

HOUSE OF LORDS

Merits of Statutory Instruments Committee

11th Report of Session 2010-11

Correspondence:

**Conventions of the House
Relating to Secondary
Legislation**

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The Select Committee on the Merits of Statutory Instruments

The Committee has the following terms of reference:

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

Members

The members of the Committee are:

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

Registered interests

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

Declared interests for this Report are in Appendix 2.

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.

Eleventh Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

None

OTHER INSTRUMENTS OF INTEREST

Draft Producer Responsibility Obligations (Packaging Waste) (Amendment) Regulations 2010

1. This draft SI amends the Producer Responsibility Obligations (Packaging Waste) Regulations 2007 (SI 2007/871) (“the 2007 Regulations”), which impose an obligation on producers of packaging to recover and recycle packaging waste in order to attain targets set out in an EU Directive. The 2007 Regulations set targets in Great Britain until 2010. In order to continue to comply with the Directive’s requirements, new domestic targets are required for 2011 onwards. This draft SI will therefore set targets for 2011 and 2012 based on current market data. The draft SI also includes provisions to increase the transparency associated with revenue from Packaging Recovery Notes, the process by which packaging producers who do not carry out their own recycling provide ‘top-up’ funding to accredited reprocessors or exporters.

Draft Scottish Parliament (Elections etc.) Order 2010

2. This draft Order provides for the conduct of elections for membership of the Scottish Parliament. It updates and consolidates the existing provisions on conduct of such elections contained in the Scottish Parliament (Elections Etc.) Order 2007 (as amended). It makes provision equivalent to that which applies to the conduct of Westminster parliamentary elections, but adapted to fit the electoral system for the Scottish parliament. It also applies, with modifications, provisions relating to parliamentary elections including changes made by the Electoral Administration Act 2006 and the Political Parties Act 2009. Section 6 of the Explanatory Memorandum explains the Government’s position in relation to convicted prisoners and the European Convention on Human Rights.

Misuse of Drugs (Licence Fees) Regulations 2010 (SI 2010/2497)

Controlled Drugs (Drug Precursors) (Intra-Community Trade and Community External Trade) Regulations 2010 (SI 2010/2564)

3. The Controlled Drugs (Drug Precursors) (Intra-Community Trade and Community External Trade) Regulations 2010 introduce fees for precursor chemical licences, registrations, and authorisations. The policy objective is to use fee revenue to improve the service received by licensees and registrants, and to strengthen the regulatory regime to reduce the risk of precursor chemicals being diverted into the illicit trade. In response to concerns raised

by some licensees in the consultation, the annual renewal process was amended so that compliant low-risk licensees and registrants will be able to use a light-touch renewal system with a correspondingly low fee. The Misuse of Drugs (Licence Fees) Regulations 2010 introduce a new fees structure for controlled drug licences. The fees structure is being revised in order to improve the service for licenses and to strengthen the regulatory regime to reduce the risk of controlled drugs being diverted into the illicit trade. Again the Home Office made changes to the Regulations following some concerns raised in the consultation. The House may be interested to note that the Home Office has undertaken to conduct a review of all the arrangements for the licensing of hemp, and is in dialogue with other Government departments as well as hemp growers and their representatives, in order to examine alternatives to the current regime.

National Health Service Bodies (Membership and Procedure) Amendment Regulations 2010 (SI 2010/2538)

Health Protection Agency (Amendment) Regulations 2010 (SI 2010/2540)

4. In line with the rules for other health bodies, these Regulations allow the Secretary of State powers to suspend Strategic Health Authority chairs and/or non-executives to allow a full investigation where there are accusations of malpractice, whilst at the same time providing a mechanism, through the Secretary of State's appointment of a temporary Vice Chairman, for the day to day functioning of the body to continue. (This is distinct from the position where a Chairman dies or falls ill, in which case the elected Vice-Chairman automatically takes over for the interim). Members asked for a clearer rationale of why the Vice-Chair elected by the Board should be automatically downgraded in these circumstances, so that the Secretary of State could put his own nominee in to run the organisation, but found the Department's response disappointingly vague.

Care Leavers (England) Regulations 2010 (SI 2010/2571)

5. These Regulations revoke, and in part replace with amendment, the Children (Leaving Care) (England) Regulations 2001. They make provision about the advice, assistance and support local authorities provide to children and young people aged 16 and over who are no longer "looked after" – that is, children who were looked after by a local authority, whether or not they were in the local authority's care by virtue of a care order. These Regulations place some new requirements on local authorities, which include: providing a personal adviser to advise and assist care leavers; preparing a pathway plan for each care leaver that should be reviewed regularly; and having regard to the suitability of the accommodation provided for care leavers. These new requirements will also apply to those relevant children who are detained or in hospital at the age of 16, having been looked after by a local authority prior to this (see Regulation 3 for details).

Equality Act 2010 (Amendment) Order 2010 (SI 2010/2622)

6. The Equality Act 2010 ("the 2010 Act"), which received Royal Assent on 8 April 2010, replaces and consolidates previous discrimination legislation. This Order amends the 2010 Act in order to ensure that employers are not

open to claims for pregnancy and maternity discrimination in circumstances where they have properly complied with their statutory and contractual obligations governing maternity-related pay. The Order came into force on 30 October 2010 and will therefore make the legal position after this date the same as it was prior to the commencement of the 2010 Act on 1 October 2010. The policy intention was always to maintain the same legal position in this area, but the Government Equalities Office was concerned that the drafting in the relevant part of the 2010 Act might allow for unintended legal challenges. The Order came into force the day after it was laid in order to mitigate any risks arising from the original drafting of the relevant part of the 2010 Act. The Committee recognises the Government's desire to amend the legislation quickly but is still disappointed that a breach of the 21 day rule has been the result.

Capital Requirements (Amendment) Regulation 2010 (SI 2010/2628)

7. The Capital Requirements Directive (“the CRD”) sets out the EU framework for the supervision of banks, building societies and certain investment firms. It sets minimum rules on capital requirements (in line with internationally agreed standards known as “Basel II”), provides a framework for supervision by national supervisors and establishes an information disclosure regime. Several aspects of CRD have now been amended by other EU legislation, including the provisions dealing with supervisory arrangements and crises management. These amendments (known as “CRD2”) form part of the European Commission’s response to the financial crises. Much of CRD2 is being implemented by the Financial Services Authority (FSA) using their statutory rule-making powers; these Regulations are necessary to implement the parts of CRD2 concerning supervisory arrangements.

CONVENTIONS OF THE HOUSE RELATING TO SECONDARY LEGISLATION: FURTHER CORRESPONDENCE

8. On 21 October the Committee published a letter from Lord Goodlad, Chairman of the Committee, to Lord Strathclyde, the Leader of the House, relating to the conventions of the House for voting on statutory instruments. The Committee subsequently received a response from Lord Strathclyde on 30 October. This letter is printed at Appendix 1.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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

Draft Instruments requiring affirmative approval

Draft Local Elections (Northern Ireland) Order 2010

Draft National Assembly for Wales (Representation of the People) (Amendment) Order 2010

Draft Northern Ireland Assembly (Elections) (Amendment) Order 2010

Draft Producer Responsibility Obligations (Packaging Waste) (Amendment) Regulations 2010

Draft Scottish Parliament (Elections etc.) Order 2010

Instruments subject to annulment

SI 2010/2538 National Health Service Bodies (Membership and Procedure) Amendment Regulations 2010

SI 2010/2540 Health Protection Agency (Amendment) Regulations 2010

SI 2010/2497 Misuse of Drugs (Licence Fees) Regulations 2010

SI 2010/2564 Controlled Drugs (Drug Precursors) (Intra-Community Trade and Community External Trade) Regulations 2010

SI 2010/2568 Revenue Support Grant (Specified Body) (England) Regulations 2010

SI 2010/2571 Care Leavers (England) Regulations 2010

SI 2010/2577 Civil Procedure (Amendment No. 3) Rules 2010

SI 2010/2578 Bank Administration (Scotland) (Amendment) Rules 2010

SI 2010/2579 Bank Insolvency (England and Wales) (Amendment) Rules 2010

SI 2010/2580 Bank Administration (England and Wales) (Amendment) Rules 2010

SI 2010/2581 Building Society Insolvency (Scotland) Rules 2010

SI 2010/2583 Bank Insolvency (Scotland) (Amendment) Rules 2010

SI 2010/2584 Building Society Special Administration (England and Wales) Rules 2010

SI 2010/2586 Building Society Insolvency (England and Wales) Rules 2010

SI 2010/2599 Child Trust Funds (Amendment No. 4) Regulations 2010

SI 2010/2613 Iran (European Community Financial Sanctions) (Amendment) Regulations 2010

SI 2010/2617 Ecodesign for Energy-Related Products Regulations 2010

SI 2010/2622 Equality Act 2010 (Amendment) Order 2010

SI 2010/2628 Capital Requirements (Amendment) Regulations 2010

APPENDIX 1: CONVENTIONS OF THE HOUSE RELATING TO SECONDARY LEGISLATION: FURTHER CORRESPONDENCE

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

Thank you for your letter of 20 October, setting out your Committee's views on the House's conventions in respect of secondary legislation and commenting on my correspondence with Lord Scott of Foscote.

The House does have power to vote on secondary legislation, and, indeed, to reject it. Fatal motions on statutory instruments are very occasionally divided on, although they have been pressed in circumstances that led to rejection only four times since 1911. *Prima facie* that suggests that a convention, or propensity of behaviour, may be established.

Further, the Joint Committee on Conventions chaired by Lord Cunningham found that:

- The House should not regularly reject Sis. [Para.227]
- In only certain specific circumstances should it *threaten* to do so. [Para. 229]
- In only exceptional circumstances might it actually be appropriate. [Para.227]
- For opposition to defeat an SI '*simply because they disagree with it ... would be contrary to the fundamental conventions which govern the relationship between the Houses.*' [Para.230]

I accept those considered views. It is right that the House has the power to defeat Sis. It is a potential constitutional safeguard. But the House has a number of powers that it rarely exercises. It may reject a supply Bill that is not certified as a money Bill, but has long stayed its hand. I propose no change in that.

On SIs, as I observed to Lord Scott, the House normally chooses to support a non-fatal motion. That is in my personal view tantamount to a convention; this was illustrated in the case of the recent Royal Parks Regulations, when the House opposed a fatal motion, but supported a non-fatal one on the same subject. It was also illustrated on 22 March, in the case of the Norwich and Norfolk and Exeter and Devon Structural Changes Orders, when the House rejected fatal amendments to the approval motions for the two Orders, but supported non-fatal amendments to the same motions.

Where the House has departed from this custom, the episodes were clearly not the norm. Indeed, their rarity suggests the convention to which I referred has proved highly robust over the decades, and the House has rightly exercised – as both Labour and Conservative parties chose to in opposition - the utmost restraint in using its power to reject.

30 October 2010

APPENDIX 2: 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 9 November 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, L. Plant of Highfield and L. Scott of Foscoate.