fertility Society, Partnership Focus Group, International Donor Offspring Alliance & Joanna Rose published as Written Evidence

Costs and ease of application:

Feedback describes the legislation as clear and additional costs minor limited to familiarisation, reprinting literature and some additional counselling.

The Committee's view now:

Statistical data provided by respondents and on the HFEA website indicates that the specific impact of the loss of anonymity on the number of donors is uncertain and changes in numbers can equally be attributed to other factors and trends. The Committee found this data interesting in the way it illustrates that the timing of the PIR can be significant: in the first 3 years donor numbers did decline and could be taken as an indication that the removal of anonymity had reduced the number of donors, but after 5 years donor numbers had risen again to above previous levels which might be taken to indicate that any effect was transitional. Full review of the policy will not be possible until the cohort of children born after 2005 reach the age of 18.

Case Study 5: Work at Height Regulations 2005 (SI 2005/735)

Policy Objective:

The regulations implemented EC legislation on the management of risks from working at height with the objective of reducing injuries. Falls from height are the biggest single cause of fatal injuries (50-60 fatalities per annum), and the second biggest cause of major injuries at work (around 4000 each year). In response to representations HSE also conducted a second consultation on whether to retain the "two metre rule" and on balance took the decision not to include this reference point so that work at whatever height would be considered on a case by case basis.

The Committee's view then:

The measures seemed appropriate and although they implemented the legislation after the official EC transposition date this was because they were seeking to engage a very wide range of industries and establish practical requirements. (16th Report, Session 2004-05, not drawn to the special attention of the House).

The NAO found:

The impact assessment committed to carrying out a post-implementation review, which is usually done 3 years after a regulation has been implemented. However, the Health and Safety Commission decided to undertake the review after just one year, in 2006.[33]

System Concepts Limited conducted the review in two stages. The first stage (Stage 1) was conducted in early 2005 to establish a baseline for the state of safety in work at height before the Work at Height Regulations came into force. Stage 2 evaluated the impact of the Work at Height Regulations one year after they were introduced.

The review is considered to have been useful in assessing the effects of the SI. These have included some unexpected outcomes such as a fall in ladder sales but an increase in the sales of other access equipment. The review did not comment on whether the Regulations had reduced the number of falls from height and the most recent statistics included in the review pre-dated the implementation of the regulations. The review was an analysis of how well the risks of working at heights were managed by industry before and after the

[33] The review is published at: http://www.hse.gov.uk/research/rrhtm/RR521.htm

legislation came into force. There is currently additional work planned in 2010/11 to build on this more extensively and to contribute towards an EU Directive review.

Responses to the call for evidence:[34]

Schedule 6 to the Regulations stated that a ladder should only be used if the work is "low risk" and "short duration" but these terms were not defined and were misinterpreted as a ban on ladders (LA, Thomas, p 30 and 33). HSE has tried to remedy this misconception through clearer guidance but has found that rumour, once established, is hard to shift (Thomas, p 33). The interpretation of the regulations by the UK was narrower than that used in other EC countries and inhibited firms' ability to sell products elsewhere in the EC (PASMA, IPAF, p 32 and 29). It also led to a number of manufacturers producing alternative products some of which initially increased rather than reduced risks, for example from assembly difficulties (Thomas, PASMA, p 32 and 33). Both ladder and platform manufacturers have had to published revised training materials which added considerably to the costs estimated in the RIA (ICE, PASMA, p 28 and 32).

Cost and ease of application:

The correspondence shows that there were both winners and losers. Due to misplaced rumours about ladders being banned that industry suffered severe financial loss and had to spend additional money in publicity to combat the misconception. Conversely manufacturers saw a boost in sales. Due to uncertainty about the exact requirements users bought mobile platforms where it may not have been necessary and so this may have resulted in them paying out more than was necessary to the task.

The Committee's view now:

This case illustrates the need for a broad evaluation. All the correspondence we received agrees that the prime objective of reducing the number of falls has been achieved to a degree, and the removal of the 2 metre-rule in particular has resulted in greater thought now being given to safety considerations when working at height. But the evidence provided indicates that there were a wide range of unintended consequences with unforeseen commercial impacts, and inappropriate alternative equipment being used that may have actually led to accidents. We saw this case as a clear demonstration of how important external feedback can be in evaluation: although HSE responded well to ease the consequences of the unforeseen events, some of the problems might have been avoided through clearer communication when the regulations were introduced. To alert others to such potential difficulties, particularly the commercial impacts, there should be a mechanism to disseminate lessons from good and bad practice more widely both within the Department and across Whitehall.

Case Study 6: Railways (Penalty Fares)(Amendment) Regulations 2005 (SI 2005/1095)

Policy Objective:

These Regulations increased the rail travel penalty fare from £10 to £20 because the fine had remained at £10 for 12 years and the deterrent effect had reduced in real terms.

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[34] See submissions received from Dr J Anderson, Institution of Civil Engineers, David Thomas, Ladder Association, Prefabricated Access Suppliers and Manufacturers' Association, International Powered Access Federation published as Written Evidence

The Committee's view then:

The case made for increasing the sum to maintain the deterrent effect seemed appropriate.

The NAO found:

Commitment was not made to carry out a post-implementation review and it has not been performed. Due to the small change the regulations made, it is thought that the costs of undertaking a post-implementation review would outweigh the benefits gained from the information gathered.

There has been no other formal review work performed on the effect of this amendment. The Penalty Fares team does review the revenue received to ensure that operators are not using the fare to "catch passengers out". Work is ongoing with the appeals body to ensure that penalties are used fairly, but no monitoring is done on the effectiveness of the amount.

Additional changes proposed to the penalty fares system are currently at consultation. The proposed adaptations do not refer to the effectiveness of the current level of penalty but on bringing the system into alignment across all operators and regions.

Responses to the call for evidence:

None.

Cost and ease of application:

A recent newspaper article "10 ways to avoid penalty fares"[35] does not indicate the presence of good robust law.

The Committee's view now:

There was considerable discussion in response to the original consultation exercise about the appropriate level of penalty ranging from £15 (representing an inflation-only rise) to £100 to increase the deterrent element. The DfT has not reviewed the operation of the penalty to find out whether £20 has proved an effective deterrent or whether the sum is still appropriate. Nor has it assessed whether the anticipated benefits set out in the RIA have been achieved. We would regard it as very poor practice to bring forward extension regulations without having undertaken at least some degree of review of the performance of the previous regulations.

Case Study 7: Waste (Household Waste Duty of Care) (England and Wales) Regulations 2005 (SI 2005/2900)

Policy Objective:

The EM states that the Regulations implement obligations under the Waste Framework Directive (Council Directive 75/442/EEC) and "impose a duty on the occupier of any domestic property in England to take all such measures available to him as are reasonable in the circumstances to secure that any transfer by him of household waste produced on the property is to an authorised person or to a person for authorised transport purposes". Breach of this duty will be a criminal offence carrying a fine of up to the statutory maximum on summary conviction (£5,000 currently), or an unlimited fine on conviction on indictment.

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[35] Evening Standard, 13 August 2009

The UK originally exempted an occupier of a domestic property from the requirement to pass waste only to an authorised person. However, an EU Court of Justice ruling in 2004 determined that UK domestic legislation improperly excluded domestic occupiers from this duty of care obligation. This ruling meant that the EU might impose heavy fines on the UK. Therefore an amendment was required.

The Committee's view then:

Whilst agreeing that the objective of improving waste management and tackling fly tipping was desirable, we were concerned that not enough had been done to inform householders that they would shortly be subject to the new duty. Householders would wish for advice, for example, about how in practice they could know whether anyone to whom they pass their waste is "an authorised person". Neither the EM nor the RIA contained information about publicising the new duty of care to householders and the further information we received from DEFRA showed that the Government were planning publicity at or after the date when the new duty came into force. We considered that the publicity for regulatory requirements affecting so many people should have been initiated well in advance of this date. (12th Report with additional material in the 13th and 15th Reports, Session 2005-06)

The NAO found:

No commitment was made to post-implementation review and none has been undertaken. However, a review of a package of measures in the Clean Neighbourhood and Environment Act 2005 is planned. It is proposed that a review of the Household Duty of Care aspect be covered in this process.

Keep Britain Tidy has worked with local authorities on their fly tipping strategies, which has included duty of care issues and the Environment Agency has undertaken various campaigns (including in the North East in 2007-08) which covered the household Duty of Care.

DEFRA also monitor figures received from Ministry of Justice which indicate that there have been some prosecutions for Duty of Care offences, although it is not possible to determine how many were against householders.

Responses to the call for evidence:[36]

Although it is true that the Department had no option but to implement the Directive to avoid infraction proceedings, A&C are critical of the options analysis in the RIA as lacking rigour in considering the different approaches to implementation that might have been considered (p 4).

Cost and ease of application:

Difficult to tell as no clear data available.

The Committee's view now:

We note that consideration of this instrument is to be included in a wider review of the Act, presumably to take place at the five year point. As with all such overarching reviews we are concerned that particular learning points from a single SI may be missed in taking a wider perspective on the goal of the Act. Although some publicity has now been undertaken it still appears to be piecemeal, with some areas faring better than others. Our

[36] see submissions from Ambler and Chittenden is published as Written Evidence

concern remains that householders may still be in ignorance of a duty that could result in a £5,000 fine if breached.

Case Study 8: Draft Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order 2006 (made as SI 2006/1032)

Policy Objective:

This Order raised the maximum penalty that the Office of Communications (Ofcom) can impose for persistent misuse of communications networks from £5,000 to £50,000, which Ofcom had requested because of the public's growing concern about "silent calls". These are calls made by direct marketing companies and similar organisations, which use computerised calling equipment to dial a consumer's telephone number and automatically transfer the call to an available sales agent; if a sales agent is not available, the consumer receives a silent call. A survey found that 22% of the public felt anxious if they received these calls and 37% inconvenienced.

The Committee's view then:

There was some debate over the appropriate level of the increased fine and doubt about its effectiveness if Ofcom did not take appropriate action. Our report concluded "we look to the Government to inform the House of the effectiveness of Ofcom's enforcement activity in tackling the problem of "silent calls" misuse of networks". (28th Report, Session 2005-06)

The NAO found:

The impact assessment for the regulations was delivered jointly between DTI (now BIS) and the enforcement body Ofcom. The enforcement body noting that there were a number of cases where the fine hadn't been a significant deterrent to repeat offending drove the changes in the penalty. In a number of cases there have been fines made to large firms that then went on to repeat the offence.

Commitment to a post-implementation review was not made and no review has been conducted. However, Ofcom has an ongoing monitoring and enforcement programme for silent and abandoned calls, which is one type of persistent misuse. Ofcom's research shows that between 2005 and 2009, since the maximum penalty was raised, the number of people who have experienced silent calls halved, while in the same period there was a reduction in the number of silent calls that people receive per month.

There were no barriers to a review but it was seen that for a minor and quite narrow change it would not be the best use of resources. The nuisance calls legislation as a whole is monitored by BIS centrally as part of its legislative burdens work, which ensures that the issue is kept under review.

Responses to the call for evidence:[37]

According to A&C the DCMS do not feel the fine is high enough and the Department indicated that they might bring forward a new SI to that effect. A&C point out that this is a common approach - Departments tend to raise the fine instead of revisiting the effectiveness of their enforcement tactics (p 4).

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[37] See submission from Ambler and Chittenden published as Written Evidence

Cost and ease of application:

The information given to the NAO indicated that the number of complaints about silent calls has halved, and overall the number received has decreased, but that does not mean that public concern has been sufficiently addressed. No comparable data is provided about current consumer views.

The Committee's view now:

Doubts were expressed about the potential effectiveness of the solution at the time the legislation was laid, and although we asked for the House to be kept informed we can find no indication that that has been done. We note that concern has recently been raised in the Commons about the issue: an early day motion notes that Ofcom receives over 1,000 complaints about silent telephone calls a month; …and urges the Government to enforce Ofcom regulations more strictly[38]. We also note that although the previous regulations were brought forward by DTI (now BIS), DCMS are apparently considering further regulations forward and we hope that there are clear lines of communication between the Departments involved. While the current material seems to indicate the situation has improved it does not indicate that the problem has necessarily been solved and this may be because the solution chosen was not the best available. What is clear that a much more rigorous analysis of the situation and likely outcomes will be expected if amending regulations are forthcoming.

Case Study 9: Waste Electrical and Electronic Equipment Regulations 2006 (SI 2006/3289)

Waste Electrical and Electronic Equipment (Waste Management Licensing (England and Wales) Regulations 2006 (SI 2006/3315)

Policy Objective:

The Waste Electrical and Electronic (WEEE) Directive aims to minimise the impact of electrical and electronic equipment on the environment by introducing producer responsibility for the financing the collection, treatment and recycling/recovery of the equipment when it reaches the end of its life.

The Committee's view then:

These Regulations are intended to make sure that waste electrical and electronic equipment (WEEE) is stripped out of the normal waste stream, does not end up in landfill, and is treated in an environmentally responsible manner. They will have a fundamental impact on the collection, treatment, recovery and disposal of such waste, through a set of complex new arrangements. The Regulations implement a European Directive, but full implementation in July 2007 will be almost two years later than the EU deadline. "We conclude that, while the delay in implementation has been undesirable, the Government have made sustained efforts to ensure that a practical system for processing WEEE is in place from July 2007." (7th Report, Session 2006-07, which also includes transcript of oral evidence.)

In their oral evidence, DTI said that the Directive was one of the most challenging pieces of European legislation that they had had to implement, due to the practical difficulties of developing a system to deal with the collection and disposal of WEEE (Q 14). They

[38] Silent Calls EDM 1188 session 2008-09 Nick Harvey MP:
http://edmi.parliament.uk/EDMi/EDMDetails.aspx?EDMID=38308&SESSION=899

admitted that during the process of agreeing the Directive, there may well have been too little understanding of these problems: ""the most difficult part was where people signed up to the Directive who did not quite understand what it actually meant in practice within Member States and in particular one area where it was envisaged that individual producer responsibility would kick in for new electrical equipment. That has proved technically impossible" (Q4).

The NAO found:

The process was handled by DTI (now BIS) in the following sequence:

- The UK conducted 5 consultation exercises into the implementation of the Directive in the UK which resulted in the final transposition of UK Regulations in 2007;
- The Regulations required producers, distributors and treatment facilities to undertake appropriate administrative tasks including joining compliance scheme or seeking waste management permits in the early part of 2007 with full producer responsibility being introduced on the 1 July 2007;
- The first compliance period under the regulations ran from 1 July to 31 December 2007, with all subsequent compliance periods running from 1 January – 31 December each year;
- The 2007 Regulations were amended following JCSI review in December 2007;
- A review of the Regulations and supporting infrastructure was conducted in 2008, resulting in a public consultation exercise between December 2008 and April 2009.
- Further amending regulations, as a result of the outcomes of the consultation are planned for October 2009 which will come into effect from 1 January 2010;

The post-implementation review commitment was carried out after the first compliance period to assess not only the effectiveness and impact of the regulations but also the developing infrastructure.

The major barrier to the review was the lack of information offered by stakeholders to assess the actually burdens on business, both administrative and financial. This is partly as a result of the commercial nature of the information requested.

The Department believes the review has been useful in understanding the administrative burdens placed on business by the regulations. The amending Regulations to be introduced in October 2009 aim to streamline some of the requirements.

Responses to the call for evidence:[39]

A&C felt the original RIA was vague and so the subsequent performance of the SIs will not be determinable (p 5).

Cost and ease of application:

This is a long term process and costs and effectiveness are being considered as part of the review. We commend the intention to streamline the requirements in the light of this experience.

[39] See submission from Ambler and Chittenden published as Written Evidence

The Committee's view now:

With commendable frankness DTI officials confessed to us in oral evidence when the SI was considered that the Directive had been agreed to without people really understanding whether or how the commitment could be delivered. The Department made great efforts to implement the legislation in as practical a way as possible but it inevitably included elements of compromise. It is therefore all the more important that this particular set of regulations is evaluated and the lessons learned spread more widely across Whitehall. This Committee has not yet seen either the evaluation assessment or the promised amending regulations but hope that the supporting material will live up to our expectations.

APPENDIX 3: GOVERNMENT EVIDENCE

Memorandum from the Better Regulation Executive in BIS

The Better Regulation Executive welcomes the Committee's inquiry into post-implementation Review. A range of stakeholders hold Departments to account to ensure the effectiveness of policies and implementation methods.

Q1. *Repeated NAO reports from 2003 onwards comment on the variable quality of Impact Assessments (IAs). Our own observations validate this – there is often a wide variation in standard within the same department. A post-implementation review (PIR) cannot be good if the initial objective and benchmark data is vague. What action is BRE taking to improve IA standards across the board in a way that will facilitate good PIRs?*

A1. In 2007 the BRE rolled out a package of tools for policy-makers to improve the quality of analysis in IAs. New Impact Assessment guidance was issued which included a template to facilitate consistency of approach among policy-makers. This guidance was accompanied by an online toolkit to guide policy-makers through the IA process. As a result of these revisions, the template requires policy-makers to state the intended date for post-implementation review.

As a result of review and lessons learned, the BRE is currently revising the IA template, toolkit and guidance with a view to strengthening the current framework to promote continued improvement in the quality of impact assessments. This work is due for completion in the first half of 2010.

To further increase the emphasis on good quality impact assessments, the Government published, on 15th October 2009, its future regulatory plans in the regulatory Forward Programme. The Forward Programme40 also provides greater transparency and facilitates scrutiny of Impact Assessments.

A new better regulation sub-committee of the National Economic Council – NEC (BR), has been established this year taking on the responsibilities of the Panel for Regulatory Accountability. The new committee has a remit, in the current economic environment, to look carefully at the timing of planned new regulation with the aim of avoiding the introduction of new regulation unless there is a clear case for action now.

We believe that the strong external scrutiny of impact assessments provided by the new Regulatory Policy Committee (RPC) will help to ensure that the analysis of likely costs and benefits is of a consistently high standard and is transparent and credible.

In October 2009 Government published, for the first time, the benefit/cost ratio of regulations arising from legislation enacted from April 2008 to March 2009. Publication of this ratio will be on an annual basis, hereafter and will further enhance transparency and the opportunity for public scrutiny of Impact Assessments.

Q2. *We understand that BRE staff currently only get directly involved with IAs likely to result in costs of over £20m. The most recent NAO survey of IAs Delivering High Quality Impact Assessment recommended that BRE should provide Departments with more external challenge to the development of regulations, ensure that minimum standards of scrutiny are met, and assess the standard of a sample of a department's IAs to develop an understanding of their strengths and weaknesses. What have BRE done to follow this up?*

A2. The Government is committed to enabling effective scrutiny and evidence-based development of new policy measures. Key to this commitment is the effective use of

[40] http://www.berr.gov.uk/files/file53203.pdf

impact assessments and public consultation which together help policy-makers to consider carefully the consequences of new proposals before introducing them, identify the most effective way to achieve their policy objectives and ensure that the likely costs of new measures are minimised and balanced by likely benefits.

Building on this framework the Government has established the new Regulatory Policy Committee (RPC) which has been tasked with providing strong and effective external scrutiny throughout the policy making process. The RPC will be able to comment publicly on whether the Government has been effective in minimising the costs of measures and maximising the benefits, and on whether the benefits justify the costs. It will bring an expert, external voice into the debate and will help to ensure that impact assessments are of a consistently high standard, as well as bringing greater transparency and credibility to regulatory decision making within government. Furthermore, it will be a powerful tool in helping to improve the quality of analysis underpinning policy-making decisions and should help influence behaviour and attitudes towards regulatory interventions across government.

The Government has published a report on the benefit-cost ratio of new regulations introduced in the financial year 2008-09.

The report shows that the benefits of new regulations enacted in the last financial year outweighed the costs by £9 billion, at a ratio of nearly 2 to 1 and confirms the Government's commitment to strengthening regulatory management. Publication of the benefit-cost ratio will also improve understanding and facilitate scrutiny of Impact Assessments.

The NAO regularly reviews the quality of Impact Assessments through an annual published report. The BRE responds to the reports' recommendations when published.

Q3. *An NAO report from 2003-04 commented that only 4 out of 10 IAs had even mentioned their intention to conduct any sort of PIR. Evidence from our sample from 2005 shows that only 30%, of SIs which were accompanied by an IA have actually been reviewed. The recent NAO report Delivering High Quality Impact Assessment states that only 20 per cent of IAs included a detailed plan setting out how the proposed regulation would be implemented, including arrangements for post-implementation review. What do BRE plan to do to reverse this downward trend?*

A3. The Better Regulation Executive believes there is an upwards trend in the level of commitment to carry out post-implementation reviews. The Impact Assessment template launched in 2007 requests a date to be specified for policy review. An initial analysis of final Impact Assessments published on the Impact Assessment library in September 2009 indicates that 97% (11 out of 355) of Impact Assessments have indicated a review date or review cycle.

Q4. *The BRE issues very brief guidance on PIR but doesn't appear to follow it up with departments. In his evidence to the Commons Regulatory Reform Committee Mr Kohli said BRE had a role in following up PIR but did not define it.41 What is the BRE's role? If it is not a task for BRE who within government should be monitoring departmental reviews of secondary legislation and spreading good practice?*

A4. The BRE plays a role in supporting and challenging departments' use of all better regulation tools. The Impact Assessment guidance and template encourage policy-makers in departments to review and evaluate the effectiveness of their policy-interventions once they are implemented. The BRE does not police the use of the Impact Assessment guidance or template, rather its role is that of a 'critical friend'.

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[41] Q33, Evidence to the 5th Report, Session 2007-08

Further policy evaluation guidance for officials is available through the Impact Assessment guidance, as well as the 'Green' and 'Magenta' books.

It is the responsibility of each Department to ensure that their policies meet their stated objectives. A range of stakeholders hold departments to account on the effectiveness of their policy-making (e.g. NAO, Select Committees).

In March 2008 the Government complemented its existing Impact Assessment guidance to review and evaluate policy-making post-implementation. The Government made a commitment that each department would publish a Memorandum, within 3 to 5 years of Royal Assent for each Act (including associated secondary legislation or surrounding policy environment) detailing for its Departmental Select Committee how the Department's Acts of Parliament had achieved its stated objectives. This will enable the relevant Select Committee to carry out post-legislative scrutiny of each Act.

The Cabinet Office has issued and published guidance to departments detailing the Government's approach on post-legislative scrutiny. Between 3 to 5 years (normally) after Royal Assent, the responsible Department must submit a Memorandum to the relevant Commons departmental select committee giving a preliminary assessment of how the Act has worked out in practice, relative to objectives and benchmarks identified during the passage of the Bill. For Acts which received Royal Assent in 2005 all departmental Memoranda are to be produced by July 2010.

The BRE will collaborate with the Cabinet Office to ensure the guidance on post-implementation review and post-legislative scrutiny are properly aligned.

Q5. *IAs prepared 3-5 years ago will be based on very different financial assumptions. Is there an effective mechanism for assessing whether the benefits of a particular SI still outweigh the costs in the current economic and financial climate?*

A5. When Departments review a policy area, through post-implementation review or other mechanisms for evaluation, they should consider whether the instruments for implementing the policy are relevant in current times.

It is important that new regulations remain resilient, reasonable and applicable during times of economic uncertainty and big swings in economic performance. Impact Assessment guidance recommends conducting a sensitivity analysis around key variables. Sensitivity analysis is a fundamental aspect of appraising options and is aimed at testing how vulnerable the options are to uncertainties.

Q6. *The emphasis in recent comments by the BRE has been on risk-based Hampton Reviews and removal of administrative burdens. These are important issues but not the whole story. Is a degree of PIR implicit in Hampton reviews and Administrative Burdens studies?*

A6. One aspect of the Hampton Implementation Reviews is to examine how the regulator contributes to the design of regulations. The responsibility for making and amending regulations and undertaking PIR's is often undertaken by a regulator's sponsoring department. In these cases the review team will look for evidence that the regulator has processes in place to influence the design of regulation including cost benefit analysis and impact assessments. The reviews also examine the capacity of regulators to link their regulatory activity to outcomes and that monitoring is in place to assess the effectiveness of how they regulate.

There is a degree of post-implementation review implicit in the Administrative Burden Reduction Programme.

Q7. *In evidence to the Commons Regulatory Reform Committee, Mr Kohli gave an example of some DTI three-stage regulations on resolving employment disputes as an example of the benefits of post-implementation review. We see this as a clear illustration of the need for systematic PIR to see*

if regulations are working as planned, because even well researched regulations can go wrong. What is being done to ensure that the reviews promised in the new IA format are undertaken and that there is some degree of consistency in the methodology?

A7. The BRE is currently revising its IA template, guidance and toolkit to encourage and facilitate increased consistency in IA and post-implementation review across government.

A range of stakeholders hold Departments to account on the quality of analysis in Impact Assessments and post-implementation reviews. This scrutiny has been facilitated by BRE through the publication of the Impact Assessment library, the benefit/cost ratio and the Forward Programme of regulations.

Q8. *The BRE has a strong business focus. Your IA guidance now includes the public sector but implementation is patchy. What are BRE doing to promote better quality IAs and PIR for public sector regulation?*

A8. The BRE works with Government departments to explore the impact of regulation on the public sector, specifically if proposed impacts exceed the £5m IA guidance threshold or where impacts are likely to attract significant public attention.

Q9. *In the material sent to the Committee for scrutiny we note a wide variety of interpretations of the £5m threshold for not publishing a final IA for a public sector measure. Do BRE agree that this means the total cost, ie including both administrative costs and programme spend?*

A9. The £5m threshold for not publishing a final IA for a public sector measure relates to Average Annual Cost – which spreads administrative costs and programme spend across the life of the policy. The IA guidance is currently under revision and we will look to see if this needs to be clarified to ensure clarify for policy-makers across government.

Two new Committees announced 2 April 2009

Q10. Government will "establish a new better regulation sub committee of the National Economic Council ... This Committee will scrutinise planned regulation and proposals for new regulation that will impact on business." (Written Statement, HC Debates 2 April 2009, col 74WS). This appears once again to be treading well-worn paths, not looking at the impact on the public sector and not looking at the efficiency of existing regulations – who will cater to those needs?

A10. The terms of reference for the NEC(BR) intentionally include the public sector only in the context of scrutinising departmental simplification plans. This was specifically to avoid duplication of other Cabinet committees scrutinising public sector functions, for example PSX for public services and public expenditure, PSX(P) for public service pay.

On the efficiency of regulations, the BRE takes an interest in whether existing policies are fit for purpose and encourages the review of existing policies is an integral part of the Better Regulation Agenda.

The Government is on track to meet its target to reduce by 25% the net annual administrative burden of complying with existing regulations by 2010. The next phase of the Government's Simplification Programme 2010-2015 seeks to achieve a further net reduction of £1.5bn in administrative and reductions and aims to identify reductions of £5bn in the legacy policy costs (not simply the administrative costs) of existing regulations.

The better regulation website42 offers members of the public, businesses, charities and public sector organisations the opportunity to give feedback directly to government on how existing regulations can be made more efficient and simpler to comply with.

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[42] www.betterregulation.gov.uk

Q11. *"Government will set up a new external Regulatory Policy Committee whose role will be to advise Government on whether it is doing all it can to accurately assess the costs and benefits of regulation" (Written Statement, HC Debates 2 April 2009, col 74WS). Does this include informing new regulations by looking at the outturn of their predecessors? This is to be a very small Committee - how many regulations will they be able to consider at each meeting and how often will they meet?*

A11. The Government agrees that devising new regulations whilst learning lessons for improvement from previous experience is critical.

The Chair of the RPC and the three Committee members will work with Secretariat officials to formulate the detailed strategy and work programme for the RPC. The terms of reference for the RPC do not specify how often the Committee will meet. The RPC will be formally launched once the members are in place at which time details of its initial work programme and methods of working will be made public.

22 October 2009

Written Evidence

OVERARCHING RESPONSES

Memorandum submitted by Tim Ambler and Francis Chittenden

Thank you for the copy of your letter to David Frost of the British Chambers of Commerce which clarifies the role of the Merits of Statutory Instruments Committee. This was very helpful. We recognise the enormous efforts the Committee devotes to their task as well chronicled by your excellent leaflet. Congratulations on winning the 2007 Select Committee of the Year award for influencing the legislation on casinos and Home Information packs. We welcome that and are asking for more of the same.

You reject the criticism that the Committee does not reject or modify Instruments on the grounds that doing so is beyond your remit. But the same paragraph concedes that changes are made following your Committee's comments, as does your winning of the 2007 Award. In other words, this is a technicality and p 19 of our report should have read ". . . only rarely does either chamber cause rejection or substantive modification . . .". We are also concerned by the lack of attention the Committees of both chambers give to Impact Assessments. There is a brief mention of Explanatory Memoranda which may, or may not, include Impact Assessments but the latter are the documents that should summarise the alternative means of achieving the policy goals and the relevant costs and benefits, notably for SMEs.

The distinction in the roles of the various Committees is clearly important to the Committees themselves, to avoid overlap, but is not relevant to our argument. We are saying that all these Committees taken together, no matter how they apportion responsibilities, are failing the taxpayer by inadequately challenging Statutory Instruments (SIs) and not causing them to be rejected or substantively improved. The amount of legislation amending earlier legislation bears witness to that.

Contributing factors include confusion between new regulations and statutory instruments, few of which are regulations. The others clog up the system. The regulatory process outside Parliament, namely impact assessments (IAs) and the large number of other scrutiny bodies, operate independently and wastefully—a far cry from the "joined up government" Prime Minister Blair proclaimed. I am sorry to express this so crudely but we believe fewer effective bodies would be better than many ineffective ones, however elegant the distinctions between them.

We attach our response to your Call for comments on the seven SIs and the following Post Implementation Reviews, to the extent that they exist. Based on our experience, we think you have chosen a small but representative sample. The report outlines specific inadequacies of IAs as now practised, notably that they are exercises in box-ticking, not rigorous analysis. The consequence is poor and excessive secondary legislation (SIs).

It was good of you to respond to our report on behalf of your Committee and we will note to express similar conclusions more carefully in future.

A review of seven Impact Assessments

Tim Ambler and Francis Chittenden

Our intention was to review the seven Statutory Instruments (SIs) identified by the House of Lords Merits of Statutory Instruments Committee, first to see if the regulation was justified and then to compare the outcomes projected by their Impact Assessments (IAs) with the subsequent Post Implementation Reviews (PIRs). As some of the PIRs could not be found, the second purpose was frustrated but their absence is a significant finding for the Committee. Departments may claim to have conducted PIRs internally but if they are not only professional (formal), public and also easily located, the effort is wasted.

We focus on IAs as they are supposed to present a rigorous analysis of the alternative outcomes, costs and benefits of the regulation (SI) by showing that the policy outcome is justified and it is being achieved in the least burdensome way. Without a firm base of analysis and a clear statement of what will be achieved by the SI that would otherwise not be achieved, it is impossible to assess its effectiveness in a post implementation review (PIR).

The seven SIs are:

1. Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations (made as SI 2004/1511).
2. Horse Passports (England) Regulations SI 2004/1397.
3. Licensing Act 2003 (Transitional provisions) Order SI 2005/40.
4. Road Transport (Working Time) Regulations SI 2005/639.
5. Waste (Household Waste Duty of Care) England and Wales Regulations SI 2005/2900.
6. Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order SI 2006/1032.
7. Waste Electrical and Electronic Equipment Regulations SI 2006/3315.

For each SI we outline its purpose, justification and effectiveness as shown by the PIR or equivalent information from the department (where available). We then summarise the overall picture emerging and draw conclusions.

Detailed Comments

1. *Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations (made as SI 2004/1511)*

Purpose

To give future donor conceived children the same means to access their genetic origins as adopted people have, ie to remove anonymity from future donors.

Justification

55% of people responding to a survey were in favour of the change. 50% of donors said they would continue if anonymity was removed. The risk assessment passes over the likely drop in donor numbers quite quickly, asserting that a Department of Health publicity campaign will make people proud to be donors. The assessment spends longer on the apparently self evident rights of donor conceived children and the "distress" they will suffer. No evidence of this distress, for example, how severe and how widespread it might be, is provided. Some children have been unsure of their fathers, and occasionally their mothers, for thousands of years. The IA does not consider their rights. As the information is on data bases but not available, donor conceived people may sue. No consideration is given to the rights of donors, eg reciprocal rights to information about their children, still less the simpler solution of removing the information from the databases.

Options and outcomes

The options are palpably straw men introduced just to go through the motions. The benefits are openness and following the prevailing fashion (no doubt as represented by pressure groups), the costs are manifestly incorrect as the small initial cost reverting to zero thereafter, fails to allow for increased donor reluctance and the costs needed to offset that. In July 2009 we have heard the chairperson of this quango calling for permission to purchase sperm, eggs and embryos. As no outcomes were quantified, a PIR would not be able to assess the success or failure of this SI.

Post implementation review

No PIR has been completed but we did receive a helpful informal departmental review on 10th August. This acknowledged that persuading donors was a problem (as should have been better anticipated) but not a critical one. There is belated recognition that the donor's concerns should be (should have been) given more weight but with increased advertising, efforts and costs, donor levels seem to have stabilised. The benefits for the resultant children are too far in the future to monitor at this stage.

2. *Horse Passports (England) Regulations SI 2004/1397*

Purposes

To implement the Commission decision of four years earlier aimed at controlling horsemeat entering the food chain and to correct the errors in DEFRA's legislation of the previous year. The Commission regulation before 2000 was in 1993.

Justification

As this SI belatedly transposes EU law (as required) and corrects DEFRA's previous errors, it is simply a technicality and requires no justification. The options provided are a charade. There is neither choice of options nor outcomes for consideration in a PIR.

Post implementation review

None available.

3. *Licensing Act 2003 (Transitional provisions) Order SI 2005/40*

Purpose

To deal with five issues inadequately covered by the Licensing Act 2003 (two years earlier) which seems not be have been thoroughly thought through.

Justification

As the IA quite reasonably points out, the effects of this SI cannot be separated from the main 2003 Act it is amending in order to make it effective. It is not a new regulation (or set of regulations), nevertheless the justifications for the original Act are repeated here to attempt to justify this SI. Much the same applies to options, costs and benefits. However well intentioned, this is simply going through the motions of IA compliance. It is questionable whether an IA is required at all as these are administrative orders not legislation in any real sense. The IA is a massive, 35 page document, and although it may seem an excessive exercise, the consultations and the refinements will have undoubtedly improved the 2003 Act. Nonetheless one may surmise that this revision should not have been necessary.

Post implementation review

There is no separate PIR for this SI but the whole Licensing Act has been evaluated in March 2008. Given the nature of the SI, this is reasonable. The review concludes that there have been more positive outcomes than negative but, overall, the outcome has been broadly neutral. At the time and since, there have been complaints that the requirements are disproportionate for small venues, eg village halls. There is no mention of "SMEs" and, whilst acknowledging the complaints, the department is oddly reluctant to address the issue. The negatives (continuing law and order matters, under-age purchasing) are recognized but the proposed solution is to up the penalties without considering whether the current penalties are (fully) applied or what difference changing the penalties would make. It seems more likely that the enforcement authorities, in some areas, are simply not doing their jobs but that is not a matter for the DCMS. There is little quantification of objectives or results so the performance cannot be evaluated other than in the narrative, and probably selective, discussion however well balanced that may be.

4. *Road Transport (Working Time) Regulations SI 2005/639*

Purpose

Transposition into UK law of EU Directive 2002/15/EC on the organisation of the working time of persons performing mobile and road transport activities and other EU associated legislation.

Justification

Not unusually for EU sourced legislation, this IA confuses what should have been two separate IAs: the one for the original EU legislation (which once enacted ceases to be an option) and another for the transposition which needs to justify all UK legislation above the minimum set by the EU, ie gold plate. This IA considers one transposition option taking advantage of all available derogations, ie the minimum allowed by the EU, along with one option taking no derogations and two middle ground options. The small firms impact test is

wholly inadequate dismissing this consideration even though the evidence, such as it is, points to some form or degree of exemption. The summary of results from consultation is reported as being published subsequently, ie too late to be of any use to a reader of the IA. Unsurprisingly, the employers wanted both derogations and the unions wanted neither. The Department dodged this issue by publishing, a year before this SI and IA, a decision that both derogations would apply but only where the workforce so agreed. This earlier determination of the only key issue in the new legislation makes a nonsense of the process, quite apart from dismissing the small firms issue in defiance of the evidence and siding with the unions without any evidence to justify that.

Post implementation review

The review was published in 2006, barely a year after the new regulations. Although a slight reduction in paid hours for drivers is shown for 2005–06, this must be too early for weight to be placed upon it. A wide area of complaint is that the new rules are not being observed by "foreign" (but presumably EU) drivers. As the review says, it is impossible to know if this small decline (if real) is due to the Directive or other factors. This trend seems already to have been in place. SMEs are not mentioned. The review does not distinguish the Directive component from the choice of derogations. Of the three derogations available two were adopted but the derogation enabling the 60 hour weekly working time limit to be exceeded was not. This may explain the greater licence available for foreign drivers. The word "derogation" does not appear in the review. Overall the review concluded that there was little evidence of non-compliance—presumably by British firms. The foreign driver issue was not taken up. Some clarification of the guidelines was needed. Beyond the analysis of the administrative burden, no action was suggested.

5. *Waste (Household Waste Duty of Care) England and Wales Regulations SI 2005/2900*

Purpose

Ostensibly, these regulations merely transpose the requirement of the first limb of Article 8 of Council Directive 75/442/EEC on waste. Although the Directive has been modified a number of times over the years, up to 2003, no explanation for the 30 year gap is provided.

Justification

Clearly there is no option but to transpose the Directive although option 1 is the usual straw man of not doing so and the redundant explanation of EU legal requirements. Option 3 is to impose business-type waste record keeping on households and that is rightly dismissed. We have no means of knowing if option 2 is really the minimum but, as the only survivor, that was the one presented. These regulations only apply for England which raises the question of why Wales and Scotland require separate and possibly different transpositions and which, in that case, is the least onerous. Since the original Directive was in 1975 it predates both the EU and UK IA processes.

Post implementation review

None available.

6. *Communications Act 2003 (Maximum Penalty for Persistent Misuse of Network or Service) Order SI 2006/1032*

Purpose

To reduce consumer detriment [sic] from silent [phone] calls, by increasing the maximum fine.

Justification

As the [partial] IA points out, the only negative impact is on mis-users of the networks whose fine could, with this SI, rise from £5,000 to £50,000 (maxima). This is really just an administrative order rather than regulation but the paperwork was brief and to the point. Evidence was neither provided on current fines nor on how close they are to the maximum nor on the expected impact of the higher fine in terms of reduced silent calls and/or levying of fines nearer £50,000. We can therefore neither judge the expected outcomes nor measure the performance of the SI. So far as we could determine, the original IA was not finalised. The Minister should not have signed off on a merely partial IA.

Post implementation review

There has been no formal PIR but informal communication from DCMS on 6th August informed us that the maximum fine was not felt to be high enough. This implies that the previous increase, which was not justified (see above) should be raised again and DCMS indicated they intended to bring forward a new SI to that effect. No evidence was given as to the number of cases or companies brought to book, or what the fines were, or what effect they had. As seems endemic, there is a reluctance to blame lack of enforcement by the relative agencies and substitute, in a Pavlovian fashion, higher penalties without regard for whether they will ever be applied or what effect they might have. It is not difficult to foresee very high penalties being struck down by a judge who considers them disproportionate.

7. *Waste Electrical and Electronic Equipment Regulations SI 2006/3315*

Purpose

The Regulations transpose the treatment and permitting requirements of Directive 2002/96/EC on waste electrical and electronic equipment (the WEEE Directive). They also make provision for exemptions from waste management licensing for WEEE recovery operations, and in particular, exemptions for repair and refurbishment for re-use of WEEE; the storage of WEEE prior to treatment; and the crushing of waste gas discharge lamps for the purpose of volume reduction prior to collection.

Justification

This IA confuses EU minimum requirements with various options (1 and 2, a and b) and issues so that it is not possible to determine what the choices were. Much consultation, including with SME representatives, clearly took place. The recommendations do not mention any of these options or issues so the basis for performance comparisons, despite the extensive costings of the options and issues, could not be determined and therefore the subsequent performance of the SI will not be determinable.

Post implementation review

None available.

Overview

We have no reason to doubt that these seven SIs are representative. Some clear patterns emerge:

— Departments are confused by EU Directives and conduct after-the-event IAs, which are pointless, rather than a UK IA of the draft directive early enough for UK consultation and input into the finalisation of the Directive, followed by a separate IA to deal with transposition options.

— IAs for upcoming SIs are too vague to be able subsequently tell whether their objectives have been achieved or not. In particular the objectives are not quantified.

— Each piece of major legislation seems to generate a trail of later regulation to correct the errors, oversights and unnecessary administrative burden. One can understand the rush to get things done but if Britain has existed for hundreds of years without it, a few more months to get it right would seem a good investment.

— SMEs are rarely mentioned yet they bear a disproportionately high burden from regulation. There is inadequate attention to low level cut offs, eg licensing.

— For UK sourced regulation, attention is rarely given to the experience of other countries whereas it should be standard to ask why this regulation is required in England, or the UK, when it is not required in the rest of the EU.

— PIRs are treated in a casual fashion. Some are not produced at all others are too informal to establish whether the original SI is achieving what it was supposed to achieve. The mood of Whitehall is just a well intentioned, but dreamy, "oh well, we keep everything under review".

— PIRs (and IAs) should cite the sources of any research used in evidence to support the proposed regulation or evaluate its outcome so that the reader can judge its independence and substance.

— Whilst the BRE was helpful in trying to find PIRs, the BRE do not seem to regard PIRs as being within their mandate even though they are clearly required by the IA guidelines. In evidence to the House of Commons Regulatory Reform Committee in July (see attached) Mr Kohli, representing the

BRE rather disingenuously tried to shift the responsibility for chasing up PIRs to Parliament when it is the responsibility of the BRE to take departments to task where they fail to follow the IA (and this includes PIR) guidelines. What else is the BRE for?

Conclusions

The overview above indicates an amateur, if not downright sloppy, approach to justifying secondary legislation before the event through IAs and subsequently through PIRs. No doubt civil servants, being only human, behave that way because those who should be calling them to account, namely Parliamentarians, are failing to do so. Whether or not each chamber can reject SIs (we believe the Commons can but the Lords cannot), they have enough influence to improve matters considerably but we do not see them using it.

The Better Regulation Executive should be charged with ensuring that, for regulation placing significant burdens on the private sector, a PIR is published three years after each UK only regulation and those failing properly to show whether the regulation fulfilled its original purpose are referred back to its home department.

18 August 2009

Memorandum submitted by the Hansard Society

The case for post-legislative scrutiny of delegated legislation

1. The Hansard Society has long advocated for formal, systematic post-legislative scrutiny of statute law in order to ensure that legislative provisions are clear and operating as intended. *Making the Law,* the report of the Hansard Society Commission on the Legislative Process, recommended in 1993 that "the operation of every major Act (other than Finance Acts and some constitutional Acts), and all the delegated legislation made under it, should be reviewed some two or three years after it comes into force".[1]

2. The volume of delegated legislation has increased significantly over the past few decades, largely (though not solely) due to the increased scope of EU legislation and the increasingly complex and technical nature of legislation, particularly in the field of social welfare. In 1970, Statutory Instruments (SIs) filled 4,880 pages of legislation; in 1990, 6,500 pages; and by 2005 had reached 11,868 pages. Correspondingly the number of SIs doubled from around 2,000 per year in the mid 1980s to over 4,000 per year in 2005.[2] This growth indicates the growing role and influence that delegated legislation has come to play in the legislative process.

3. However, this growing role and influence has not been matched by a concomitant increase in parliamentary scrutiny. Reforms such as the establishment of the Lords Select Committee on the Merits of Statutory Instruments have delivered improvements in some areas, but overall the amount of parliamentary scrutiny of delegated legislation has declined. In the 1996–97 session, for example, 46 hours were spent debating SIs in the House of Commons, but that declined to just 18 hours in the 2006–07 session and the situation is mirrored in the House of Lords where there has been a similar, though more gradual, decline in time spent debating SIs (56 hours in 1996–97 compared to 44 hours in 2006–07).[3] The pressures upon and rigidity of the parliamentary timetable, and the inevitable time constraints that apply, suggest significant improvements to the scrutiny of SIs at the time of creation may be limited given the volume of delegated legislation currently being created. This therefore militates in favour of rigorous and robust post-legislative review of delegated legislation.

4. SIs are not amendable at creation stage. However, they are easier to amend in light of practice and experience than are Acts of Parliament and the ability to revisit individual SIs in order to correct mistakes, clear up problems and clarify areas of confusion is therefore of significant value.

5. Our recent research, especially *Law in the Making: Influence and Change in the Legislative Process,* has highlighted several factors and legislative developments which further underline the need for systematic post-legislative review of delegated legislation, namely:

— the challenges posed by "framework" bills;

— the extent to which ministerial commitments made in debate on parental primary legislation may not actually be reflected in the final content of SIs.

[1] Hansard Society (1993), Making the Law: The Report of the Hansard Society Commission on the Legislative Process (London: Hansard Society), para 393.
[2] R. Cracknell (2008), Acts & Statutory Instruments: Volume of UK legislation 1950 to 2007 (London: House of Commons Library).
[3] Compiled from House of Commons and House of Lords sessional returns.

"Framework" legislation

6. "Framework bills" (or "skeleton bills" as the Delegated Powers and Regulatory Reform Committee refers to them)[4] set out the principles of the legislation for scrutiny but rarely provide substantial information about how those principles will apply in practical policy terms. The detailed provisions and powers are to be supplied later in the form of delegated legislation which is often not made available to MPs and Peers (even in draft form) when they are scrutinising that parental legislation and, if made available, is often provided at a very late stage in the process.

7. Consequently, the Law Commission concluded in its review of post-legislative scrutiny that for framework legislation, "the only way to examine the outcome of the primary legislation is by examination of the secondary legislation".[5]

8. Based on our own research, the Hansard Society suggests that the Committee may wish to investigate the post-legislative scrutiny of the 2002 Export Control Act as a case study to see whether it offers a model of good or bad practice with respect to the delegated legislation provisions. The Act has been described as an "enabling" Act because all the substance of export policy was contained in the delegated legislation. This Act was one of five case studies examined in detail by the Hansard Society for our 2008 Law in the Making report. Beyond the sheer scope and importance of the delegated legislation in relation to the parent Act and the issues about framework bills that this Act raises, it is also potentially useful as a case study because:

- the delegated legislation was only made available to parliamentarians in draft form at a very late stage (at the fourth sitting of the standing committee) leading many MPs to criticise the process and conclude that effective scrutiny by the committee had been compromised;
- there were subsequent public consultations on the delegated legislation under the Bill; and
- the Government did commit to undertake post-implementation review of the new controls three years after their introduction. This post-legislative review process was launched with a public consultation published by the Department for Business, Enterprise and Regulatory Reform on 18 June 2007 to which the Government issued three responses in 2008, since when a number of changes to export controls have been implemented.[6]

Ministerial Commitments

9. There is some concern that commitments given to MPs and Peers about the content and practical application of SIs during debates on the parental legislation may not always be reflected in the final content of SIs.[7] During the course of debates ministers often make valuable assurances in Parliament concerning the meaning and implementation of the legislation under scrutiny, often with commitments made as to the contents of the delegated legislation that will follow. However, our research found scepticism as to the extent to which these assurances translate into action.[8]

10. For example, during parliamentary debate on the Immigration, Asylum and Nationality Act 2006, ministers said that the fines for employers of illegal immigrants would be around £2,000; but in 2007, the government brought forward delegated legislation to allow fines of up to £10,000.[9]

Holistic Post-Legislative Review of all Legislation or Dedicated Post-Legislative Review of Delegated Legislation?

11. In March 2008, the government gave a commitment to establish a systematic process of post-legislative review, recommending a holistic approach where "review of an Act should properly include the consideration of all or much of the delegated legislation made under the Act".[10] Whilst any post-legislative scrutiny is to be welcomed, there are a number of shortcomings to this holistic approach which should nonetheless be borne in mind.

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[4] House of Lords Delegated Powers and Regulatory Reform Committee (October 2007), Guidance for Departments on the role and requirements of the Committee, p.3.
[5] Law Commission (2006), Post-Legislative Scrutiny, Cm 6945, p.38.
[6] For details of the post-legislative review of the Export Control Act 2002 see: www.berr.gov.uk/consultations/page39910.html
[7] A. Brazier, S. Kalitowski & G. Rosenblatt with M. Korris (2008), Law in the Making: Influence and Change in the Legislative Process (London: Hansard Society), p.196.
[8] A. Brazier, S. Kalitowski & G. Rosenblatt with M. Korris (2008), Law in the Making: Influence and Change in the Legislative Process (London: Hansard Society), pp.187–188.
[9] A. Brazier, S. Kalitowski & G. Rosenblatt with M. Korris (2008), Law in the Making: Influence and Change in the Legislative Process (London: Hansard Society), p.196.
[10] Leader of the House of Commons (March 2008), Post-legislative Scrutiny—The Government's Approach, Cm 7320, para 32.

— The post-legislative review of Acts is intended to take place three to five years after Royal Assent. However, SIs can still be made after that review has taken place, and therefore will fall through the post-legislative scrutiny net if no alternative mechanisms are in place.

— While it is impossible to assess until the system has been embedded both in government and in Parliament, it is not unreasonable to expect that the post-legislative scrutiny of large or contentious Acts is likely to focus on the primary legislation at the expense of the delegated legislation.

— There may be cases where the parent Act is not deemed particularly contentious or flawed, but the application and operation of one or two pieces of delegated legislation that stemmed from it leads to concerns or unforeseen outcomes. In such circumstances it may be deemed overly burdensome to necessarily review the entire Act and all delegated legislation arising from it simply to bring scrutiny to a very small proportion of it. It would therefore be sensible to establish a mechanism by which individual or a small numbers of SIs only need be subject to post-legislative scrutiny if considered appropriate.

12. In its review of post-legislative scrutiny the Law Commission found that consultees felt that secondary legislation should not be treated differently from primary legislation in terms of the need for review,[11] and concluded that there is scope for the development of parliamentary post-legislative scrutiny of secondary legislation in the form of a new joint committee on post-legislative scrutiny.[12]

13. The Hansard Society endorses this view, and believes there is a role for a dedicated post-implementation review system for delegated legislation to be integrated with holistic consideration of primary and delegated legislation.

14. An alternative model, which we have recommended in the past and which might also fulfil this need for dedicated post-legislative scrutiny, is that departmental select committees commission research on the effect of particular SIs or undertake a short inquiry.[13] For this approach to be effective it would require select committees to embrace a new strand of working and a greater commitment of resources to allow them to carry out this function.

September 2009

Memorandum submitted by the Social Security Advisory Committee (SSAC)

Background

1. The SSAC is an Independent Statutory Body, funded by the Department for Work and Pensions (DWP). It is the main UK advisory body on social security and related matters, such as links with the labour market and wider social welfare issues. The Committee provides advice to the Secretary of State (SoS) for Work and Pensions on his functions generally, and it also plays a unique role in the secondary legislation process.

2. Here it performs a mandatory scrutiny of most proposals for making the regulations that underpin the social welfare system that is the responsibility of the DWP. The Committee may report formally on proposed regulations to the Secretary of State, who is responsible for publishing the Committee's reports, along with his responses to them, and placing them before Parliament in the form of Command Papers as and when he proceeds to lay the regulations.

Scrutiny of Proposed Regulations

3. The Committee's scrutiny of proposals for regulations—and decision on whether to report on them to the SoS—takes in consideration of the policy objectives they will take forward, the rationale and evidence base presented in support of the policy, the assessments made of the effects and impacts of the policy, and the arrangements that will be made for monitoring and evaluating these effects and impacts if and when the proposed regulations are brought into effect.

4. The information supplied by the Department to support the scrutiny exercise is contained in a memorandum covering the proposed draft regulations. Under statute,[14] the SoS shall "*. . . furnish the Committee with such information as the Committee may reasonably require for the proper discharge of its functions*", and for a number of years the Committee has set out its minimum standards for the provision of information in guidance to officials.

[11] Law Commission (2006), Post-Legislative Scrutiny, Cm 6945, para 4.2.
[12] Law Commission (2006), Post-Legislative Scrutiny, Cm 6945, para 4.7.
[13] See A. Brazier (2003), Issues in Law Making 3: Delegated Legislation (London: Hansard Society); N. Gerrard & S. Hinton-Smith, "Regulation and the Legislative Process: Improving Scrutiny and Accountability", in A. Brazier (ed) (2004), Parliament, Politics and Law Making: Issues & Developments in the Legislative Process (London: Hansard Society), p.99.
[14] S170(4) of the Social Security Administration Act 1992.

5. The Committee pays particular attention to the quality and completeness of the information it receives from the DWP. Where information received is judged to be inadequate in any respect, the Committee may defer scrutiny of the proposals until the necessary information has been supplied. In reporting on proposals to the SoS, the Committee may draw attention to any perceived deficiencies in the material the Department has supplied, and may make recommendations with regard to the implementation of the proposals that aim to ensure that particular effects and impacts are monitored and evaluated.

Post Implementation Review

6. The Committee would take the view that it is difficult to separate any review of whether the regulations as implemented are having the intended effect (and delivering policy efficiently and in the way that was originally envisaged) without undertaking some critical assessment of the effects of the policy itself. Our view is influenced by the nature and purpose of much/most DWP legislation. DWP's regulations frequently deal in detail with aspects of the lives of millions of benefit claimants whose "experience" of legislation is generally at such a remove as to make it irrelevant to them. It would more often be operational "front line" staff (or their external partners delivering services under contract to the DWP) who would be best placed to answer the "feedback" questions the Merits Committee has posed, and offer "experience" of legislation in practice. In doing so, it is probably inevitable that they would also consider the effects of the policy itself on the benefit claimants they serve.

7. DWP's monitoring and evaluation of changes to regulations not infrequently incorporates qualitative elements aimed at drawing information from both staff and benefit claimants about the effects and impacts of changes. However, we are not aware of any systematic gathering of "feedback on experience" information of the sort the Merits Committee has expressed interest in (although we readily acknowledge that we might not be routinely informed that such information was gathered to inform post-implementation reviews). Similarly, we are not aware of new policies being reviewed after three years separately from any ongoing monitoring and evaluation. Certainly, when proposed changes to regulations are put to us for scrutiny we have not seen references to post-implementation reviews policies that are to be changed included in the accompanying memoranda.

8. It is our view that post-implementation reviews could be an effective support to, and discipline within, the policy making process. However, we also recognise that such reviews are likely to be costly and resource intensive when conducted alongside monitoring and evaluation exercises that are already often very expensive. In addition, it is often very difficult to separate out the effects of one set of regulations from the combined effects of a mass of over legislation that may already apply in the area subject to new regulation (this, we believe, is likely to the case with much of DWP's legislation). The fact that such exercises are done infrequently suggests that they present substantial challenges. Accordingly, we would be interested to see DWP carry out an exercise on a trial basis in order to determine whether it is feasible to carry out an effective review that can demonstrate whether a set of regulations are *having the intended effect and whether they are implementing policy objectives efficiently.*

September 2009

CASE STUDY 1: LICENSING ACT TRANSITIONAL PROVISIONS ORDER 2005 (SI 2005/40)

Memorandum submitted by the City of London Corporation

1. The City of London Corporation welcomes the opportunity to offer some observations on its experience of the Licensing Act 2003 (Transitional Provisions) Order 2005 as part of the Committee's investigation of post-implementation reviews.

a) *was the legislation easy to understand and apply to your situation?*

2. The transitional arrangements introduced new application forms for licences and in the City's licensing officers' experience, many applicants found the forms to be long and more bureaucratic than the previous system with even applicants' solicitors disagreeing on what information needed to be included. This continues to be a problem. Instructions on the information required on the form are in many places imprecise or unclear and there are arguments for greater definition of potentially ambiguous terms. For example, there is sometimes difficulty in knowing when an application is deemed to have been made and hence from when the 28 day representation period runs. There are also difficulties associated with the advertising requirements. The detail required in the notice to be placed in the window of the applicant's premises should be more clearly stated and, for example, be required to include reference to any changes in the licensing hours. Incidentally, although not as a result of the transitional arrangements, the situation is not helped by subsequent changes to procedures. For example the very recent addition of the Minor Variations procedure which has introduced confusion, uses

slightly different terminology. Rather than using the understood term "14 days" when advertising an application, the regulations instead introduce "10 consecutive working days". The newspaper advertisement can be an unnecessary and expensive requirement especially in the City where there is no generally circulating local paper and usually means the more costly option of the Evening Standard.

b) *did it cost you more or less to implement than the Department suggested?*

3. The timetable set for licensing authorities in the transitional period as the new regime came into force was very demanding, with most applications being submitted in a very short period before the deadline at the end of July and the start of August. At the time, the expectation on Members and Officers to be available for a great many hearings in such a tight timescale placed undue pressure on them, particularly as many hearings fell within the recess. The prescribed small size of Licensing Committees exacerbated the problem as did the relatively late publication of regulations and scale of fees. Whilst the City Corporation managed to hold all its transition hearings, it did so under considerable pressure of time and it is understood that many other authorities experienced difficulties. The time periods introduced by the regulations were very inflexible and hearings had to be held even if the parties were close to agreement. Failure to hold such a hearing resulted in an automatic deemed refusal, and was open to appeal. When parties were close to agreement however, the hearing may have been unnecessary and resources could have been better employed elsewhere.

c) *did the legislation achieve its stated objective?*

4. Yes, in the broadest sense but there were some problem areas. For example, there was a certain amount of difficulty in determining how conditions attached to old licences applied to licences issued under the new legislation. This arose in particular where the nature of conditions imposed under the old regime lacked precision and, in consequence, in many instances, the obligations imposed under the new legislation were only established inferentially. For example, s.182 of the Licensing Act 1964 which covered the provision of music was repealed only in part with the effect that premises licensed under the new regime can provide recorded music without any requirement for it to be included on the licence and, it could be argued, is also not limited by the hours of the licence. These "embedded conditions" which can only be removed by a formal review and a public hearing continue to be a source of difficulty for the City's licensing officers and this could be said to be the major lasting problem from the transition process.

d) *were there any unintended consequences, or problems with the way the legislation worked?*

5. Government guidance for applicants invited licensing authorities to discuss applications and help applicants complete forms. It is understandable why this was suggested as Officers would be able to use their familiarity with the forms and expertise to assist applicants. In practice, however, and especially in areas like central London where there is a high density of licensed premises, this comment turned out to be unhelpful. Whilst officers did everything possible to assist, the volume of applications in the City meant there was a particularly high demand on the time of a relatively small number of staff who were not able to be as involved as the DCMS implied officers should or could be.

e) *now you have experience of the legislation can you suggest ways in which it could be simplified or made to operate more cost-effectively?*

6. Even though the 2003 Act comprehensively reformed licensing law, subsequent amendments and insertions from more recent legislation have not necessarily simplified it. The legislation itself is very complex and there are now test case decisions that need to be borne in mind as well as a raft of allied provisions under subsequent legislation such as the Violent Crime Reduction Act 2006 which continue to change the law. There are now therefore arguments in favour of a "regulatory pause" to allow the new arrangements to bed down and provide licensing authorities with some certainty.

7. Although not as a direct result of the transitional arrangements, during the progress of the Licensing Bill, Ministers consistently sought to assure MPs and local authorities that the fees will be set at a level which permits recovery of the full costs of administration, inspection and enforcement to local authorities. This continues to cause difficulties for licensing authorities. In the City's experience, whilst fees might be sufficient to cover costs associated with the initial untested application, they are not at a sufficient level to cover the full cost of the service provided by licensing officers including enforcement, handling the many enquiries, advising the public and businesses. Attendance by officers, and on occasion Members, at residents meetings, and liaison with partner organisations, licensees and their representatives etc, all of which the Statutory Guidance recommends, also give rise to additional costs. Training of Members and officers in the detailed and changing legal situation is a further cost not currently covered by the fees. The costs of public hearings and any

subsequent appeal seem completely outside the scope of the licensing fee and have to be borne from other funds.

8. Further costs can also be encountered through the collection of fees. Whilst an application is considered incomplete if not accompanied by the associated fee, annual fees are classified as a debt, which can lead to difficulties in recovering monies on non-payment. The sums involved are at relatively low levels and it is only once the debt reaches a reasonable amount that it becomes economically viable to recover the debt and, because it can be some time before the debt reaches that level, the threat of debt recovery is not, in some cases, a sufficient deterrent to encourage applicants to pay their fees. There is also no provision to allow a licensing authority to suspend or revoke a licence for non-payment of fees. The problem was addressed in the Gambling Act 2005 where a licence can be revoked on the non-payment of fees but the matter remains unresolved in the context of alcohol licensing. This "permanent licence" provision leads to a growing difficulty where businesses cease trading at a premises but do not surrender the licence which then remains live indefinitely.

f) *are you aware of any arrangements that would enable you to give feedback on your practical experience of the legislation to the Department that issued it?*

9. Apart from this Committee inquiry, there was an inquiry conducted by the then ODPM Select Committee in 2005 and by the Culture, Media and Sport Select Committee last year which both looked at the working of the 2003 Act. Aside from those, the City Corporation has not been involved in any other formal post legislative review.

September 2009

CASE STUDY 2: ROAD TRANSPORT (WORKING TIME) REGULATIONS 2005 (SI 2005/639)

Memorandum submitted by the Road Haulage Association Ltd

Thank you for inviting us to comment upon the post implementation review of these Regulations.

As you are aware, we had grave concerns in 2005 about the impact the regulations would have upon the UK road haulage industry, the timing of the publication of Guidance and Regulations and the general communication to employers and drivers about the Regulations.

We subsequently provided evidence to the Department for Transport's Review of the Regulations, the Report being published on 19 February 2008. I am sure you are aware that, as part of this Review, a Data Validation Working Group was set up to identify what information was available, what information was needed and how this information could be collated. Data was collected by Ipsos MORI through an independent survey, from data collected by VOSA, along with submissions by members of the Working Group. The Review rightly concluded that there were no fundamental problems with the Regulations, there was no need to amend the Regulations, although it recommended that associated guidance and VOSA enforcement strategy should be improved.

What was not established through the review was any improvement in road safety or health and safety—which were the principle reasons behind the Directive/Regulations.

It is our view that the lessons learned from the experience of implementation and subsequent review of the Regulations are as follows:

i) ensure Guidance is published at least two months prior to Regulations coming into force or changing (in this instance the Guidance was published on the DfT website seven working days prior to the initial implementation date) and supplement this with an awareness campaign for both employers and workers;

ii) establish an evidence base so that an assessment of post regulation cost and benefit can be made ie in this case, demonstrable evidence that there has been an improvement in working conditions, health and safety and road safety;

iii) ensure enforcement is effective from date of implementation. At the time the RHA was supportive of the widely publicised "light touch" approach to enforcement, but experience has anecdotally told us that some employers were inclined to ignore the Regulations, safe in the knowledge they would not have enforcement action taken against them. This quickly created the unlevel playing field when the majority of employers were complying with the Regulations.

I hope that these comments are useful to you. If you require any further information on this please do not hesitate to contact me.

11 September 2009

CASE STUDY 3: HORSE PASSPORTS (ENGLAND) REGULATIONS 2004 (SI 2004/1397)

Memorandum submitted by Patricia Aidley

1. This submission on horse passports is from me as an individual and retired biology teacher and addresses your question (d) on the subject.

2. I am concerned about the accuracy and therefore practical value of some horse passports and parts of the National Equine Database.

3. Not all horse passports include a pedigree. For those that do include a pedigree, neither a buyer nor the National Equine Database nor the horse passport issuing bodies can carry out even a preliminary A.I (artificial insemination) verification check in this country, as national semen import records are not available to them.

4. Whilst I realise pedigree checks are not the purpose of horse passports their existence has an exploitable weakness (as we have no available semen import records): it could lead to paperwork malpractices and put part of the foundations of the National Equine Database in jeopardy.

5. I also realise and understand that it does not matter how a horse or pony is bred for him or her to have a passport, but if a passport with a pedigree cannot reasonably be assumed to be true for these animals what is the point of these I.D. documents (which are therefore a waste of public money)?

7 August 2009

Memorandum submitted by the British Hanoverian Horse Society

There were many mistakes made by DEFRA in the lead up to this legislation in many cases by the failure of Paul Newman the head of the passport team and his SRO Mr. Cory to understand the implication of words used in the directive. As an example the use of the word Studbook in the major Equine nations in the EU this is an organisation that pro actively managers the breeding population and implements grading systemns to improve that population in accordance to the EU directive. Mr. Newman did not seem to understand the extent of that control and kept insisting that a studbook was a paper or electronic file. This led him to allow the creation of I.D only passport issuing organisations that had no previous connection with the Equine industry and the directive did not allow this. In the end the minister Alun Micheal admitted the creation of these organisations was a mistake. The definition of organisations which issue passports in the E.U. Directive is as follows

(a) the organisation or association officially approved or recognised by the Member State, or by the official agency of the Member State concerned, both as referred to in the first indent of Article 2(c) of Directive 90/427/EEC, which manages the studbook for that breed of animal, as referred to in Article 2(c) of Directive 90/426/EEC; or

(b) a branch with its headquarters in a Member State of an international association or organisation which manages horses for competition or racing, as referred to in Article 2(c) of Directive 90/426/EEC.

You are approved to issue passports if you are a studbook or an international organisation none of the ID only studbooks meet that criteria except Weatherbys and Sports Horse GB. DEFRA has never commented on this part of the directive and the strict criteria of financial records and constitution that were applied to applications under the 1997 S.I. were ignored.

Question. Did the HPO 2004 achieve the aim of all horses applying for a passport by February 2005?

Answer. No

Evidence.

If that had have been achieved then all horse passports after 2006 would have been issued in the year of their birth. The NED records will show that many horses have been applied for passports after that date and no action was taken. Studbook PIOs are in no doubt that many horses have never applied for passports even now.

Question. Has the enforcement policy been a success?

Answer. No

Evidence.

Not all horses have passports.

No checks have been done to see if livery yards or dealers have all the horses passported.

The S.I. requires a change of ownership has to be recorded within 30 days. This has not been done in the majority of horses.

There has been no prosecution under the 2004 order that was solely a passport issue all passport offences have been as a support to other infringements under the sale of goods legislation or welfare legislation.

Trading Standards are required to enforce the HPO and have not done so. The Local Authorities have the budget tightly controlled and many councilors would say "What harm as been done" by failing to comply with this order and in their ignorance assume not much. Northamptonshire C.C. has 61 staff in the Trading Standards Department and under the last Chief Executive 21 were down as posts at risk. When Trading Standards have decided they have enough evidence for a prosecution then they have to convince Legal Services to proceed and they will not do so as they have many cases they may consider have a higher priority and they are also under budgetary constraints. I spoke to Buckinghamshire County Council recently about a possible case of fraud and was told they would get an officer to speak to me but it would be at least three weeks.

When consultations took place regarding the 2009 HPO,DEFRA said they were proposing to make offences under this order a fixed penalty situation of an automatic £50 fine and if you felt wronged you go to court to explain your defence. As a PIO I suggested that if a PIO made a complaint to Trading Standards they would be forced to investigate but this was not adopted.

At the workshop at Reading the DEFRA communication team asked PIOs how was the best way to communicate this legislation to the horse world and the overwhelming response was better enforcement. Now seeing the SI 2009 this has not happened.

As a PIO many cases of abuse of the Horse Passport Order are quite clear and I list some of the most common.

A dealer has a horse and throws away the passport and applies for a new one from an I.D. only PIO stating the age as much less than the original passport shows. This was done in a prosecution at Buxton Magistrates Court and the defendant pleaded guilty to saying the horse was 11 when it was 18. The horse had to be DNA parentage tested to prove this case; as the horse was branded with a Studbook brand and a number it was possible to prove this point but if the horse had not been branded it would have been impossible to identify the horse.

In show jumping circles passports are regularly destroyed for the simple principle that the owner wishes to give the horse a new name and say it has never competed so they can be successful in novice classes.

As far as the reliability of microchips. Haras Natauionaux (the French Government horse equine body) says these transponders can be destroyed; it is claimed that some of the laser equipment can destroy chips. Pet I.D. have queried the position that where a horse applies for a passport and when it is scanned a chip is found that has not been recorded there is little that can be done. The chip has been inserted contrary to the new legislation as it has not been done by a vet or a record would have been kept regarding its number on sale. The horse complies with the legislation as it has a chip so there is no point in putting another one. Chips and inserters cost about £3 and are easily available. This has again been done for financial gain to conceal the age and identity of the horse. If a seven year old horse competes as a four year old it is more successful and so is more valuable.

The number of these offences would be considerably reduced if DEFRA funded the Local Authorities for prosecution. All that is proposed, but not yet done, is to supply microchip readers at a cost of about £400 each. Local Authority Trading Standards Officers say the legislation is unenforceable and the ratepayers and councilors do not see the importance of the legislation and believe they have better things to spend the rates on.

August 2009

Memorandum submitted by Christine Jarvis

I understand that the House of Lords Merits of SI Committee is enquiring into the way Horse Passport legislation was introduced and is trying to determine whether or not it has achieved it's aim. I would like to comment on this.

When the legislation was introduced we were given to understand that one of the main aims was to protect horses from theft as it would be illegal to sell a horse without a passport issued by a recognised passport issuing authority. We thought this was a good idea and had all of our horses passported (spending a lot of money in the process). A lot of our friends and acquaintences did not do so *and have still not done so.* In fact they "laughed behind their hands" at us and at the amount of money we spent *abiding by the law.*

They have had the last laugh too because no-one has checked to see if their animals are passported (we were originally given to understand that all local councils would appoint an officer to do this). But the worst anomaly in this Bill is the fact that horse sales can passport a horse taken to their sale (on the day of the sale) and then legally sell it in the sale ring. This happens at York Horse Sale *every month.* They employ the Cleveland Bay Horse Society as a Passport Issuing Authority and anyone who takes a horse to their sale without a passport pays £20 or so to have the passport made out that day. This means that I could go to a field on the Thursday night, steal a wagon-load of horses, take it to York Sale, have it passported (and now microchipped too). pay a passport fee of £20 and an entry fee of £18 and sell those stolen horses through the sale ring. How can this be right!! Even after paying for the passports, the microchipping and the entry fee I could still make a tidy profit on the stolen horses.

In all the travelling we do with horses in the horsebox we have only been stopped once and this was by the Commissioners who wanted to check our horsebox for Red Diesel and road worthiness etc. Having spent as much money getting our horses passported I was dying for someone to ask to check the passports and so asked them to do so. They were very reluctant and looked at me as though I had suddenly grown two heads. Presumably checking these passports was not up to them. However, on my insistence, they did look at them and showed them to a Police Officer who was working with them. However they did not check them against the horses we were carrying.

At this stage of the legislation I ask that this loophole be closed. If unpassported horses were turned away from horse sales it would have a three-fold effect. It would cut down on the possibility of horses being stolen and then quickly sold on, it would mean more horses would have to be passported and the law adhered to as it would not be so easy to sell a horse without a passport and this would, ofcourse, then go further towards achieving the aim for which legislation was passed in the first place.

I sincerely hope you can take my comments "on board" and do something about closing this loophole.

July 2009

Memorandum submitted by Karen Martin

Re: Horse Passport Legislation. . . has it worked?

NO! From personal experience the system doesn't work, there have been so many cases of people being able to obtain two passports or more for the same horse. Nothing ever seems to be checked.

I have personal experience of this which nearly resulted in a court case against me even though I was actually totally innocent. I bought a mare locally from a breeder who I trusted who then told me she couldn't locate the mares passport and gave me a genuine reason why which I had no reason to doubt. I sold the mare on with a new passport I had obtained completed by a vet, so all very legal.

The purchaser put the mare in foal and asked if I had the original passport with her breeding on. I had nothing to hide and gave him the breeders number to see if she could help. She only sent him the original passport which confirmed the mare was five years older than first thought!

Surely compulsory freezebranding or microchipping has got to be the way forward. Personally after buying foreign horses I much prefer branding as it can not move, and is on display so can not be hidden. Passports only work as a supplementary form of identification to support branding and breeding papers.

July 2009

Memorandum submitted by Graham Suggett

Your Press Notice of 24 June 2009 asked for feedback on six areas.

I make personal comment upon c), d) and e).

c) *did the legislation achieve its stated objectives?*

d) *were there any unintended consequences, or problems with the way the legislation worked?*

The objective of the EU Directive which led to the introduction of the Horse Passports (England) Regulations SI 2004/1397 was to establish a recording system which would prevent horse meat from animals treated with various pharmaceutical medicines from entering the food chain.

This was to be achieved by requiring all equines intended for the human food chain to have details of all medicines prescribed entered onto their passports and for a national database to be established which would record details of all equines and whether their passports were endorsed as "being an equine intended for entry to the human food chain".

In introducing the English legislation, Defra extended the objectives to include "administration of the passport system and the surveillance and control of equine diseases".

The first of these was essential to include due to the declaration as to intent with regard to "entering the human food chain" being recorded in the individual passports. Therefore, unless the issuing and monitoring of passports was adequately controlled, it would be impossible to monitor whether any of the animals to which medicines had been prescribed had entered the food chain.

The surveillance and control of equine disease is not an essential adjunct to the original EU objective. However, the addition of these objectives is applauded as it required very little amendment to the functionality of the database and would be of immense value in the event of any epidemics.

Administration

Unfortunately, in the administration of the passport scheme that the legislation has not proved to be as effective as it might have been. The issuing of passports in England has been designated to 61 different organisations (84 in the British Isles) designated as Passport Issuing Organisations (PIOs). PIOs work to a wide range of efficiency eg many of these organisations are extremely slow in processing applications and it has been demonstrated that some of the data they transmit to the national database is of questionable accuracy. Legislation is in place for Defra to take action against any PIO who fails to be "efficient". However, due to lack of manpower and resources, any such actions are noticeable by their absence.

Holes in the legislation

Similarly, the legislation has not proved to be as effective as it might have been due to omissions in establishing the data required, by the Horse Passports (England) Regulations SI 2004/1397, to be sent to the national database. It is absolutely essential that equines recorded on the national database are correctly identified against a passport. The regulation makes it mandatory to provide data, to be submitted on a regular basis, regarding gender, colour, age, name, etc to the national database. Unfortunately, this data in itself is insufficient to individually identify equines as there are many equines with the same name and of the same colour, sex and age. The passport number is also a mandated piece of data. However, this does not necessarily resolve duplication as all PIOs are free to determine their own numbering systems and thus i/d numbers are not necessarily unique. A European initiative adopted by the UK is for all equines to have an identifying unique equine life number (UELN). This has now been adopted for all foals but it will take at least 15 years for the system to be applicable to all equines. This is where the domestic legislation is lacking, in order to resolve duplications during the period prior to the UELNs becoming effective the legislation should have made it mandatory to provide the names of the equine's sire, dam and dam's sire to the national database. Had this been done then virtually all the cases of duplication in the national database would have been resolved.

Penalties and Enforcement

The Horse Passports (England) Regulations SI 2004/1397 require any change of ownership to be notified to the PIO. This is rarely done and there does not appear to be anyone sufficiently motivated to initiate legal action against owners who have passports for their equines which bear an incorrect owner name. How then can action be initiated against the owner of a horse sent for slaughter for human consumption which has been treated with prohibited medicines if the passport bears an incorrect owner name? It is interesting to note that the legislation contains no requirement for a change of address to be notified. How then do the authorities contact the owner?

Similarly, there is a requirement in the Horse Passports (England) Regulations SI 2004/1397 for the death of all equine to be reported to the issuing PIO. This is rarely done and, again, there does not appear to be anyone sufficiently motivated to initiate legal action.

It has been stated that passports are being issued to some equines when sold at auction. If this is true, how can any prescribed medicines administered by the previous owner be recorded on the passport? (Sections 14 and 20)

e) *now you have experience of the legislation can you suggest ways in which it could be simplified or made to operate more cost-effectively?*

There were other problems and faults with the 2004 legislation which have now been corrected in the 2009 legislation and, hence, I have omitted reference to them.

However, the items raised above are still extant and the purpose in raising theses is to demonstrate that where the 2004 Regulations are not working it is in the main due to Sections 24 and 25 (Penalties and Enforcement) not being implemented. The recommendation is, therefore, that Statutory Instruments should not be introduced without the accompanying financial and manpower resources required for implementation.

8 September 2009

Memorandum submitted by Dawn Thornton and Zoe Thornton

Horse Passports (England) Regulations SI 2004/1397 from DEFRA required that horses being slaughtered for meat were to have a record of medicines administered; the scheme was extended to all horses in England as a welfare measure.

My views on the new law for passport(s) and micro chipping are:

passporting and micro chipping is very expensive as for most horses and ponies do not go for meat, but if they are going for meat they should have special passports and should not be stolen or treated inhumanely when it comes to slaughtering them; and

most people will not be able to afford passporting and micro chipping therefore more horses will be neglected and homeless. A lot of travellers have not and will not passport or micro chip their horses.

It's not fair that generally horse people should have to pay extra for their horses when they can only just afford them now (with the credit crunch and all.)

18 July 2009

CASE STUDY 4: DRAFT HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY (DISCLOSURE OF DONOR INFORMATION) REGULATIONS 2004

Memorandum submitted by the British Association of Social Workers Project Group on Assisted Reproduction (PROGAR)

PROGAR was established in the 1980s originally to provide evidence on behalf of BASW to the Warnock Committee of Inquiry into Human Fertilisation and Embryology. Since then PROGAR has consistently contributed to policy discussions and policy formation in assisted conception, working in partnership with British Association for Adoption and Fostering, the British Infertility Counselling Association, and the Donor Conception Network, the National Association of Guardians Ad Litem and Reporting Officers and UK DonorLink.

a) *was the legislation easy to understand and apply to your situation?*

The legislation was easy to understand and apply. PROGAR had been campaigning for such legislation since the original parliamentary debate on the Human Fertilisation and Embryology Bill 1989, during which time it had been in regular contact with Department of Health officials and—more recently—ministers.

b) *did it cost you more or less to implement than the Department suggested?*

There were no costs to PROGAR as regards implementation of the legislation. We understand that costs were incurred by treatment centres who needed to amend their patient information and consent forms. We also assume that following implementation of the legislation, counsellors are spending more time helping people prepare for building their family through donor conception.

c) *did the legislation achieve its stated objective?*

Yes, insofar as we are informed by the Human Fertilisation and Embryology Authority (HFEA) that licensed clinics now make donors aware that their identity will be disclosed to any offspring seeking it when they reach the age of majority, and make patients aware of this too. Clinics' written literature and that of the HFEA also make this clear. However, the legislation raises may new issues for those potential parents and donors who might not have previously planned to be open about their donation. This makes it all the more important that they have counselling to assist them to respond appropriately to their children's needs as they grow up.

PROGAR believes that the wider use of counselling was long overdue. Given that the effect of the legislation was to enable donor-conceived people reaching 18 years of age to learn the identity of their donor, its effectiveness can only be answered with confidence when the first such individuals come of age in 2023.

d) *were there any unintended consequences, or problems with the way the legislation worked?*

Both before implementation of the legislation, and subsequently, claims have been expressed that it would (a) reduce the number of people willing to act as an egg or sperm donor, therefore (b) encourage more British fertility patients to seek donor services abroad and (c) reduce the likelihood of parents of donor-conceived children telling their children about their conception, (d) attract donors who might desire involvement with donor offspring and their families. We will deal with each of these in turn:

(a) *reduction in the number of people willing to act as an egg or sperm donor.*

The evidence base for determining the impact of the legislation on donor recruitment is not strong. We know anecdotally that the publicity about the regulations led to increased enquiries to a number of clinics from prospective donors and that some clinics were unprepared to respond expeditiously to such interest. Initial reports from the Human Fertilisation and Embryology Authority suggested a decline in the recruitment of both egg and sperm donors. However such decline was part of a longer term trend evident in respect of sperm donation since the mid 1990s. This pattern was also consistent with those in other jurisdictions, *whether or not donor anonymity continued to be protected* and the only jurisdictions that have seemed able to ensure a greater balance between supply and demand for donated gametes are those where a commercial market for gamete procurement operates.

More recent HFEA figures, as well as reports from individual UK clinics, indicate that donor recruitment has started to rise in some areas and elsewhere to hold up.

(b) *donor shortages have encouraged more British fertility patients to seek donor services abroad*

The evidence base for determining the impact of the legislation on cross border travel for reproductive services is not strong. No formal or systematic records of UK fertility patients travelling abroad for fertility treatment have ever been kept and only now are studies being undertaken to quantify the extent of cross border reproductive travel and to investigate the motivation and experiences of those who undertake cross border reproductive travel. From information currently available, patients' decision to seek reproductive services abroad are founded on a range of factors, including success rates and cost of services, in addition to any problems in accessing donor procedures.

(c) *parents of donor-conceived children are less likely to tell their children about their conception*

This proposition is based on the assumption that a donor-conceived person's ability to learn the identity of his or her donor may increase the possibility of them finding their donor, rejecting their parents or of the donor intervening in the life of the "donor-conceived family" and that parents will seek to remove or reduce these risks by not disclosing the nature of their child's conception. The evidence base for this assertion is totally absent. Indeed, the only UK research study published to date on the impact of potential parents' disclosure intentions following the implementation of this legislation indicated that numbers stating their intention to disclose had risen (Crawshaw 2008). Furthermore, in Sweden, the only other jurisdiction where the impact of similar legislation can be ascertained, available evidence indicates that, as time passes, an increasing proportion of parents of donor-conceived children actually tell their children of the nature of their conception (Milsom and Bergman, 1982; Gottlieb, Lalos and Lindblad, 2000; Lalos, Gottlieb and Lalos, 2007).

(d) *those seeking increased involvement in the lives of donor offspring might be attracted as donors*

There is no evidence either from the UK or other jurisdictions that have removed donor anonymity that there has been increased recruitment of donors wishing to become involved in the lives or the families of their offspring.

(e) *now you have experience of the legislation can you suggest ways in which it could be simplified or made to operate more cost-effectively?*

No; as far as we aware it is working well.

(f) are you aware of any arrangements that would enable you to give feedback on your practical experience of the legislation to the Department that issued it?

We are in regular contact with the Department of Health

9 September 2009

Memorandum submitted by the British Fertility Society

The Merits Committee asks for comments under six headings as outlined below:

Was the legislation easy to understand and apply to your situation?

The legislation, as published, was relatively easy for clinics to understand and was accompanied by adequate guidance from both the Human Fertilisation and Embryology Authority (HFEA) and the Department of Health. The BFS is of the opinion that all UK clinics that recruited sperm, egg and embryo donors or used their donations in treatment at the time the legislation came into force were fully aware of the change.

Did it cost you more or less to implement than the Department suggested?

There were some cost implications for UK clinics to comply with this legislation, associated with staff training, printing of new leaflets and redrafting protocols to take account of the change. In addition, there was a cost implication associated with contacting donors to alert them that they could re-register as known donors. This involved staff time in consultation and counseling those that wished to re-register.

However, one unforeseen consequence of the legislation was a decrease in the availability of donor sperm within the UK (see below), which in turn led to a significant increase in the "market value" that clinics had to pay if they were unable to recruit enough donors locally to supply the needs of their patient population. The BFS estimates that the "cost" of donor sperm increased 10 fold following the introduction of the Donor Information Regulations.

Did the legislation achieve its stated objective?

It is not possible to say whether the Donor Information Regulations have achieved their stated objectives. This is because the regulations provide for donor-conceived people to find out the identity of their donor once they reach the age of 18 years. Therefore, for donors recruited after 1 April 2005, this will only start occurring from the year 2023.

Although the legislation did allow for voluntary re-registration of anonymous donors who were recruited from August 1991 (ie the establishment of the HFEA register) until 31 March 2005, the BFS understands that less than 100 such donors have re-presented their information and waived their right to anonymity. So it is likely to be at least 14 years before the legislation has a major impact.

Were there any unintended consequences, or problems with the way the legislation worked?

The decision to change the law and abolish donor anonymity from 1 April 2005 was taken following a protracted period of consultation and debate. In December 2001, the Department of Health launched a public consultation on this issue to which the BFS responded and concluded that "the time is not yet right for a radical change to lift anonymity in a universal manner as" believing that "the majority of donors and recipients are not ready for such a change" (see Hunt et al., 2002). The document outlined how the BFS was concerned that:

— Donor recruitment would be adversely affected so treatment would be less accessible to people needing donor treatment.

— People who are concerned to maintain anonymity may seek treatment in countries where it is guaranteed.

— Recipients would take risks with self-insemination or choose to go overseas for treatment.

— Illegal gamete importation would occur.

— It would create potential conflicts between donors, recipients and offspring.

The BFS has evidence that some of these concerns, unfortunately, have come true:

— There is evidence from the HFEA's own data that the number of patient's being treated with donor sperm in 2006 (the first full year after the removal of donor anonymity) was significantly reduced in comparison to previous years (see http://www.hfea.gov.uk/104.html). Claims by the HFEA that sperm donor numbers have not been adversely affected by the law change (see http://www.hfea.gov.uk/465.html) cannot be independently assessed as they do not publish details of the number of 'families' each donor has given consent for his samples to create. Within the original document the Department of Health stated that of the donors who responded to the consultation, 50 per cent would not donate if anonymity was removed (although this was reported as 50 per cent would donate) and this has been the case.

— There is evidence that a significant number of UK couples are seeking treatment overseas. Sadly, although empirical data is lacking and difficult to collect, it is generally acknowledged that many UK couples travel to countries such as Spain, particularly for egg donation.

— We have witnessed a proliferation of on-line services aimed at providing recipients with supplies of "fresh" sperm for home insemination outside the licensed clinic structure. This has serious health concerns for the recipients as the sperm used in this way is not suitably screened and quarantined.

— Although there is no evidence that illegal importation of donor gametes has occurred, there is evidence from the HFEA's own data that the amount of imported sperm remains high (see: http://www.hfea.gov.uk/3413.html). For example, in 2006 (ie immediately after the law change) the number of non-UK sperm donors accounted for 25 per cent of the total. Whilst in 2008 this had reduced to 17 per cent, it remains clear that there are an insufficient number of UK donors to meet the needs of the country.

The BFS would argue that these were not unforeseen consequences of this change in legislation and they might have been avoided had the legislation been implemented differently.

Now you have experience of the legislation can you suggest ways in which it could be simplified or made to operate more cost-effectively?

Whilst many BFS members may call for the legislation to be reviewed, and perhaps reversed, this is not the official view of the Society. The BFS has recently undertaken two pieces of work to try and improve the ability to recruit donors within the UK under the current legal framework.

The first was a review and suggest improvements to the sperm donor recruitment infrastructure within the UK (Hamilton, 2008). This has suggested that closer working relationships between donor recruitment clinics and the establishment of a "National Service Framework" may go some way to improve sperm donor recruitment. The BFS is currently in discussions with the Department of Health about the possibility of their funding a pilot of these ideas.

The second was a collaboration to review the guidelines for the medical and laboratory screening of sperm, egg and embryo donors to see if there were changes that could facilitate the recruitment of more donors (see Association of Biomedical Andrologists, Association of Clinical Embryologists, British Andrology Society, British Fertility Society, Royal College of Obstetricians and Gynaecologists, 2008). However, it is difficult to see how these new guidelines will improve donor supply since the overarching conclusion of the working party was that safety issues were paramount and there was little room for a relaxation of screening tests performed on donors.

Are you aware of any arrangements that would enable you to give feedback on your practical experience of the legislation to the Department that issued it?

The British Fertility Society has an active dialogue with the Department of Health, the Human Fertilisation and Embryology Authority and is also represented on the Advisory Council of the National Gamete Donation Trust.

September 2009

Memorandum submitted by the International Donor Offspring Alliance ("IDOA")

Background

Recognising that the review addresses the effectiveness and conformity to the Better Regulation Agenda of the Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations (SI 2004/1511) ("the Regulations"), this evidence does not address the merits of the substantive policy. In the interests of transparency however we set out here a brief outline of IDOA's constitution and purpose.

IDOA was formed in 2007. It exists to act as an advocate for those conceived through the use of donor gametes: eggs or sperm. It has members from the UK, US, Canada, France, Japan, New Zealand and Australia; they include both donor offspring (of both sexes and ranging in age from 24 to 64) and academics and social work practitioners who have a professional interest in the field.

IDOA endorses the policy of the Regulations but believes that further legislation is required to ensure that donor offspring are given equal access to their personal social and genetic history to that afforded to all other citizens, including adopted people. IDOA calls for the provision of birth certificates for the donor-conceived on the same model as those provided to adopted people, such that the donor-conceived are put in possession of the facts about their own history at a specified age (currently the age of majority).

The Regulations

a) *was the legislation easy to understand and apply to your situation?*

We think that the legislation was clear. There has been some commentary and discussion of the Regulations' impact but we are not aware of any suggestion that they are ambiguous or difficult to apply.

b) *did it cost you more or less to implement than the Department suggested?*

So far as infertility clinics are concerned, we do not believe that there will have been any appreciable direct costs of implementation since the Regulations only require that information about donors (most of which was already acquired and kept by clinics) be organised into non-identifying and identifying categories.

The cost to the HFEA of responding to queries from donor-conceived individuals will so far be very small since

(a) the obligation on the HFEA to provide non-identifying information will not create a financially significant volume of queries and there is no obligation to acquire or create new information;

(b) the obligation to provide identifying information will not be effective until 2023 (when individuals conceived under the new regime first reach the age of 18) and in any even it will remain true that volumes will be small because very few donor-conceived individuals are made aware of their status.

c) *was the legislation effective in achieving its stated objective?*

The legislation has not been effective in abolishing donor anonymity. Donors remain anonymous because the majority of recipient parents do not disclose the truth about the genetic status of their donor-conceived children to those children.[15] Hence donor-conceived individuals remain, in practice, unable to exercise the rights purportedly granted by the Regulations.

That said, we have no reason to believe that there will not be widespread compliance with the Regulations.

d) *were there any unintended consequences, or problems with the way the legislation worked?*

We are not aware of any such. There have been repeated assertions from those opposed to the abolition of donor anonymity that abolition has lead to a diminution in supplies of donor sperm. These assertions have been marked by an almost complete lack of evidence. The HFEA's own figures, which must be seen as authoritative, are:

[15] Research in this area tends to be done on very small numbers but suggests that between 55% and 80% of UK recipients decide not to tell their DI children about their conception.

All new donors registered		
Year	*Sperm donors*	*Egg donors*
1992	331	447
1993	415	522
1994	416	731
1995	412	745
1996	417	805
1997	341	913
1998	255	946
1999	297	1,120
2000	310	1,219
2001	313	1,281
2002	275	1,146
2003	247	1,029
2004	224	1,029
2005	250	923
2006	285	783
2007	364	956
2008	384	1,084

(http://www.hfea.gov.uk/3411.html)

These figures show that in every year since the Regulations were made, the number of sperm donors has increased. The numbers of egg donors show a fall of around 24 per cent between 2004 and 2006, recovering in 2008 to a level higher than that in the two years prior to the coming into force of the Regulations. IDOA believes that a great many different factors contribute to the numbers of donors of both gametes. Whatever the case, what the figures disclose most clearly is that there is no objective basis to suggest a causative link between the Regulations and donor numbers.

e) *now you have experience of the legislation can you suggest ways in which it could be simplified or made to operate more cost-effectively?*

No.

f) *are you aware of any arrangements that would enable you to give feedback on your practical experience of the legislation to the Department that issued it?*

No. We are of course able to write to the relevant Secretary of State and have done so but we are not aware of any arrangements specific to the Regulations.

31 August 2009

Memorandum submitted by the Partnership Focus Group on the Rights and Life Long Needs of People Created by Donor Assisted Conception

(a) *Was the legislation easy to understand and apply to your situation?*

The legislation was clear and easy to understand. The PFG believes that all children have a right to know about their genetic heritage. The Regulation was therefore a positive step forward however more needs to be done if the intention of the Regulation is realised—that donor-conceived children have a right to know their genetic origins.

(b) *Did it cost you more or less to implement than the Department suggested?*

There are no costs to the PFG to implement this Regulation. People have a basic human right to know their genetic heritage and donor-conceived people need to be able to access information about how they can achieve this. Inevitably there would have been additional costs to infertility centres and the HFEA as publicity material would need to have been amended to inform prospective parents, donors and donor-conceived people about the Regulation and the implications this has. If the feedback from this consultation shows that financial constraints has prevented this from happening then the government needs to address this as soon as possible.

(c) *Was the legislation effective in achieving its stated objective?*

The objective of the legislation was to remove anonymity to enable donor-conceived children the right to know of their donor-conceived status and the right to apply for identifying information about their donor. This was an important piece of legislation but unfortunately will not be effective unless the government does a lot more to ensure that donor-conceived children are able to access this right.

Unless there is a clear expectation from the government that children have a right to know about their donor-conceived status and their genetic inheritance, then in practice the majority of donor-conceived individuals will remain unable to exercise the rights purportedly granted by the Regulations.

As it stands children have to rely on their parents to tell them about the fact of their donor-conceived status. The donor-conceived person will have no official documentation to alert them to this. The increase in the number of situations where genetic and social/legal parenthood are not the same, lends urgency to calls for reform of the legislation about birth registration.

We note that the government agreed that a review should take place within four years of the Human Fertilisation and Embryology Act 2008 being implemented. Whilst the registration remains unchanged thousands of children will continue to be denied information about their genetic identity, and will be in a position of not being able to make informed decisions that may profoundly affect their lives. The review of the birth registration needs to be undertaken as a matter of priority.

We consider that the HFE 2008 legislation needs to go further and make it mandatory for all prospective parents using donated gametes to attend preparation and information sessions prior to treatment. Introducing donated gametes into a family is not something to be undertaken lightly nor without appropriate opportunities for the recipients to explore and understand what the implications are for themselves and their children.

The preparation and information sessions can provide a crucial service to help prospective parents think about the particular and pertinent issues relating to parenting a child who is not genetically related to either one or both of them, and help them to think about how they will tell their children about their origins.

(d) *Were there any unintended consequences, or problems with the way the legislation worked?*

We are aware of the expressed concern and the publicity that the numbers of potential donors have decreased as a result of the donor anonymity being lifted. However according to the figure produced by the HFEA this has certainly not been borne out. See http://www.hfea.gov.uk/3411.html

We hope that these statistics reassure the lobby who argue that donor anonymity should be reinstated as it clearly has not had an adverse impact. Such a move would be a retrograde step and ignores and dismisses the importance of a person's right to know their origins and heritage.

(e) *Now you have experience of the legislation can you suggest ways in which it could be simplified or made to operate more cost-effectively?*

No.

(f) *Are you aware of any arrangements that would enable you to give feedback on your practical experience of the legislation to the Department that issued it?*

We are aware that we can write to the Department of Health but we are not aware of any arrangements specific to the Regulations.

10 September 2009

Memorandum submitted by Louise Priday

As a donor conceived adult and member of the International Donor Offspring Alliance (IDOA), my views on the specific feedback questions pertaining to this review have already been expressed in David Gollancz's submission dated 31 August.

Though I appreciate it is strictly outside the terms of the Review, I am sending this further, individual response, as it feels appropriate to me briefly to share the relevance of this secondary legislation to my own life.

Born in 1964, I am obviously too old to have benefited from the removal of donor anonymity under the 2004 Regulations. However, associated with this was the creation of UK DonorLink, the voluntary contact register. Through this I was, in 2005, informed of the identity of several half-siblings. One of these was the son by marriage of my donor. At a stroke I therefore gained not only an extended family of half-siblings but, even more significantly, the missing piece of my own identity.

It is impossible for me to overstate how important this has been for my sense of well-being, mental, emotional and relational health. I have experienced:

- the confusion and dislocation associated with being raised by a social/step father, under the misapprehension that I was his biological daughter;
- the relief of being told the truth;
- the associated trauma of having no recourse to information about my biological father's—and hence my—identity;
- the powerful joy and relief of learning my biological father's identity; and
- the excitement of meeting and getting to know half-siblings.

I know that the Review is not intended to call into question the legislation itself. However, I felt it important to flag up the reform's importance on a personal level, as those children who will directly benefit from it are, of course, still far too young to comment.

I know that there are those who would challenge the rightness of using identifiable donors. Speaking as a donor conceived adult, I believe that the 2004 legislation was unquestionably a step in the right direction. A return to anonymous donors would be equivalent to removing from adopted people the right to access their own birth records.

David Gollancz's submission for IDOA included a table of HFEA figures demonstrating that sperm donor numbers have in fact risen since 2004. I have read an interesting paper by another IDOA member, Tom Ellis, which goes into further detail regarding donor numbers, drawing on a 2008 report by the British Fertility Society Working Party on Sperm Donation Services in the UK. This serves further to confirm that the claim of falling numbers since 2004 is spurious. A copy is attached for your information [not printed].

9 September 2009

Memorandum submitted by Joanna Rose

a) *was the legislation easy to understand and apply to your situation?*

N/A

b) *did it cost you more or less to implement than the Department suggested?*

N/A

c) *was the legislation effective in achieving its stated objective?*

The legislation does add to the recognition of rights of the donor offspring but continues to provide differing levels of rights to offspring from different dates of conception. In order to be in line with current adoption policy, the recognition of rights and the best interests of the child would have to be paramount and not taken into consideration or further demoted. As such the rights recognised for all donor offspring would have to be

equal and therefore retrospective. However, if the best interests of the child were paramount the service of donor conception could not easily justify encouraging, funding or facilitating the deliberate separation of a child from one or both genetic parents as a service to the infertile. This is very different to adoption policy that provides a child to the infertile as a last resort for child protection. Policy and practice in adoption and relevant child centred services firstly provide support to genetic parents to take responsibility for their children. Donor conception is an aberration of this foundational principal.

d) *were there any unintended consequences, or problems with the way the legislation worked?*

Additional to the above stated problems, donor offspring have not got the same rights as adoptees in relation to their full birth certificates indicating their genetic parentage. Thus they are mostly denied knowledge of their true status through lies and deception from their parents. This is dangerous for medical reasons and unacceptable. Current legislation continues to be complicit in this.

This legislation confuses parental responsibility for children with birth registration which should indicate lineage and will further disadvantage people like myself who want to know their genetic kin and origins. I believe this is the line which Dr McWhinnie has taken on the issue.

Further to the problems raised for different cohorts of donor offspring is the issue of support services with trained councillors. For those using UK DonorLink, born prior to those who will be approaching the HFEA, there is no commitment for what is only a pilot service. Such future security is vital for the emotional and physical health of these offspring. One offspring to join donor link is urgently requiring a bone marrow transplant and UK DonorLink is an important resource to help find a match for a rare gene type. Other offspring will continue to require medical and personal kinship history and connection. UK DonorLink needs to be a secure base for such needs.

UKDonorLink continues to grow in it's understanding of the needs of donors and donor offspring yet if the HFEA take over clerical aspect of UKDL as is currently proposed the HFEA will provide a service without this training or insight. There are no counselling support services to be provided for those approaching the HFEA for information in the future. This is inadequate and a negation of a service that is already there to provide this help and safety net to what is a lot more than a simple information exchange.

The HFEA committee must be seen to be more supportive of the welfare of the child and have greater dialogue and equal representation of donor offspring and donors on its committee. Without this it fails to be either elected, representative or unbiased. Giving further responsibility for donor offspring welfare in light of it's current composition and relationship with donor offspring is dubious and unsavoury.

e) *now you have experience of the legislation can you suggest ways in which it could be simplified or made to operate more cost-effectively?*

N/A

f) *are you aware of any arrangements that would enable you to give feedback on your practical experience of the legislation to the Department that issued it?*

N/A

We would also be interested in any broader comments on this review.

— Can you offer any other examples of Statutory Instruments that demonstrate good or bad practice in post-legislative review? Or that we might consider adding to our list for in-depth consideration?

N/A

September 2009

Memorandum submitted by UK DonorLink

(a) *Was the legislation easy to understand and apply to your situation?*

1.1 The legislation was easy to understand; it does not apply directly to any of UKDL's service users so we have no direct experience of its application.

1.2 UKDL is committed to advocating for greater openness in the field of donor conception services and their aftermath for those directly affected. This comes out of our experience of the adverse effects, especially on donor conceived people, where information about their genetic origins including identifying information is withheld. This legislation was a significant and positive milestone towards openness.

(b) *Did it cost you more or less to implement than the Department suggested?*

2.1 There were no costs to UKDL as regards implementation of the legislation. We are not aware of any costs incurred by others.

(c) *Did the legislation achieve its stated objective?*

3.1 Our regular contacts with those involved in current service provision suggest that the legislation has achieved its stated objective. We understand that licensed clinics are making donors aware that their identity will be disclosed to any offspring seeking it when they reach the age of majority as are organisations such as DC Network and National Gamete Donation Trust. Written literature provided by clinics and the Human Fertilisation and Embryology Authority also make this clear.

3.2 Of course those donor-conceived people eligible to receive identifying information will only reach the age of 18 years in 2023 so evaluation of its effectiveness cannot be fully determined until then. However we believe that the implementation of the legislation has given a clear message about the principle of openness and the rights of people to have access to identifying information about their donors and this is already having a positive effect in the "here and now". Indeed the media coverage accompanying the introduction of the legislation has raised public awareness of the issue and made a number of donors and donor conceived adults aware of our service, leading to their registration with us.

(d) *Were there any unintended consequences, or problems with the way the legislation worked?*

4.1 There have been some unsubstantiated claims made pre- and post-implementation to the effect that donor recruitment would be adversely affected by the legislation, that "social" parents would be less likely to tell their children of their origins and that prospective parents would seek treatment overseas in order to use anonymous donors. We have found no evidence for any of this through our own service.

4.2 With regard to donor recruitment, it is UKDL's view that any effect on supply that results from legislation should NOT prompt any change to that legislation. The legislation was determined by matters of principle not market economics and we firmly believe the principle to be sound. We also, anyway, understand that donor recruitment is robust in some areas, suggesting that the approach to recruitment may be of influence.

4.3 With regard to parents telling their children of their origins, we are not aware of any evidence that has found increased reluctance to disclose. In fact, research by our Adviser, Marilyn Crawshaw, found that prospective parents' disclosure intentions following the implementation of this legislation indicated that numbers stating their intention to disclose had risen (Crawshaw 2008). UKDL has had the regular experience of parents disclosing to their adult children that they were donor-conceived once they become aware of the emotional, medical or social significance of such a heritage. Parents have told us that they wished that they had been made more aware of this at the time that they received treatment. This legislation has, we believe, prompted present day professionals to be more likely to give prospective parents the clear message of the need for openness.

4.4 With regard to travelling overseas for treatment with anonymous donors, UKDL has no direct experience. However we are aware through our networks with other organisations that there is a worldwide increase in numbers seeking treatment outside of their own country for many different forms of health care, not just fertility treatment. We have also been told that some patients have expressed distress that they have difficulty in finding *identifiable* donors in some overseas treatment centres when they feel pressed to consider travelling for reasons of cost or shorter waiting times and so on.

(e) *Now you have experience of the legislation can you suggest ways in which it could be simplified or made to operate more cost-effectively?*

5.1 No; as far as we are aware it is working well.

(f) *Are you aware of any arrangements that would enable you to give feedback on your practical experience of the legislation to the Department that issued it?*

6.1 We are in regular contact with the Department of Health, who fund our service.

10 September 2009

Memorandum submitted by Christine Whipp

My experience of the legislation, in respect of the specified questions, is as follows:

1. Regarding question *a) was the legislation easy to understand and apply to your situation?*

I found the meaning of the legislation to be understandable, however, despite the stated intention of bringing "the position of donor-conceived people more closely into line with that of adopted people, in terms of the information they can be given about their genetic origins," these regulation have provided no such benefit for donor conceived people like myself who are currently over the age of 18.

These Regulations, made under sections 31(4)(a) and 45(1) to (3) of the Human Fertilisation and Embryology Act 1990 are only to be of benefit to adults conceived through gamete donation at HFEA licensed clinics. They make no attempt to address the situation of the estimated 12,000 donor conceived adults who were conceived through private clinics and NHS hospitals before the HFEA began to regulate the practice methods and record keeping of donor conception practitioners.

2. Regarding question *c) was the legislation effective in achieving its stated objective?*

The stated objective of bringing "the position of donor-conceived people more closely into line with that of adopted people in terms of the information they can be given about their genetic origins" cannot be said to have been met when it is apparent that the legislation does not and cannot be applied equally to all donor conceived people, irrespective of the date on which they were conceived. The legislation passed in the 1970's for the benefit of adopted people allowed all such people to have full access, on reaching the age of majority, to all records pertaining to their birth and subsequent adoption. Access to full identifying information about their biological parentage was granted retrospectively to all pre-existing and to all future adoptees, regardless of their date of birth or the promises of anonymity previously given to relinquishing parents.

The long term effectiveness of Regulation SI 2004/ 1511 can really only be objectively assessed when those who are most intended to benefit from it are able to do so, by exercising their right to the acquisition of full donor identifying information. This will not happen until 2023 when the beneficiaries will be in a position to articulate the positive effects of discovering the truth about their missing identity and of having the opportunity to forge relationships with their previously excluded biological parents and wider kinfolk.

3. Regarding question *d) were there any unintended consequences, or problems with the way the legislation worked?*

Regulation SI 2004/ 1511 has effectively created three separate categories of donor conceived people, each with different degrees of legal rights to their full identity:

i) Donor conceived people born after the implementation of this statutory instrument in 2005 will have full and unrestricted access to all carefully collated information about their full biological identity and full knowledge of their donor parentage and on reaching the age of majority.

ii) Donor Conceived people born between 1991 and 2005 will have access to any collated non-standardised, non-identifying information about their donor parentage on reaching the age of majority.

iii) Donor Conceived people born prior to 1991 will continue to have no right of access to any information about their biological identity and donor parentage that might still be stored in repositories. The introduction of the UKDonorLink Voluntary Register has been a step in the right direction in providing some hope to older donor conceived people of locating their donor parents, but this is clearly not enough and a continued failure by the relevant authorities (both the Department of Health and HFEA) to acknowledge the need for parity between all categories of donor conceived people is a clear act of discrimination.

This inequality in these three distinct groups of people can further be subdivided by those who have been made aware of their donor conception status by their recipient parents and those who have not. Only the former group will have the opportunity to seek the information which has been collected about them as a result of the recognition that such information is vital for the development of the individual. Until measures are put in place to ensure that donor conceived people are not deliberately mislead about their biological parentage by their

recipient parents and by having birth certificates (unlike those of adoptees) which reflect the sensitivities of the people who commission their births rather than reflecting their genetic truth, Regulation SI 2004/ 1511 cannot be considered to have fully achieved its objectives.

At the current time this legislation can effectively be seen to be divisive, causing further discrimination to specific small sections of society.

The introduction of Regulation SI 2004/ 1511 was unpopular with a number of leading figures within the reproductive industry and since it came into force there has been much media publicity about a UK shortage of donor sperm and eggs, with this scarcity of gamete donors being specifically attributed to the change in the law on donor anonymity. Figures published by the HFEA website in July 2009 (http://www.hfea.gov.uk/3411.html) do not show a consistent drop in the number of gamete donors following the introduction of SI 2004/ 1511 however, this issue has been further fuelled in recent weeks by Professor Lisa Jardine, Chair of the HFEA in an exclusive interview with the Times in which she proposed a debate to revise the way that gamete donors are financially compensated, in order to increase the number of available donors. I have concerns that while this post implementation review is intended to establish whether implemented regulations are having the intended effect, but is not intended to review the effects of the policy itself, it will provoke a call for a return to full donor anonymity, or to a mixed system of anonymous and voluntary identity release donors, in order to satisfy the growth in demand for reproductive services.

4. In summary, Regulation SI 2004/ 1511 cannot achieve its stated objective if donor conceived people have no means of being made aware of their donor conception status. It cannot achieve parity of identity rights for donor conceived people with those already long established for adoptees when different degrees of access to information are applied to donor conceived people on the basis of their date of birth.

4 September 2009

CASE STUDY 5: WORK AT HEIGHT REGULATIONS 2005 (SI 2005/735)

Memorandum submitted by Dr John Anderson

I understand your Committee is looking into the merits of the implementation of the Work at Height Regulations 2005. I understand this from an article I have read in the *Safety and Health Practitioner.*

I have followed this matter through from its inception, and have:

- Studied the four page Directive—the Annex of which is written in a clear and understandable style.
- Formally responded to the huge 166 page HSE Consultative Document on 12 March 2004 with seven pages of general and detailed comments.
- I made the comment in the letter that proposed Regulations 4; 5; 6(1); 6(2); 6(4); 8(c); 8(g); 8(h); 10; 11; 13; 14; 15; 16; Schedule 2; Schedule 4; Schedule 5; Schedule 5, Part 4; Schedule 5, Part 5 and Schedule 6, para 9 were all not required by the Directive.
- My comments were all ignored by the HSE despite having a meeting with the policy team at HSE Rose Court.
- I wrote a further letter of 25 October to the "Head of the Falls from Height Team" at the HSE making further complaints about the texts and particularly the new Reg 6(2) which was a complete reversal of the intent of the Directive, and the continued inclusion of all the "so far as is reasonably practicable" phrases. All this was ignored as well.
- I wrote again on 29 November 2004 to the Chairman of the Health and Safety Commission urging the Commission not to approve these Regulations—but they did.
- I wrote to the HSE's "Better Regulation Unit" on 10 November 2004 and asked them seven questions and I got replies to none of them.
- I wrote to the Regulatory Impact Unit at the Cabinet Office on 23 September 2004 and got nowhere with them.
- I wrote to MPs in Parliament hoping at the last moment they would not pass this bad law and formally object—but nothing effective happened.

All this correspondence I have available for you to see if you so wish.

The HSE "gold-plated" a perfectly good well-written Directive and created a bureaucratic legislative monster out of very little and wrote the Regulations in legal language that does not find favour on the construction world of busy, task-focused people. The HSE behaved throughout in an arrogant "we know best" frame of mind and would not listen to others with any alternative view.

The costs to UK industry of understanding all this, training others (forever more) to understand it all, the paperwork requirements, etc etc does not bear thinking about and is impossible to calculate.

Go to Swedish Work Environment Authority AFS 1999:3 "Building and Civil Engineering Work" (page 18) Sections 57, 58 and 59 and you will see there that the Work at Height Directive has appeared in Swedish legislation in only 20 lines.

What more can I say?

2 September 2009

Memorandum submitted by the Institution of Civil Engineers

(a) *Was the legislation easy to understand and apply to your situation?*

ICE believes that is that users would seek guidance from the HSE (and other bodies including the ICE) on interpretation of any regulations. Anecdotal evidence suggests that there is a tendency in respect of specific safety regulations for firms to take an overly conservative or risk averse approach unless guidance is clear. In this context we have received reports that some organisations, particularly clients, have misapplied the regulations by implementing policies which ban the use of all ladders or stepladders on their site.

(b) *Did it cost you more or less to implement than the Department suggested?*

The original Regulatory Impact Assessment for the Working at Height Regulations 2005 suggested a number of different business sectors which might be affected by the regulations of which the only one directly of interest to the ICE is the construction industry, although we have a small amount of involvement in telecommunications. In respect of construction, the RIA states that "*The proposed regulations overlap with existing construction regulation in Great Britain*" (para 28) and therefore "*only familiarization costs have been estimated for the construction sector*". This is later estimated to be on average £80 per business (paras 41 and 73).

However, misapplication of the regulations, by some clients has, we believe, resulted in unnecessary costs. For example, full scaffolds have been used when short duration ladder work would have been a reasonably practical solution. If it would assist with considering these regulations, we would be happy to take a short survey of ICE members active in the construction industry, to give a breakdown of what their actual costs were of implementing the regulations (in addition to CDM).

(c) *Did the legislation achieve its stated objective?*

The objective stated in its explanatory memorandum to the Regulations is to address the risk of injuries and deaths caused by falls at work. The RIA contains a table of injuries and fatalities before the introduction of the regulations.

For all years, between half and two-thirds of fatalities from falls from a height occur in the construction industry. Falls from working at a height are the greatest cause of death and serious injury in the construction industry.

The general trend in the number of fatalities and major injuries resulting from falls at height has been downwards, although the decrease has not been dramatic (for example, the figure for fatalities in 2003–04 was 67 and in 2007–08, this was 58). However, in comparison to the previous year, the number of fatalities and major injuries in 2007–08 increased by 12% and 13% respectively. On a basic analysis of the figures, this would suggest that the impact of the regulations has been limited in terms of making work at height safer.

There is some anecdotal evidence that the need for compliance with the regulations can be ignored at smaller construction sites, but it is generally considered that at the larger end of the industry the regulations have forced many to take action to control and minimise the risk of serious injury and death, so there may be little scope for significant improvement in this area. However, for smaller undertakings and smaller jobs which may not always be obviously "working at height" (eg unloading a high lorry) the response may be more erratic giving rise to either little compliance or an excessive response. This may reflect a misunderstanding of what is required under the regulations at this level and in turn explain the failure of failures to decline significantly in light of the new regulations.

(d) *Were there any unintended consequences, or problems with the way the legislation worked?*

As touched upon in response to the previous questions, the main "unintended consequence" of this legislation is the tendency by some clients to misapply the regulations and take over-cautious measures. This is illustrated in previous points where ladders and stepladders have been forbidden on some sites and scaffolds been used when not necessarily required.

(e) *Now you have experience of the legislation, can you suggest ways in which it could be simplified or made to operate more cost-effectively?*

It would be difficult to suggest an exact method for how the regulations could be simplified, or give a "one size fits all" recommendation. We would recommend that greater emphasis and resource be placed into education of small and medium sized firms in the requirements of the regulations, and to educate all that the regulations do not require a blanket ban on ladders and stepladders.

Additionally, we would strongly recommend greater resource being applied to HSE Inspection Action Teams (more staff and more money) and greater policing on a more "practicable" basis.

(f) *Are you aware of any arrangements that would enable you to give feedback on your practical experience of the legislation to the department that issued it?*

There are consultations occasionally on changes to the regulations but most of our members' dealings are with the HSE and therefore their interpretation of the obligations. This is a key area, as the guidance and the HSE's approach to enforcement will often influence the approach taken by firms to implementing regulations.

In this respect the HSE has a significant amount of detail on its website including guidance at: http://www.hse.qov.uk/pubns/indg401.pdf. Additionally, guidance is provided for the Construction industry at: http://www.hse.gov.uk/construction/pdf/fallsqa.pdf). This does recognise that the steps which must be taken are subject to reasonable practicability, however there is little otherwise to suggest that the regulations are not intended to impose any additional burden beyond that in existing regulation (which is the basis on which the RIA is drafted) or that it is not intended to produce an unnecessarily risk averse outcome (refusing to use ladders at all etc).

Good regulation must recognise the balance between achieving a job efficiently and safely and protecting workers and others and there is a sense that HSE's approach and guidance may be causing excessive caution in the industry. One possible solution, which is a common observation, is that the HSE needs to improve its communication on issues such as these.

16 September 2009

Memorandum submitted by the International Powered Access Federation

IPAF believes that the Work at Height Regulations 2005 have been a substantial success. They have caused employers to assess the risks associated with their work and made them question the most suitable and safest equipment and methods that they need to carry out work at height. This has led to a heightened awareness of the risks and a more practical approach to ensuring the safety of the people involved. As a consequence it has been a major step in bringing about safer work places where work at height is carried out.

From IPAF's perspective this has been good for business because mobile elevating work platforms (MEWPs) are now acknowledged, rightly, as being a safer way of conducting work at height in many applications compared with other types of equipment. It has also provided a larger hire market for MEWPs. There have also been knock on effects for manufacturers in relation to the sale of new MEWPs and the development of new MEWP models.

The regulations and initiatives that have supported these Regulations have also encouraged duty holders to question how they can prove the competence of their employees to work at height and this has encouraged the wider use of industry based training schemes, such as the IPAF PAL card scheme for MEWP operators and the IPAF MEWPs for managers course. This has encouraged a more educated workforce that is likely to take safety seriously and share their experiences with each other.

The UK has been at the forefront of the campaign to reduce deaths caused by temporary work at height. However, it may have put the British economy at a disadvantage because the Temporary Work at Height Directive has not been implemented with the same determination and imagination in other EU member states. We call on the UK Government to push for more consistent implementation of the Directive in other EU member states based on the experience in the UK. This should help to promote consistent enforcement by

authorities and a level playing field when contractors are giving quotations for work in a variety of member states.

September 2009

Memorandum submitted by the Ladder Association

In response to your call for evidence for the post implementation review on the Work at Height regulations (SI2005/735), the Ladder Association would provide the following information:

1. *How clear were the requirements of the regulations?*

a. Initially there was considerable misinterpretation on the part of persons responsible for the use of ladders, persons involved in the regulation of the use of ladders, ladder users and the general media, that ladders were effectively banned from use in the workplace. This was as a result of the imprecise wording of schedule 6 of the regulation which states: *Every employer shall ensure that a ladder is used for work at height only if a risk assessment under regulation 3 of the Management Regulations has demonstrated that the use of* ***more suitable*** *work equipment is not justified because of the* ***low risk*** *and the* ***short duration*** of use.

b. When the regulations were implemented many sectors of industry took the immediate decision to ban the use of ladders due to uncertainty or misinterpretation. There was no clear definition of "low risk" or "short duration" and regulatory guidance was initially vague, sparse and in some cases incorrect, and took some time to be developed and made widely available,

c. Although the HSE has subsequently tried to deliver a message that "ladders are not banned" and has made available more constructive and clearer guidance, the misinterpretation and misconception still continues in many sectors.

2. *What were the actual costs of implementation?*

a. This misconception that ladders were banned generated a substantial reduction in the demand for ladders which had a severe impact on the UK Ladder manufacture and supply industry. The review of potential costs of implementation failed to anticipate or consider this level of reduction and its effect on UK industry

b. Whilst there has been an obvious and considerable loss of revenue to UK ladder manufacturers and suppliers through an overall reduction in demand for ladder products in the workplace, there has also been a significant cost to the industry in combating the misconception that ladders are banned. The review of potential costs of implementation failed to anticipate or consider this issue.

c. There has been a considerable cost to some industry sectors who through misunderstanding and misinformation, initially moved away from the use of ladders and onto other forms of work equipment when in many circumstances they could have carried on using ladders more safely and also more efficiently. Following a move back to ladders in many sectors (as a result of a belated understanding of how ladders can continue to be used effectively and safely) there are now additional costs to reverse initial misinformed decisions. The review of potential costs of implementation failed to anticipate or consider this issue.

d. The UK implementation of the European Directive also appears to have been considerably more robust and rigorous when compared to mainland Europe. This has resulted in UK manufacturers, suppliers and contractors being at a severe disadvantage when attempting to sell into mainland Europe with UK specification equipment and work methods. This issue was not considered in the assessment of potential costs of implementation.

3. *How effective were the Regulations in achieving their objectives?*

a. There has been a considerable improvement in people's awareness of the dangers of working at height especially at low levels below 2 metres. The Ladder Association continues to fully support the legislation with regard to the removal of the 2m rule in previous legislation. This removal of the 2m rule has been the greatest success of the Work at Height regulations.

b. There has been a more gradual improvement in peoples understanding of the limitations of ladders at greater heights, and in certain tasks. There is also an improvement in peoples understanding of the need to select the correct ladders for work. This is a positive result of the Regulations.

4. *What were the unintended consequences or problems?*

a. When the regulations were implemented and as a result of the misconception that ladders were banned, there was a sudden demand for alternative products for low level access. Products were developed rapidly and with no appropriate standards in place to regulate their design. As a consequence, many of these products were poorly specified and designed and contained features that made them less safe than the ladders they replaced leading to a significant number of accidents. Users with no experience of these new products exhibited behavioural patterns in their use that were hazardous with many unfortunate results recorded. In this respect there was a failure to anticipate the potential of the regulations to create a panic situation that has initially reduced their effectiveness.

b. There was also a move to alternative access solutions which may have been seen as "more suitable" but in fact created a greater global risk. In industry sectors where ladders were banned as a result of uncertainty or misinterpretation, low risk and short duration tasks were often undertaken on more complex equipment where more people were at risk for longer periods creating a greater global or actuarial risk. This situation continues and further work is necessary to develop people's awareness of this issue.

c. Prior to implementation of the regulation in the UK, it was common knowledge that exactly the same issues had arisen in some mainland European countries where the regulation had been implemented earlier. However, the potential lessons that could have been learnt from these countries experiences were ignored and insufficient clarity was given in the wording of the regulation or the guidance that was made available at the time of UK implementation.

d. It is probable that the issues noted above have contributed to the lower than expected reduction in figures for falls from height.

5. *Ways in which the regulations could be simplified and made more cost-effective.*

a. Ladders remain an effective, efficient and safe tool in many applications for work at height. The Ladder Association and HSE message "If it's Right to Use a Ladder, Use the Right Ladder and Use it Safely" should continue to be promoted at all levels of UK Industry with the support of government. Although guidance is now clearer on this point, some of the wording of the regulation is still imprecise with respect to ladders and should be improved.

b. The Ladder Association proposes that the regulatory authorities continue to investigate the issues of global risks associated with the selection of other equipment which is seen as "more suitable" than ladders. The regulations should be reviewed with respect to this issue and clarified accordingly.

c. The need for effective training and proven competence in the use of ladders must be promoted by the regulators in the same way as it is for other types of access equipment. Although it is a relatively technically simple tool this does not remove the need to ensure people are adequately trained in it use. Schedule 6 should include specific requirements for training in the management, selection and use of ladders. The Ladder Association proposes that this measure would have a significant effect in reducing falls from heights.

6. *Dialogue with the HSE*

a. As a result of the regulations there has been an increased and beneficial development of partnerships between the various bodies involved with work at height following the formation of the Access Industry Forum of which the Ladder Association is a member together with the HSE.

b. Initial contact with the HSE prior to implementation of the regulations was difficult and some of the bodies selected for initial consultation were poorly chosen. However, since then the Ladder Association and the HSE have worked hard to develop a constructive relationship in which a continuous two way dialogue (including feedback on the results of the implementation) takes place either directly or through the Access Industry Forum.

If the committee has further questions relating to the Work at Height regulations with respect to ladders then the Association would be pleased to assist or provide further evidence.

September 2009

Memorandum submitted by Mike Ponsonby

Having earlier this year submitted 24 pages of evidence to the Department of Work & Pensions Enquiry into Fatal Injuries in the Construction Industry, chaired by Mrs Rita Donaghy, plus 32 photographs of so called "Accidents" just waiting for a place to happen, on this occasion I think I will try a different approach and in three sentences will attempt to summarise why we still have 224 fatalities in UK workplaces (HSE figure for 2008) and uncounted significant personal injuries.

1. The Health & Safety at Work Act 1974 and all of the legislation that flowed from it, gives UK workers all of the Statutory protection that we need in English Law to be protected from fatal or personal injuries in the workplace. So we don't need more legislation.

2. However, what we do need is Better Enforcement and Directors Duties for legislation without enforcement is a waste of time, money and paper.

3. The effect of this lack of enforcement, is that many UK Employers are openly Contemptuous of Safety Law, because they know that the possibility of a visit by a HSE Inspector is probably once every 12 years and the possibility of prosecution is so remote, that its more cost effective not to bother. Other than to insist that workers wear the cursory Hi-Viz vest and Hard Hat, while still performing highly dangerous tasks like steam cleaning the moss off the roof of a house in Stourbridge while working at height.

I could go on at length on this subject, but my discourse would not add one extra HSE Inspector to the payroll, nor will it save one man's life (224 killed at work in 2008). For only Parliament can resolve the problem of the lack of Directors Duties and Better Enforcement of Safety Law and that is precisely why I have tried this single issue approach.

Happy to make a much wider presentation on this humanitarian subject, just say where and when, so that I can be there?

September 2009

Memorandum submitted by the Prefabricated Access Suppliers & Manufacturers' Association (PASMA)

In response to your call for evidence for the post implementation review on the Work at Height regulations (SI2005/735), the Prefabricated Access Suppliers' & Manufacturers' Association (PASMA) submits the following for consideration:

1. *How clear were the requirements of the regulations?*

a. In the first instance, our manufacturing members had difficulty in understanding the requirements of the regulations relating to the prevention of falls during assembly, alteration and dismantling of access towers. However, prior to implementation of the regulations, in collaboration with the Health & Safety Executive, we were able to arrive at only two recommended methods which afford fall prevention during assembly, alteration and dismantling.

2. *What were the actual costs of implementation?*

a. The two methods of assembly, alteration and dismantling which PASMA / HSE have recommended as a result of the regulations mean that additional components are necessary to build access towers. On average, this adds some £200 to £400 per complete tower unit, however, the additional costs to *gear up* with the additional components for existing stockholdings has run into many hundreds of thousands, perhaps millions of pounds.

b. Whilst this has resulted in considerable cost for hire companies and those who own their own tower equipment who have had to purchase additional components to comply, on the positive side, this has also generated an equal income for manufacturers who have supplied the equipment.

c. Because the two assembly methods agreed by PASMA and the HSE were fundamentally and considerably different from previous practice, it was necessary to instigate a wide ranging information and education campaign. With assistance from the HSE, PASMA produced and distributed over 3,000 educational DVDs to explain how these methods worked. PASMA organised a countrywide road-show with seminars to educate and inform users, managers and health & safety professionals. The cost of this was some £20,000. This also necessitated a complete review and reissue of our training course materials and industry Code of Practice. We do not believe that these implications were considered in the assessment of potential costs of implementation.

d. The implementation of the European Directive appears to be rather more exacting in the UK in comparison to other European countries. In order to comply with UK regulations, manufacturers have had to alter their products and in effect then have a different product for sale outside the UK, this being counter to the principles of market harmonisation and placing our manufacturing members at a competitive disadvantage when trying to sell their products outside the UK. We do not believe that these implications were considered in the assessment of potential costs of implementation.

3. *How effective were the Regulations in achieving their objectives?*

a. It is our belief that there is a wider understanding and greater focus on work at height issues as a result of the regulations. By removing the 2.0m height rule and by applying the regulations pan-industry there has been a positive effect in ensuring that cognisance is given to the risks of falls from any height and in any work environment, not just the construction industry which has been a generally perceived view in the past.

4. *What were the unintended consequences or problems?*

a. An unintended consequence has been the dramatic increase in the use of prefabricated low level access units such as podium steps and folding tower units in preference to stepladders. Whilst these are ostensibly viewed as a "safer" alternative to stepladders because they generally provide a protected working platform, there have been issues in respect of their safe use. This has meant PASMA have had to design a training module for users of these units. Whilst the increased preference for these units has benefited our members who sell and rent the equipment, it has also attracted low cost, inferior products which have, on many occasions, been the cause of accidents. PASMA has had to produce a product standard for this equipment to set a quality and safety standard since none currently exists.

5. *Ways in which the regulations could be simplified and made more cost-effective.*

a. The regulations could be improved by removing any reference to a specific industry sector, such as construction.

b. The regulations could be improved by having a more efficient reporting system for falls from height to enable industry bodies and government departments to understand the effectiveness of training and other initiatives to reduce falls from height.

c. The need for effective training and proven competence is generally understood by those who use and manage access towers. A specific requirement for training and proof of competence would, in our opinion, improve the regulations and reduce the number of falls from height.

6. *Dialogue with the HSE*

a. In the period prior to the implementation of the regulations, PASMA collaborated closely with the HSE to agree a common approach to how the regulations would impact on the use of access towers. Since then, both through our involvement in the Access Industry Forum (which is the umbrella body for the lead industry associations involved in the UK work at height sector) and with direct lines of communication, we have enjoyed a close working relationship with the HSE, which we both continue to nurture.

We would be pleased to further elaborate on any points and to assist the Committee in any way we can.

11 September 2009

Memorandum submitted by David Thomas

1. Was the legislation easy to understand and apply to your situation?

1.1 In my opinion, the legislation was generally easy to understand (see INDG401, *The Work at Height Regulations 2005 (as amended), A brief guide*).

1.2 At the heart of the Regulations is the overriding principle that you must do all that is reasonably practicable to prevent anyone falling. Thereafter, and central to the duty of care placed upon those who control the work of others, is the obligation to follow a simple "hierarchy" when planning work at height (Reg 6); with *collective* protective measures to be given priority over *personal* protective measures, and measures that *prevent* a fall given priority over those that *minimize the height and consequences* of a fall.

1.3 In my opinion, an understanding of this hierarchy is essential. Correctly selecting work equipment for any activity at height means being able to justify why safer alternatives required by the hierarchy have been ruled out.

2. *Did it cost you more or less to implement than the Department suggested?*

2.1 I do not have available the final Regulatory Impact Analysis (Cost-Benefit Analysis) to be able to comment specifically upon this issue.

2.2 In my opinion, however, the extensive consultation process prior to the introduction of the Regulations served to focus minds on the challenges of working at height. This process resulted in the development of a wide range of new safety products that are—or are now becoming—more widespread in practice.

2.3 Within my own Company—a leading steelwork contractor—the introduction of the Regulations led to us developing:

(i) a "trailer edge protection system", fabricated within the Company, to prevent falls from trailers during loading/unloading (see HSE Case Study);

(ii) a proprietary handrail system (see Cellshield)—designed for ease of use and installation and to offer safety for the construction industry; and

(iii) ways of maximising the use of Mobile Elevating Work Platforms (MEWPs) during the erection of steelwork.

2.4 The latter, in particular, is an example that illustrates adherence to the principles laid out in the Regulations. On a congested site it can be difficult to operate MEWPs—generally accepted as a *collective* measure that prevent falls—and, inevitably, they have finite reach. Therefore, a temporary platform—that supports the MEWPs—has been designed and this is moved progressively upwards through the structure as steel erection progresses (see Mitsui Sumitomo Insurance Group Newsletter). This enables workers to reach connections on higher floors in greater safety than previously. In years past it was "custom and practice" to climb on open steelwork, using fall arrest equipment (a *personal* measure and thus lower down the hierarchy).

2.5 I am not able to quantify explicitly the cost of using these "MEWP frames". However, there has been an increase in programme and cost—not, sadly, shared by those who have been slow to follow—or, perhaps, do not wish to (making competition for jobs more difficult). That said, it has challenged our construction planners to examine their build sequence and we are now realising benefits, whilst retaining and maximising our use of MEWPs.

2.6 HSE's Research Report, *A technical guide to the selection and use of fall prevention and fall arrest equipment, Glasgow Caledonian University* (*Research Report 302, 2005*), contains a review of a number of the safety products then available. In my opinion, a review—and possible update—of this document would prove useful.

3. *Did the legislation achieve its stated objective?*

3.1 Yes. In my opinion, the decision to go beyond the requirements of European Council Directive 2001/45/EC, concerning minimum safety and health requirements for the use of equipment for work at height, was the correct one.

3.2 Consolidating and replacing all previous legislation was part of the HSC/E's wider strategy to reduce the number of accidents (see Re*vital*ising Health and Safety), in particular those due to falls from a height.

3.3 Part of the consultation process related to the withdrawal of the so-called "two-metre rule" (see Letter issued after the HSC Meeting on 12 October 2004). In my opinion, and despite some thoughts that goal-setting legislation would lead to reduced standards, this withdrawal has not been detrimental—as it now requires the risk of all falls to be evaluated.

3.4 The Work at Regulations 2005 provide an emphasis on "competence" (Reg 5) and, therefore, training. At the time, the impending introduction of the Regulations encouraged industry to "take the lead" in producing supporting advice, eg BS 8454, *Code of practice for delivery of training and education for work at height and rescue*, and the "Awareness Syllabus" developed by the Advisory Committee for Work on Height Training (ACWAHT).

3.5 The original Consultation Document (CD192, Annex B) set out proposals proposed "guidance" to assist in meeting the requirements of the Regulations and the steps required to manage work at height safely. This was not taken forward (other than, subsequently, a simple "plain English" guide (INDG401) and, for Construction, a "Question and answer brief".

3.6 On balance, and with the benefit of hindsight, I believe that this was the correct decision. It encouraged, and led to, the preparation—by trade associations—of much industry-specific guidance, including BS 8437: 2005, *Code of practice for selection, use and maintenance of personal fall protection systems and equipment for use in the workplace*.

3.7 This reliance on industry may have resulted in differing interpretations of the Regulations. In my opinion, therefore, it would be prudent for the HSE to revisit its "Falls from Height Inspection Topic Pack" (Dated January 2007) to ensure that it reflects relevant industry benchmarks (and amend, if required, any that do not meet expectations).

3.8 With the work by many organisations, including the HSE, to disseminate best practice—and reinforce the message that everyone has the right to work in safety—there should, in my opinion, be a structured follow-up evaluation into the effectiveness (or otherwise) of the Regulations (see Para 9.2, below). Only then—with, I believe, improvements now in place—will it be possible to judge whether the legislation has been truly effective.

4. *Were there any unintended consequences, or problems with the way the legislation worked?*

4.1 In my opinion, there are a number of "lessons learnt" from the introduction of the Regulations. In particular:

(i) a recognition as to the limited scope of the Directive, in terms of detail (eg scaffolding ladders and rope access). In addition, that some of it is poorly worded;

(ii) the additional work brought about by the application of the Regulations to climbing or caving instructors and their employers; and

(iii) the alleged "banning of ladders".

Directive

4.1.1 The Directive contains specific provisions for the use of ladders, scaffolding and "rope access and positioning techniques" only. In the UK, the latter is referred to as "industrial rope access"—as promoted by IRATA and outlined in BS 7985: 2002— and the term adopted in the Directive does not recognise other "work positioning" techniques (as detailed in BS 8437: 2005).

4.1.2 There is also some poor terminology, eg "mobile fall prevention system". In my opinion, this resulted from a poor understanding at the time—across much of Europe and by those drafting the Directive's proposals—of industrial rope access. The Regulations attempt to address these issues, but it has resulted in some "clumsiness" in the wording, in particular Schedule 5, Parts 2 and 3.

Amendment Regulations 2007

4.1.3 There was much debate, argument, lobbying and prevarication by the adventure activities industry over the application of the Regulations to climbing or caving instructors and their employers. In my opinion this was completely unnecessary; wasting much resource.

4.1.4 Those who work at height—whoever they are—should never forget that gravity is no respecter of persons. It affects everyone; too many times with disastrous consequences resulting in serious, permanent injuries or death.

4.1.5 More importantly, the two fundamental principles of work at height—"primary support" and "fall protection"—always apply.

4.1.6 As an aside, many of the advances in personal fall protection in industry have their origins in climbing and caving. The cross-fertilisation of equipment and techniques is beneficial.

Ladders

4.1.7 The alleged banning of ladders was, perhaps, "the one that nearly got away". In my opinion, there was a "fear of the unknown", ie how the Regulations would be enforced. There was also an over-zealous reaction by some—in particular Principal Contractors—in banning ladders on their sites. Whilst well-intentioned this resulted, in my opinion, from:

(i) an uncertainty about the best means of addressing what might be termed "short duration" and/or "low height" work;

(ii) a lack of detailed Guidance/ACoP from the HSE;

(iii) a lack of consistency and approach between Inspectors; and

(iv) poor consideration, on occasion, of "global risk", ie alternatives were creating too many other concerns and/or hazards.

4.1.8 In my opinion, HSE should consider further work on common "short duration" and/or "low height" work. Some advice is given by the HSE's "Work at height solutions" webpage. However, I remain to be convinced about the effectiveness of this initiative.

5. *Now you have experience of the legislation can you suggest ways in which it could be simplified or made to operate more cost-effectively?*

5.1 In my opinion, the Regulations—on balance—are simple, clear and effective. There could be clarification in some of the wording (see 4.1.1, above); however, this would mean amending the Directive.

5.2 I remain to be convinced about the cost-effectiveness—and proportionality—of the Regulations in respect of their application to "falls from vehicles". Within the steelwork industry, a number of different products and approaches have been developed. However, there are many difficult issues and none are sure whether we have taken "suitable and sufficient" measures.

6. *Are you aware of any arrangements that would enable you to give feedback on your practical experience of the legislation to the Department that issued it?*

6.1 Yes. Contact can be made with the Health and Safety Executive (on either technical, enforcement or policy issues).

6.2 In order to evaluate the effectiveness of the Regulations, and improvements or otherwise made over recent years, I would recommend strongly that HSE repeats the work undertaken in Research Report 116, Falls from height—prevention and risk control effectiveness (BOMEL Ltd., 2003).

6.3 This report describes a pan-industry study into the underlying influences on, and control of, falls from height. The falls accidents reported via RIDDOR, over a five-year period, were analysed and the views of key stakeholders obtained at structured workshops. The resulting analysis, and "influence network", gave an insight into: the underlying organisational and human factors influencing falls from height; risk control measures; and their potential effectiveness.

6.4 Have the Regulations, and product improvements, etc, made a difference? If so, how and what should be done next? A repeat of RR106 may provide the answers.

7. *Can you offer any other examples of Statutory Instruments that demonstrate good or bad practice in post-legislative review? Or that we might consider adding to our list for in-depth consideration?*

7.1 No response.

To conclude, my opinion is that the Regulations—whilst not perfect—are an important piece of legislation.

6 September 2009

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