HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

25th Report of Session 2012-13

Draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013

Additional information:

General Pharmaceutical Council (Amendment of Miscellaneous Provisions) Rules Order of Council 2012

Also includes an Information Paragraph on 2 Instruments

Ordered to be printed 29 January 2013 and published 31 January 2013

Published by the Authority of the House of Lords

London: The Stationery Office Limited

£price

HL Paper 109

Secondary Legislation Scrutiny Committee (formerly Merits of Statutory Instruments Committee)

The Committee has the following terms of reference:

(1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), scrutinise—

(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 (2).

(2) 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.

(3) 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.

(4) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.

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

Members

Lord Bichard
Baroness Eaton
Lord Eames
Rt Hon. Lord Goodlad *(Chairman)*
Baroness Hamwee
Lord Hart of Chilton
Lord Methuen
Rt Hon. Baroness Morris of Yardley
Lord Norton of Louth
Lord Plant of Highfield
Rt Hon. Lord Scott of Foscote

Registered interests

Information about interests of Committee Members can be found in Appendix 2.

Publications

The Committee's Reports are published on the internet at www.parliament.uk/seclegpublications

Information and Contacts

If you have a query about the Committee or its work, including concerns or opinions on any new item of secondary legislation, please contact the Clerk of the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email seclegscrutiny@parliament.uk.

Statutory instruments

The National Archives publishes statutory instruments on the internet at http://www.legislation.gov.uk/, together with a plain English explanatory memorandum.

Twenty-Fifth Report

PUBLIC BODIES ORDER

A. Draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013

Introduction

1. The draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013 ("the Order") was laid on 18 December 2012 under section 1 of the Public Bodies Act 2011 ("the 2011 Act"). The Order was laid by the Ministry of Justice (MOJ) with an Explanatory Document (ED) and an Impact Assessment.

Overview of the proposal

2. The draft Order would abolish the Administrative Justice and Tribunals Council ("AJTC") which was established in 2007 to replace the Council on Tribunals. It was given the wider roles of taking an overview of the administrative justice system as a whole and advising the Lord Chancellor, Scottish and Welsh Ministers on how to make it more accessible, fair and efficient. It also had a role to report on the workings of tribunals and to make proposals for research.

3. The AJTC must consist of the Parliamentary Commissioner for Administration and between 10 to 15 members of which 2-3 represent the Scottish system and 1-2 the Welsh. There is also a Scottish Committee and a Welsh Committee of the Council. The Council meets monthly.

MOJ's argument for abolition

4. The MOJ states that the removal of the AJTC would cut out duplication because administrative oversight is properly a function of Government and now that robust governance and oversight arrangements exist within Her Majesty's Court and Tribunals Service (HMCTS - which was created by the merger of the previously separate courts and tribunals services in 2011) accountability to Ministers is assured. MOJ states that its function is advisory and its removal would have no direct impact on judicial decision-making.

Role of the Secondary Legislation Scrutiny Committee

5. The Committee's role, as set out in its Terms of Reference, is to "report on draft orders and documents laid before Parliament under section 11(1) of the 2011 Act in accordance with the procedures set out in sections 11(5) and (6)". The Committee may clear the instrument in which case it may be debated after 40 days or trigger the enhanced affirmative procedure which would require the Government to have regard to any recommendations made by the Committee during a 60–day period from the date of laying. The Committee may also consider taking oral or written evidence in order to aid its consideration of the orders.

6. The House of Commons Justice Select Committee, which has an equivalent scrutiny role, has already given preliminary consideration to the Order and

has triggered the enhanced affirmative procedure while it investigates further.[1]

Statutory Consultation

7. The Public Bodies Act 2011 places a great deal of emphasis on the need for consultation: as well as the mandatory provisions in section 10 on who should be consulted, there is a requirement in section 11(2)(d) that the Explanatory Document (ED) should "contain a summary of representations received in the consultation".

8. The other elements are adequately met, but the ED provided does not explain how the provisions of section 10(1)(a) have been addressed: this provision requires the Minister to consult "the body or the holder of the office to which the proposal relates."

9. There is a sentence in section 9.2 of the ED which indicates that the AJTC was simply one of the respondents to the general consultation. Their letter, from Richard Thomas, Chairman of the AJTC, included the comment "*we would like to reiterate our disappointment, expressed at the time of the announcement in October 2010, that the AJTC was not consulted or invited to contribute to the review process before the government's decision was reached.*"

10. The Committee asked MOJ officials to explain how the requirements of section 10(1)(a) had been satisfied. Their response was:

> "The Government announced, in October 2010, planned reforms to public bodies including the proposal to abolish the AJTC, subject to appropriate consultation. While MoJ senior officials informed Richard Thomas, in advance of this announcement, to forewarn him of the proposal, **it is correct to say that we did not invite the AJTC to contribute to the review process or consult them prior to the proposal being announced**. This approach was consistent with that adopted in regard to other bodies considered in the review process.[2] *[emphasis added]*
>
> After the proposed abolition of the AJTC was announced in October 2010, the then Parliamentary Under Secretary of State (PUSS), Jonathan Djanogly MP, met Richard Thomas on 1 November 2010. Senior Officials also met Mr Thomas on 20 May 2011 and attended the annual AJTC conference in November 2011 and November 2012.
>
> Since the consultation, there has been correspondence between senior officials and Mr Thomas about the proposed abolition, the re-appointment of Council Members and how the Ministry will oversee administrative justice after the abolition of the AJTC. Since early 2012, MoJ Justice Policy Group and Arm's Length Bodies Division officials have met Mr Thomas and the AJTC Chief Executive, Ray Burningham, on a monthly basis to discuss the proposed abolition and the oversight of administrative justice."

---

[1] Justice Select Committee, 5th Report (2012-13): *Draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013* (HC Paper 927)

[2] The Committee notes however that several of the bodies included in the MOJ's generic consultation exercise were already inactive at the time of the consultation exercise for example Her Majesty's Inspectorate of Courts Administration or the Crown Court Rule Committee. That was not the case with the AJTC.

11. The wording of the Act is that *"A Minister proposing to make an order must consult…"* Although the Minister appears to have made the decision before conducting any consultation with the body involved, there does appear to have been a degree of "consultation" with the AJTC after the announcement but before the Order was laid. **The Committee concludes that the process meets the letter of the law but it is evident that consultation has been about how to close down the AJTC rather than a proper consideration of whether it should be done. We regard this as poor practice.**

12. We also note that all but four of the 41 respondents to the public consultation exercise opposed the abolition of the AJTC on the grounds that its strength is that it is an independent organisation and exercises a UK-wide overview of the administrative justice system. However the consultation was conducted some time ago and it appears that in the interim **MOJ may have addressed some of the concerns raised, however the current position is not made clear in the ED and we regard this as poor practice.**

Consent of Wales and Scotland

13. The Committee also sought clarification of whether the consent of the Scottish and Welsh Parliaments has been obtained as required by section 9 of the Public Bodies Act 2011. (The remit of the AJTC does not extend to Northern Ireland.) As is usual practice, while consent in principle had been obtained from relevant Ministers, the formal consent of the Scottish Parliament and National Assembly for Wales has not yet been obtained. The scrutiny processes is conducted in each Parliament simultaneously after the final text of the order to which the Secretary of State seeks their consent has been laid in Westminster.

14. MOJ inform us that the Welsh Government lodged a Consent Memorandum in the National Assembly for Wales on 7 January and the Scottish Government lodged a Public Body Consent Memorandum in the Scottish Parliament on 10 January.

- In Wales, following consideration of the order by the Constitutional and Legislative Affairs Committee, we understand that the National Assembly for Wales intend to debate the order on 26 February. If the Assembly approves the consent motion then consent will have been given.
- In Scotland, Public Bodies Orders are subject to scrutiny by the Subordinate Legislation Committee and the relevant lead Subject Committee, which in this instance is the Justice Committee. The lead Committee then reports to the Parliament followed by a vote on the consent motion in plenary session. If the Parliament approves the motion then consent will have been given.

15. The MOJ states that the UK Government would not seek a resolution of either House in Westminster until the consent of the Scottish and Welsh Parliaments has been obtained. If consent is not forthcoming then the order could not be pursued in Westminster.

Other Tests in the Public Bodies Act 2011: assessment of the proposals

16. A Minister may only make an order under sections 1 to 5 of the 2011 Act if he considers that the order serves the purpose of improving the exercise of public functions, having regard to (a) efficiency, (b) effectiveness, (c)

economy, and (d) securing appropriate accountability to Ministers (section 8 of the 2011 Act).

Efficiency

17. The MOJ considers that this Order serves the purpose of efficiency because the AJTC duplicates internal functions. MOJ states at paragraph 7.16 of the EM that *"the Department is capable of providing Minsters with balanced, objective, impartial and expert advice on administrative justice policy"*. The Ministry also states that the AJTC's tribunal oversight functions are no longer required due to the establishment of HMCTS; and the Advisory Group they have set up can provide an expert and critical forum to examine issues raised and options to address them. It should be noted however that the Advisory Group will only meet twice a year.

Effectiveness

18. MOJ states that the Ministry can provide effective oversight of the administrative justice system as a whole by its strengthened governance arrangements, and that HMCTS will perform a similar service for tribunals. We note however that not all tribunals are or will be included in the centralised system. One of the AJTC's key roles is *considering ways to make the administrative justice system accessible, fair and efficient*. We assume that the Advisory Group is intended to take on that function but do not know whether it will do it as comprehensively or as effectively having yet to gain the respect and influence that the AJTC has accumulated.

Economy

19. The House of Commons Public Administration Select Committee was critical of the original much higher estimate of the savings for the abolition of the AJTC that accompanied the 2011 Act as it failed to offset the costs of running the same functions in-house. **We find it surprising that the Impact Assessment attached to the Order is the one the PASC criticised and that it has not been amended.**[3] However revised cost estimates, accurate at the date of laying, are set out on page 9 of the ED which indicate net cumulative savings of £0.8m for the Spending Review period (which now also include transitional costs such as a sum for staff redundancies).

20. Although the AJTC is being abolished in England, the Scottish and Welsh governments wish to continue with equivalent bodies for the time being. MOJ will be contributing £100,000 to Wales and £50,000 to Scotland each year for the remainder of the Spending Review period. We asked for an explanation of why the devolved administrations saw a continuing need for an AJTC. MOJ responded:

> "The devolved administrations wish to set up their own bodies *post* AJTC abolition as the tribunal landscapes in both Scotland and Wales are complex and at differing stages of reform and development. Both devolved administrations feel that an oversight body to support these processes would be beneficial. The Government agrees that there is a case for maintaining some form of oversight in the short term, but does

[3] The MOJ laid a revised Impact Assessment on 28 January 2012 – six weeks after laying the Order.

> not believe that this oversight needs to have a statutory basis. Nor does the Government believe that oversight bodies will be necessary in the longer-term, although both devolved administrations are able to fund such bodies if they deem it necessary."

Accountability

21. The Ministry considers that the abolition of the AJTC will not result in any loss of accountability to Ministers as HMCTS is an executive agency of MOJ and on that basis the test in the 2011 Act is met. However the responses to the consultation exercise do express concern that accountability to the public will be reduced as a result of this abolition.

Safeguards

22. Section 8(2) of the 2011 Act requires that a Minister may make an order only if the Minister considers that (a) the order does not remove any necessary protection, and (b) the order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. Paragraph 7.17 of the ED confirms that the Minister believes that the tests are met because alternative avenues exist for Court and Tribunal users to have their voice heard.

23. Other Explanatory Documents to PBOs have mentioned that the Cabinet Office's Public Bodies Review in 2010 applied the general principle that public bodies should only exist at arm's length from Ministers where the body is required to perform "a technical function, requires impartiality and is needed to establish facts independently". These considerations are not included at paragraph 4.5 of this ED but feature partially in paragraph 35 of the Strategic Work Programme:

> "The Government believes that the independence of the tribunals system administered by HMCTS ensures that tribunal members and their administrative support systems are sufficiently removed from decision makers to diminish the case for a standing body to oversee tribunals. We believe that policy development and oversight of the wider administrative justice system should be led from within the MOJ."

Paragraph 7 of the Impact Assessment does state explicitly that the MOJ concludes the AJTC does not meet any of these three criteria.

24. The question of independence and impartiality comes up repeatedly in the consultation responses, with respondents questioning how, even with the best of intentions, HMCTS can properly examine itself, and remain impartial in its relations with other parts of the administrative justice system when it has a vested interest. The Education Appeals Support Initiative, for example, points out that the Government are often a party to tribunals and maintains that an independent authority such as the AJTC is necessary.

25. MOJ officials point to the establishment of the Administrative Justice Advisory Group mentioned in paragraph 7.15 of the ED as an equivalent public voice. We note that this Group will have a diverse membership but its scope will be limited by the simple fact that it will meet twice-yearly rather than monthly. We do not know if its coverage will be as comprehensive as the AJTC. Nor does the ED explain what the Group's aims are. In supplementary information the MOJ has told us more about the Advisory Group's remit:

"Aims:

- To gauge how administrative justice is working, and identify any areas of concern or good practice.
- To provide early, informal, testing of policy initiatives. (This will not replace formal consultation undertaken for any significant policy proposals where this is appropriate.)

Objectives:

- To share user experiences of the system.
- To act as an expert forum for testing ideas and policy initiatives.
- To identify any areas within administrative justice that may benefit from reform and any key cross-system issues (including the drive to ensure more decisions are made *right first time*).
- To keep informed of current research and discuss with the Group research to be commissioned.
- To share best practice across administrative justice.
- To identify areas of administrative justice that are currently under-represented and would benefit from involvement in the Group's work."

Timing

26. In its Strategic Work Programme the Government include the following justification for the removal of AJTC:

> "The AJTC – and its predecessor the Council on Tribunals – has played an important role in overseeing the administrative justice landscape while it has developed. It has produced a number of reports that have helped to improve our understanding of the administrative justice and tribunals system in the UK. The dedication and expertise of the AJTC has proved important while the tribunal system has gone through a period of transformation." (Paragraph 32)

27. A number of respondents to the consultation point out that the HMCTS was only established in 2011 and the process of structural reform is not yet complete. Respondents, for example the Trading Standards Institute, believe that it would be premature to abolish AJTC now and that to do so would remove a public safeguard. It is notable that Scotland and Wales are choosing to maintain an independent AJTC equivalent for this very reason.

Coverage

28. Consultees also express some doubts whether the coverage of the new arrangements will fully replicate the AJTC's overview functions and whether some minor tribunals and alternative dispute resolution panels will be left out:

- The ED at paragraphs 7.8-10 refers to what MOJ plans to do with these external tribunals, for example by strengthening bilateral arrangements,

but that is part of a three year programme.[4] So there is a question whether the (temporary) loss of oversight of such tribunals represents the removal of a necessary protection;

- the Valuation Tribunal's response indicates that at the time of writing it did not know its own position, although paragraph 21 of the Strategic Work Programme now states it will be integrated into the Property Chamber within the First-tier Tribunal at some point during 2013-14;
- There is also doubt whether all the tribunals currently involved in the AJTC will eventually be included, most of which are run under the aegis of a Department other than MOJ.
- Correspondence from the Education Appeals Support Initiative indicates that they are unclear about the position for School Admission and Exclusion Panels, which handle over 60,000 cases a year.

29. The Ombudsmen appear equally unclear about their status: letters from the British and Irish Ombudsman Association, the Parliamentary Ombudsman and the Local Government Ombudsman in response to the consultation all genuinely value the opportunity to exchange good practice in the forum that the AJTC currently provides and its ability to look across boundaries in the administrative justice system; they feel MOJ officials will not be able to replicate this. The Ombudsman Association is included in the Advisory Group but we are given no indication of whether they find that a satisfactory replacement.

30. The House may wish to press the Minister to confirm that no part of the administrative justice system currently included under the AJTC's overview remit to make the whole system more accessible, fair and efficient, will be left out under the new arrangements, because that is what is required to ensure the two safeguard tests are fully met. **We recommend, as a minimum, that the Minister publishes a mapping exercise illustrating all the bodies currently under the aegis of the AJTC and showing their status in relation to the unified Tribunal System, the Advisory Group and the MOJ now and at 31 March 2013, the date proposed for the abolition of the AJTC.**

Conclusion

31. While the Committee has found no reason to dispute the effect of the proposed Order, the process followed has pre-judged the outcome. We found the documentation presented with the Order unconvincing and have had to seek additional information to obtain a better understanding of the proposition. We are still not clear about how far the considerable concerns expressed in the consultation responses will have been resolved by the time this Order takes effect. (The intended abolition date is 31 March 2013.)

32. Although it has been supplemented by a number of documents since it was laid, the ED was unsuitably vague. We have recommended that the MOJ produce an unequivocal statement about how each of the tribunals, ombudsmen and alternative dispute resolution fora currently included in the

---

[4] Administrative Justice and Tribunals Strategic Work Programme – mentioned as imminent at paragraph 7.8 of the ED and subsequently published on the MoJ website http://www.justice.gov.uk/downloads/publications/policy/moj/admin-justice-tribs-strategic-work-programme.pdf

AJTC's remit of disseminating good practice and coherence across the whole of the administrative justice system will be covered after abolition. Had the Commons not already done so, this Committee would have requested the enhanced 60-day procedure to ensure that this is done.

33. In its ED the Government have stated their view that the AJTC should be abolished but, given the strength of opposition expressed and the very minor financial gains anticipated, the Committee was surprised that MOJ did not present its case more robustly**. In debate the House may wish to press the Minister to articulate the perceived advantages more strongly and present a well-argued case to counter the objections made.**

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

No new instruments are drawn to the special attention of the House in this Report.

GENERAL PHARMACEUTICAL COUNCIL (AMENDMENT OF MISCELLANEOUS PROVISIONS) RULES ORDER OF COUNCIL 2012 (SI 2012/3171): ADDITIONAL INFORMATION

34. This instrument amends the rules of the General Pharmaceutical Council (GPhC) relating to the composition, functions and procedures of the Statutory Committees of the Council. The Explanatory Memorandum (EM) states that one of the amendments has the policy objective of avoiding conflicts of interest by making sure that a panellist assigned to an appeals case had not been involved in any related Fitness to Practise proceedings. The Committee was unclear how this policy would be delivered by the instrument and requested an explanation from the Department of Health. The Department's reply is published in Appendix 1; it states that not all potential situations are covered by the current drafting and an amending instrument will be made.

INSTRUMENT OF INTEREST

Draft Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013

Criminal Legal Aid (General) Regulations 2013 (SI 2013/9)

35. These instruments make changes to the Criminal Legal Aid scheme in consequence of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The policy intention for criminal legal aid is unchanged from that set out in the Access to Justice Act 1999: that is, that those who are accused of criminal offences should be able to benefit from publicly funded legal advice, assistance or representation when they cannot afford to pay for themselves, if the interests of justice require it. These Regulations substantially replicate the effect of the secondary legislation made under the Access to Justice Act 1999. However some of the administrative processes are changed; for example all applications for advice and assistance at a police station must be made to the Defence Solicitor Call Centre. There is also one addition to the categories of proceedings which are prescribed as criminal for the purposes of legal aid, that is a charge for the purposes of Article 6(1) of the European Convention on Human Rights. The Regulations also set out the provisions for making and withdrawing determinations about advice and assistance for criminal proceedings and for appeals to an Independent Funding Adjudicator. The affirmative Regulations in particular aim to ensure that publicly funded defendants in criminal proceedings are able to select representation appropriate to their case but no more than that. They also require a defendant to select the same provider as any co-defendants in most cases.

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 subject to affirmative approval

Council Tax Reduction Schemes (Detection of Fraud and Enforcement) (England) Regulations 2013

Criminal Legal Aid (Determinations by a Court and Choice of Representative) Regulations 2013

Health and Social Care Act 2012 (Consequential Amendments) Order 2013

Local Authorities (Contracting Out of Tax Billing, Collection and Enforcement Functions) (Amendment) (England) Order 2013

National Employment Savings Trust (Amendment) Order 2013

Instruments subject to annulment

SI 2013/9	Criminal Legal Aid (General) Regulations 2013
SI 2013/15	Non-Domestic Rating (Small Business Rate Relief) (England) (Amendment) Order 2013
SI 2013/23	Plant Health (England) (Amendment) Order 2013
SI 2013/24	Proceeds of Crime Act 2002 (Appeals Under Part 2) (Amendment) Order 2013
SI 2013/38	Assured and Protected Tenancies (Lettings to Students) (Amendment) (England) Regulations 2013
SI 2013/41	Social Security (Information-sharing in relation to Welfare Services etc.) (Amendment) Regulations 2013
SI 2013/65	Passenger Car (Fuel Consumption and CO2 Emissions Information) (Amendment) Regulations 2013

APPENDIX 1: DEPARTMENTAL MEMORANDUM TO THE GENERAL PHARMACEUTICAL COUNCIL (AMENDMENT OF MISCELLANEOUS PROVISIONS) RULES ORDER OF COUNCIL 2012

The Department was asked the following question by the Secondary Legislation Scrutiny Committee:-

The second bullet in paragraph 7.1 of the EM says the change

- *allows panellists to be members of both the Fitness to Practise Committee and Appeals Committee and for both committees to share the same list of reserve panellists, to provide greater flexibility and make sure panellists can maintain their skills. Conflicts of interest would be avoided by making sure that a panellist assigned to an appeals case had not been involved in any related Fitness to Practise proceedings;*

This policy is delivered in Regulation 16 of the current SI by amending rule 18.

Rule 18 A at 2(d) has a provision that "any member who has sat in a formation of the Committee that has made an interim suspension order or an order for interim conditional entry in a particular case does not sit in subsequent proceedings in that case" – which clearly delivers the exclusion set out for fitness to practice BUT rule 18 B on Appeals lacks an equivalent provision.

Can you please let us know if this is indeed an omission (and if so take appropriate action) or explain how the SI delivers the exclusion in Appeals panels.

Department's Response

The Department has asked the General Pharmaceutical Council (GPhC) for its views. For the reasons set out in detail below the GPhC-

- confirms that the Committee has identified an issue that it would wish to address and
- confirms that it will bring forward an amendment in order to do so at a suitable opportunity.

The Department would assist the GPhC General Pharmaceutical Council in seeking the approval of the Privy Council for such an amendment.

For the Committee's information, the Department informs the Committee that the GPhC made the following detailed comments.

> "There is no equivalent for the Appeals Committee of the situation envisaged under the new rule 18A(2)(d) of the Statutory Committees & their Advisers Rules (SI 2010/1616), inserted by the rule 16 of the General Pharmaceutical Council (Amendment of Miscellaneous Provisions) Rules 2012.
>
> That provision prevents a person who has sat on the Fitness to Practise Committee ("FtPC") for an interim order hearing from sitting in subsequent proceedings in that case. This is because, when a FtPC meets specifically to consider whether to make an interim order, they may consider 'soft' evidence which would not be admissible for a principal hearing. The interim order hearing does not test evidence and make findings of fact in the same way as would a principal fitness to practise hearing. An interim order hearing is simply to determine whether the committee is satisfied that it is necessary in the interests of

public protection, or otherwise in the public interest, or in the interests of the registrant concerned, for the registrant's entry in the register to be suspended or made subject to conditions (art 56 of the Pharmacy Order 2010). Members of the Committee are therefore excluded from sitting on subsequent proceedings as they may be prejudiced by the material they considered at the interim order hearing.

The same situation does not arise with the Appeals Committee i.e. there would not be instances where a panel member considers 'soft' evidence in a case which is later the subject of a principal hearing.

Where a fitness to practise issue concerns a registrant, this will be handled through the usual procedures for fitness to practise allegations. This could result in a determination by the FtPC to remove the person from the register, to suspend their entry in the register or to impose conditions on their registration. In these cases, the decision of the FtPC would be appealable to the courts under art 58 of the Pharmacy Order 2010. It would not be appealable to the Appeals Committee.

The Appeals Committee only considers appeals relating to registration decisions or the approval of education & training providers (art 39 of the Pharmacy Order 2010), so it would be unusual for there to be a situation where the Appeals Committee and the FtPC could be considering the same issues.

The possible situations we have identified where this could occur are as follows.

- The Appeals Committee may request advice from the FtPC under rule 9(1)(d) of the Appeals Committee Rules (SI 2010/1614).
- Under rules 10(8) & (10) of the Registration Rules (SI 2010/1617), the Registrar may seek the advice of the FtPC about the fitness to practise of an applicant for registration. The FtPC would not make the final decision on the application in such cases but would advise the Registrar, who would then decide whether to grant the application. If the Registrar refuses the application, the applicant could appeal that decision to the Appeals Committee (art 39(1)(b of the Pharmacy Order 2010)).
- The Registrar may determine that a registrant's entry in the register has been fraudulently procured or incorrectly made (art 29(3) of the Pharmacy Order 2010). A registrant's entry may also be removed if their fitness to practise was impaired at the time the entry was made (article 30 of the Pharmacy Order 2010). These cases are covered by rules 18-20 of the Registration Rules. Under rule 18(2), the Registrar may serve a Notice of Intention to Remove [from the register] on the registrant. Rules 19 & 20 of the Registration Rules provide that a registrant on whom a Notice of Intention to Remove has been served may request a hearing. If a hearing is requested, the Registrar must refer the matter to the FtPC, which must then hold a hearing in accordance with rule 33 of the Fitness to Practise Rules. In these circumstances, the FtPC would make findings of fact and advise the Registrar accordingly but it is the Registrar who would then decide whether to remove the person from the register. The Registrar's decision could then be appealed to the Appeals Committee under art 39(1)(i) of the Order.

> We would wish to avoid having any common membership of the panels drawn from each committee in all these instances and would propose that a general provision to prohibit this be added by amendment in due course.
>
> In the meantime, we will take steps to ensure that the same person does not act on both Committees in the same case."

The Department is happy to provide any further information should the Committee request it.

Department of Health

29 January 2013

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 Parliamentary Archives.

For the business taken at the meeting on 29 January 2013 Members declared no interests.

Attendance:

The meeting was attended by Lord Bichard, Lord Eames, Baroness Eaton, Lord Goodlad, Baroness Hamwee, Lord Hart of Chilton, Lord Methuen, Baroness Morris of Yardley, Lord Plant of Highfield, Lord Norton of Louth and Lord Scott of Foscote.