HOUSE OF LORDS

Merits of Statutory Instruments Committee

23rd Report of Session 2010-11

Drawing special attention to:

Draft Code of Recommended Practice on Local Authority Publicity

Employment and Support Allowance (Limited Capability for Work and Limited Capability for Work-related Activity) (Amendment) Regulations 2011

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The Select Committee on the Merits of Statutory Instruments

The Committee has the following terms of reference:

(1) The Committee shall, subject to the exceptions in paragraph (2), consider—

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (3).

(2) The exceptions are—

(a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;

(b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;

(c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.

(3) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may inappropriately implement European Union legislation;

(d) that it may imperfectly achieve its policy objectives.

(4) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (3) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

The members of the Committee are:

Rt Hon. the Baroness Butler-Sloss GBE
The Lord Eames OM
Rt Hon. the Lord Goodlad (*Chairman*)
The Baroness Hamwee
The Lord Hart of Chilton
The Lord Lucas
The Lord Methuen
Rt Hon. the Baroness Morris of Yardley
The Lord Norton of Louth
The Lord Plant of Highfield
Rt Hon. the Lord Scott of Foscote

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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 National Archives publishes statutory instruments on the internet on behalf of the Government at www.legislation.gov.uk/uksi, together with an explanatory memorandum (a short, plain-English explanation of what the instrument does) for each instrument.

Twenty-third Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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

A. Draft Code of Recommended Practice on Local Authority Publicity

Date laid: 11 February 2011
Parliamentary Procedure: affirmative

Summary: The Publicity Code updates and consolidates previous instructions on local authority publicity, making a single document relevant to all tiers of local government. It contains specific guidance on the frequency, content and appearance of local authority newsletters, seeks to prevent councils using paid lobbyists and requires publication to be objective and even-handed. A draft version of the Code was considered by the Commons' Communities and Local Government Select Committee which found little evidence to support the DCLG's view that there was a need to restrict Local Authority publications to four issues a year to prevent unfair competition with local newspapers. The enforcement arrangements seem rather attenuated and it is not clear how effective they will be in supporting the revised Code. The House may therefore wish to press DCLG for clarification on these points.

This instrument is drawn to the special attention of the House on the grounds that it gives rise to issues of public policy likely to be of interest to the House.

1. This Code of Practice is laid by the Department for Communities and Local Government (DCLG) under the Local Government Act 1986 and is subject to approval by affirmative resolution. It has been laid with an Explanatory Memorandum (EM). When in draft the Code was considered by the Commons' Communities and Local Government Committee, which published a report on it on 27 January[1]. The Government response to both the consultation and Committee report was published on 11 February.[2]

2. The Government states that the Publicity Code updates and consolidates the previous instructions, making a single document relevant to all tiers of local government. It aims to improve transparency and imposes tougher rules to stop the proliferation of council newspapers causing unfair competition with local newspapers. The Code contains specific guidance on the frequency, content and appearance of local authority newsletters, seeks to prevent councils using paid lobbyists and requires publications to be objective and even-handed.

3. The key findings of the Commons' Communities and Local Government Select Committee report on the consultation draft of the Code were:

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[1] A copy is available from the Commons' DCLG Committee's website : http://www.parliament.uk/business/committees/committees-a-z/commons-select/communities-and-local-government-committee/

[2] A copy is available from the DCLG website http://www.communities.gov.uk/publications/localgovernment/publicitycodegovresponse

- that it found little evidence to support the view that there was unfair competition between Local Authority publications and local newspapers;
- that quarterly issues was probably the appropriate limit but issuing limits at all seemed potentially in conflict with the Government's "localism" agenda;
- that the interaction of all forms of local media needed to be studied properly;
- that consideration of the use of lobbyists was important but that this Code was not the appropriate tool by which to apply constraints on such activity.

4. The main change that the DCLG has made in response to that report and the consultation exercise is to allow parish council newsletters to be published monthly.

5. The Publicity Code of Practice aims to reduce unfair competition between local newspapers and Local Authority publicity – however, the degree of harm that is actually being caused is unclear. The impact assessment estimates that such newspapers stand to gain £1.2m from additional advertising and £1.3m for the publication of statutory notices if local authority newsletters are restricted to being published four times a year. Indications from the Commons' report are that it is only a few councils' publications which are currently causing problems (although the Local Government Association's response to the consultation puts the number publishing more than quarterly at 20%). **The House may wish to seek a better explanation from DCLG of what evidence leads them to conclude that there is currently unfair competition and why they consider four issues a year represents the right balance between the council's legitimate need to give information to local residents and the interests of commercial newspapers.**

6. The Committee was unclear whether the fault the Code aims to cure was the expenditure on lobbying or the lobbying itself. DCLG officials responded that *"there is nothing in the Code to prevent an authority lobbying for something, but DCLG are seeking to ensure that they do not use taxpayers' money to pay commercial lobbyists to lobby for them. Any material published for the purposes of lobbying would be caught by the Code's requirements in relation to published material rather than the requirements on the employment of lobbyists."*

7. However if the Code was breached paragraph 8.23 of the EM states that *'there is no power in the 1986 Act to provide for any enforcement mechanism'*. DCLG explained to the Committee that:

> *"if a person considers a local authority has failed to have regard to the Code (the statutory duty is to have regard to the Code) then the person may approach the local authority's auditor. The auditor's powers under the Audit Commission Act 1998 include powers to: apply to the court for a declaration that an item of account is contrary to law; consider whether to issue an advisory notice or to make an application for judicial review; or consider whether a written recommendation or public interest report should be made to the audited body requiring it to be considered and responded to publicly. Additionally employees of authorities are charged with specific functions under primary legislation to ensure that the authority acts*

lawfully - the monitoring officer, the chief finance officer and the head of paid service. They have powers to produce reports which have to be considered by the full council."

8. These arrangements seem rather attenuated and no evidence is given on how successfully these powers have been used to prevent abuse in the past, so it is not clear how effective they will be in supporting the revised Code. **The House may wish to seek further information on how often and how effectively this enforcement mechanism has been used in practice.**

Conclusion

9. While simplification and codification of legislation is always welcome, it is not entirely clear why this Code should be a legislative priority. DCLG do not give supporting evidence to show that the existing arrangements have failed to maintain an appropriate balance, nor why limiting local authorities to four issues a year will resolve the matter. The enforcement arrangements seem rather attenuated and, if breached, it is not clear how effective they will be in supporting the revised Code. **The House may therefore wish to press DCLG for clarification on these points.**

B. Employment and Support Allowance (Limited Capability for Work and Limited Capability for Work-related Activity) (Amendment) Regulations 2011(SI 2011/228)

Date laid: 16 February 2011
Parliamentary Procedure: negative

Summary: It is clear that DWP see the implementation of the Employment and Support Allowance (ESA) and the Work Capability Assessment (WCA) that underpins it as an evolving programme. In line with best practice they have reviewed the initial performance of the WCA and, having found that it is not working as well as expected, are keen to revise it, which is laudable. However, many of those involved in the consultation process, including those with considerable expertise, are expressing strong views that the current Regulations are premature and that piecemeal change will cause more harm than good. First, because there is insufficient data from the initial trial of the migration of Invalidity Benefit claimants to ESA to be clear whether the changes proposed will be an improvement. Second, there are concerns that the WCA system has not bedded in fully and the operation of the system needs to achieve greater consistency before further changes are added. Third, that the current changes may not maintain the distinctions set out in the Act between the two levels of capability and may over-estimate many individuals' actual ability to work. And lastly, there are serious concerns about the effect on already vulnerable people from repeatedly changing the WCA eligibility descriptors. ***The House may wish to seek further information from DWP on the rationale for putting forward these Regulations now.***

These Regulations are drawn to the special attention of the House on the grounds that they give rise to issues of public policy likely to be of interest to the House and may imperfectly achieve the policy objective.

10. These Regulations are laid by the Department of Work and Pensions (DWP) under the Welfare Reform Act 2007 and are accompanied by an Explanatory Memorandum (EM) and an Impact Assessment (IA). A report by the Social

Security Advisory Committee (SSAC), a statutory consultee has been published with the instrument.[3]

Background

11. An applicant's entitlement to Employment and Support Allowance (ESA) is assessed on the basis of a Work Capability Assessment (WCA). The WCA is based on the premise that eligibility should not be determined by a person's condition, but rather by the way that the condition limits their functional capability. Evidence for an individual's capability for work is in most cases gathered through a questionnaire completed by the claimant, an assessment carried out by Atos Healthcare, any additional evidence supplied by the claimant and - in some cases - through evidence requested by Atos from the claimant's relevant healthcare professional.

12. The assessment focuses on a claimant's capability and scores points against a series of functional descriptors:

- If a claimant scores more than 15 points (see the descriptors in Schedule 1 of these Regulations) they are found to have limited capability for work and are placed in the **Work-Related Activity Group.** They are required to take part in work-focused interviews with a personal adviser to help them prepare for suitable work. Individuals are also automatically treated as having limited capability for work for a number of other reasons, such as if they are a hospital inpatient.
- More severely disabled people may be assessed as having limited capability for work-related activity in addition to limited capability for work if their functional capability is shown to meet any of the criteria set out in Schedule 2 of these Regulations. Additionally, individuals who are terminally ill or undergoing particular kinds of chemotherapy are treated as having limited capability for work-related activity. They are placed in the **Support Group**, they will not be expected to take part in any work but may participate in return to work activity on a voluntary basis.
- People who are assessed as not having limited capability for work are disallowed the benefit and required to claim Jobseeker's Allowance instead with its obligations to seek work and attend activities likely to improve employability.

13. While some individuals are clearly capable of a range of jobs and others are clearly too ill or disabled to undertake any work, the appropriate means of assessing the abilities of those falling in the grey area in between has been subject to heated debate. This distinction also has a financial impact as the benefit rates differ:

Weekly Payment for a single person over 25	
Jobseekers' Allowance	£65.45
ESA in the Work Related Activity Group	up to £91.40
ESA in the Support Group	up to £96.85

[3] On the official documents website:
http://www.official-documents.gov.uk/document/other/9780108509698/9780108509698.asp

Previous ESA regulations

14. The broad policy intention is to reduce the numbers claiming benefits on the grounds of incapacity for work and to help move them closer to the job market through training, work experience, etc. The policy has continued in the same broad direction despite the change of government in 2010.

15. The original **Employment and Support Allowance Regulations 2008 (SI 2008/794)** setting out the conditions for new claimants were examined in our 18th report of session 2008-09 and included the comment: "*The Regulations are complex and claimants may find it difficult to understand the operation of this allowance. The Government need to do more to explain how this system will work and to address the concerns of interest groups that are in a position to offer significant assistance in helping claimants understand the new system.*"

16. The plans to "migrate" all existing Invalidity Benefits claimants to the new system were laid at the end of March 2010 in the **Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) Regulations 2010 (SI 2010/ 875)**, which were drawn to the special attention of the House in our 1st report of this Session: "*Over the period October 2010 to March 2014 all those with existing claims for incapacity benefits will be reassessed using the new Work Capability Assessment. The Department estimates that 23% will be found fit for work and will be required to make a new claim for Jobseeker's Allowance (JSA) with its obligation to participate in activities to improve job prospects. The rest will be moved across to ESA. The Social Security Advisory Committee has expressed particular concerns about the Department moving ahead with the initiative without a solid evidence base for either the decision to migrate or the proposed migration arrangements as it believes that DWP has underestimated the support required by this vulnerable group of claimants. The evaluation of ESA for new claimants, the first phase of the programme, will not be complete until 2011 by which time the proposed migration arrangements will have commenced.*"

These comments remain relevant to the current regulations being put forward by the new Administration.

Current and future Regulations

17. The Work Capability Assessment aims to measure an individual's physical and mental ability to deal with tasks that might be encountered in a work place, using a set of descriptors that allocate points according to the severity of the dysfunction. The Impact Assessment for the current Regulations explains that their policy objective "is to ensure the Work Capability Assessment is achieving its aim of correctly identifying an individual's capability for work". The Regulations modify some of the descriptors in the light of a Department-led review[4], which considered in particular how effectively the WCA system takes into account fluctuating conditions, and that some individuals adapt more effectively than others.

18. In addition, the Welfare Reform Act 2007 committed the Government to commissioning an independent review annually for the first five years of the ESA's operation. The first of these reviews (which also included 400 items of evidence from the public), led by Professor Malcolm Harrington, an Occupational Health expert, was published on 23 November 2010.[5] It found

[4] http://www.dwp.gov.uk/docs/work-capability-assessment-review.pdf published 29 March 2010

[5] http://dwp.gov.uk/docs/wca-review-2010.pdf

that the WCA was not working as well as it should and made a substantial series of recommendations for improving it. The DWP state that they have accepted these recommendations, and are *"now working to implement them as quickly as possible"*. The DWP also states that implementing the recommendations of the review will allay many of the concerns raised by the SSAC report (EM para 8.8). Professor Harrington's second stage review will consider the descriptors in relation to mental health and fluctuating conditions and will report later in 2011. DWP expect to lay further regulations to accommodate those recommendations towards the end of the year.

Views from interested organisations

19. The SSAC report welcomes some aspects, for example the new regulations which place those on chemotherapy in the Support Group. However it has serious concerns about other aspects, in particular:

- The streamlining of certain descriptor groups has lost necessary subtleties for example those dealing with memory and concentration, and those dealing with walking, standing and bending, which is likely to over-estimate an individual's capacity. (recommendations 13 & 14)
- The current descriptors are also inadequate in measuring the capacity of those with mental health conditions, sensory disabilities or fluctuating conditions. (recommendations 11& 20)
- There needs to be closer correlation between the tests and normal work situations – someone who needs to be accompanied to familiar places by a helper is not sufficiently adapted to their condition to be capable of work yet this only scores 9 points.(recommendation 15)
- As well as the evidence from the First Harrington review, there are clear indications that the WCA has not yet bedded in – for example 40% of appeals against a decision that an individual is capable of work are currently upheld, which suggests that the WCA guidance is not being applied correctly or consistently. (recommendation 15)

20. In consequence, the SSAC consider that it would be premature to make the majority of the changes to the descriptors. They believe they should be deferred and reviewed once the second stage of the independent review of the WCA has concluded and in the light of better evidence of the outcome of the trial of the migration of Invalidity Benefit claimants to ESA (which only commenced in October 2010).

21. The Disabilities Benefits Consortium, MIND, the Multiple Sclerosis Society and the Royal National Institute for the Blind have also sent in submissions that support this view[6]. All of them make the point that although they were involved in one or more of the reviews they did not feel sufficient account was taken of their expert views and they did not subscribe to the recommendations made. The submissions are published at Appendix 1 and provide examples, based on case studies from their areas of expertise, that illustrate why a particular descriptor could over-estimate a person's capacity to operate in a normal work environment. For example:

[6] These are variously endorsed by Action for Blind People, ME Association, Parkinson's UK, National Aids Trust and Arthritis Care

- the perspective on work skills needs to be wider - someone might be able to pack boxes all day but not be able to competently find their way to the factory canteen
- people with a limited capability (e.g. blind) may be able to work but in a very circumscribed set of jobs and there is an insufficient supply of those jobs in a depressed job market
- pushing "borderline" people towards work may have negative consequences in many cases both on their finances and their self esteem if they are repeatedly rejected by employers
- the changes to the descriptors do not easily allow for multiple conditions - which may involve mental as well as physical conditions

22. Correspondents conclude that the changes are premature and should wait for the second phase of the Harrington review. Implementing these changes and the further set planned for later this year would mean the descriptors would be radically changed twice within the space of just one year. *"This would clearly be extremely unfair on those people being assessed in the interim, and risks a very high level of appeals, and potential judicial review cases, not to mention confusion, anxiety and frustration amongst claimants, professionals carrying out the WCA, and those supporting claimants through ESA applications."* (MS Society)

23. Some also question whether the latest proposals conform with the criteria set out in the Act:

> *"These regulations set such a high threshold for eligibility for ESA that they effectively transform the 'Limited Capability for Work' test into a 'Limited Capability for Work Related Activity' test, losing distinction between the two tests. This undermines the intention within the 2007 Welfare Reform Act, that there should be two distinct groups of claimants; one moving towards work (Work Related Activity Group), the other with no conditionality (Support Group). Under the regulations, we believe that the numbers of disabled people able to qualify for the Work Related Activity Group would drop dramatically, as whole groups of people are largely excluded by the eligibility threshold." (RNIB)*

Conclusion

24. It is clear that DWP see the implementation of the ESA and the Work Capability Assessment as an evolving programme. In line with best practice they have reviewed the initial performance of the WCA and, having found that it is not working as well as expected, are keen to revise it, which is laudable. However many of those involved in the consultation process, including those with considerable expertise, are expressing strong views that the current Regulations are premature and that piecemeal change will cause more harm than good. First, because there is insufficient data from the initial trial of the migration of Invalidity Benefit claimants to ESA to be clear whether the changes proposed will be an improvement. Second, there are concerns that the WCA system has not bedded in fully and the operation of the system needs to achieve greater consistency before further changes are added. Third, the current changes may not maintain the distinctions set out in the Act between the two groups and may over-estimate many individuals' actual capability for work. And lastly, there are serious concerns about the effect on already vulnerable people from repeatedly changing the WCA eligibility descriptors. **The House may wish to seek further information**

from DWP on the rationale for putting forward these Regulations now.

[A further instrument, the draft **Employment and Support Allowance (Work-Related Activity) Regulations 2011** was laid on 28 February. The Regulations will enable the Secretary of State to require those claimants in the Work-Related Activity group to undertake work-related activity and to impose benefit sanctions on those who fail to comply without good cause. The provisions will not apply to those in the Support Group. These Regulations will be considered at the Committee's next meeting.]

OTHER INSTRUMENTS OF INTEREST

Draft Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011

25. The main change in these draft Regulations is to repeal the legislation which currently permits an employer to terminate the employment of an employee who reaches 65 without that being deemed unfair dismissal or unlawful age discrimination (provided that the employer follows a statutory notification procedure). The Explanatory Memorandum (EM) says that there has been considerable public interest in the Government's decision to phase out the default retirement age with, for example, over 600 responses to the public consultation and widespread coverage in the press (paragraph 7.2). The draft Regulations have been laid with a detailed Impact Assessment, and the Government estimates that the overall impact on business, charities, voluntary bodies and the public sector will be positive, with increased tax receipts and wider labour supply benefits (EM paragraphs 10.1 and 10.2).

Draft Equality Act 2010 (Public Authorities and Consequential and Supplementary Amendments) Order 2011

26. This draft Order amends the Equality Act 2010 ("the 2010 Act") to add to the list in Schedule 19 of public authorities which are subject to the public sector equality duty under section 149 of the Act. This duty includes requirements on public authorities to eliminate discrimination, advance equality of opportunity, and to foster good relations between persons who share a protected characteristic and persons who do not share it. The draft Order extends the duty to around 100 additional bodies, including: Financial Services Authority; ACAS; Bank of England (in respect of its public functions); BBC and Channel 4 (except their functions relating to the provision of a content service or commercial activities); chief constables of a police force maintained under section 2 of the Police Act 1996; Parole Board for England and Wales; and the Civil Aviation Authority. It also creates some new categories, including one for regulators, and extends the duty to four cross-border Welsh authorities: the Environment Agency, NHS Blood and Transplant, the NHS Business Services Authority and the Student Loans Company Limited. The draft Order also makes a number of consequential amendments to the 2010 Act and corrects some inadvertent omissions and drafting errors. The Committee has received a submission from 'The

Christian Institute' which is available on the Committee website[7]. They argue that the extension of the duty to Academies by this draft Order would be a mistake, as it would subject them to excessive bureaucracy and expense, distract them from their core function and expose faith-based academies to hostility from campaign groups.

Draft Greater Manchester Combined Authority Order 2011

27. This is the first Order under Part 6 of the Local Democracy, Economic Development and Construction Act 2009, which provides for the establishment of combined authorities. Combined authorities are to be bodies with their own legal identity, able to take economic development, regeneration and transport decisions across all or part of the combined area and to carry out statutory functions (such as the functions of an integrated transport authority). The Greater Manchester Combined Authority will consist of 10 metropolitan district councils in the area: Bolton, Bury, Manchester, Oldham, Rochdale, Salford, Stockport, Tameside, Trafford and Wigan. It will replace the current Greater Manchester Integrated Transport Authority, which is abolished, and take over responsibilities for economic development and regeneration from the existing voluntary Association of Greater Manchester Authorities (AGMA). Various reviews[8] have found that the previous arrangements have not worked as efficiently as expected given the size of the sub-region's economy and they concluded that better integration of decision-making was key to unlocking this potential. Costs will be met through the transport levy or through a separate contribution for economic development and regeneration costs (see articles 5 & 6), assessed in proportion to the population of each authority. The Combined Authority will not involve increased costs as much of the infrastructure to support the authority is already in place and, through sharing and avoiding the duplication of services, is expected to lead to considerable efficiency savings.

Draft Legal Services Act 2007 (Approved Regulators) Order 2011

28. This Order designates the Institute of Legal Executives (ILEX) as an approved regulator for the purpose of the conduct of litigation. This will enable ILEX to permit properly qualified and trained members to conduct litigation in line with its regulatory arrangements. The extent to which members of ILEX can exercise these new rights in practice is, however, defined by ILEX's own regulatory framework which must be approved by the Legal Services Board. The reason for the designation being made now is to enable ILEX to regulate the conduct of litigation by Crown Prosecution Service Associate Prosecutors who, by definition, will be carrying out criminal litigation only. ILEX's current regulatory arrangements do not allow it to permit any other of its members to conduct litigation of any kind (whether civil or criminal). However, if the instrument is made, it will then be open to ILEX to apply to the Legal Services Board to amend its regulatory framework (under Part 3 of Schedule 4 to the Legal Services Act

[7] http://www.parliament.uk/business/committees/committees-a-z/lords-select/merits-of-statutory-instruments-committee/publications/

[8] The Manchester Independent Economic Review published in April 2009 and the subsequent statutory reviews carried out under the Local Transport Act 2008 and the Local Democracy, Economic Development and Construction Act 2009.

2007) to widen both the scope of the litigation rights which it can authorise, and the categories of its membership to which that authorisation can be given. ILEX has, in fact, already made such an application (in anticipation of the instrument) seeking approval to authorise suitably qualified Fellows of ILEX to undertake civil and family litigation. This application will be subject to the approval process set out in Schedule 4, under which the Legal Services Board may seek advice from any person it considers appropriate on whether the application should be granted. Any such advice must be published and the applicant may make further representations in response. The Board must then make a decision on whether to approve the application, which it can do in whole or in part.

Draft Licensing Act 2003 (Royal Wedding Licensing Hours) Order 2011

29. This draft Order extends the hours during which licensed premises can be used for certain licensable activities during the period from 29 April 2011 to 1 May 2011. The draft Order is made under Section 172 of the Licensing Act 2003, and marks the occasion of the marriage of His Royal Highness Prince William and Miss Catherine Middleton on 29 April 2011. The Government consulted on these proposals between 12 January and 26 January this year. The Explanatory Memorandum (EM) says that the majority of respondents were opposed on the grounds that there would be an increase in late night crime and disorder and public nuisance, and increased policing costs (EM paragraph 8.1). However, the EM says that although the Home Secretary understood these concerns, she felt that they did not represent the views of the majority of the people given the positive response to the consultation in the media (EM paragraph 8.2).

Draft Media Ownership (Radio and Cross-media) Order 2011

30. This Order proposes to deregulate the provisions which govern the ownership of local newspapers, radio and television licences by relaxing the current restrictions on owning more than one local or national radio multiplex licence; a regional Channel 3 licence together with one or more local newspapers with a 20% local market share; or owning more than one local radio licence and/or local newspaper and/or regional Channel 3 licence with 50% or more of the local market share. The Order implements recommendations made by an Ofcom review in 2009 and a Commons' Culture, Media and Sport Select Committee report in March 2010.[9] The proposed changes aim to maintain a healthy and plural local media but enable some economies of scale in their high staffing and premises costs in recognition that income from local advertising is falling.

Draft Guidance on matters to be taken into account in determining questions relating to the definition of disability

31. The Equality Act 2010 prohibits discrimination in relation to *"a protected characteristic"* in a range of circumstances including access to services and

[9] Future for local and regional media 4th report of Session 2009-2010
http://www.publications.parliament.uk/pa/cm200910/cmselect/cmcumeds/43/4302.htm

public functions, premises, work education associations and transport. Disability is one of these characteristics and this guidance is designed to help adjudicators determine whether someone is disabled for the purposes of the legislation. To assist adjudicators the Guidance defines – with illustrative examples – what is meant by "*impairment", "substantial", "long-term*" and "*normal day to day activities*". The guidance follows the draft negative procedure which means that it can only be made once it has laid before the House for 40 days in draft without objections.

Armed Forces Redundancy Scheme 2006 and the Armed Forces Redundancy Etc. Schemes 2010 (Amendment) Order 2011(SI 2011/208)

32. This Order amends the two redundancy compensation schemes for the regular Armed Forces – the Armed Forces Redundancy Scheme 2006 ("the 2006 Scheme") and the Armed Forces Redundancy Scheme 2010. The Order follows the Strategic Defence and Security Review which will lead to manpower reductions across all three Services, which the Explanatory Memorandum (EM) says cannot be managed by the usual manning regulators (EM paragraph 7.2). The EM states that a planned redundancy programme is expected to begin in April 2011 and to last for approximately four years (EM paragraph 7.2). The amendments made by this Order include: reflecting the fact that there are now two types of paternity leave, being ordinary paternity leave and additional paternity leave; ensuring that members of the Gurkha Pension Scheme are excluded from the 2006 Scheme; and that compensation can now be paid to officers of at least the rank of Commodore, Brigadier or Air Commodore who have been notified that they are directed to take early retirement by the Defence Council.

Apprenticeship (Specification of Apprenticeship Standards for England) Order 2011 (SI 2011/219)

Apprenticeship Sectors (Specification) Order 2011 (SI 2011/220)

33. The Apprenticeships (Specification of Apprenticeship Standards for England) Order 2011 brings into effect the Specification of Apprenticeship Standards for England (SASE) ("the document"). The document is a specification of requirements that must be met by an apprenticeship framework to be issued as a recognised English framework, and has been prepared and submitted by the Chief Executive of Skills Funding. The document has been published by the Secretary of State and can be found on the website of the Department for Business, Innovation and Skills[10]. The Apprenticeship Sectors (Specification) Order 2011 specifies the apprenticeship sectors in England and Wales. The Explanatory Memorandum (EM) says that the purpose of specifying apprenticeship sectors is: to ensure that apprenticeship frameworks may be issued across the full range of skills, trades and occupations; and to support the requirement within the Apprenticeships, Skills, Children and Learning Act 2009 that

[10] http://www.bis.gov.uk/assets/biscore/further-education-skills/docs/s/11-521-specification-apprenticeship-standards-england.

apprenticeship frameworks within a sector may be issued by only one English or Welsh Issuing Authority (EM paragraph 7.2).

CRC Energy Efficiency Scheme (Amendment) Order 2011 (SI 2011/234)

34. This Order is primarily being introduced to postpone the second phase of the CRC Energy Efficiency Scheme ("the CRC") and to action initial simplification measures to the scheme. The CRC is a UK-wide scheme aimed at reducing carbon emissions through improving energy efficiency in large public and private sector organisations. The CRC was introduced through the CRC Energy Efficiency Scheme Order 2010, which was drawn to the special attention of the House by the Committee on the ground that it gave rise to issues of public policy likely to be of interest to the House [9th Report of Session 2009-10, 4 February 2010]. The Explanatory Memorandum says that the Government has committed to review the design and operation of the scheme in light of stakeholder feedback about its perceived complexity (paragraph 7.2). The Impact Assessment (IA) states that the policy objective of this Order is primarily to extend the scheme's introductory phase by 12 months and postpone the commencement of the second phase by 24 months in order to provide a window for the simplification review (IA page 1).

Promotion of the Use of Energy from Renewable Sources Regulations 2011 (SI 2011/243)

35. These Regulations are part of the measures taken to transpose the EC Renewables Directive in the UK. The main SI transposing this Directive in the UK is the Renewables Obligation Order 2009, which was drawn to the special attention of the House by the Committee on the ground that it gave rise to issues of public policy likely to be of interest to the House [8th Report of Session 2008-09, 5 March 2009]. The measures in these Regulations include duties on the Secretary of State for energy and energy sources: to introduce measures effectively designed to ensure the indicative targets as set out in the Schedule are met; to ensure that measures are taken to inform the public of the benefits and practicalities of generating and using energy from renewable sources; and to take steps to ensure that new public buildings (and those undergoing major renovation) fulfil an exemplary role. The House may be interested in the Government's detailed explanation of this latter duty and how it may relate to the Palace of Westminster (see Appendix 2).

Police Act 1996 (Equipment) Regulations 2011 (SI 2011/300)

36. These Regulations require the police service to buy certain equipment through specified contractual arrangements. The equipment covered by the Regulations includes: body armour; vehicles; IT commoditised hardware; and commercial off-the-shelf software. The Regulations are being made under section 53(1) and (1A) of the Police Act 1996, and are the first to be made under this section. The Explanatory Memorandum (EM) says that the Regulations are being made to improve the value for money obtained by the police in purchasing the specified equipment (EM paragraph 4.2). They follow the Comprehensive Spending Review of 20 October 2010 resulting in

the Home Office facing cuts over the next four years - the EM says the police will have to contribute through substantial savings (paragraph 7.2). The Government estimates the likely savings flowing from the implementation of these Regulations as £14 million per annum by 2013/14 (EM paragraph 7.4).

Local Authorities (Alteration of Requisite Calculations) (England) Regulations 2011 (SI 2011/313)

37. These Regulations amend the components of calculations set out in the Local Government Finance Act 1992 and the Greater London Authority Act 1999 which provide how billing authorities, major precepting authorities and the Greater London Authority are to calculate their budget requirements and council tax. (A major precepting authority is an authority that exercises local government functions but does not collect council tax itself; for example, a county council in an area where there is a district council, or a combined fire authority. It issues a precept to a billing authority, which then collects council tax on its behalf.) Similar regulations are made each year immediately following the approval by the House of Commons of the annual Police Grant Report and Local Government Finance Report. The Department for Communities and Local Government is proposing changes to the requisite calculations in the Localism Bill (at the time the instrument was laid these were in clauses 58 to 64 and Schedule 7 of that Bill) to replace the obligation to calculate a budget requirement for a financial year with an obligation to calculate a council tax requirement. The proposals are intended to place local authority requisite calculations on a simpler footing and to avoid the need for a set of Alteration of Requisite Calculations Regulations each financial year. If the clauses are approved by Parliament the intention is that they will be brought into force in 2012/13.

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.

<u>Draft Instruments subject to affirmative approval</u>

Draft Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011

Draft Equality Act 2010 (Public Authorities and Consequential and Supplementary Amendments) Order 2011

Draft Greater Manchester Combined Authority Order 2011

Draft Guardian's Allowance Up-rating (Northern Ireland) Order 2011

Draft Guardian's Allowance Up-rating Order 2011

Draft Tax Credits Up-rating Regulations 2011

Draft Legal Services Act 2007 (Approved Regulators) Order 2011

Draft Licensing Act 2003 (Royal Wedding Licensing Hours) Order 2011

Draft Media Ownership (Radio and Cross-media) Order 2011

Draft Waste (England and Wales) Regulations 2011

Draft Instruments subject to annulment

Draft Guidance on matters to be taken into account in determining questions relating to the definition of disability

Instruments subject to annulment

SI 2011/207 Harwich Haven Authority (Pension Fund) Harbour Revision Order 2011

SI 2011/208 Armed Forces Redundancy Scheme 2006 and the Armed Forces Redundancy Etc. Schemes 2010 (Amendment) Order 2011

SI 2011/213 Food (Jelly Mini-Cups) (Emergency Control) (England) (Revocation) Regulations 2011

SI 2011/219 Apprenticeships (Specification of Apprenticeship Standards for England) Order 2011

SI 2011/220 Apprenticeship Sectors (Specification) Order 2011

SI 2011/225 Social Security (Contributions) (Amendment) Regulations 2011

SI 2011/227 Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) (Amendment) Order 2011

SI 2011/230 Police Federation (Amendment) Regulations 2011

SI 2011/231 Plastic Materials and Articles in Contact with Food (England) (Amendment) Regulations 2011

SI 2011/232 Gas (Exemptions) Order 2011

SI 2011/234 CRC Energy Efficiency Scheme (Amendment) Order 2011

SI 2011/237 Air Navigation (Overseas Territories) (Amendment) Order 2011

SI 2011/238 North West London Hospitals National Health Service Trust (Transfer of Trust Property) Order 2011

SI 2011/243 Promotion of the Use of Energy from Renewable Sources Regulations 2011

SI 2011/253 Buckinghamshire Primary Care Trust (Transfer of Trust Property) Order 2011

SI 2011/255 Non-Domestic Rating and Business Rate Supplements (England) (Amendment) Regulations 2011

SI 2011/258 Food Additives (England) (Amendment) Regulations 2011

SI 2011/269 National Health Service (Quality Accounts) Amendment Regulations 2011

SI 2011/300 Police Act 1996 (Equipment) Regulations 2011

SI 2011/309 Registrar of Companies (Fees) (Companies, Overseas Companies and Limited Liability Partnerships) (Amendment) Regulations 2011

SI 2011/313 Local Authorities (Alteration of Requisite Calculations) (England) Regulations 2011

SI 2011/319 Registrar of Companies (Fees) (Limited Partnerships) (Amendment) Regulations 2011

SI 2011/324 Registrar of Companies (Fees) (European Economic Interest Grouping) (Amendment) Regulations 2011

APPENDIX 1: EMPLOYMENT AND SUPPORT ALLOWANCE (LIMITED CAPABILITY FOR WORK AND LIMITED CAPABILITY FOR WORK-RELATED ACTIVITY) (AMENDMENT) REGULATIONS 2011(SI 2011/228): SUBMISSIONS

Submission from the Disability Benefits Consortium

The grounds for drawing this regulation to the attention of the merits committee is that we believe it imperfectly achieves its policy objectives, and should be annulled.

The primary legislation (Welfare Reform Act 2007 Part 1 section 1) clearly provides for ESA benefit where the claimant has limited capability for work due to his physical or mental condition making it unreasonable to expect the claimant to work. The ESA regulations 2008 (No. 794) Part 5 define the descriptors in schedules 2 and 3 as the tests for limited capability for work-related activity and limited capability for work. This new regulation will make significant changes to these descriptors resulting in a marked increase in the number of claimants with significant health conditions and impairments being classified as "fit for work" and denied ESA.

Prior to ESA being introduced the government predicted[11] that 49% of people being assessed would be in the 'fit for work' group, 46% in the 'work related group', and 5% in the 'support group'. DWP state12 actual figures to be 66%, 24% and 10%. This indicates that 17% more claimants (i.e. 89,000 people) have been found fit for work by the current WCA than expected by the original legislation. DWP predictions[13] show the proposed changes will increase the 'fit for work' group by a further 5% of claims (which represents 74% of those assessed, i.e. 25% more than expected by the legislation).

The primary legislation requires the impact of the claimants' physical or mental condition to be assessed for the purpose of undertaking work. However the descriptors in the proposed regulation have little direct relationship to workplace activities and the real world implications of being able to undertake work. The DWP have no research or evidence to show that the descriptors or the proxy indicators in the proposed descriptors measure capacity for work. The DBC and the SSAC have recommended that these descriptor changes are not introduced. However the government are proposing descriptor changes to make the WCA more difficult. The Harrington Independent WCA Review report[14] found that the current descriptors already fail to adequately and fairly measurement the claimants capability for work, and is undertaking a detailed review of the descriptors in the second year of the review.

The DWP's internal review recommended these changes, however the disability representative charities involved in this review (all members of the DBC) strongly opposed many of the changes and do not support the DWP review and its findings, which will result in making the test even tougher. These charities wrote to government ministers both prior to and after the general election, making clear our opposition. The DBC recommends that these descriptor changes are not introduced.

Both the SSAC and the Harrington review found that the present WCA does not work properly and fails to adequately and fairly measure claimant's capability for work. The SSAC had an unprecedented level of response to its consultation (164 responses, usually about 20) and recommended that the proposed descriptor changes are deferred awaiting Harrington's report. The Harrington review received over 400 submissions, and found consistent failures to adequately and fairly measure the claimants' fitness for work. Harrington proposed his second year review should

[11] www.citizensadvice.org.uk/not_working_march_2010_final.pdf Not Working, CAB, March 2010. See also DWP Transformation of the Personal Capability Assessment, Nov 2007.

[12] Act Paper (S.I.2011 No.228), page 41/42.

[13] Impact Assessment – ESA Regulations 2011, 7 Dec 2010. www.dwp.gov.uk/docs/wca-ia-eia.pdf

[14] www.dwp.gov.uk/docs/wca-review-2010.pdf Nov 2010

examine the descriptors in particularly how they account for mental, intellectual, cognitive, fluctuating conditions and generalised pain, provide any recommendations necessary, and to also consider real world or work focused elements.

Impact of proposed descriptors.

- Both the SSAC and Professor Harrington reports state that the present WCA does not work properly and fails to adequately and fairly measure claimants' capability for work, and does not adequately consider real work or work focused elements.
- The government accepts the new descriptors will make the WCA tougher and a significant increase the disallowance rate, which would result in an increase in unfair assessments of claimants' capability for work reported by the SSAC and Harrington.
- Removes some complete categories of functional assessment (e.g. 'bending and kneeling' and 'completing tasks') which are significant in many working environments.
- Removes all lower-level descriptors in some categories (e.g. there are now no six point descriptors within manual dexterity) making it more difficult for people with multiple impairments to qualify.
- Under the proposed descriptors RNIB predict that many blind and partially sighted people will only get nine points and are therefore be classified as fit for work, even though 92% of employers describe blind or partially sighted people as difficult or impossible to employ[15].
- A person who can communicate with difficulty and only through the written word would be classed as 'fit for work'. Not a very realistic assessment of the modern workplace.
- The descriptor for being able to write (9 points) has been reduced to "cannot make a meaningful mark". This is not consistent with the ability to work, employers expect employees to be able to write legibly at a reasonable pace. It is unlikely to find employers looking for workers who can only make a meaningful mark.
- The descriptors for turning star headed sink tap have been removed, consequently there is no functional assessment for the ability to turn or rotate the hand. Such an activity is frequently found in working environments (doorknobs, instrument and machinery controls, cleaning and maintenance).
- The descriptor "cannot transfer a light but bulky object such as a empty cardboard box" is not consistent with the real world of work. The DWP definition of "transfer" is to move from left to right or right to left without a change of height. It is difficult to imagine a real world job with any significant content requiring this activity.
- An individual who "cannot mount or descend two steps even with the support of a handrail" could be classed "fit for work".
- Someone unable to stand at a workstation for more than ten minutes could now be deemed "fit for work".
- Someone "unable to get to a specified place with which the claimant is familiar, without being accompanied by another person" could be deemed "fit for work"
- Rising to standing from sitting has been removed.
- Someone who cannot use a keyboard (even one adapted) could be classed "fit for work".
- Reduced from 9 to 6 points: "At least once a month, has an involuntary episode of lost or altered consciousness, resulting in significantly disrupted awareness or concentration" (11b under the existing WCA, 10b under the proposed new WCA).

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[15] Guardian 16th Feb 2011, Blind people will lose £30 per week under new benefit regime, says RNIB

- Consideration of "repeatedly" has been included in descriptor 1 only, whereas previously it had been confined to guidance (along with "reliability" and "safety"). This is likely to result in repeatability not being considered by decision-makers and tribunal judges in other relevant descriptors, since a judgement may conclude that if "repeatedly" was to be considered in other descriptors, it would also be included in those descriptors. This will result in a significant disadvantage to some claimants with other impairments and limitations (e.g. manual dexterity).

February 2011

Submission from MIND

Background

Mind is a member of the Disability Benefits Consortium (DBC), and supports the DBC's submission to the Committee. We are providing this further submission to highlight some particular problems with the regulations as they relate to the assessment of people with mental health problems.

Mind has long-standing concerns about the Work Capability Assessment (WCA). It became clear very quickly after its introduction that the assessment does not work fairly or accurately for people with mental health problems. As with other DBC organizations, we were heavily involved in the internal review of the WCA but dissented from its findings. Last year Mind's Chief Executive, Paul Farmer, was asked to sit on the Scrutiny Group overseeing Professor Harrington's Independent Review of the WCA.

Professor Harrington has asked Mind, Mencap and the National Autistic Society to design an amended assessment for mental and cognitive impairments. This will be finalised in March 2011 but will need time to be piloted before being presented to the Minister in June 2011.

We draw these regulations to the attention of the merits committee because they will imperfectly achieve their policy objectives, and because the regulations move away from the direction of travel set out in the Independent Review's findings. At the very least, the Department should wait until Mind, Mencap and the National Autistic Society have reported to Professor Harrington.

Key concerns

Many organisations, including Mind, have been heavily critical of the consultation that led to these regulations, and particularly how they will affect applicants with mental health issues. We have argued that the simplification of the assessment – eg, reducing the mental function descriptors by a third, from ten to seven questions - is at the expense of comprehensiveness, rather than in unison with it.

There are already deep concerns about the how well WCA descriptors record the impact of mental health issues, and the simplification the descriptors will exacerbate the problem. We have particular concerns about the following changes:

- Assessment of an individual's awareness of hazards will now simply focus on the need for supervision, rather than the significance and frequency of the risk posed.
- Three different categories of descriptors looking at motivation, concentration and reasonable time to complete an action have been collapsed into one single descriptor, meaning significant areas of function are excluded from the new assessment. A mental health problem such as depression may affect a person's motivation (and therefore their ability to initiate or complete set tasks at work), and/or the length of time they take to perform certain duties, in particular their daily routine (execution of tasks). Although depression is just one impairment, it may affect functioning in two separate areas of a person's life, and this should not be seen as double scoring to be eradicated.

- Abilities to get about and cope with change will no longer be assessed in terms of frequency, which will impact negatively on people with variable or fluctuating conditions.
- The loss of the propriety behaviour descriptor means that the assessment fails to capture the significant distress caused to people with depression, anxiety and paranoia by misinterpreting or overreacting to the behaviour of others.

Mind believes that the regulations will lead to significantly fewer people with mental health problems qualifying for ESA, meaning that they will receive a smaller income, be denied the support they need, and be subject to a tougher conditionality regime. People must take steps towards employment at the right time and pace for them. Those who are inappropriately placed on Jobseeker's Allowance will be pushed into unsuitable and potentially harmful situations.

Case study

Michelle has a diagnosis of paranoid schizophrenia and lives in the South East. She was called for a Work Capability Assessment. She no longer hears voices, but experiences severe anxiety and depression. She has very poor short-term memory and writes a list of tasks to perform each day. Her brother visits daily to help with simple tasks such as managing her correspondence. Daily tasks such as washing, dressing, shopping and cooking take her far longer than it would take someone without her condition, and without prompting from her family she does not always get washed and dressed.

Michelle becomes seriously anxious about appointments, and will spend the days beforehand worrying about leaving the house, arriving on time, and whether her clothes will match. Should that appointment be rearranged, it is likely to be very upsetting for her, not least because she will experience the same anxieties the second time round.

Michelle finds social situations very difficult and tends to avoid social contact. She has severe panic attacks when she visits new places and has a fear of using the telephone. She gets upset when other people try to cajole her to do things she can't do, and feels distressed when she feels she is misinterpreting people's intentions or is overreacting to things.

At her WCA Michelle said yes to each question but was awarded no points. On appeal, the judge awarded Michelle the following:

- Coping with change: 6 points
- Social situations: 9 points
- Dealing with other people: 9 points.

The judge then stopped counting, as Michelle had scored enough points to be awarded ESA.

Under the new descriptors, Michelle would score the following:

Proposed descriptor	Reasoning	Score
11. Learning tasks	Michelle has no impairment of her ability to learn	0
12. Awareness of hazards	Michelle does not have a reduced awareness of tasks	0

13. Initiating and completing personal action:	Michelle uses a pre-planned list rather than verbal prompting by someone in her presence, so she may not score on this descriptor at all, despite impairments to her functioning on completing tasks within a reasonable time and difficulties in initiating action including daily routine tasks.	0
14. Coping with change	Michelle experiences significant distress for a number of days when an appointment is changed without prior warning. However, she would still manage to attend the re-arranged appointment. Depending on the interpretation of day to day life being made significantly more difficult (would her attending the re-arranged appointment negate the distress she experiences?), Michelle is likely to score 6 points	6
15. Getting about	Michelle does not need accompaniment to get to new or familiar places	0
16. Coping with social engagement	Because Michelle's ability to engage socially with either familiar or unfamiliar people is not always precluded because her anxiety fluctuates, she would not score on the new descriptor.	0
17. Appropriateness of behaviour	The loss of the propriety descriptor, which looks at how the person interprets other people's behaviour and how that behaviour impacts on them, means that significant impairments experienced by Michelle are not captured by the assessment.	0
	Total	6 points

Michelle would not be awarded ESA, yet Michelle is not "fit for work". Her care workers and the appeal judge are clear that she would not at present be able to engage in full-time work and would not be able to handle the tougher regime imposed by JSA.

February 2011

Submission from the MS Society

The MS Society is a member of the Disability Benefits Consortium, and supports the DBC's submission to the Committee. We are providing this further submission to highlight some particular problems with the regulations as they relate to the assessment of people with complex and fluctuating conditions like MS.

This submission is supported by Parkinson's UK, Arthritis Care, ME Association and the National AIDS Trust.

We draw these regulations to the attention of the merits committee, as we believe that they:

1. give rise to issues of public policy likely to be of interest to the House;
2. will imperfectly achieve their policy objectives; and
3. should therefore be annulled.

1. Issues of public policy likely to be of interest to the House

The primary legislation (the Welfare Reform Act 2007) provides that claimants are entitled to ESA where they have limited capability for work due to their physical or mental condition, such that it is not reasonable to expect the claimant to work. The policy objective of these regulations is to amend the Employment and Support Allowance Regulations 2008, which set the criteria to determine whether someone has a 'limited capability for work'.

The regulations make significant changes to these criteria, which could impact on millions of current claimants of Incapacity Benefit due to be reassessed through the WCA from April this year, as well as any new claimants of ESA. The Disability Benefits Consortium (DBC) and the Social Security Advisory Committee (SSAC) have both recommended that these descriptor changes are not introduced.

2 Imperfect achievement of their policy objectives

We believe that these regulations will imperfectly achieve their policy objective, of identifying those with a 'limited capability for work', for the following reasons:

- Flaws in the process of the review: The review which gave rise to the proposals for change to the WCA was carried out based on very limited evidence of how the assessment was working in practice. The DWP has failed to consult widely on the proposals, despite the enormous impact that these could have on disabled people, and they have been subjected to a far lower level of external consultation and scrutiny than both the Harrington review and SSAC's review. The DWP roundly rejected the recommendations of SSAC, which showed a very clear lack of support for the regulations, despite SSAC's recommendations being based on a much wider consultation (with over 160 responses to their call for evidence).

  In addition, although the DWP state repeatedly in their response to the SSAC report that the 'a number of external stakeholders including specialist disability groups were closely involved in the department-led review', it is well documented that the disability groups involved (many of whom are members of the DBC) unanimously rejected the Government's proposals, and highlighted that they did not feel that their input had been adequately considered.[16]

- Regulations are premature: Work is already ongoing as part of Professor Harrington's second year of the review: Mencap, Mind and the National Autistic Society have already presented recommendations to Harrington's team on how the descriptors for mental health, learning difficulty and cognitive impairments could be improved. The MS Society is currently chairing a working group[17] to develop recommendations to improve the descriptors in relation to fluctuating conditions, and symptoms such as pain and fatigue. The implementation of these regulations now risks diminishing the positive impact of Harrington's previous and forthcoming recommendations, and diverting limited resources from addressing the Harrington reforms.

  Conversely, if the work done as part of the Harrington second year review is fully taken into consideration and implemented, this could mean the descriptors would be radically changed twice within the space of just one year. This would clearly be extremely unfair on those people being assessed in the interim, and risks a very high level of appeals, and potential judicial review cases, not to mention confusion, anxiety and frustration amongst claimants, professionals carrying out the WCA, and those supporting claimants through

[16] These charities wrote to government ministers on 22 March 2010 and 12 July 2010, and large groups of charities, including many of those originally involved, have written again in 2011.

[17] Including Forward ME, Parkinson's UK, National Aids Trust and Arthritis Care.

ESA applications.

- Shift in focus of descriptors: The descriptors proposed in these regulations seem not to be assessing '*limited* capability for work', but rather assessing only 'capability for work', blurring the distinction between the 'Limited Capability for Work', and 'Limited Capability for Work Related Activity', and therefore undermining the Welfare Reform Act's intention to separate claimants into two distinct groups with different levels of need. There are a number of specific examples within the descriptors themselves which highlight this:
    - The original descriptor 15 (Execution of tasks) accounted for the barriers stemming from time taken to complete tasks, rather than someone's ability to complete tasks at all. This is an extremely important factor in an individual's employability, particularly for those who suffer from multiple impairments, and symptoms such as fatigue, pain and cognitive problems, all of which are experienced by many people with MS. Someone who takes more than twice the amount of time to complete activities is highly unlikely to be considered 'fit to work' by any employer and will thus certainly have a limited (but not no capacity) for work. Yet under the new descriptors, this issue is no longer accounted for.
    - The DWP state as justification for their changes to the continence descriptors: 'an individual whose problems with continence can be managed if they are able to reach a toilet quickly should not be considered unable to do any work'. Once again, this statement neglects that the purpose of the assessment is to identify limited capability and not inability to do any work.
- Improper purpose of the regulations: We are concerned that the DWP are proposing the descriptor changes in order to further reduce access to ESA by making the WCA more stringent, despite the Harrington review's findings that the current descriptors are flawed and that the system is *'lacking in empathy'*, meaning that in many cases this results in people being wrongly classified as fit to work.
- Failure to address problems with fluctuating conditions: The DWP recognises that the current WCA struggles to accurately assess people with fluctuating conditions, yet it is clear that the proposed descriptors do not adequately address this problem, and in some cases may even exacerbate it. For example:
    - In response to the SSAC report, the DWP accepts the rationale that whether an activity is performed 'reliably, repeatedly and safely' is a crucial factor in assessing someone's functional capability. However, they go on to reject the Committee's recommendation to add in more qualifications like this into the descriptors themselves without giving any explanation as to their reasoning for this.
    - The regulations remove all lower-level descriptors in some categories (e.g. removal of the six point descriptors within manual dexterity, and 'navigating safely' – which replaces any other reference to sight problems) making it more difficult for people with multiple or fluctuating impairments to qualify. For example, a person with MS could: be unable to write legibly; experience pain using a keyboard for more than a few minutes at a time; intermittently have to use a wheelchair due to fatigue and mobility problems; take twice as long as someone with no cognitive impairment to complete workplace activities due to problems with memory and concentration; manage bowel function through self-catheterisation (which can mean very regular and lengthy toilet breaks); experience slurring of speech such that they feel unable to hold a conversation over telephone; and experience significantly reduced vision (or even temporary blindness) for short periods during relapses. Such an individual

clearly has a significantly reduced capacity for work – but could score no points whatsoever under the new regulations, and thus be classed 'fit to work'.

The DWP state that healthcare professionals conducting WCAs receive training in assessing fluctuating conditions. However, the MS Society is concerned that few disability organisations have been consulted in developing this training, and that our concerns regarding this have not been taken into account. Furthermore, this training would need to be significantly revised to reflect any new assessment, and carried out prior to any new assessment being brought in, to ensure that healthcare professionals carrying out assessments interpret the descriptors appropriately.

Impact of the proposed descriptors

This new regulation will make considerable changes to these descriptors resulting in a significant increase in the number of claimants with high levels of impairment and disability being classified as "fit for work" and denied ESA benefit. People with complex and fluctuating conditions, those who suffer from mental health conditions, cognitive impairments, and multiple changeable or lower-level impairments (such as MS) are particularly likely to be improperly assessed under these new descriptors. Many of these people, who should be eligible for at least the Work Related Activity Group of ESA, would be forced by these new descriptors onto Job Seekers Allowance, which is not the appropriate benefit for people with limited capability for work.

Yet the ongoing work of the Harrington review, supported by the DWP, is developing recommendations that could take important steps towards resolving these problems, and is likely to involve yet more wide-reaching changes to the WCA in just a matter of months.

These regulations should therefore be annulled in favour of more timely, better researched, reviewed and consulted upon, evidence-based regulations for changes to the WCA based on Harrington's recommendations later in the year.

February 2011

Submission from the Royal National Institute of Blind People (RNIB) and Action for Blind People

RNIB and Action for Blind People are members of the Disability Benefits Consortium, and support the DBC's submission to the Committee. We have chosen to provide an additional memorandum to the Committee in order to highlight our deep concerns about the impact the above regulations will have on blind and partially sighted people in particular.

We welcome the Committee's Inquiry, as the regulations, in our opinion:

1) Give rise to issues of public policy likely to be of interest to the House;

2) Are inappropriate in view of changed circumstances since the enactment of the parent Act; and

3) Imperfectly achieve policy objectives.

1) Issues of public policy likely to be of interest to the House

Undermining of the current ESA structure

We believe that the regulations fundamentally undermine the structure of Employment and Support Allowance (ESA), where claimants with a limited capability for work are put into either the Work Related Activity Group or the Support Group. The regulations do this through putting in place new descriptors, which make the 'Limited Capability for Work' test, the gateway to the benefit, unreasonably tough to pass for blind and partially sighted people, against the spirit of the 2007 Act and the intention of Parliament.

The regulations, we would argue, set such a high threshold for eligibility for ESA that they effectively transform the 'Limited Capability for Work' test into a 'Limited Capability for Work

Related Activity' test, losing distinction between the two tests. This undermines the intention within the 2007 Welfare Reform Act, that there should be two distinct groups of claimants; one moving towards work (Work Related Activity Group), the other with no conditionality (Support Group). Under the regulations, we believe that the numbers of disabled people able to qualify for the Work Related Activity Group would drop dramatically, as whole groups of people are largely excluded by the eligibility threshold.

Impact on blind and partially sighted people

Blind and partially sighted people will in all likelihood fail to qualify for ESA if these regulations come into force. We find this deeply concerning, considering that many blind and partially sighted people have limited capability for work, and so should qualify for ESA where limited capability for work can be demonstrated.

A person of working age who loses their sight will need to learn new skills for independent mobility (e.g. use of a long cane or Guide Dog), how to use a computer using screen magnification or speech output software, as well as new everyday living skills around cooking, dressing, cleaning etc. We do not believe that it is appropriate to require someone in this position to end up claiming Job Seekers Allowance, yet that will be the impact of the regulations.

Under the proposed Limited Capability for Work test a blind person's difficulties in performing most work-related activities would be ignored and only extreme difficulties in 'navigation and maintaining safety' would be assessed. A visually impaired person would only be considered to have a limited capability for work if they were "unable to navigate around unfamiliar surroundings without being accompanied by another person" (see appendix 1 for comparison of current descriptors on sight loss and those proposed in the regulations).

The department's internal review stated: "It is our intention to continue to work with experts and specialist disability organisations to refine the descriptors related to sight loss." [18] However, this has not taken place, despite our requests to meet with Officials. We, like many other disability organisations, did not support the conclusions of the Department's internal review and made Ministers and Officials aware of this.

Whilst we have concerns around the operation of the WCA, and the quality of assessments by Atos, the currently operating set of descriptors around sight loss are in our view satisfactory, and do not require fundamental change.

2) Changed circumstances since the enactment of the parent Act

We are deeply concerned by the confused landscape around review of the Work Capability Assessment's descriptors, and implementation of changes.

Professor Harrington and the Department's internal review reached completely different conclusions about the effectiveness of the Work Capability Assessment. The internal review concluded "…the current assessment was found to be working well…"[19], Prof. Harrington that "I have found that the WCA is not working as well as it should. There are clear and consistent criticisms of the whole system and much negativity surrounding the process."[20]

We are also concerned that Professor Harrington has just announced the second phase of his review, which will be considering the WCA and specific Limited Capability for Work activities and descriptors. However, this will be after the regulations are passed, calling into question why

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[18] Page 6, **Addendum: Work Capability Assessment Internal Review** (DWP, March 2010). www.dwp.gov.uk/docs/work-capability-assessment-review-addendum.pdf

[19] Page 64, **Work Capability Assessment Internal Review**, (DWP, October 2009) www.dwp.gov.uk/docs/work-capability-assessment-review.pdf

[20] Page 8, 'An Independent Review of the Work Capability Assessment', (Professor Harrington, November 2010)

the Government is rushing through the regulations based on the internal review, before Professor Harrington can begin phase two of his work.

Social Security Advisory Committee

We submitted evidence to the Committee's inquiry into the regulations. We welcome and support their recommendation that the Government should proceed with positive changes around treatment of people undergoing chemotherapy and of people with mental health problems, but delay the rest of the changes until lessons can be learned from the migration pilots, and Professor Harrington's recommendations.

3) Imperfectly achieve policy objectives

Setting aside our deep concerns about the descriptors, we do not believe that Atos have the specialist knowledge and expertise, in a medical test centre environment, to carry out functional assessments of the mobility of people with sight loss. For example, we are unclear how they would determine whether or not a person is unable, due to sight loss, to navigate a familiar route without support, when they will be assessed in an unfamiliar environment at the test centre, under conditions of limited time for the assessment to be completed.

Conclusion

For many blind and partially sighted people, the regulations, if brought into force, could see them denied ESA. This is due to the high qualifying threshold being put in place around Limited Capability for Work and the failure to properly assess the effects of sight loss. We do not believe that this is appropriate, or indeed within the intentions of the Welfare Reform Act, 2007. The regulations will, in our view, seriously undermine the Work Related Activity Group/Support Group distinction, and force people who should be eligible for ESA onto Jobseekers Allowance, which is not the appropriate benefit for people with a limited capability for work.

Appendix 1

Current and proposed new WCA descriptors on sight loss

Current activities and descriptors

The LCW test looks at specified "functional areas", for both physical and mental health, such as seeing, hearing, walking, memory and concentration. For each functional area there are a series of statements called "descriptors" describing the difficulties that a person may have in that functional area. If an individual scores 15 points or more on either one, or across a range of activities, they qualify for ESA. Activity 9 contains the following subsets around sight loss:

(a) cannot see at all - **15 points**

(b) cannot see well enough to read 16 point print at a distance greater than 20 cm - **15 points**

(c) has 50% or greater reduction of visual fields - **15 points**

(d) cannot see well enough to recognise a friend at a distance of at least 5 metres - **9 points**

(e) has 25% or more but less than 50% reduction of visual fields - **6 points**

(f) cannot see well enough to recognise a friend at a distance of at least 15 metres - **6 points**

none of the above apply - **zero points**

These 'vision' descriptors are clear and objectively measurable. They explicitly take account of visual acuity and field loss, so often evidence can be gained from existing Certificates of Visual Impairment of people registered as blind or partially sighted.

The proposed new descriptors in the regulations

In the new assessment the focus of the sensory activities has moved away from objective medical assessment of impairment towards an attempt to ascertain the extent to which an individual has adjusted to their circumstances, taking account of certain aids or adaptations.

The Vision activity has been replaced by one that assesses only 'navigation and maintaining safety'. This is not a comprehensive assessment of the work-related limitations that a visually impaired person would face, and takes no account of many other practical difficulties.

8 (a) unable to navigate around familiar surroundings without being accompanied by another person due to sensory impairment - **15 points**

8 (b) cannot safely complete a potentially hazardous task such as crossing the road without being accompanied by another person due to sensory impairment - **15 points**

8 (c) unable to navigate around unfamiliar surroundings without being accompanied by another person - **9 points**

None of the above apply - **0 points**

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APPENDIX 2: PROMOTION OF THE USE OF ENERGY FROM RENEWABLE SOURCES REGULATIONS 2011(SI 2011/243): FURTHER INFORMATION

Further Information from the Department for Energy and Climate Change

Q1. *What is the definition of "major renovation" in this context?*

A1. Regulation 11 transposes article 13(5) of the Renewables Directive.

The directive does not define or explain what it means by "major renovation". We have copied out this element of the directive, without attempting to elaborate, because the duty falls on the Secretary of State, Welsh Ministers and Northern Ireland Departments, and so the burden of interpreting the duty and article 13(5) of the directive will also fall primarily on them.

Directive 2010/31/EU ("the Energy Performance of Buildings Directive") offers 2 alternative definitions for major renovation. We think this may give a reasonable indication of what the Renewables Directive intends by the phrase. The 2 alternative definitions are

(1) the total cost of the renovation relating to the building envelope or the technical building systems is higher than 25% of the value of the building, excluding the value of the land upon which the building is situated; or

(2) more than 25% of the surface of the building envelope undergoes renovation.

Q2. *What is the definition of "exemplary role" in this context?*

A2. The Renewables Directive does not define what it means by "exemplary role". However, article 13(5) of the directive does give some examples of actions that would meet this requirement, such as compliance with standards for zero energy housing, or by providing that the roofs of public or mixed private-public buildings are used by third parties for installations that produce energy from renewable sources.

We do not consider that fulfilling an exemplary role need be as onerous as the examples given in article 13(5) suggest. The Concise OED (11th edition) gives one definition of exemplary as "serving as a desirable model; very good". We think the intention is that public buildings should set a good example as regards energy efficiency or the use of renewables. Once again we have not attempted to elaborate on this element of the directive for the same reasons given above.

Q3. *If the Palace of Westminster underwent a major renovation after 31 December 2011, then presumably the Secretary of State would need to take such steps as he considers appropriate to ensure that the building fulfils an exemplary role?*

A3. The Renewables Directive does not define what it means by "public buildings". What can be gleaned from article 13(5) is that it can be contrasted to private buildings.

We consider it likely that the Palace of Westminster would fall within the scope of article 13(5) of the Renewables Directive.

Q4. *Who/what holds the Secretary of State to account against this duty?*

A4. We have limited the Secretary of State's duty to the taking of such steps as the Secretary of State considers appropriate. So the Secretary of State could conclude that no steps are appropriate in a particular case. Regulation 11 does not give the Secretary of State any new powers.

So the steps that the Secretary of State could take in compliance with this duty are those steps that are already within the Secretary of State's power to take.

Regulation 11 does not enable the Secretary of State to compel public buildings to play an exemplary role. The need for regulation 11 may be superseded should the Secretary of State take steps leading to a framework that itself ensures public buildings play an exemplary role, through further legislation.

The duty in regulation 11 could be used as a basis to judicially review the actions or policies of the Secretary of State. Furthermore, the European Commission may bring infraction proceedings against the UK if we fail to comply with article 13(5) of the Renewables Directive.

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APPENDIX 3: INTERESTS AND ATTENDANCE

Committee 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.

For the meeting on 1 March 2011 Members declared the following interests:

Draft Code of Recommended Practice on Local Authority Publicity

Lord Lucas: as a shareholder in Archant Ltd.

CRC Energy Efficiency Scheme (Amendment) Order 2011 (SI 2011/234)

Baroness Butler-Sloss and Lord Scott of Foscote: as owners of solar panelling.

Attendance:

The meeting was attended by B. Butler-Sloss, L. Eames, L. Goodlad, B. Hamwee, L. Lucas, L. Methuen and L. Scott of Foscote.