

HOUSE OF LORDS

Merits of Statutory Instruments Committee

First Report of Session 2009-10

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The Select Committee on the Merits of Statutory Instruments

The Committee has the following terms of reference:

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

Members

The members of the Committee are:

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

Registered interests

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

Publications

The Committee's Reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/parliamentary_committees/merits.cfm

Contacts

If you have a query about the Committee or its work, please contact the Clerk of the Merits of Statutory Instruments Committee, Delegated Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email merits@parliament.uk. The Committee's website, www.parliament.uk, has guidance for the public on how to contact the Committee if you have a concern or opinion about any new item of secondary legislation.

Statutory instruments

The Government's Office of Public Sector Information publishes statutory instruments on the internet at www.opsi.gov.uk/stat.htm, together with an explanatory memorandum (a short, plain-English explanation of what the instrument does) for each instrument.

First Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

None.

INSTRUMENTS OF INTEREST

Draft Banking Act 2009 (Exclusion of Insurers) Order 2009

1. The Banking Act 2009 (“the Act”) establishes a special resolution regime (“SRR”), providing the Authorities (the Bank of England, the Treasury and the Financial Services Authority (“the FSA”)) with the tools to deal with banks that are failing, or are about to fail to meet, their threshold targets. This Order excludes insurers from the definition of “bank” in Part 1 and Part 2 of the Act. The Treasury has explained that it was never the Government’s intention for the SRR to cover insurers (see Appendix 1). However, the definition of “bank” in the Act has unintentionally allowed for that possibility, and the purpose of this Order is to provide clarity.

Immigration (Restrictions on Employment) (Amendment) Order 2009 (SI 2009/2908)

2. This Order amends the Immigration (Restrictions on Employment) Order 2007 (“the 2007 Order”) to allow an employer to accept an ID Card issued under the Identity Cards Act 2006 as evidence of the individual’s right to work in the UK. The Order came into force on 24 November 2009. However, the Explanatory Memorandum (paragraph 4.4) suggests a brief policy gap in that a limited number of Identity and Passport Service (IPS) and Home Office personnel (including contractors) have been able to apply for an ID Card since 20 October 2009; and employees of Manchester Airport Group working airside at Manchester Airport have been able to apply for an ID Card since 10 November 2009. IPS explains (see Appendix 2) that although 450 people applied for an ID Card issued under the Identity Cards Act 2006 between 20 October and 11 November, the individuals applying for ID Cards prior to this Order coming into force were already employed and therefore the ID Card would not have been needed to prove a right to work.

Child Support (Miscellaneous Amendments) (No. 2) Regulations (SI 2009/2909)

3. These Regulations correct an error which resulted in certain parents without custody overpaying maintenance for a year. The error arose due to different definitions of the term child being used in Child Benefit regulations and in the Child Support Regulations. These Regulations restore the policy intention that maintenance payments need not be paid after the child’s 19th birthday. The problem arose due to poor coordination between departments and the complexity of the underlying legislation, a matter on which this

Committee has commented before. We also note with concern that the error was only discovered after 3 years and only because the issue was raised by an MP on behalf of his constituent; the error was not picked up by the Department's own review processes. The Department estimates that overpayments were made in just over 2,700 cases. The Child Maintenance and Enforcement Commission will be refunding this to the paying parent, but it will not be recouped from the parent with custody, rather the estimated £1.1m will be paid out of the Commission's own budget. We regret that taxpayers are again paying for departmental errors.

Audiovisual Media Services Regulations (SI 2009/2979)

4. This instrument implements certain provisions of the Audiovisual Media Services (AVMS) Directive which are not already implemented in UK law or Ofcom's statutory codes. It extends the coverage of the existing Television without Frontiers Directive to impose similar standards on broadcasts made through other media, for example via satellite, up-link or the internet, and to include on-demand programmes such as the iPlayer services. The AVMS Directive establishes a common regulatory framework for all such services and sets out minimum content standards to which they must adhere. Ofcom will also be responsible for investigating complaints from other EU states where they receive material that is transmitted from the UK. The AVMS Directive also allows Member States to decide whether to permit product placement in broadcasting: the Government currently permit product placement in on-demand services and when incorporated in films originally made for the cinema, but is consulting further on whether or not to permit product placement more widely in television broadcasting.¹

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft Instruments requiring affirmative approval

Banking Act 2009 (Exclusion of Insurers) Order 2009

Crime (International Co-operation) Act 2003 (Designation of Participating Countries) (England, Wales and Northern Ireland) (No. 3) Order 2009

European Communities (Definition of Treaties) (1996 Hague Convention on Protection of Children etc.) Order 2009

National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009

¹ Consultation ends 8 January 2010 see proposals on DCMS website:
http://www.culture.gov.uk/reference_library/consultations/6421.aspx

Instruments subject to annulment

- SI 2009/2894 Nursing and Midwifery Council (Midwifery and Practice Committees) (Constitution) (Amendment) Rules Order of Council 2009
- SI 2009/2908 Immigration (Restrictions on Employment) (Amendment) Order 2009
- SI 2009/2909 Child Support (Miscellaneous Amendments) (No. 2) Regulations 2009
- SI 2009/2930 Occupational and Personal Pension Schemes (Authorised Payments) Amendment Regulations 2009
- SI 2009/2937 Magistrates' Courts (Drinking Banning Orders) Rules 2009
- SI 2009/2938 Materials and Articles in Contact with Food (England) (Amendment) Regulations 2009
- SI 2009/2956 Plant Health (Fees) (Forestry) (Amendment) Regulations 2009
- SI 2009/2964 Private Security Industry Act 2001 (Exemption) (Aviation Security) Regulations 2006 (Amendment) Regulations 2009
- SI 2009/2969 Export Control (Amendment) (No. 4) Order 2009
- SI 2009/2973 Railway Closures (Minor Modifications) Order 2009
- SI 2009/2974 Statistics of Trade (Customs and Excise) (Amendment) Regulations 2009
- SI 2009/2979 Audiovisual Media Services Regulations 2009
- SI 2009/2992 Public Contracts (Amendment) Regulations 2009
- SI 2009/2995 Limited Liability Partnerships (Amendment) (No. 2) Regulations 2009

APPENDIX 1: DRAFT BANKING ACT 2009 (EXCLUSION OF INSURERS) ORDER 2009: GOVERNMENT RESPONSE

Information from HM Treasury

Q1. *Why are you making this amendment now ie why didn't you exclude insurers on the face of the Banking Act 2009?*

A1. The Banking Act 2009 (“the Act”) establishes a special resolution regime (“SRR”), providing the Authorities (the Bank of England, the Treasury and the Financial Services Authority (“FSA”)) with the tools to deal with banks that are failing, or are about to fail to meet, their threshold conditions. (The SRR is also applied to building societies and may be applied to credit unions.)

The conventional way of defining a ‘bank’ in legislation (for example in tax law) is to refer to a UK institution that has a regulatory permission granted by the FSA to accept deposits, and then to refine the definition to exclude regulated bodies that do not carry out banking business. This is the approach taken in sections 2 and 91 of the Act.

Under the Financial Services and Markets Act 2000, institutions can apply for multiple permissions to carry on regulated activities such as accepting deposits and dealing in investments. Where institutions meet with the conditions for authorisation, the FSA will issue a permission for each institution that lists all the regulated activities the institution may undertake and any restrictions that apply to those activities. Most institutions that are authorised by the FSA to carry on insurance business also have the permission to accept deposits for the purposes of carrying on insurance business although they are prevented from carrying out banking business by European law.

As a result of the permission to accept deposits for the purposes of carrying on insurance business, insurance companies fall within the scope of the definition of “bank” in sections 2(1) and 91(1) of the Act. This means that theoretically the Authorities could exercise the SRR powers (referred to in paragraphs 4.1 to 4.3 of the Explanatory Memorandum) in relation to such institutions.

The Government believes that it is appropriate to exclude insurers from the definition of “bank” in sections 2(1) and 91(1) for the reasons set out below.

First, the powers under Part 1 of the Act are not designed to be used to resolve a failing insurance company. For example, the first three of the special resolution objectives (section 4) refer explicitly to ‘banking services’, ‘banking systems’ and ‘protection of depositors’; none of which are applicable to insurance companies (the other two objectives refer to the Government’s human rights obligations and protection of public funds). Various other provisions of Parts 1 to 3 of the Act would require certain modifications if they were to be applied effectively to insurers, owing to differences in the structure of insurance and banking institutions, and the way in which they carry out their business.

Second, as implied by its short title, the purpose of the Act is to deal with firms that carry out banking business, not insurance business. The published consultation documents refer to banks and building societies, not insurance companies, and application of the SRR to insurance companies was not substantively debated in the passage of the Banking Bill through Parliament.

The published statutory Code of practice (issued under section 5 of the Act), to which the Authorities must have regard in exercising the SRR powers, also refers only to banks and building societies.

For these reasons, the Government believes that it is appropriate to make this order to explicitly exclude insurers from the definition of “bank” in sections 2(1) and 91(1) of the Act.

Q2. *Have any insurers benefited from the provisions of the Act so far, or are likely to in the near future?*

A2. The Act builds on the Tripartite framework to enhance the Government’s ability to deal with crises in the banking system, to protect depositors and to maintain financial stability. The SRR is the centrepiece of the Act. All parts of the financial services industry benefit from the existence of an effective regime to resolve banks and building societies that are failing.

As the Committee may be aware, since the Act received Royal Assent in February 2009, the SRR powers have only been exercised once, in order to successfully resolve the Dunfermline Building Society. The powers have not been used in respect of an insurance company, and there are no plans to do so.

Like many industries, the UK insurance sector has been affected by the financial crisis. However, both the insurance industry and the UK’s prudential regulation regime for insurance have so far stood up well to testing economic conditions and the insurance industry continues to provide a vital contribution to the UK economy.

Q3. *Is there a policy intention to extend the provisions to insurers at any point?*

A3. There is currently no policy intention to extend the current provisions in the Banking Act to insurers.

Indeed, the Treasury has no express power in the Act to extend the SRR to insurers- the SRR applies to “banks” (as defined in sections 2 and 91), is applied with modifications to building societies (section 84), and may be applied, by order, to credit unions (sections 89 and 131).

November 2009

**APPENDIX 2: IMMIGRATION (RESTRICTIONS ON EMPLOYMENT)
(AMENDMENT) ORDER 2009 (SI 2009/2908): GOVERNMENT RESPONSE**

Information from the Identity and Passport Service

Q1. The Order comes into force on 24 November 09. However, paragraph 4.4 says that some IPS and Home Office people have been able to apply ID cards from 20 October 09 and some people working at Manchester Airport have been able to apply for ID cards from 10 November 09. Does this therefore mean that there is a period of over a month when an ID card would not suffice as evidence of an individual's right to work in the UK?

A1. The roll out of identity cards issued under the Identity Cards Act is being managed by commencement. On 22nd September 2009, a commencement order was made to allow some IPS and Home Office staff and their suppliers to apply for an identity card. This group is limited to those who are already employed. Hence, an identity card could not be used to prove eligibility to work in the UK at the time the individual applied for the position. That same commencement order enables employees of Manchester Airport Group (or those with an offer of employment) working in a restricted zone at Manchester Airport to apply for an identity card from 10th November. Again, the individuals applying for a card will have already had their right to work checked before they are issued with an identity card.

A further commencement order was made on 16th November 2009 which extends eligibility to those living or working in Greater Manchester from 30th November. In this instance, there is no pre-requisite to be employed (or have an offer of employment). As a consequence the amendment to the Immigration (Restrictions on Employment) Order 2007 is necessary to allow employers to be excused from a civil penalty if they check and copy an identity card, issued under the Identity Cards Act 2006, in accordance with the amended Order.

Q2. Do you how many people have applied for ID cards between 20 October 09 and 24 November 09?

A2. 450 people have applied for an identity card issued under the Identity Cards Act 2006 between 20th October 2009 and 11th November 2009.

Q3. In paragraph 4.6 you say that an ID card will be a document which will provide the employer with an excuse from a civil penalty should the individual not have the right to work in the UK. Isn't it the case that all ID cards issued under the ID Cards Act 2006 are issued to people with the right to work in the UK?

A3. No. Two types of card can be issued under the Identity Cards Act - the National Identity Card and the Identification Card. The National Identity Card is only issued to British citizens. The Identification Card will be issued to EEA and Swiss nationals, as well as some British citizens in exceptional cases. Under the transitional arrangements for accession state nationals, some EEA nationals do not have an automatic right to work in the UK and employers are therefore required to carry out additional checks to establish whether the person has registered with the Home Office (nationals of Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia) or been granted a work authorisation (nationals of Bulgaria or Romania), or is exempt from the requirements of the relevant accession regulations.

November 09