HOUSE OF LORDS

Merits of Statutory Instruments Committee

7th Report of Session 2010-11

Drawing special attention to:

Draft Medical Profession (Responsible Officers) Regulations 2010

Draft Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010

Home Energy Efficiency Scheme (England) (Amendment) Regulations 2010

Correspondence:

Fishing Boats (Electronic Transmission of Fishing Activities Data) (England) Scheme 2010

The Government's Position on Consultation Procedure for Delegated Legislation

Ordered to be printed 5 October and published 7 October

London : The Stationery Office Limited
£price

HL Paper 33

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 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.

Seventh 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 Medical Profession (Responsible Officers) Regulations 2010

Summary: Whilst these draft Regulations indicate the new Government's commitment to progressing the revalidation of doctor's skills, the professional organisations involved consider that further detail on the component parts of the process should have been developed before this statutory instrument was introduced. Letters to us from the British Medical Association and the Royal College of Surgeons do not appear hostile to the policy objective but express the view that the intended implementation date for these Regulations of 1 January 2011 is premature given that the revalidation scheme that the Responsible Officers are to support is still in the pilot stage and that there are several significant gaps in the Responsible Officers scheme. In addition the Department of Health's existing plans have been overtaken by the new Government's announcements that propose to change the landscape of the NHS. ***The House may wish to seek clarification in the debate of how the profession's concerns are to be addressed and how the new Government's proposed changes to the NHS administrative structure will affect the revalidation scheme in general and these Regulations in particular.***

These Regulations are drawn to the special attention of the House on the grounds that they may imperfectly achieve the policy objective.

1. The Department of Health (DH) has laid this instrument under the Medical Act 1983 and the Health and Social Care Act 2008 along with an Explanatory Memorandum (EM) and an Impact Assessment (IA). The Department has also published guidance on the role of Responsible Officer on its website.[1]

Background

2. As part of the continuing reform of the medical profession following the Shipman Inquiry, from November 2009 all practising doctors had to be registered and will be subject to revalidation every 5 years. The revalidation process is still being drawn up; the General Medical Council (GMC) is currently running 10 pilots to decide on an appropriate model, and the final format is unlikely to be announced before the middle of 2011. The incoming Secretary of State wrote to the GMC on 5 June asking for an extra year of testing and evaluation and therefore the scheme is unlikely to come into full operation before summer 2012.

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[1] http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_119418.pdf

3. These Regulations set up the Responsible Officer element of the system, to come into effect from 1 January 2011, as the Department wishes Responsible Officers to be appointed and trained in advance of the revalidation system being put into operation so that they are available to support it from the start. The Health and Social Care Act 2008 made provision for "senior doctors" in designated organisations to conduct regular appraisals of each of its practising doctors, and it is envisaged that a doctor's "Responsible Officer" will use that and other evidence to make a recommendation to the GMC on whether that doctor remains fit to practice under criteria that will be set out in the revalidation process.

4. Using the evidence provided, the Responsible Officer is expected to identify the cause of any deficiency and take appropriate remedial action to bring that doctor's performance back on track, or to refer more serious matters to the GMC. Although it is expected that the introduction of a standardised process will initially lead to a small increase in the number of remediation cases, it is anticipated that action at an earlier stage will reduce the number of cases currently referred to the GMC for a formal hearing by about a quarter.

5. DH has provided some additional information about the definition of "Responsible Officer", how they will assess specialists in an area with which they are not familiar and whether 5 years, the minimum requirement set out in regulation 7, is sufficient experience in a profession with such a long initial training period. The full response is set out at Appendix 1 but the Department clarifies that 5 years is a minimum requirement and the appointing organisation will also need to be satisfied that supplementary criteria set out in the guidance are met; for example "…he or she will be able to demonstrate an ability to lead and manage change in complex healthcare organisations and have significant experience of medical management…" (*Role of Responsible Officer* paragraph 4.40 ff). The Responsible Officer will also need to demonstrate evidence handling skills so that they can draw on the various elements of the revalidation process which are likely to include feedback questionnaires from colleagues and patients as well as doctors' own evidence of their continuing professional development.

Concerns from the profession

6. Consultation exercises have shown general support for the main thrust of the initiative but some concerns have been expressed about aspects of its implementation (see the correspondence from British Medical Association (BMA) and Royal College of Surgeons (RCS) attached at Appendix 1). Their key concerns are:

   - potential conflicts of interest,
   - whole practice appraisal when a doctor works for more than one organisation,
   - indemnity for responsible officers, and
   - the local appeals system.

7. They are also seeking clarification over who the Officer is responsible to – the organisation or the doctor. The BMA point out that a doctor's registration is personal – while it should be withheld if his incompetence is a risk to the public, it should not be withheld because he has a difference of opinion with the organisation he works for. The RCS similarly feel that, as currently

drafted the regulations seem "one sided and threatening" and offer two examples of how a Responsible Officer may be subject to conflicting pressures:

Example 1: The surgeon is a fast worker and meets list targets. However, the surgeon has had concerns raised about their practice by colleagues and other evidence suggests there might be some problems with the quality of practice. The responsible officer might be under pressure from the Board to suppress concerns about the surgeon and recommend revalidation because they contribute so much to the surgical throughput of the Trust. Any period of suspension or limited practice would have a negative financial and administrative impact

Example 2: The surgeon has an awkward relationship with Trust management and does not readily cooperate. The surgeon has fixed ideas about how treatment should progress even if this involves more expensive processes. Nevertheless the surgeon's practice is safe and within normal safety parameters for the specialty. The responsible officer might be under pressure from the Trust to use the revalidation process to "manage out" the surgeon even though the surgeon's practice is safe.

8. The correspondence also points out some potential gaps in the scheme, such as how a doctor who works for more than one agency will be assessed. While the Departmental guidance indicates a hierarchy (see paragraphs 3.28 ff) there are a number of situations where it simply states that the GMC will bring forward proposals at a later date. The RCS notes that the Department is currently consulting on regulations on a Duty of Cooperation that will require healthcare organisations to share information where a concern has been identified, but RCS point out that they currently omit a requirement to routinely share information for appraisal purposes. **The Department could not provide the Committee with a plan for how the various elements of the scheme are to be rolled out; to publish one up might help the target audience to understand the full scope of the Department's intentions.**

Changes in the NHS Structure

9. Since the 2008 Act the Department of Health has, with the UK Revalidation Programme Board hosted by the GMC, been rolling out the reform in phased stages, including a number of pilot exercises which will hopefully result in a well-informed and robust system. However, this programme has now been overtaken by plans for the restructuring of the NHS set out in the recent White Paper *Liberating the NHS*.[2] For example, the published guidance states that Responsible Officers will themselves be assessed by the Responsible Officer in the Strategic Health Authority (para 2.8) whereas the White Paper says the government will phase out the top-down management hierarchy, including both Strategic Health Authorities and Primary Care Trusts. We understand that the new Secretary of State has asked for some simplifications and a longer testing period, this seems sensible but needs to be better communicated to those groups most closely affected, who evidently have concerns.

Conclusion

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[2] Liberating the NHS - *http://www.dh.gov.uk/en/Healthcare/LiberatingtheNHS/index.htm* published 12 July 2010

10. Whilst these draft regulations indicate the new Government's commitment towards the implementation of revalidation, there is a clear indication from the professional organisations involved that further detail on the component parts of the process should have been developed before this statutory instrument was introduced. Particularly in light of the implications of the recent White Paper, *Liberating the NHS,* the major professional bodies are expressing practical concerns about how effective these Regulations will be. Their letters to us do not appear hostile to the policy objective but express the view that the current effective date for these Regulations is premature when the revalidation scheme that the Responsible Officers are to support is still in the pilot stage and information is not yet available on several significant aspects of the Responsible Officers scheme. The professional organisations are seeking a better explanation of how this rather complex jigsaw will fit together before committing time and resources to it in at a time when there is no money to spare.

11. In addition the Department of Health's existing plans have been overtaken by the new Government's announcements that propose to change the landscape of the NHS. **The House may wish to seek clarification in the debate as to how the profession's concerns are to be addressed and how the new Government's proposed changes to the NHS administrative structure will affect the operation of the revalidation scheme in general and these Regulations in particular**.

B. Draft Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010

Summary: This draft SI directs the Office of Communications (OFCOM) to carry out a package of spectrum management measures to support the deployment of high speed mobile broadband services. An earlier draft of the SI had been laid by the last Government but was still before the House at the time of the General Election. There were significant differences of opinion on the previous draft amongst operators and the earlier SI was drawn to the special attention of the House by this Committee on the ground that it gave rise to issues of policy likely to be of interest to the House. The Explanatory Memorandum (EM) for the current draft SI says that the Coalition Government have decided that a less interventionist approach would be preferable (EM paragraph 8.4). The draft does not therefore implement all the proposals in the previous draft. Importantly, OFCOM will not be directed to introduce quantitative restrictions on holdings of particular frequencies (so called 'spectrum caps') or impose wholesale or coverage obligations on different spectrum bands (Impact Assessment (IA) page 6). 'everything everywhere' (EE) have written to the Committee (and the Joint Committee on Statutory Instruments) detailing their concerns about the current draft (see Appendix 2) and the Department for Business Innovation and Skills (BIS) have responded to those points (see Appendix 2). The IA also provides a detailed Competition Assessment which provides useful context (IA page 10).

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

12. This draft SI directs the Office of Communications (OFCOM) to carry out a package of spectrum management measures to support the deployment of high speed mobile broadband services. The draft SI will also enable the UK

to meet its obligations to implement Directive 2009/114/EC and Commission Decision 2009/766/EC on the liberalisation of frequencies in the 900 MHz and 1800MHz bands to allow them to be used for different mobile telephony technologies. The package of measures in the direction to OFCOM include:

- Liberalisation of 900MHz and 1800 MHz spectrum in the hands of the incumbent operators so that it can be used to deliver 3G services as well as 2G services;
- Making 2G and 3G spectrum licences indefinite and tradable;
- Revising annual licence fees to reflect the full market value of the relevant spectrum; and
- Proceeding with the auction of 800 MHz and 2.6GHz spectrum.

13. The House may recall that an earlier draft of this SI was laid before Parliament under the affirmative procedure in March 2010. That draft was drawn to the special attention of the House by this Committee on the ground that it gave rise to issues of public policy likely to be of interest to the House (16th Report of Session 2009-10, HL Paper 110). There were significant differences of opinion on that draft SI amongst operators. The Committee published letters from four companies (Telefonica O2 UK Ltd, BT, Hutchison 3G UK Limited and Vodafone Ltd) making a number of detailed points about the proposals.

14. The Explanatory Memorandum (EM) says that it was not possible to obtain the necessary time in both Houses to debate and vote upon the earlier draft prior to the General Election (EM paragraph 8.3). The draft was therefore left before Parliament pending a decision by the new administration on how to proceed (EM paragraph 8.3). The EM then goes on to say that the Coalition Government have decided that a less interventionist approach would be preferable and so have decided not to implement all the proposals set out in the previous draft (EM paragraph 8.4). A key change from the earlier draft is that OFCOM will not now be directed to introduce quantitative restrictions on holdings of particular frequencies (so called 'spectrum caps') or impose wholesale or coverage obligations on different spectrum bands (Impact Assessment (IA) page 6).

15. The Committee has received a letter from 'everything everywhere (EE)'[3] in response to the current draft (see Appendix 2 for the formal submission from EE). EE have also written to the Joint Committee on Statutory Instruments. They make a number of points about the current draft SI. These include the view that mobile network operators which already hold 900 MHz spectrum licences (Vodafone and O2) will, by the liberalisation of the spectrum in the terms of the draft SI, be granted a significant competitive advantage. The Department for Business Innovation and Skills (BIS) has also written to the Committee responding to EE's points (Appendix 2). The IA also provides a detailed Competition Assessment which provides useful context (IA page 10).

[3] Recently formed by the merger of Orange and T-Mobile

C. Home Energy Efficiency Scheme (England) (Amendment) Regulations 2010 (SI 2010/1893)

Summary: The main Regulations allow the Warm Front Scheme ("the Scheme") to accept applications for a package of heating and insulation measures from people who are vulnerable to fuel poverty. This SI adds two new Regulations to the Scheme which: will require the Secretary of State to allocate to the administering agency the amount of money which is available to them to make grant payments each year; and require the administering agency to refuse an application for a grant where the amount of money allocated by the Secretary of State for that year has already been awarded. The Department for Energy and Climate Change say that the new Regulations are required to clarify the administering agency's ability to refuse applications in these circumstances. The future funding for the Scheme will not be clear until the Spending Review decisions are announced in October. Although the Spending Review will be a key determining factor in the importance of this SI, the House may wish to seek assurance that any impact will be fully assessed and managed.

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

16. The Home Energy Efficiency Scheme (England) Regulations 2005 ("the 2005 Regulations") provide the ***Warm Front Scheme*** *("the Scheme")* with powers to accept applications from people who are vulnerable to fuel poverty and to install heating and insulation measures that will improve the thermal efficiency of their homes. The Scheme is administered by Eaga plc, whose website lists[4] the applicants who may be eligible for the Scheme. These include: householders over 60 in receipt of one or more of a number of benefits; and householders with a child under 16 in receipt of one or more of a number of benefits. The Scheme provides a package of insulation and/or heating measures up to a maximum value of £3,500 (or £6,000 where oil, low carbon or renewable technologies are recommended). The package of measures[5] can include: loft insulation; draught-proofing; cavity-wall insulation; hot-water-tank insulation; and gas, electric or oil central heating.

17. The Explanatory Memorandum (EM) for this SI says (paragraph 7.3) that the Scheme has had £1.1 billion funding for the spending period 2008-11, with £345 million in 2010/11. The EM also says (paragraph 2.2) that the administering agency needs to be able to refuse new works applications at the point that the annual budget has been allocated; the SI clarifies the administering agency's ability to do this. This SI inserts two new Regulations into the 2005 Regulations. These are:

    - The Secretary of State must allocate to the administering agency the amount of money which is available to them to make grant payments each year; and
    - The administering agency is required to refuse an application for a grant where the amount of money allocated by the Secretary of State for that year has already been awarded.

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[4] Eaga website: Do I qualify for a Warm Front Grant?

[5] Eaga website: What will I get from Warm Front?

18. The Committee asked for further information from the Department of Energy and Climate Change (DECC) on the impact of the new Regulations and received the response published at Appendix 3. DECC say that funding for future years will not be clear until the Spending Review decisions are announced in October, but it is important to make this change to the Regulations well in advance of the point at which the provision might need to be relied on. In response to questions from the Committee, DECC say that their latest assessment shows that the Scheme is unlikely to have to refuse applications in the near future, and that an equality impact assessment will be considered if it is necessary for the Scheme to begin refusing applications. DECC say that a consultation on the SI was not considered necessary as the policy objectives are straightforward.

19. The EM and further information from DECC provide only limited information on the likely impact of the new Regulations. The Committee recognises that the outcome of the Spending Review will be a key determining factor in the importance of this SI. However, as no further SI will be required to allocate the annual sums, the House may wish to press the Government as to how the changes will effect delivery of the Scheme. In particular, the House could seek assurances from the Government that any risks associated with the changes have been identified and will be effectively managed; and that there is a coherent strategy for managing any impact on vulnerable customers.

OTHER INSTRUMENTS OF INTEREST

Consolidation

20. The Committee notes with pleasure that a number of items in the current batch of instruments consolidate and simplify existing legislation. This includes several from DCLG, including the Building Regulations 2010 (SI 2010/2214) and the Town and Country Planning (Development Management Procedure) (England) Order 2010(SI 2010/2284); and the Materials and Articles in Contact with Food (England) Regulations 2010 SI 2010/2225 is one of several from the Food Standards Agency. The Ministry of Justice continues its review and update of court rules in the Criminal Procedure (Amendment) Rules 2010 (SI 2010/1921), and we welcome the Equality Act 2010 (Obtaining Information) Order 2010 (SI 2010/2194) from the Home Office which reduces 20 forms to four.

The 21 day rule

21. However, the Committee also notes that the following three instruments were laid without allowing the House adequate time for scrutiny. We remind Departments that "the 21 day limit should only be breached where urgent action is necessary. Problems with Departmental administration or a project plan are unlikely to be accepted by the Scrutiny Committees as sufficient reason for curtailing Parliamentary scrutiny."(Statutory Instruments Manual, Appendix H).

European Communities (Designation) (No. 3) Order 2010 (SI 2010/1834)

22. Designation Orders are fairly standardised, setting out which Minister will be allowed to implement EC legislation under section 2(2) of the European

Communities Act 1972. They are not usually worthy of note but this one has breached the 21 day rule without good reason. The EC Regulation to which it relates came into force with direct effect on 26 April 2010, although there would inevitably have been some delay in implementing suitable enforcement provisions because of Dissolution that does not explain why the Order did not appear earlier, e.g. mid-June. The Cabinet Office has acknowledged that the breach was inappropriate.

Seal Products Regulations 2010 (SI 2010/ 2068)

23. These Regulations introduce a criminal sanction for breach of an EC Regulation on the trade in seal products. The Regulation comes into force across the EU on 20 August 2010. It prohibits the placing on the market of products from seals and other pinnipeds (i.e. sea lions and walruses), which includes imports and intra-Community trade with a few exceptions. The House may wish to note that although the EC Regulation was published on 16 September 2009, this SI was laid before Parliament on 17 August 2010 in order to come into effect on 20 August 2010. The SI therefore failed to comply with the 21 day rule by a significant margin.

Statement of Changes in Immigration Rules (HC 382)

24. This Statement makes a number of changes to the Immigration Rules. These include: some changes as a result of successful legal challenges which were brought against the Government regarding the extent to which some Points-Based System criteria are specified in UK Border Agency ("UKBA") guidance rather than in the immigration rules; and changes to Tier 4, the student tier of the Points-Based System. Damian Green MP (Home Office Minister for Immigration) wrote to the Committee on 22 July to explain why some of the changes would come into effect the day after the Statement was laid (see Appendix 4). One of the changes in the Statement allows students to commence study with a different sponsor before receipt of UKBA's decision on the application where that education provider is a "Highly Trusted Sponsor". The Minister explains that the need to bring this change in immediately was to cater for the summer peak. However, the Committee considers that the Government could have anticipated this issue and could therefore have laid a Statement earlier, thereby allowing the House appropriate time for scrutiny.

Other instruments

Draft Code of Practice for the Welfare of Gamebirds Reared for Sporting Purposes

25. The Animal Welfare Act 2006 introduced a statutory duty of care on all owners and keepers to provide for the welfare needs of their animals. This draft Code of Practice is intended to provide more detail on how game rearers can meet this duty of care in relation to gamebirds. An earlier version of the code was laid before Parliament on 15 March 2010 but was withdrawn by the new administration on 17 May. This was because it was considered that the minimum space allowances for the birdcages included in that draft were not based on any sound evidence; and that industry would have faced considerable costs in replacing these. The draft Code has been amended to

remove the minimum space allowances, along with a number of other minor amendments to the draft.

Draft Royal Parks and Other Open Spaces (Amendment) (No. 2) etc. Regulations 2010

26. The original Regulations were multi-faceted but there were strong objections to the proposals to introduce parking charges in Richmond and Bushy Parks. We informed the House of this concern in an overview paragraph in our 11th Report of Session 2009-10, HL Paper 62. A motion to prevent the Regulations being made was defeated but a second motion from Lord Howard of Rising, which proposed removing only the parking charges element was agreed (HL Deb, 10 March 2010, cols 302-317). The original regulations were made as SI 2010/1194 and the parking charges were due to come into effect on 1 October, however the new government has issued the current Regulations to annul the contentious element of the previous order and the charging scheme will therefore not be implemented.

Lord President of the Council Order 2010 (SI 2010/1837)

27. In the Written Ministerial Statement of 2 June 2010, the Prime Minister announced that the Deputy Prime Minister would be given special responsibility for political and constitutional reform, including a range of matters relating to elections, the duration and make-up of Parliament, and for specific bodies including the Electoral Commission. This Order gives effect to this by making provision for certain functions of the Ministry of Justice or the Lord Chancellor to be exercisable concurrently by the Secretary of State and the Lord President of the Council. (The office of Lord President of the Council is held by the Deputy Prime Minister.)

Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010 (SI 2010/1996)

28. These Regulations complete the transposition of the Aviation ETS Directive by making provision to include aircraft operators in an emissions allowance trading scheme. The Regulations make provision for the free allocation of allowances; for the monitoring and reporting of emissions and the surrender of allowances equal to emissions; for the appointment of regulators; and for a system of enforcement. Earlier Regulations, which were reported on by this Committee last year (26th of Report Session 2008-09, HL Paper 156), are largely revoked by these current Regulations but will remain in effect for some purposes, as outlined in the accompanying Explanatory Memorandum.

SI 2010/2056 Veterinary Surgery (Rectal Ultrasound Scanning of Bovines) Order 2010

SI 2010/2058 Veterinary Surgery (Epidural Anaesthesia of Bovines) Order 2010

SI 2010/2059 Veterinary Surgery (Artificial Insemination) Order 2010

29. These three linked Orders authorise trained non-veterinarians to carry out: artificial insemination of cows and mares; rectal ultrasound scanning of bovines; and epidural anaesthesia of bovines. The Explanatory Memorandum (EM) says that the procedures named in these Orders are

already carried out by trained non-veterinarians; but the Orders set out conditions to ensure that non-veterinarians are sufficiently trained and experienced to carry out the procedures safely, minimising risk of damage or distress to the animal (EM paragraph 7.1). An informal consultation was conducted on broadly common changes to all three Orders. The EM says that, in general, respondents acknowledged that amendments were necessary to comply with European law, but there were calls for a greater level of regulation and control of all veterinary technicians by the Department for Environment, Food and Rural Affairs (paragraph 8.3). Although these are negative instruments, the House may wish to consider the points made in the consultation if it chooses to look at the SIs further.

Legal Services Act 2007 (Commencement No. 8, Transitory and Transitional Provisions) Order 2010 (SI 2010/2089)

Legal Services Act 2007 (Legal Complaints) (Parties) Order 2010 (SI 2010/2091)

30. The Legal Services Act 2007 reforms the way in which legal services are regulated in England and Wales. It established the Legal Services Board as oversight regulator for the legal profession in England and Wales and the Office for Legal Complaints (OLC) as the single, independent handling body for complaints about the provision of services by legal professionals. This instrument commences the provisions of the 2007 Act that allow the OLC to assume its main statutory functions and become fully operational from 6 October 2010. The instrument also makes the necessary transitional arrangements and provides for the winding down of the existing complaints handling system, the offices of the Legal Services Ombudsman (LSO) and the Legal Services Complaints Commissioner (LSCC), in 2011.

Town and Country Planning (General Permitted Development) (Amendment) (No.2) (England) Order 2010 (SI 2010/2134)

Town and Country Planning (Compensation) (No.3) (England) Regulations 2010 (SI 2010/2135)

31. Amongst other changes, SI 2010/654, which came into effect on 6 April 2010, required planning permission to be sought when converting a single family dwelling house to accommodation for 3-6 non-related people (known as a House in Multiple Occupation or HMO). These new Regulations revoke that change because the new Government feel that a national rule was unnecessarily bureaucratic, that problem HMOs only occur in 0.7% of wards in England and, where they do, Local Authorities have alternative mechanisms to address the matter. The Department for Communities and Local Government (DCLG) state that by revoking the requirement they remove a potential 8,500 planning applications each year. However, the Committee has received a letter from the Milton Keynes Council Planning Department drawing attention to some unintended consequences arising from the revocation, particularly that, because they do not provide transitional provisions, they effectively give retrospective permission to a number of cases that Local Authorities have been pursuing for enforcement action. Secondly, the Impact Assessment does not properly reflect the financial impact on Local Authorities from compensation. While the DCLG has provided further information to the Committee that clarifies their policy,

we agree that the Explanatory Memorandum should have addressed the consequences of revocation more clearly and the Impact Assessment should have given some indication of the scale of compensation that an Authority might have to pay as a result.

Storage of Carbon Dioxide (Licensing etc.) Regulations 2010 (SI 2010/2221)

32. This SI forms part of the UK's implementation of Directive 2009/31/EC of the European Parliament on the geological storage of carbon dioxide ("the Directive"). It implements the requirements of the Directive relating to the licensing of CO2 storage and to the liabilities of the storage operator both during and after the active operation of the store. Further instruments will be required to cover other parts of the Directive; including third-party access to CO2 stores and pipelines and the transfer of liability to the State on termination of a CO2 storage licence. The Department for Energy and Climate Change will monitor licensing arrangements implemented by this instrument and will seek feedback from the industry as to the regime's efficacy.

Immigration and Nationality (Cost Recovery Fees) (No.2) Regulations 2010 (SI 2010/2226)

33. These Regulations revoke and replace, with modifications, the Immigration and Nationality (Cost Recovery Fees) Regulations 2010. The Regulations specify fees for certain matters, such as; entry clearance, sponsorship licences and applications for leave to remain in the United Kingdom. The Regulations also set out the consequences for failing to pay a specified fee. The Government published a full public consultation on charging for immigration and visa applications in September 2009, and received 98 responses.

FISHING BOATS (ELECTRONIC TRANSMISSION OF FISHING ACTIVITIES DATA) (ENGLAND) SCHEME 2010 (SI 2010/1600): CORRESPONDENCE

34. This SI provided for the payment of grants as a contribution to the purchase or supply of approved software for the electronic recording and transmission of fishing activities data by English fishing boats over 15 metres length overall. The Committee identified the SI as an instrument of interest in their 4th Report of this Session, HL Paper 17, and the Chairman wrote to the Department for Environment, Food and Rural Affairs (Defra) on 30 June raising two issues about the SI. Subsequently, the Parliamentary Under-Secretary for Natural Environment and Fisheries, Richard Benyon, sent a letter of reply on 10 August. Both letters are published at Appendix 5.

THE GOVERNMENT'S POSITION ON CONSULTATION PROCEDURE FOR DELEGATED LEGISLATION: CORRESPONDENCE

35. The Committee wrote to the Leader of the House of Lords, Lord Strathclyde, on 17 June requesting the Government's views on the issue of

consultation in the development of secondary legislation. Lord Strathclyde subsequently sent a letter of response on 26 August. Both letters are published at Appendix 6.

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 Instrument subject to annulment

Draft Code of Practice on Equal Pay

Draft Code of Practice for the Welfare of Gamebirds Reared for Sporting Purposes

Draft Royal Parks and Other Open Spaces (Amendment) (No. 2) etc. Regulations 2010

Instruments subject to annulment

SI 2010/1812 Local Land Charges (Amendment) Rules 2010

SI 2010/1834 European Communities (Designation) (No. 3) Order 2010

SI 2010/1836 Secretary of State for Education Order 2010

SI 2010/1837 Lord President of the Council Order 2010

SI 2010/1839 Transfer of Functions (Equality) Order 2010

SI 2010/1864 Safety of Sports Grounds (Designation) (No. 3) Order 2010

SI 2010/1874 School Information (England) (Amendment) (Revocation) Regulations 2010

SI 2010/1881 Health and Social Care Act 2008 (Miscellaneous Consequential Amendments) Order 2010

SI 2010/1882 Medicines for Human Use (Advanced Therapy Medicinal Products and Miscellaneous Amendments) Regulations 2010

SI 2010/1883 Audiovisual Media Services (Codification) Regulations 2010

SI 2010/1886 Addition of Vitamins, Minerals and Other Substances (England) (Amendment) Regulations 2010

SI 2010/1898 Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations 2010

SI 2010/1902 Organic Products (Amendment) Regulations 2010

SI 2010/1906 Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (Revocation) Regulations 2010

SI 2010/1907 Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No. 2) Regulations 2010

SI 2010/1908 Sale of Electricity by Local Authorities (Scotland) Regulations 2010

SI 2010/1910 Sale of Electricity by Local Authorities (England and Wales)) Regulations 2010

SI 2010/1911 Henley College Sixth Form College Corporation Designation (England) Order 2010

SI 2010/1915 Equality Act 2010 (Designation of Institutions with a Religious Ethos) (England and Wales) Order 2010

SI 2010/1916 Family Proceedings Fees (Amendment) Order 2010

SI 2010/1917 Magistrates' Courts Fees (Amendment No. 2) Order 2010

SI 2010/1918 School Governance (Transition from an Interim Executive Board) (England) Regulations 2010

SI 2010/1919 Education (Pupil Referral Units) (Application of Enactments) (England) (Amendment) (No. 2) Regulations 2010

SI 2010/1920 Education (Short Stay Schools) (Closure) (England) (Amendment) Regulations 2010

SI 2010/1921 Criminal Procedure (Amendment) Rules 2010

SI 2010/1927 Cosmetic Products (Safety) (Amendment No. 2) Regulations 2010

SI 2010/1928 Toys (Safety) (Amendment) Regulations 2010

SI 2010/1939 Education and Inspections Act 2006 and Education and Skills Act 2008 (Consequential Amendments to Subordinate Legislation) (England) Regulations 2010

SI 2010/1941 Apprenticeships, Skills, Children and Learning Act 2009 (Consequential Amendments to Subordinate Legislation) (England) Order 2010

SI 2010/1953 Civil Procedure (Amendment No. 2) Rules 2010

SI 2010/1969 Consumer Credit (Amendment) Regulations 2010

SI 2010/1970 Consumer Credit (Advertisements) Regulations 2010

SI 2010/1976 Coastal Access Reports (Consideration and Modification Procedure) (England) Regulations 2010

SI 2010/1979 School Teacher's Pay and Conditions Order 2010

SI 2010/1988 Vaccine Damage Payments (Specified Disease) (Revocation and Savings) Order 2010

SI 2010/1996 Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010

SI 2010/1997 Education (Independent School Standards) (England) Regulations 2010

SI 2010/2001 Plant Health (Fees) (Forestry) (Amendment) Regulations 2010

SI 2010/2007 Export Control (Amendment) (No. 2) Order 2010

SI 2010/2019 Sites of Special Scientific Interest (Appeals) (Amendment) Regulations 2010

SI 2010/2056 Veterinary Surgery (Rectal Ultrasound Scanning of Bovines) Order 2010

SI 2010/2058 Veterinary Surgery (Epidural Anaesthesia of Bovines) Order 2010

SI 2010/2059 Veterinary Surgery (Artificial Insemination) Order 2010

SI 2010/2060 Road Vehicles (Construction and Use) (Amendment) (No. 3) Regulations 2010

SI 2010/2068 Seal Products Regulations 2010

SI 2010/2078 Rural Development (Enforcement) (England) (Amendment) Regulations 2010

SI 2010/2079 Marketing of Fruit Plant Material Regulations 2010

SI 2010/2089 Legal Services Act 2007 (Commencement No. 8, Transitory and Transitional Provisions) Order 2010

SI 2010/2091 Legal Services Act 2007 (Legal Complaints) (Parties) Order 2010

SI 2010/2090 Local Government Pension Scheme (Miscellaneous) Regulations 2010

SI 2010/2126 Social Security (Miscellaneous Amendments) (No. 4) Regulations 2010

SI 2010/2127 Public Rights of Way (Combined Orders) (England) (Amendment) Regulations 2010

SI 2010/2128 Equality Act 2010 (Disability) Regulations 2010

SI 2010/2130 Care Standards Act 2000 (Registration) (England) Regulations 2010

SI 2010/2132 Equality Act 2010 (Sex Equality Rules) (Exceptions) Regulations 2010

SI 2010/2133 Equality Act (Age Exceptions for Pension Schemes) Order 2010

SI 2010/2134 Town and Country Planning (General Permitted Development) (Amendment) (No. 2) (England) Order 2010

SI 2010/2135 Town and Country Planning (Compensation) (No. 3) (England) Regulations 2010

SI 2010/2150 Pharmacy Order 2010 (Appeals - Transitional Provisions) Order of Council 2010

SI 2010/2156 Companies (Disclosure of Address) (Amendment) Regulations 2010

SI 2010/2161 Occupational Pension Schemes (Investment) (Amendment) Regulations 2010

SI 2010/2172 Environmental Permitting (England and Wales) (Amendment) (No. 2) Regulations 2010

SI 2010/2173 Smoke Control Areas (Exempted Fireplaces) (England) (No. 2) Order 2010

SI 2010/2184 Town and Country Planning (Development Management Procedure) (England) Order 2010

SI 2010/2185 Planning (Listed Buildings and Conservation Areas) (Amendment No. 2) (England) Regulations 2010

SI 2010/2188 Cornwall Inshore Fisheries and Conservation Order 2010

SI 2010/2189 Eastern Inshore Fisheries and Conservation Order 2010

SI 2010/2190 Kent and Essex Inshore Fisheries and Conservation Order 2010

SI 2010/2192 Equality Act 2010 (Qualifying Compromise Contract Specified Person) Order 2010

SI 2010/2193 North Eastern Inshore Fisheries and Conservation Order 2010

SI 2010/2194 Equality Act 2010 (Obtaining Information) Order 2010

SI 2010/2196 New Woodlands School (Amendment) Order 2010

SI 2010/2197 Northumberland Inshore Fisheries and Conservation Order 2010

SI 2010/2198 Southern Inshore Fisheries and Conservation Order 2010

SI 2010/2199 Sussex Inshore Fisheries and Conservation Order 2010

SI 2010/2200 North Western Inshore Fisheries and Conservation Order 2010

SI 2010/2205 Furniture and Furnishings (Fire) (Safety) (Amendment) Regulations 2010

SI 2010/2212 Devon and Severn Inshore Fisheries and Conservation Order 2010

SI 2010/2213 Isles of Scilly Inshore Fisheries and Conservation Order 2010

SI 2010/2214 Building Regulations 2010

SI 2010/2215 Building (Approved Inspectors etc.) Regulations 2010

SI 2010/2221 Storage of Carbon Dioxide (Licensing etc.) Regulations 2010

SI 2010/2225 Material and Articles in Contact with Food (England) Regulations 2010

SI 2010/2226 Immigration and Nationality (Cost Recovery Fees) (No. 2) Regulations 2010

SI 2010/2228 Contaminants in Food (England) Regulations 2010

SI 2010/2231 Water Use (Temporary Bans) Order 2010

SI 2010/2232 Flood Risk Management Functions Order 2010

SI 2010/2235 Police Pensions (Additional Voluntary Contributions) (Amendment) Regulations 2010

SI 2010/2245	Equality Act 2010 (General Qualifications Bodies) (Appropriate Regulator and Relevant Qualifications) Regulations 2010
SI 2010/2246	Community Care, Services for Carers and Children's Services (Direct Payments) (England) (Amendment) Regulations 2010
SI 2010/2262	Solicitors' (Non-Contentious Business) Remuneration (Amendment) Order 2010
SI 2010/2285	Equality Act (Age Exemption for Pension Schemes) (Amendment) Order 2010
HC 382	Statement of Changes in Immigration Rules
CM 7929	Statement of Changes in Immigration Rules

APPENDIX 1: DRAFT MEDICAL PROFESSION (RESPONSIBLE OFFICERS) REGULATIONS 2010: GOVERNMENT RESPONSE AND FURTHER EVIDENCE

Information from the Department of Health

Q1. *Can you explain how someone who has only been qualified 5 years meets the definition of a "senior doctor".*

A1. The functions of the responsible officer will require the post to be a senior medical role within a designated organisation. The Regulations are supported by guidance which describes clearly the level of seniority required of doctors undertaking the role. For example, paragraph 4.40 states "…he or she will be able to demonstrate an ability to lead and manage change in complex healthcare organisations and have significant experience of medical management…". Each designated organisation will need to determine for itself, taking account the Regulations and guidance, whether a candidate is capable of carrying out the role.

The requirement for the responsible officer to have been a qualified doctor for five years is a minimum requirement. Once a doctor has qualified and is admitted to the General Medical Council's register they will usually to go on to undertake postgraduate training. Upon successful completion of postgraduate training, usually after about 5 years, they will be admitted to the specialist or general practitioner register. At this point in their careers. Doctors are eligible for independent practice as a consultant or GP.

In the first consultation about the role of responsible officers, we asked whether a responsible officer should be a medical director or board member (where organisations do not have boards it would be a member of the senior decision making body in the organisation). The vast majority of respondents answered 'yes' to this question, and the description of the role in the responsible officer guidance reflects this view..

Q2. *Could you also explain how a responsible officer would examine the fitness to practise of those of whose work and specialty they may know nothing and have no experience. How would a consultant cancer specialist be able to judge the professional competence of a gynaecologist?*

A2. The evaluation of fitness to practise is an assessment of evidence that a doctor meets the standards set by the GMC in Good Medical Practice6. As part of the introduction of medical revalidation, these generic standards will be supplemented by specialty standards developed by the medical Royal Colleges (and approved by the GMC). Doctors will be expected to participate in a process of annual appraisal in the workplace which will evaluate their performance against the relevant standards. The role of the responsible officer will be to assess whether sufficient evidence has been produced to demonstrate that the relevant standards have been met or, where concerns exist about a doctor's practise, that they have been investigated appropriately and evidence gathered.

The responsible officer has a duty under regulation 11(4) to ensure that procedures for investigating concerns includes provision for the doctor's comments to be sought and taken into account. This will enable the doctor to provide an explanation and to address any clinical issues that may be involved. There are similar provisions, under regulation 16, for doctors to be informed of progress and for comments to be sought in the additional responsibilities of responsible officers in England, where concerns are raised about a doctor that are not sufficiently serious to bring into question a doctor's fitness to practise. The responsible officer will need to ensure that appraisals and investigations are carried out by appropriately trained staff. In this way they will have confidence that the evidence

[6] Good Medical Practice sets out the principles and values expected of all doctors registered with the GMC. These are under the following headings: Good clinical care, Maintaining good medical practice, Teaching and training, appraising and assessing, Relationships with patients, Working with colleagues and Health.

is appropriate and valid. The responsible officer can also decide to take advice from appropriate sources eg National Clinical Assessment Service or the Royal Colleges, in the way that medical directors do currently. This is set out in paragraphs 4.7 and 4.11 of the guidance. In the event that a responsible officer is unable to confirm a doctor's fitness to practise, the doctor will be subject to the GMC's Fitness to Practise procedures.

Q3. *Did you consult specifically on what the qualification for a "responsible officer" should be?*

A3. We did not consult specifically on the qualification for a "responsible officer" as there is currently no recognised qualification that identifies the skills and attributes required of this post. An expert group consisting of representatives of employers, SHA's, PCTs, trade unions and representatives of specific groups of doctors, such as those in higher education and working on cruise ships, was convened to advise on the development of the policy. The group considered whether responsible officers should be required to be registered or licensed doctors. The overwhelming view of members of the group, which was supported by the consultations, was that responsible officers should be licensed. Copies of our summary responses to the consultation are available on the website.

September 2010

Evidence from the British Medical Association

Introduction

The BMA welcomes the opportunity to provide a written submission to the Merits of Statutory Instruments Committee as part of its considerations on The Medical Profession (Responsible Officer) Regulations 2010. The BMA is a voluntary, professional association that represents all doctors from all branches of medicine across the UK. Over 100,000 practising doctors are members, as are nearly 20,000 medical students. The BMA is an independent trade union, a scientific and educational body and a limited company, funded largely by its members.

The recent consultation by the General Medical Council (GMC) provided the most comprehensive statement to date on how revalidation would work. This brought into perspective many of the concerns that the BMA has with the process and provided us with the opportunity to submit a detailed critique of the plans.7 Following the submission of our response, the Secretary of State for Health announced his intention to extend the pilots in England in order to allow a 'clearer understanding of the costs, benefits and practicalities of implementation.' This pilot extension, the revision of the GMC's plans and now, the publication of the White Paper, has caused widespread uncertainty about the concept of revalidation, the direction it is taking and the timescales involved.

Whilst these draft regulations indicate the Government's commitment towards the implementation of revalidation, there is a perception that further detail on the component parts of the process should have been developed before the statutory instruments were introduced, particularly in light of the implications of the recent White Paper. Admittedly, the White Paper did not refer specifically to revalidation but the proposals to abolish PCTs and SHAs in England will have significant implications for the governance structures envisaged for primary care, along with the connection between a Responsible Officer (RO) and their own RO. It is envisaged that 975 ROs will be in place in the UK by January 2011,8 many of whom will be tasked with strengthening governance systems in organisations which are to be abolished. We have grave doubts about how so many ROs will be identified and trained during the coming months. It also remains unclear where the

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[7] www.bma.org.uk/images/bmaresponsetogmcrevalidationconsultation25may2010_tcm41-197363.pdf

[8] The Medical Profession (Responsible Officers) Regulations 2010 Impact Assessment

RO role will sit for GPs in England when GP consortia assume full responsibilities from PCTs in 2013.

The BMA acknowledges that the RO guidance stipulates that medical directors appear best placed to assume the RO role, given that they undertake some of the responsibilities already, but we believe that this could result in conflicts of interest in some parts of the UK, particularly where medical directors have a corporate board responsibility. These conflicts could be between the RO and organisation and also between RO and individual doctors. Whilst the regulations go some way to addressing the issue of conflicts of interest or an 'appearance of bias', we do not believe that they are sufficient in all cases to address doctors' perceptions of potential conflicts between an RO's professional responsibilities and the demands of the employing organisation in the legislation. By way of example, a consultant may well want to continue to undertake complex cardiothoracic surgery in risky patients, but because this would distort the organisations targets, the trust may choose to question his/her professional competency through revalidation.

The regulations state that it is an organisation's responsibility to ensure that there is a robust system, and one that commands the confidence of the RO. We are concerned that, as yet, most if not all organisations have not demonstrated the capability to pull together data necessary for the process to happen, and indeed in many, appraisal is disjointed and ineffective. The RO's role is firmly embedded in good governance, supporting doctors through revalidation and of making a recommendation to the GMC on an individual's fitness to practise. These three roles have different lines of accountability, thus creating conflicts of interest. This is compounded by the fact that the RO, as currently envisaged, would sit on the board of the designated organisation. Clearly for the governance role, sitting on the organisation's board would be essential as assuring the standard of appraisal and setting up systems to educate and remediate doctors is part and parcel of an organisation's core business. Such processes affect all the doctors in the organisation and such duties are usually carried out by the medical director, supported by other medical managers. We would suggest that the medical director should continue to be responsible for clinical governance within an organisation with the chief executive remaining the accountable officer.

Whilst we see the role of the RO as having responsibility for ensuring that clinical governance systems are robust and fit for purpose, their main functions should be to support doctors through the revalidation process and make recommendations to the GMC. These roles can be broader than the interests of a particular organisation since doctors can work for more than the RO's particular organisation. Revalidation covers all of a doctor's work, is individual to that doctor and is between the doctor and the GMC– it is the doctor's registration, not the employer's. In these instances the RO's accountability is to the individual doctor, the GMC and the public. Revalidation recommendations should be made purely on the standards set by GMC and Colleges and this does not require the decision to be made by a medical line manager.

It has become increasingly evident therefore that the governance role and the recommendation role are incompatible. Situations in which conflicts of interest may arise if the RO is the medical director include:

- Contractual disputes – the medical director is the ultimate medical line manager
- Whistle-blowing - doctors may feel less inclined to raise concerns
- Doctors working for multiple employers who may be competing in some way with the organisation of the medical director
- Conflicts between the academic priorities of clinical academics with honorary contracts and the service priorities of the medical director and the NHS organisation

- Referral of doctors to the GMC in contrast to deciding on revalidation recommendations
- Board decisions of the organisation which corporately bind the medical director to a course of action which may run contrary to the best interests of individual doctors – e.g. maintaining failing services. This is particularly relevant in the current and future financial situation
- In private medical institutions where the RO has a vested interest and thereby conflict in the clinical workload of the doctor concerned.

As such, the only solution that avoids any conflicts of interest is for some designated organisations to appoint or nominate an RO whilst also maintaining a separate medical director position. In this way, the medical director could continue to be responsible to the employing organisation's board with the RO maintaining responsibility to individual doctors. In addition to the conflicts of interest issue, the workload implications of the RO role suggest that it will need to be a full-time position and so two distinct positions may be required in order to ensure that the roles are carried out adequately.

In Scotland however, where the role of the RO is different and where we perceive there to be better working relationships, intra-professional trust and different conflicts of interest, medical directors may be best placed to assume the RO role. Elsewhere, where governance arrangements suggest a potential for conflicts of interest, a separate appointment should be considered. Regardless of who undertakes the role of the RO, there needs to be greater clarity regarding what constitutes medical director functions (for which the individual would be responsible to the board) and which are RO functions.

Specific comments on the draft regulations

Regulation 6 requires designated bodies to nominate or appoint an additional RO in cases where there is a conflict of interest or appearance of bias between a doctor and the original RO. If a doctor has a conflict with the designated organisation, there is little point in that organisation having the ability to appoint a second RO. Regulation 6 does not contain appropriate safeguards to address this. The regulations should make provision for an appeals process to enable an external review to be undertaken should a disagreement arise.

Regulation 10 sets out the 'prescribed connection' between designated bodies and doctors. It is evident that most doctors will be able to readily relate to an RO. For some doctors, such as those performing duties outside the NHS, it may be more difficult. Instead of the regulations making provision for every doctor with an esoteric job, it should generally be the individual doctor's professional responsibility to secure some form of appraisal and sign-off in order to maintain a license to practice (without which they cannot continue to work). Therefore, the regulations should give doctors the responsibility of engaging with an appropriate RO, either organisationally or geographically, but only once the arrangements for dealing with the minority of doctors that fall outwith the framework have been clarified. Currently, Regulation 10 (1) appears incomplete as it does not accommodate, for example, academic doctors who are employed by universities and who hold an honorary contract with an NHS organisation.

Both Regulations 14 and 19 create offences where a designated body fails to provide resources for a responsible officer or a responsible officer is prevented from carrying out their statutory duties. We note that the RO is responsible for ensuring that sufficient resources are put in place to support the function. This is a rather invidious position for the RO, particularly if there is not clear guidance on the subject. We fear that, as a last resort, the RO may have to report his or her organisation to the Care Quality Commission in England to secure the necessary resources. This is a further reason why it would be difficult for the role to be undertaken by the medical director.

Conclusion

The BMA continues to have significant concerns about the potential conflicts of interest that may arise in the RO role where medical directors have a corporate board responsibility. Further measures are required to address this issue, both in the regulations and the accompanying guidance. At a time when many of the component parts of revalidation remain undecided, in light of the recent GMC consultation and the White Paper, the BMA believes that it is premature to lay these statutory instruments. In the current financial climate, with the NHS expected to make substantial efficiency savings, we have to question the logic of placing ROs in PCTs and SHAs in England when these organisations are to be abolished in the coming years. We would also suggest that a realistic time period is allowed to train appointed ROs, and that the system that supports them is unified around all organisations before the concept is rolled out; otherwise there will be major disparities in how different individuals or disciplines are dealt with.

September 2010

Evidence from the Royal College of Surgeons

Introduction

The Department of Health recently published responsible officer regulations9, guidance10 and the Department of Health's response11 to the consultation responses received. This paper outlines the key concerns the Royal College of Surgeons still has regarding the regulations that were laid in Parliament on 26th July. A draft of this paper was shared with the Royal Colleges of Anaesthetists, Physicians and Radiologists; each College was supportive and their comments have been incorporated.

Background

Primarily, responsible officers exist to make recommendations of revalidation to the GMC based on local processes. Revalidation requires doctors to demonstrate their continuing fitness to practice at least every five years in order to retain their licence. Responsible officers will be senior doctors with local responsibility for overseeing the evaluation of fitness to practise, and monitoring the conduct and performance of doctors. The regulations lay out:

- which organisations are required to appoint responsible officers
- the responsibilities of responsible officers
- how a doctor relates to a responsible officer

The Department of Health twice consulted on their plans, most recently in autumn 2009 on draft regulations and draft guidance. RCS responded to these consultations.

Conflict of interest

Revalidation is the affirmation that a doctor is safe and competent to practice. It is not the confirmation that the doctor is an efficient employee although we would expect that all employers require safe and competent employees. We believe that responsible officers may have a potential conflict of interest between their responsible officer role and other management roles they may hold for the Trust e.g. being a Medical Director on the

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[9] http://www.opsi.gov.uk/si/si2010/draft/ukdsi_9780111500286_en_1

[10] http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_117861

[11] http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_117885

Board. We raised this in our consultation response and other correspondence but while it was acknowledged by the Department of Health as a point raised, it has not been addressed in the regulations.

We believe that circumstances might arise where the responsible officer is torn between Trust commitments and the professional role of responsible officer. We therefore call for Trusts to separate the role of responsible officer to be separate from the role of Medical Director. The responsible officer should remain a member of the Board but not hold the legal responsibilities of the other directors. Where this is not possible, especially for smaller organisations, the designated body should put processes in place to mitigate this conflict and the GMC must be responsible for overseeing this. Two theoretical examples should be considered.

Example 1: The surgeon is a fast worker and meets list targets. However, the surgeon has had concerns raised about their practice by colleagues and other evidence suggests there might be some problems with the quality of practice. The responsible officer might be under pressure from the Board to suppress concerns about the surgeon and recommend revalidation because they contribute so much to the surgical throughput of the Trust. Any period of suspension or limited practice would have a negative financial and administrative impact

Example 2: The surgeon has an awkward relationship with Trust management and does not readily cooperate. The surgeon has fixed ideas about how treatment should progress even if this involves more expensive processes. Nevertheless the surgeon's practice is safe and within normal safety parameters for the specialty. The responsible officer might be under pressure from the Trust to use the revalidation process to "manage out" the surgeon even though the surgeon's practice is safe.

Given the obvious potential impact on patient safety and quality this conflict is too important to be ignored in the regulations. The role of the responsible officer, in relation to revalidation, is concerned with the professional conduct and clinical ability of a doctor not the contribution the doctor makes to Trust targets etc. We believe it is necessary for the regulations to specify that designated organisations must ensure separation of interests either through the separation of the role or other measures.

Whole Practice appraisal

The College believes that revalidation will only be effective if the whole of a doctor's practice is considered at appraisal. Doctors with portfolio careers, e.g. those working in more than one location possibly undertaking different kinds of work12, are more difficult to regulate and pose a greater risk if the challenges of regulation are not addressed.

We are therefore disappointed that the guidance does not mention whole practice appraisal directly. The guidance does make responsible officers "responsible for ensuring that systems are in place to record and collate all the necessary information, including a record of any practice undertaken by the doctor outside of the organisation." This leaves out an obligation for all designated bodies to provide such information. We would expect that all bodies that employ or contract doctors be required to:

- release key information such as records of complaints and outcome data; and
- facilitate exercises such as patient and colleague feedback.

The Department of Health is currently drawing up regulations regarding the Duty of Cooperation13. This will require healthcare organisations to share information where a

[12] A good example would be a surgeon that has an NHS practice but undertakes cosmetic surgery in the independent sector that is not offered by the NHS.

[13] http://www.dh.gov.uk/en/Consultations/Liveconsultations/DH_113563

concern has been identified. It does not include a requirement to routinely share information for appraisal and is inadequate for the purposes of effective revalidation.

Indemnity for responsible officers

We urge the Department of Health to clarify the situation on indemnity for responsible officers in the regulations. The latest guidance states that "The GMC recommends that all doctors have indemnity appropriate to the work they do. The responsible officer is a doctor and should be indemnified in the same way." We think this is inadequate. We have heard from organisations that they think that appointing a good responsible officer will be difficult due to a lack of volunteers for a role that carries great personal responsibility. We believe that designated organisations should be responsible for providing indemnity for responsible officers.

Local appeals systems

The regulations make no mention of local appeals systems and this is a significant oversight. Issues should not have to escalate as far as the GMC fitness to practise processes before doctors can appeal against recommendation or the way in which complaints about internal systems are handled. Locally based appeals processes would be proportionate and need not be unduly burdensome. For many NHS Trusts, existing grievance processes can, with some adaptations, be used for this purpose but it is likely that not all organisations will have similar robust processes in place. Moreover, it would be good practice to have in place an external (perhaps regionally based) system of appeals. The way the regulations are written seems very one sided and threatening. It is important that a robust and transparent locally based appeals mechanism is written into the regulations and laid out in formal guidance from the outset.

September 2010

APPENDIX 2: DRAFT WIRELESS TELEGRAPHY ACT 2006 (DIRECTIONS TO OFCOM) ORDER 2010: EVIDENCE AND GOVERNMENT RESPONSE

Formal submission from Everything Everywhere Ltd

We, Everything Everywhere Limited ("EE") write concerning The Wireless Telegraphy Act 2006 (Directions to Ofcom) Order 2010 ("the Draft Order") that was laid before Parliament in 26 July 2010, and which EE understands that the House of Lords Select Committee on the Merits of Statutory Instruments will be considering at its next meeting on 5 October 2010.

The Statutory Instrument was not made available for public consultation prior to its submission to Parliament, and EE believes that the issues raised are relevant to the following points in the Terms of Reference of the Committee for which matters may be drawn to the special attention of the House:

a) The issue has been rushed by the Government and as a result of such action or otherwise inappropriately implements European Union (EU) legislation.

b) It is legally important and gives rise to public policy issues which are likely to be of interest in both Houses.

c) It imperfectly achieves its policy objectives.

Competition

The promotion of effective competition in mobile communications markets is of great importance both for the UK economy, and the UK consumer. Distorting the level playing field in the mobile broadband market is likely to have knock on consequences in other mobile communications markets. It is therefore essential that the Draft Order is reviewed in order to ensure that the wider context and requirement for continued competition and investment in the mobile voice and broadband markets is protected through the implementation of a broad solution to the issues raised by spectrum liberalisation.

Indeed, the promotion of competition is a duty incumbent on the State and on Ofcom pursuant to the Communications Act 2003 and it is a specific requirement of the Amended GSM Directive that the effect of liberalisation on competition be assessed and addressed prior to such liberalisation taking place in order to preserve competition.

However, the revised Statutory Instrument was rushed through by the Government, and the Draft Order fails to meet the legal requirements incumbent on the Secretary of State and Ofcom, and will, if passed, do severe damage to competition in mobile communications markets and to the future development of mobile communications in the United Kingdom, in particular mobile broadband. It will also be contrary to EU law.

Spectrum Liberalisation

The Draft Order pursues the policy of spectrum liberalisation under both the Amended GSM Directive and the Commission Decision.[14] Spectrum liberalisation means licensees may decide how best to use spectrum, including what services to offer and what technology to deploy, subject only to necessary technical restrictions. It therefore purports to remove current restrictions in 900 MHz and 1800 MHz licences which restrict their use to 2G technology and thereby would also enable the use of these frequencies for 3G/mobile broadband services. EE strongly endorses and supports the process of spectrum liberalisation since it will enable improved services to consumers. However, in order to ensure long term benefits to consumers it is essential that spectrum liberalisation

[14] The Amended GSM Directive liberalises the 900 MHz band, and the Commission Decision liberalises the 1800 MHz band.

be undertaken in such a way as to promote and preserve competition between mobile networks. EE does not believe the current proposals achieve this policy objective.

Deploying 3G in the 900 MHz band will give a competitive advantage over 3G in the 2.1 GHz and 1800 MHz Bands

Signals using the 900 MHz band penetrate buildings more easily and carry better across longer distances than signals using spectrum above 1 GHz. This provides (a) better in building reception; (b) requiring fewer base stations; and therefore (c) allowing coverage which is simply not achievable or economic using the higher frequency 1800 MHz and 2.1 GHz bands. These facts are uncontested and are supported by the findings of Ofcom, the European Commission and numerous independent papers. Furthermore, over 50% of handsets now sold in the UK can use 3G in the 900 MHz band, whereas the handsets and infrastructure that would enable this in the 1800 MHz band are unavailable or available only from 01 2011 respectively. Hence, even under the current terms of the Draft Order Vodafone/02 (the two holders of 900 MHz spectrum in the UK market) would derive an immediate competitive advantage over their competitors, which advantage is unlikely to cease in the foreseeable future.

EU law requires the Secretary of State to consider that competitive advantage

Recital 6 to Amended GSM Directive states that *"liberalisation of the use of the 900 MHz band could possibly result in competitive distortions… where certain mobile operators have not been assigned spectrum in the 900 MHz band, they could be put at a disadvantage in terms of cost and efficiency in comparison with operators that will be able to provide 3G services in that band."* Consequently, article 1(2) of the Amended GSM Directive specifically requires Member States to consider competition issues, and take action to address those competition issues, when legislating to implement spectrum liberalisation. No equivalent concerns or measures are contained in relation to the 1800 MHz band in either the Directive or the related Commission Decision. The UK is unique in Europe in having allocated all 900 MHz spectrum and not ensuring all 2G operators have access to such spectrum and so is specifically contemplated by this provision.

The Secretary of State has discarded proposals which would have redressed that competitive advantage

BIS issued a consultation on a proposed direction to Ofcom in October 2009, building on the work of the Independent Spectrum Broker. BIS's previous proposed direction included a package of measures to deal with the competition problem identified above, including firm proposals for the auction of 800 MHz spectrum (which is broadly comparable to 900 MHz), caps on the holding of sub-1 GHz spectrum and wholesale roaming obligations on holders of sub-1 GHz spectrum. The revised Draft Order has discarded all these additional measures, without consultation or proper explanation. Given that these were specifically put in place in order to ensure a measure of long term competitive balance among operators this is significant. Even where other operators may have voiced concerns over the detail or form of these measures, alternatives are available to simply discarding them in their entirety regardless of their underlying rationale.

Five to Four Operators Market

The changes between the original draft order and the revised Draft Order reflect concerns raised by Vodafone/02 regarding the merger of T-Mobile and Orange. The assertion is that the creation of EE itself not only solves the issue of preserving competition, but itself creates a threat to Vodafone and 02, and that none of this was considered or reflected in the process and outcome leading to the previous draft order. This is unambiguously not the case. BIS and the Independent Spectrum Broker (appointed by Government to reach the compromise which formed the basis of the previous draft) explicitly considered the scenario of a merger between MNOs, going so far as specifying what changes should be

required and these were reflected in the previous draft Order. Hence, while that merger has come to fruition, the competitive dynamic considered and aimed to be preserved has not. There is therefore no basis for the discarding of the measures that would have addressed the continued competitive advantage enjoyed by the 900 MHz operators.

THE DRAFT ORDER IS ULTRA VIRES AS THERE WAS NO CONSULTATION

The Draft Order is made under section 5 WTA 06. Section 6(2) WTA 06 provides that "before making an order under section 5, the Secretary of State must consult - a) OFCOM; and (b) such other persons as he thinks fit." Such consultation goes to the vires of the Secretary of State to make the Draft Order. Plainly, the consultation required by section 6(2) must be consultation on the measure which is actually proposed. Equally plainly, EE as a holder of 1800 MHz licences, is a person obviously affected by the Draft Order and must be a fit person to consult. This position was accepted with regard to the previous Draft Order where EE was consulted.

There has simply not been any, or any adequate, consultation with the mobile industry on the path pursued by the Draft Order by the current administration of liberalisation in the hands of incumbents. The changes from the previous draft Order are significant and constitute a quite different proposed Direction. The Secretary of State has not consulted on the abandonment of those proposals despite meeting with each of the mobile operators.

EE's understanding is that Ofcom was only consulted on the form of the draft Direction and its contents days before it was tabled, and that at earlier meetings BIS only consulted Ofcom on its timing and confidence in ability to do a rapid competition assessment to allow a spectrum auction at the end of 2011.

For those reasons, EE believes that the Secretary of State lacks *vires* to make the proposed Order.

THE DRAFT ORDER IS UNLAWFUL UNDER EU LAW

15. As set out above Article 1(2) of the Amended GSM Directive specifically states that "*Member States shall, when implementing this Directive, examine whether the existing assignment of the 900 MHz band to the competing mobile operators in their territory is likely to distort competition in the mobile markets concerned and, where justified and proportionate, they shall address such distortions in accordance with Article 14 of [the Authorisation Directive].*[15]" Further, Member States are required by Article 8 of Directive 2002/21/EC ("the Framework Directive") to take all reasonable measures to ensure that there is no distortion of restriction of competition in the electronic communications sector.

EE believes that the Draft Order would breach the United Kingdom's obligations under Article 1(2) of the Amended GSM Directive and Article 8 of the Framework Directive in three ways.

First, the Secretary of State has failed to carry out any or any adequate assessment of the present assignment of 900 MHz licences on competition. The Impact Assessment mentions competition in the briefest possible terms, confined to a few paragraphs. Further it is vague and general. It plainly does not constitute a proper basis on which the Secretary of State could decide to legislate or not to legislate or indicate exactly what assessment the Government believed it carried out.

Following on, it would appear that the Secretary of State envisages that Ofcom will carry out some form of competition assessment after the Draft Order is made. This is reflected in Article 8 of the Draft Order and in the Secretary of State's letter of 27 July 2010 to the

[15] Article 14 of the Authorisation Directive relates to the amendment or variation of, inter alia, spectrum licences.

Chair of the Business, Innovation and Skills Committee. However, this does not appear to be the assessment required by the Amended GSM Directive but an assessment directed at informing the rules of the proposed spectrum auction. Further, such an approach is plainly unlawful under the Amended GSM Directive which requires assessment prior to implementation.

Finally, Even though the Impact Assessment does identify concerns in respect of competition due to the present allocation of 900 MHz licences, the Secretary of State has abandoned the well-developed proposals on which BIS had previously consulted and which would have redressed those concerns.

According to his letter of 27 July he has done so because *"rapid growth of smart phones and similar devices… has resulted in the greater need for capacity on existing networks and I believe that this requirement cancels out any potential advantage of sub-1GHz spectrum in terms of rural reach and in building'*. It is plain that growth in demand for mobile capacity does not in any way go to the competitive advantage inherent in using the 900 MHz band over higher frequency bands. Rather, it appears that the Secretary of State has taken the view that other public policy goals can override competition concerns. Whatever the merits of that view, it is plainly not lawful for the Secretary of State under Article 1(2) of the Amended GSM Directive, nor is it an appropriate implementation of Article 1(1) of the Amended GSM Directive.

THE DRAFT ORDER WILL SEVERELY DAMAGE COMPETITION IN MOBILE COMMUNICATIONS

Liberalisation of the 900 MHz and 1800 MHz bands has the potential to vastly increase the quality and range of mobile broadband coverage. However, realising the benefits of liberalisation depends in particular on a number of competing mobile network operators ("MNOs") having access. to sub-1GHz spectrum: low frequency spectrum (such as the 900MHz spectrum held exclusively by Vodafone and 02) is necessary to allow economic roll-out of mobile broadband coverage to rural areas and to allow effective in-building penetration. In addition, stronger competition will provide MNOs with greater incentives to improve mobile broadband coverage. More widely, the promotion of effective competition in mobile communications markets is of great importance to the UK economy as it continues to recover from the economic shocks experienced over the last two years. Distorting the level playing field in the mobile broadband market is likely to have knock-on consequences in other mobile communications markets.

Under the Draft Order, Vodafone and 02 will enjoy the following major advantages over EE and 3 by reason of having access to the 900 MHz band.

Cost and Coverage

It will be much cheaper for them to provide truly nationwide mobile broadband coverage, as they will be able to deploy up to a third fewer base stations using 900 MHz for 3G services than their competitors using 2.1 GHz spectrum. According to research by Ofcom this alone will enable Vodafone and 02 to each save billions of pounds as compared to their competitors.[16] Furthermore, unlike Vodafone/02, operators seeking to compete using 800 MHz spectrum will first have to acquire this at auction. Following the precedent set in the German auctions of this spectrum this would likely cost many billions of pounds once new network infrastructure has been built in order to deploy it. 800 MHz spectrum will not be available in any event until the end of 2013 or 2014, following analogue television switch over.

[16] Everything Everywhere estimates this to be £5bn over 10 years. Ofcom has similarly concluded the effect to be in the billions, albeit its conclusion was a lower figure of £2.2bn.

Penetration

They will be able to provide better in-building mobile broadband coverage than EE is able to achieve. According to Ofcom research, the quality of network reception is the leading factor for consumers choosing between operators. Furthermore, this is of particular significant in the growing market for mobile broadband since (as verified by independent research) the majority of mobile data use is consumed from within buildings.

Timing

The 900 MHz operators will be able to deploy more extensive mobile broadband networks far quicker than EE. As has already been seen in deployments on the continent, 3G at 900 MHz can be achieved by a simple swap of a network card at sites. Many 3G devices will operate both at 900 MHz and 2.1 GHz. Even were EE to acquire 800 MHz spectrum at auction it would be some time before it was able to build out a new national network over which to deploy it, and offer devices to consumers. Even then, there is still no voice standard agreed for 3G at 800 MHz and it will likely take 5-8 years before the majority of consumers migrate on to handsets which will use this frequency. Hence, while Vodafone and 02 will be able to achieve a substantial and near immediate improvement in service, even with an acquisition of 800 MHz it will take their competitors several years (and many billions of pounds of investment) to achieve some form of competitive parity.

Public Policy Objectives

More widely, the promotion of effective competition in mobile communications markets is great importance to the UK economy. Distorting the level playing field in the mobile broadband market is likely to have knock-on consequences in other mobile communications markets. It is therefore essential that the Draft Order is reviewed in order to ensure that the wider context and requirement for continued competition and investment in the mobile voice and broadband markets is protected through the implementation of a broader solution to the issues raised by liberalisation.

27 September 2010

Information from the Department for Business, Innovation and Skills

Everything Everywhere wrote to the Committee on the 8th September drawing their attention to concerns they have about the draft order, The Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010 that the Merits Committee is due to consider on the 5th October.

The points raised in that letter have been made in a letter to the Secretary of State. The Department has responded and contests the views expressed by Everything Everywhere, and wishes to draw this to the attention of the Committee.

Everything Everywhere assert that the UK has misunderstood its obligations in implementing the revised GSM Directive 2009/114/EC; that there has been a failure to carry out an adequate competition assessment on the impact of the changes; that the competition assessment that has been done is flawed and the Department acted unfairly in failing to consult on this direction, which is a revision of a direction previously laid prior to the General Election.

The Department refutes these claims. The Secretary of State's direction was not based on a misunderstanding of his obligations but the result of a specific decision to instruct Ofcom in this way. The Secretary of State was not under the impression that he was required to act in this way by the Directive. The Secretary of State's competition assessment took into account the responses to the extensive formal consultation that took place, and further informal consultation with Ofcom and mobile operators. The Secretary

of State therefore is content that he was entitled to come to the conclusion he did on the basis of the evidence provided. Similarly he rejects the view that the assessment is flawed. Ofcom are shortly to provide a final report that will provide their latest analysis of the competitive impact of implementing the revised GSM Directive and we will consider this before deciding how to proceed. Finally, the Secretary of State believes that the formal consultation process that took place previously, supplemented by the further discussions with Ofcom and mobile operators was sufficient in coming to his decision.

30 September 2010

APPENDIX 3: HOME ENERGY EFFICIENCY SCHEME (ENGLAND) (AMENDMENT) REGULATIONS 2010 (SI 2010/1893): GOVERNMENT RESPONSE

Questions from the Merits Committee

Does the administering agency currently have the power to refuse applications because the money has run out or is this completely new?

Have you assessed how many people are likely to apply and how many are likely to be refused? How does this compare with previous years?

Has there been an equality impact assessment of the likely refusal cohort?

In paragraph 8.1 of the Explanatory Memorandum you say that there is no statutory requirement to consult. However, why did you not run a consultation in order to test the effectiveness of this SI against its policy objectives?

September 2010

Information from the Department for Energy and Climate Change

These Regulations were made to clarify the Secretary of State's ability to refuse applications when the amount of money allocated to the scheme for a particular financial year has all been allocated to approved applications. Funding for Warm Front for future years will not be clear until Spending Review decisions are announced in October. Warm Front is a popular scheme and the Government has to avoid the possibility that the funds available in any one year are insufficient to meet the demand. Our latest assessment shows that the Scheme is unlikely to have to refuse applications in the near future. An equality impact assessment will be considered if it is necessary for the Scheme to begin refusing applications. It was important to make this change to the Regulations well in advance of the point at which the provision might need to be relied on; the policy objectives are straightforward and a consultation was not considered necessary.

September 2010

APPENDIX 4: STATEMENT OF CHANGES IN IMMIGRATION RULES (HC 382): LETTER FROM THE HOME OFFICE

Letter from the Home Office

I am writing to advise you that the Government will lay a Statement of Changes to the Immigration Rules to be announced this morning by Written Ministerial Statement. Some of these changes will come into force tomorrow. 23 July.

Today's Statement of Changes brings together six separate changes to the Immigration Rules:

1. Students changing institution
2. General Grounds for Refusal and overstayers
3. Level of Tier 2 qualifications
4. Secure English testing for some Tier 4 Students
5. The minimum level of course to be undertaken by a Tier 4 General student
6. PBS maintenance requirements following judgement in the case of Pankina

Whilst it has been possible to ensure that two of these changes. relating to overstayers and the introduction of secure English language testing. will take effect on 12 August the other four changes will come into effect tomorrow. I wanted to explain to my reasons for breaching the convention of laying such changes before Parliament at least 21 days before they come into effect.

Tier 2 qualifications, the minimum level of course for non-EEA students and the maintenance requirement for those coming to the UK under the Points Based System

I wrote to you on 15 July explaining that recent judgments (specifically *SSHD* v Pankina & others [201 OJ EWCA Civ 719 and R (on the application of English UK Ltd) v SSHD [201 OJ EWHC 1726 (Admin) had considered the extent to which requirements under the Points Based System regulating entry into or stay in the UK of non-nationals must be set out in the Immigration Rules, rather than in UK Border Agency guidance. The above changes relate to requirements which have previously been set out in guidance, but which we are now bringing within the Immigration Rules.

I should emphasise that the requirements we are bringing into the Immigration Rules of the Statement of Changes (paragraphs 11-13 and18 - 21) are the same requirements which were previously set out in UK Border Agency guidance, so those interested in these categories will already be familiar with them. Following the judgments, the Government is using this Statement of Changes to make clear the requirements which it expects of applicants, placing them in the Immigration Rules as soon as possible to avoid any doubt as to the legal position. We want these changes to come into effect tomorrow to minimise the disruption or confusion for people wanting to apply for leave in these categories and to ensure the integrity of the Points Based System.

Students seeking to change institution

The change to Tier 4 will be beneficial to students applying for extensions of leave during the peak summer period where that application is for a new course of study at a different institution with Highly Trusted Sponsor status. In order to ensure the change is in place in time to cater for the summer peak in student applications it is also necessary for this change to come into effect immediately. Whilst it is regrettable that the convention of laying such changes before Parliament for 21 days before they come into effect cannot be observed on this occasion, as this change is made to support students making applications now, the Government is supported by the education sector in making this change

immediately and believes it is the right thing to do to support the students and educational institutions concerned, catering for the peak in student applications over the coming months.

22 July 2010

APPENDIX 5: FISHING BOATS (ELECTRONIC TRANSMISSION OF FISHING ACTIVITIES DATA) (ENGLAND) SCHEME 2010 (SI 2010/1600): CORRESPONDENCE

Letter from Lord Goodlad to Richard Benyon MP, Parliamentary Under-Secretary for Natural Environment and Fisheries, Department for Environment, Food and Rural Affairs

I am writing as Chairman of the Merits of Statutory Instruments Committee. The Committee agreed that I should write to you following our consideration of the Draft Fishing Boats (Electronic Transmission of Fishing Activities Data) (England) Scheme 2010. This draft instrument was initially scheduled for the Committee's meeting on 6 July. However, as a result of our concerns about some of the provisions in the draft instrument, it was held over for further consideration on 13 July pending further enquiries with Defra. Unfortunately the subsequent response from Defra did not allay our concerns.

The Committee has two issues with the draft SI. The first is that although Defra Ministers have made a commitment to fund the reasonable costs of the software, the drafting of Article 6(b) would appear to allow the Government to pay significantly less than the full cost. The second issue concerns the revocation of approval or withholding of payment provisions in Article 10. Under these provisions the Secretary of State can revoke/withhold a grant if it "appears" that conditions have been breached or an offence has been committed. This is a low threshold and we questioned whether there are any safeguards to protect fisherman against unjust revocations/withdrawals.

We have received further information from your officials on both these points. However, we remain far from convinced of the efficacy of either of the provisions. We have identified the draft SI as an instrument of interest in our weekly report. We also ask that you remind your officials that in drafting secondary legislation, proper consideration is given to ensuring that the provisions of an SI fully reflect the policy. We would also expect to see any areas of difficulty explained fully in the Explanatory Memorandum.

30 June 2010

Letter from Richard Benyon MP to Lord Goodlad

Thank you for your letter dated 30th June 2010, which we received on 28th July. You have raised two issues concerning the above Order, which allows Government to fund the purchase of electronic logbook software required on fishing boats by EU law.

The first issue is that, despite our commitment to fund the reasonable costs of the software, article 6 (b) allows us to pay significantly less than the full cost.

Let me assure the Committee that we do not propose to use article 6(b) to set the level of funding at below that of the cheapest available approved software. Article 6(a) says that the grant must not exceed the cost of purchase or supply of the software. Article 6(b) is designed to make best use of public funds by ensuring that we spend no more than is necessary to ensure that boats have a suitable electronic logbook system. A grant of £1,500 to £2,000 will cover the full cost of either of the first two software systems to have successfully passed the UK Fisheries Authorities' approval process. Should a further software system be approved at a later stage that costs (say) £1,200, we need to be able to limit public funding to that amount, leaving it to the vessel owner to pay the difference if they choose to buy a more expensive system.

The second issue is the threshold governing withholding of grant under article 10 and whether there are safeguards to protect applicants for grant against unjust revocations or withholding grant.

If we behaved unreasonably, without a sufficient evidential basis or otherwise unjustly, we could expect our decisions to be struck down by the courts in judicial review proceedings. But let me assure the Committee that action under article 10 is very much a last resort.

Such action would only be authorised at a senior level, we would give any alleged wrongdoer an opportunity to make representations and we would consider any representations before taking action under article 10.

I hope that this letter reassures the Committee on the issues raised.

10 August 2010

APPENDIX 6: THE GOVERNMENT'S POSITION ON CONSULTATION PROCEDURE FOR DELEGATED LEGISLATION: CORRESPONDENCE

Letter from Lord Goodlad to Lord Strathclyde, Leader of the House of Lords

I have recently been appointed Chairman of the Merits of Statutory Instruments Committee, which had its first meeting of the new Session this week. The Committee agreed that I should write to you on the issue of consultation about the development of secondary legislation.

The Committee believes in the value of consultation in policy development. The previous Government's '*Code of Practice on Consultation'* was a useful document. Most statutory instruments have been subject to consultation during their development, but there is still a minority which have not. We welcome the recently reported comments from David Willetts on the importance of scientific policy decisions being founded on evidence and research. However, we would be grateful for a statement of the Government's position on consultation, our hope being that the practice will accord with that set out in the Code.

The Committee has revised our guidance for Departments on the requirements for the tabling of secondary legislation. I should be grateful if you would advise Ministers of the revised guidance.

17 June 2010

Letter from Lord Strathclyde to Lord Goodlad

Thank you for your letter of 17 June in which you flagged the Committee's views on the value of consultation in policy development and requested a statement from the Government on its position on consultation.

The Government recognises the best practice established by the *Code of Practice on* Consultation and will continue to observe it wherever possible when conducting formal written consultations. We recognise that it is a well-understood channel for interested parties to give their views to Government and for Government to gather useful data.

In some circumstances, however, conducting a full, formal written consultation may not be the most appropriate or effective approach to connecting with the public; so we are also working to improve the tools available to policy-makers to engage the public more innovatively in policy-making.

As requested I will advise my Ministerial colleagues of your revised guidance on tabling secondary legislation.

I wish you every success in your appointment as Chairman of the Committee.

26 August 2010

APPENDIX 7: 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 05 October 2010 Members declared no interests on any of the instruments of interest.

Attendance:

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