HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

12th Report of Session 2012-13

Public Bodies Order: Draft Public Bodies (Abolition of the Disability Living Allowance Advisory Board) Order 2013

Statutory Instruments: Homelessness (Suitability of Accommodation) (England) Order 2012

Plus 8 Information Paragraphs on 11 Instruments

Correspondence on Immigration Rules and on the timing of laying of Statutory Instruments relating to schools

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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.

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Information about interests of Committee Members can be found in Appendix 4.

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.

Twelfth Report

PUBLIC BODIES ORDER

A. Draft Public Bodies (Abolition of the Disability Living Allowance Advisory Board) Order 2013

1. This draft Order was laid under section 5(1) of the Public Bodies Act 2011. It proposes to abolish the Disability Living Allowance Advisory Board, a committee of medical and disability experts who, on request, provide advice to the Secretary of State for Work and Pensions about the Disability Living Allowance and the Attendance Allowance. The Government do not propose to replace the Board as they state in their Explanatory Document that other avenues of consultation have replaced its function. The Committee considered this Order at its meeting on 30 October and were not satisfied with the Government's explanation of how the Minister has complied with all the statutory requirements for consultation under section 10 of the 2011 Act. As a result, we are seeking further information from the Minister and we will report substantively on the draft Order in due course. **In the meantime, we therefore recommend that the draft Order should be subject to the 60 day enhanced affirmative procedure set out in section 11(6) and (9) of the Public Bodies Act.**

INSTRUMENT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the following instrument and has determined that the special attention of the House should be drawn to it on the ground specified.

A. Homelessness (Suitability of Accommodation) (England) Order 2012 (SI 2012/2601)

Date laid: 17 October
Parliamentary Procedure: negative

Summary: Local housing authorities are being given a new power to meet their main homelessness duty with offers of accommodation in the private rented sector, without requiring the applicant's agreement. The Order sets out circumstances in which accommodation is not to be regarded as suitable for the purposes of a private rented sector offer by an authority.

We draw this instrument 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.

2. The Department for Communities and Local Government (DCLG) has laid this Order. It has also provided an accompanying Explanatory Memorandum (EM) and impact assessment (IA).

3. Under the Housing Act 1996 ("the 1996 Act"), local housing authorities (LHAs) have a duty to secure that accommodation is available for occupation by an applicant who is homeless, eligible for assistance and has a priority need for accommodation: this is known as the main homelessness duty. The Localism Act 2011 contains a provision[1] which amends the 1996 Act, to give LHAs the power to discharge the main homelessness duty by way of a private rented sector offer.

4. In the EM, DCLG states that the new power, allowing LHAs to meet the main homelessness duty with offers of accommodation in the private rented sector without requiring the applicant's agreement, was introduced in order to give local authorities freedom to make better use of good-quality private sector accommodation for homeless households. However, the Department explains that, during the passage of the Localism Act 2011, Members of both Houses of Parliament and homelessness organisations raised concerns about the quality of private rented sector accommodation; and that these related to issues of damp, cold, mould and the possibility of using rogue landlords.

5. This Order sets out circumstances in which accommodation is not to be regarded as suitable for the purposes of a private rented sector offer by an LHA, and includes a requirement for LHAs to take into account the location of the accommodation. The Department states that the Order will help prevent the use of poor-quality accommodation for homeless households placed in the private rented sector, and will also mean that they are not placed hundreds of miles away from their previous home when there is available, affordable accommodation nearer to them.

[1] Section 148 of the Localism Act 2011, inserting a new section 193(7AA) into the 1996 Act.

6. DCLG states that it carried out consultation[2] from May to July of this year, receiving 808 replies; and that the responses were overwhelmingly supportive. Five elements were proposed to determine whether accommodation is to be regarded as not suitable: physical condition of the property; health and safety matters; licensing for Houses in Multiple Occupation; landlord behaviour; and elements of good management. DCLG states that of those consultation responses which answered the question about the importance of these five elements, 88% agreed they were the right ones. The consultation paper also proposed that the Order should set out a number of factors to determine the suitability of location: distance of the accommodation from the applicant's previous home; disruption to the employment, caring responsibilities, or education of members of the household; access to amenities such as transport and shops; and established links with schools, doctors, social workers and other key services and support. 93% of people responding felt that the existing provisions on location needed to be strengthened and 94% agreed with the proposed factors to be taken into account.

7. While it is helpful to see this information in the Explanatory Memorandum, we regret the fact that the Department has not published its summary of the consultation process at the same time as laying the Order before the House, and we urge it to do so as soon as possible.

[2] See: http://www.communities.gov.uk/publications/housing/homelessnessorderconsult for consultation paper.

OTHER INSTRUMENTS OF INTEREST

Draft Child Support Arrangement of Payments and Arrears (Amendment) Regulations 2012

8. Using powers conferred by the Child Support and Other Payments Act 2008, these Regulations enable the Secretary of State to:

   - accept part payment of arrears in full and final satisfaction of a child maintenance debt; and
   - write off arrears of child maintenance in certain limited circumstances such as the death of one of the parties.

   The intent of these powers is to allow the Secretary of State to bring to a final resolution the minority of cases where the arrears are unlikely to ever be collected in full. The intention is to enable the Department's resources and enforcement powers to be concentrated on those cases where it is possible to recover full payment. Arrears remain due and parents generally will not be relieved of their liability to pay.

Draft Housing Act 1996 (Additional Preference for Armed Forces) (England) Regulations 2012

9. In our 10th Report of this Session,[3] we published information about the Allocation of Housing (Qualification Criteria for Armed Forces) (England) Regulations 2012 (SI 2012/1869), which were laid by the Department for Communities and Local Government (DCLG). That Department has now laid these draft Regulations, on an "additional preference" for social housing allocated to members of the armed forces. Both instruments relate to the process of housing allocation by local authorities and are intended to meet the overall aim of assisting members of the armed forces in need of social housing. However, the two sets of Regulations relate to different aspects of the allocation process and serve different purposes.

10. As a result of changes to the allocation legislation in the Localism Act 2011, local housing authorities now have the power to decide who qualifies or does not qualify to go on their waiting list. SI 2012/1869 prevents local housing authorities from applying a "local connection" criterion to disqualify members of the armed forces, and is intended to ensure that service personnel are not disadvantaged by the requirement to move from base to base.

11. These draft Regulations will ensure that members of the armed forces who are admitted on to the waiting list and who have more urgent housing needs are always given the highest priority ("additional preference") for social housing. Previous policy has been that former and serving members of the regular and reserve armed forces who have an identified housing need must be given priority ("reasonable preference") for social housing; these draft Regulations raise their priority status.

[3] HL Paper 46

Draft Producer Responsibility Obligations (Packaging Waste) (Amendment) Regulations 2012

12. The Regulations, laid by the Department for Environment, Food and Rural Affairs (Defra), set revised minimum recovery and recycling targets for packaging waste for the period from 2013 to 2017, in line with an EC Directive.[4] Defra announced its intention to consult on higher targets in the June 2011 Review of Waste Policy for England,[5] and carried out the consultation from 12 December 2011 to 10 February 2012. Defra reduced the consultation period from 12 to eight weeks in order to make a decision by Budget 2012. Overall, despite specific concerns, respondents supported the proposals to increase targets.

13. We obtained further information from Defra; this is enclosed as Appendix 1. We note that one stakeholder organisation objected to the shortened consultation period, because it did not give enough time to sound out its members. In July of this year, the Government announced a new approach to consultation which included an expectation that Departments would more often set periods of under 12 weeks for taking views on proposals. We would stress the importance of ensuring that consultation arrangements take account of the ability of interested parties to respond effectively, and are not compressed by Government deadlines in ways that militate against responses.

Draft Protection of Freedoms Act 2012 (Disclosure and Barring Service Transfer of Functions) Order 2012

14. Following a Government review of the Vetting and Barring Scheme which reported in February 2011, provisions in the Protection of Freedoms Act 2012 enabled the creation of a new streamlined organisation to oversee a scaled-back criminal records checking and barring system. The new organisation is the Disclosure and Barring Service ("DBS") which will be a Non-Departmental Public Body of the Home Office. It will incorporate functions of the Criminal Records Bureau and the Independent Safeguarding Authority in a single body and is expected to implement a range of reforms to the criminal record checking system, which will see the number of posts requiring checks reduced from 9.3 million to 5 million. This Order sets out the functions which are to be transferred and in effect determines the "go-live" date for the new organisation as 1 December 2012.

Police and Criminal Evidence Act 1984 (Armed Forces) (Amendment) Order 2012 (SI 2012/2505)

15. The Police and Criminal Evidence Act 1984 (Armed Forces) Order 2009 (SI 2009/1922: "the 2009 Order")[6] provides that fingerprints and DNA samples taken from a person in connection with the investigation of a Service offence may only be held for up to three years from when they are taken, unless within that period the person is convicted of the Service offence. For material taken before the commencement date of the 2009 Order, the Order provides for the three-year period to run from that commencement date. In doing so, the 2009 Order applies broadly similar provisions to the Service police as

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[4] Council Directive 94/62/EC on packaging and packaging waste (as amended by Council Directive 2004/12/EC)

[5] See: http://www.defra.gov.uk/publications/files/pb13540-waste-policy-review110614.pdf

[6] As amended by the Police and Criminal Evidence Act 1984 (Armed Forces) (Amendment) Order 2011

apply to civilian police forces under Part 5 of the Police and Criminal Evidence Act 1984 ("the 1984 Act"), as amended.

16. The amendments to the 2009 Order made by the latest Order (SI 2012/2505) allow material taken by the Service police on or after 31 October 2009 to be retained for up to four years from the date on which it was taken, unless during that period the person is convicted. For material taken before 31 October 2009, the four-year period runs from that date. We note that the practical effect of this technique (already used in an amending instrument in 2011) is potentially to enable the material to be retained indefinitely.

17. In the EM to the latest Order, the Ministry of Defence (MOD) states that in 2008 the European Court of Human Rights held (in the case of S and Marper v UK) that the relevant provisions in Part 5 of the 1984 Act were in breach of article 8 of the European Convention on Human Rights (ECHR). The provisions held to be in breach allowed for the indefinite retention of fingerprints and DNA samples without conviction. MOD states that Part 5 of the 1984 Act is to be amended by the provisions in Chapter 1 of Part 1 of the Protection of Freedoms Act 2012 ("the 2012 Act"), and that those provisions are unlikely to be commenced before mid 2013. When those provisions come into force, MOD will lay a further Order to make the periods for which the Service police may retain material generally equivalent to those applying to the civilian police under the 2012 Act.

18. MOD states that the aim of the 2009 Order, and subsequent amending Orders, was to make interim provision which would be compliant with the ECHR and would allow the Service police to retain material until Part 5 of the 1984 Act was amended. We would comment that this interim provision is now expected to be in place until at least five years after the European Court gave its judgment; that there must be a risk that it is kept in place even longer if there is further delay in commencing the relevant provisions of the 2012 Act; and that it is open to question whether successive statutory instruments with the practical effect of potentially allowing the indefinite retention of material taken by Service police can be considered compliant with the European Court's judgment.

Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012 (SI 2012/2560)
Social Security (Habitual Residence) (Amendment) Regulations 2012 (SI 2012/587)
Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2012 (SI 2012/2588)
Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012 (SI 2012/2612)

19. These four statutory instruments have been laid by four different Departments to deal with the consequences of a judgment by the Court of Justice of the European Union (ECJ), in March 2011, in the case of Gerardo Ruiz Zambrano v Office National d'Emploi ("the Zambrano judgment").[7]

20. Mr Zambrano is a Colombian national who had claimed asylum in Belgium and two of whose children had been born in Belgium and had Belgian nationality. The ECJ decided that Mr Zambrano had a right to reside in that

[7] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0034:EN:HTML

Member State by reference to Article 20 of the Treaty on the Functioning of the EU. Although he was due to be deported, the Court held that the refusal to grant Mr Zambrano a right of residence in Belgium would have resulted in his Belgian children having to leave the EU, thus depriving those children of their rights as EU citizens.

21. The Home Office has laid the *Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012 (SI 2012/2560)* to give effect to the Zambrano judgment.[8] In the accompanying Explanatory Memorandum (EM), the Home Office states that the judgment created a derivative right to enter and reside for the primary carer[9] of an EU citizen who is living in his or her own country, and where a refusal to confer such a right would force the EU citizen to leave the EEA. In the United Kingdom, the judgment enables the primary carer of a British citizen to acquire a right to enter and reside in the country whilst he or she remains the primary carer of that British citizen and where the refusal of such a right would force the British citizen to leave the EEA.

22. As regards the other instruments, which have been brought forward in parallel with the Home Office Regulations giving effect to the Zambrano judgment:

- the Department for Work and Pensions has laid the *Social Security (Habitual Residence) (Amendment) Regulations 2012 (SI 2012/2587)*, to maintain the current position on entitlement to income-related benefits;
- the Department for Communities and Local Government has laid the *Allocation of Housing and Homelessness (Eligibility) (England) (*Amendment*) Regulations 2012 (SI 2012/2588)*, to maintain the Government's policy on housing eligibility in relation to non-EEA nationals; and
- HM Treasury has laid the *Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012 (SI 2012/2612)*, to maintain the current policy position on entitlement to these benefits.

Further Education Institutions (Exemption from Inspection) (England) Regulations 2012 (SI 2012/2576)

23. These Regulations, laid by the Department for Business, Innovation and Skills, prescribe the categories of further education (FE) institutions which are exempt from routine inspection by Her Majesty's Chief Inspector, and the circumstances in which those FE institutions will be exempt. All categories of institutions within the FE sector, and 16 to 19 Academies, are prescribed; such institutions will be exempt from routine inspection if their overall effectiveness has been awarded the highest grade (currently the "outstanding" grade) in the most recent inspection by the Chief Inspector.

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[8] The instrument also makes amendments to address transposition issues and to provide clarity and consistency in the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003, previously amended several times).

[9] A primary carer (as defined in the Immigration (European Economic Area) (Amendment) Regulations 2012 (SI 2012/1547)) of another person under the age of 18 is a direct relative or legal guardian of that person, and has primary responsibility for that person's care, or shares equally that responsibility with one other person who is not entitled to reside in the United Kingdom.

24. In our 3rd Report of this Session, we referred to an instrument laid by the Department for Education (the Education (Exemption from School Inspection) (England) Regulations 2012 (SI 2012/1293)) which similarly provided that prescribed categories of schools would become exempt from routine inspections if they had received the highest grading in their latest inspection by the Chief Inspector (also an "outstanding" grading).

African Horse Sickness (England) Regulations 2012 (SI 2012/2629)

25. Council Directive 92/35/EEC lays down control rules and measures to combat African horse sickness (AHS), a disease that affects horses, zebras, mules and donkeys, and is caused by a virus that is transmitted by midges. The Directive sets out procedures to be followed and restrictions that apply in the event of an actual or suspected outbreak of AHS. Implementation of the Directive was previously achieved through statutory instruments (SIs) made under the Animal Health Act 1981.[10] The Department for Environment, Food and Rural Affairs (Defra) has now laid these Regulations, which implement the Directive and remove references to AHS from the earlier SIs. In the Explanatory Memorandum, the Department states that it now places importance on having dedicated legislation to control exotic disease outbreaks, and the present domestic controls require supplementing in case of a future outbreak.

26. In line with established disease control principles, the Regulations provide the Secretary of State with the power to declare a control zone, protection zone and surveillance zone around infected premises. Measures that would be imposed in the control zone include restrictions on the movements of horses. The Regulations also provide the Secretary of State with the power to arrange for the killing of horses on infected premises and on contact premises.

[10] The Specified Diseases (Notification and Slaughter) Order 1992 (SI 1992/3159) and the Specified Diseases (Notification) Order 1996 (SI 1996/2628).

CORRESPONDENCE

Immigration Rules

27. In its 6th, 9th and 10th Reports of this session[11] the Committee raised concerns about recent Statements of Changes of Immigration Rules, in particular how Parliamentary endorsement of the proposed interaction between the Rules and Article 8 of the European Convention on Human Rights was to be achieved, the insertion into the Immigration Rules of over 300 pages of material previously published as guidance and how the courts would react to those actions. We are grateful to the Home Office Immigration Minister, Mark Harper, who has written seeking to address a number of those points, which is printed in Appendix 2.

Timing of Laying of Statutory Instruments relating to schools

28. In its 10th Report of this session[12], the Committee drew the Education (School Government) (Terms of Reference) (Amendment) Regulations 2012 (SI 2012/1845) to the attention of the House. We expressed concern that schools be given sufficient time to plan for changes determined by the Government, and that interested parties be effectively consulted on changes affecting them. We were also concerned about the practice of laying SIs, and bringing them into force, during a Parliamentary recess. We have received a reply from Elizabeth Truss MP, Parliamentary Under-Secretary of State for Education and Childcare, printed in Appendix 3.

[11] HL Papers 26, 40 and 46.

[12] HL Paper 46.

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 affirmative approval

Child Support Management of Payments and Arrears (Amendment) Regulations 2012
Contracting Out (Local Authorities Social Services Functions) (England) (Amendment) Order 2012
District Electoral Areas Commissioner (Northern Ireland) Order 2012
Housing Act 1996 (Additional Preference for Armed Forces) (England) Regulations 2012
Legal Services Act 2007 (The Law Society) (Modification of Functions) (Amendment) Order 2012
Producer Responsibility Obligations (Packaging Waste) (Amendment) Regulations 2012
Protection of Freedoms Act 2012 (Disclosure and Barring Service Transfer of Functions) Order 2012

Draft negative instruments subject to annulment

Cumbria (Electoral Changes) Order 2012

Derbyshire (Electoral Changes) Order 2012

Feed-in Tariffs: Modifications to the Standard Conditions of Electricity Supply Licences (No. 4 of 2012)

Somerset (Electoral Changes) Order 2012

Swale (Electoral Changes) Order 2012

Instruments subject to annulment

SI 2012/2463 Early Years Foundation Stage (Exemptions from Learning and Development Requirements) (Amendment) Regulations 2012

SI 2012/2505 Police and Criminal Evidence Act 1984 (Armed Forces) (Amendment) Order 2012

SI 2012/2560 Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012

SI 2012/2569 Jobseeker's Allowance (Members of the Forces) (Northern Ireland) (Amendment) Regulations 2012

SI 2012/2573 Agricultural Holdings (Units of Production) (England) Order 2012

SI 2012/2575 Social Security (Miscellaneous Amendments) (No. 2) Regulations 2012

SI 2012/2576 Further Education Institutions (Exemption from Inspection) (England) Regulations 2012

SI 2012/2587	Social Security (Habitual Residence) (Amendment) Regulations 2012
SI 2012/2588	Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2012
SI 2012/2605	North Wales (East and Central) (Coroner's District) Order 2012
SI 2012/2607	Port Security (Port of Aberdeen) Designation Order 2012
SI 2012/2608	Port Security (Port of Grangemouth) Designation Order 2012
SI 2012/2609	Port Security (Port of Portland) Designation Order 2012
SI 2012/2610	Port Security (Port of Tees and Hartlepool) Designation Order 2012
SI 2012/2611	Port Security (Port of Workington) Designation Order 2012
SI 2012/2612	Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012
SI 2012/2613	Town and Country Planning (Local Planning) (England) (Amendment) Regulations 2012
SI 2012/2629	African Horse Sickness (England) Regulations 2012

APPENDIX 1: DRAFT PRODUCER RESPONSIBILITY OBLIGATIONS (PACKAGING WASTE) (AMENDMENT) REGULATIONS 2012

Further information from Department for Environment, Food and Rural Affairs

Q1: Section 7 of the EM refers mainly to the 1994 Directive and the 2007 Regulations:

- against the targets set in the Directive, what levels of recovery and recycling for the different materials are now being achieved in the UK?

A1: In 2011 the UK achieved the following recycling rates:

	UK recycling rate	Directive target
Paper	84.8%	60%
Glass	63.9%	60%
Aluminium	49.6%	
Steel	57.6%	
(Metal	56.1%)*	50%
Plastic	24.2%	22.5%
Wood	58.7%	15%
Recycling	60.9%	55%
Recovery	67.2%	60%

*steel/aluminium combined

Q2: UK targets are set higher than those in the Directive to take account of the small business exemption. Is the extent to which UK targets exceed the Directive's targets fully accounted for by the potential shortfall from this exemption? If the UK's targets include any additional "headroom", how is this justified (as potential "gold-plating" of EU requirements)?

A2: No, the targets have been set at a level beyond the minimum required to achieve the Directive targets.

In cases where targets have been set above the minimum set by the EU Directive there is an expected net benefit from the proposed increase. Where this has not been the case the targets have not been increased.

Q3: Section 8 of the EM deals with the consultation, which ran from 16 December 2011 to 10 February 2012 - in practice, allowing for the Christmas period, only some 6 weeks. Why was this so short? Did you receive any objections to the shortness of the period?

A3: The consultation period was shortened in order to meet the timeline imposed by the Budget process. This was agreed across Whitehall. As PRNs have been classified as a tax and spend measure, all announcements related to targets have to be made at a fiscal event. To have targets in place for 2013, an announcement needed to be made at Budget 2012.

Recognising the extra pressure on companies and trade associations arising from the shortened consultation period, officials offered to meet stakeholders to discuss any concerns, questions or extra information that respondents might be able to

provide. Several organisations took advantage of this offer, including the British Plastics Federation.

An objection to the shortened consultation period was made by the British Plastics Federation (BPF), who felt it did not give them time to properly consult their members.

Q4: Paragraph 4 of section 8 of the EM mentions concerns expressed by respondents, but does not set out the Government's response to those concerns. Can you say how you have responded: cross-reference to the summary of the consultation process is not enough to give the reader of the EM a full understanding.

A4: Concerns were raised regarding the risk of quality of recyclates deteriorating with the proposed increases and the perceived disadvantages of Packaging Waste Recovery Notes (PRNs) (generated by waste recycled in the UK) relative to Packaging Waste Export Recovery Notes (PERNs) (derived from waste exported for recycling).

In relation to quality, there is a separate work stream specifically devoted to addressing the issue. Defra is developing a Quality Action Plan which will set out the vision and ambition of where we want to get to on improving the quality of recyclates, and how we can help grow the recycling industry.

- The action plan we will commit to:
- Consult on mandatory requirement for MRFs[13] to measure quality
- Develop a voluntary system for grading the quality of dry recyclates
- Investigate potential for enhancing enforcement of the EU Waste Shipments Regulation to crack down on illegal exports
- Explore a range of other policy measures, including:
    - Amendments to the Packaging Regulations to ensure a level playing field between PRNs and PERNs and proper incentives for quality
    - Support for End of Waste Regulations
    - Best practice guidance for LAs on quality
    - Statutory guidance on the separate collection requirement of the rWFD

As referenced in the Action Plan, Defra is also developing a regulatory proposal obligating MRFs to measure quality. It will establish a consistent, industry-wide method for sampling and testing the quality of input and output material streams. This is intended to address the key market failure (lack of information) and support implementation of other policies which will deliver our vision. The draft Regulation is still subject to cross-Whitehall clearance and consultation.

Information derived from the implementation of the Regulation will provide MRFs with a tool for managing input and output quality and relationships with customers and react effectively to prevailing market demand. It will also provide customers with a metric to help confidently identify MRFs producing good quality material

[13] "MRF": Materials Recycling Facility

The issue of the perceived uneven playing field for PRNs against PERNs is being included as part of a wider review of the Packaging Regulations and Producer Responsibility Regimes.

DEFRA

23 October 2012

APPENDIX 2: CORRESPONDENCE FROM THE HOME OFFICE ON IMMIGRATION RULES

IMMIGRATION RULES

The Secondary Legislation Scrutiny Committee's 10th Report of Session 2012-13, published on 11 October 2012, considered the Statement of Changes in Immigration Rules (HC 565) which was laid on 5 September 2012.

As the Committee observed in its Report, this Statement of Changes is linked in particular to two previous Statements:

- Cm 8423, laid on 19 July 2012, which in the light of the Supreme Court judgment in *Alvi*, brought within the Rules provisions previously published only in guidance; and
- HC 194, laid on 13 June 2012, which made significant changes to the Immigration Rules relating to family and private life.

Together these Statements of Changes constitute a major set of reforms of the requirements for entering or remaining in the UK on the basis of family or private life, and they form part of the Government's programme of reform of all routes of immigration to the UK. The overall rationale for the changes and the detail of the new measures on family and private life were set out in a Statement of Intent on family migration, published on 11 June 2012.

In its 10th and earlier Reports, the Committee made important observations about these changes and about the interaction between these Immigration Rules and the European Convention on Human Rights (ECHR). It might be helpful to the Committee and other colleagues if I addressed these observations ahead of the debate in the House of Lords, on 23 October, on the motion on aspects of HC 194 put down by Baroness Smith of Basildon.

As the Committee is aware, Article 8 of the ECHR (the right to respect for private and family life) is a qualified right. The Government can interfere in the exercise of that right where in the public interest it is necessary and proportionate to do so, including to safeguard the UK's economic well-being by controlling immigration and to protect the public, by deterring foreign criminals and by removing them from the UK.

On 13 June 2012 the Home Office published a detailed statement on the compatibility of HC 194 with Article 8. The Home Secretary addressed these issues in her Oral Statement on family migration in the House of Commons on 11 June 2012 (Hansard columns 48-50) and in opening a Commons debate on a Government motion on the proper qualification of Article 8 on 19 June 2012 (Hansard columns 760-771).

I would highlight the following points in responding to the Committee's comments.

First, controlling immigration in the UK's economic interests and protecting the public are matters of public policy which it is the responsibility of the Government to determine, subject to the views of Parliament. The Immigration Rules, laid before Parliament by the Secretary of State under section 3(2) of the Immigration Act 1971, are a vehicle for the detailed expression of that policy. They are a statement of the normal practice to be followed by the Secretary of State's caseworkers in making immigration decisions under the statutory framework that

Parliament has provided. It is in the interests of a clear, consistent and transparent immigration system, in which applicants and the public can have confidence, that these Rules should enable the Secretary of State's caseworkers to decide individual cases lawfully and in accordance with the Government's immigration policy.

When the Human Rights Act 1998 was commenced in 2000, however, no attempt was made to reflect the detailed implications of this in the Immigration Rules. In particular, the Rules were amended, in paragraph 2, to require all Home Office staff to carry out their duties in compliance with the provisions of the Human Rights Act, but there was no substantive change to the family or private life part of the Rules to reflect any consideration of proportionality under Article 8 and there was no attempt thereafter to align the Rules with developments in case law. Instead, previous Secretaries of State asserted that if a Court thought that the Rules produced disproportionate results in a particular case, the Court should itself decide the proportionate outcome on the facts before them rather than hold that the Rule itself was incompatible with Article 8.

This approach – which meant that the Courts could not give due weight to the Government's and Parliament's view of where the balance should be struck under Article 8 between individual rights and the public interest, as the Courts did not know fully what that view was – was not conducive to clear, consistent and transparent decision-making by the Secretary of State's caseworkers. It meant that foreign criminals and those who failed to meet the requirements of the Immigration Rules, and who should not therefore be allowed to come to or remain in the UK, were increasingly able to challenge their decisions in the Courts on the grounds of a breach of Article 8. It also meant that each case was decided by the Courts on its own facts without reference to the role of the Secretary of State as the primary decision-maker.

The approach also did not properly reflect the responsibility of the Government and Parliament for determining the public policy framework under which immigration decisions should be taken. Indeed, it left the Courts to develop public policy themselves through case law on issues such as the appropriate level of maintenance for family migrants. Where Parliament had clearly expressed its views as to the public interest, the Courts would have regard to that, for example the deportation provisions in the UK Borders Act 2007, but still the weight to be given to that public interest when assessing an Article 8 claim was not spelt out by the Government but was left to the Courts to determine on a case-by-case basis.

The changes to the Immigration Rules in HC 194 deal with these issues. They fill the public policy vacuum the Government inherited by setting out the position of the Secretary of State on proportionality under Article 8, in the light of existing case law and of evidence such as the report of the independent Migration Advisory Committee on the minimum income threshold for sponsoring family migrants. The new Rules state how the balance should be struck between individual rights and the public interest. They provide clear instructions for the Secretary of State's caseworkers on the approach they must normally take and they therefore provide the basis for a clear, consistent and transparent decision-making process.

The Committee is right to highlight that it remains to be seen what view the Courts reach of the proportionality of the Rules and their compatibility with the qualified right to respect for private and family life under Article 8, but the Government expects that the Courts will give due weight to the views of the Government and Parliament on these matters of public policy.

The Courts have a clear constitutional role in reviewing the proportionality of measures passed by Parliament and of the executive decisions made under them. However, as the Immigration Rules now explicitly take into account proportionality under Article 8, the focus of the Courts should be on considering proportionality in the light of the clear statement of the Government's public policy which the Rules represent.

The Secretary of State's guidance to her caseworkers makes it clear that the Immigration Rules are the starting-point for decision-making and are not absolute: no set of rules can deal with 100 per cent of cases. However, if in the Rules the Secretary of State has got the balance right under Article 8, then only in exceptional cases will a decision made in accordance with the Rules lead to a disproportionate outcome.

Second, in bringing forward the changes to the Immigration Rules in HC 194, the Government has sought to underline the importance of the views of Parliament on the issues of public policy to which the qualified right under Article 8 gives rise. The Government recognises that the procedure to which the Immigration Rules are subject under section 3(2) of the 1971 Act is not of the same order as the process for Parliamentary consideration of primary legislation. For that reason, the Immigration Rules cannot be said to carry the same weight as primary legislation in representing the settled view of Parliament on a matter of public policy.

Nevertheless, the Immigration Rules are subject to Parliamentary scrutiny, including that of your Committee; they can be prayed against and debated in Parliament, as they are to be in the House of Lords on 23 October on the motion put down by Baroness Smith of Basildon; and they can be disapproved by a resolution of either House of Parliament. These procedures provide essential Parliamentary oversight and accountability for the Government's regulation of entry to and stay in the UK under the Immigration Rules.

In the case of HC 194, and within the constraints of the Parliamentary time available to it, the Government has supplemented the statutory procedure under the 1971 Act by tabling a motion inviting the House of Commons to agree that, in the context of the qualified right under Article 8, the conditions for migrants to enter or remain in the UK on the basis of their family or private life should be those contained in the Immigration Rules. The Home Secretary explained this approach in her Oral Statement on family migration in the House of Commons on 11 June 2012 (Hansard columns 49-50). The House of Commons debated and unanimously agreed the Government's motion on 19 June 2012.

As the Home Secretary set out in opening the debate on 19 June (Hansard column 763):

> "Of course, judges will continue to consider each case on its individual merits, but it is the Courts themselves that have said that Parliament needs to make its views clear. In a case in 2007[14], the House of Lords said that a statement from Parliament was needed on where the public interest lies in the operation of Article 8 in immigration cases. The Court of Appeal, last year and this year[15], has indicated that greater weight is to be given to the public interest when that has been endorsed by Parliament. Today's motion provides the Courts with the statement and the endorsement from Parliament that they have said is needed. The

[14] Huang v SSHD [2007] UKHL

[15] RU (Bangladesh) v SSHD [2011] EWCA; Gurung v SSHD [2012] EWCA

> Courts should then give that statement from the elected legislature the weight that it deserves".

The Committee is right to point to the limitations of the procedure which the Government has adopted in respect of HC 194: these are Immigration Rules, not primary legislation. The Committee commented in its 6th Report that it would have expected the Home Office to set out any precedents that have been effective in the past and to indicate what procedure the Courts would require both Houses to adopt to achieve the Government's goal of providing the Courts with a clear steer on these issues. The fact is that there is no direct precedent for the approach the Government is taking.

Therefore, the Committee is also right to conclude that it remains to be determined by the Courts how much weight they will accord to the statement of public policy on the qualification of Article 8 which the new Rules represent, including in the light of the Parliamentary scrutiny and debate which those Rules have received. However, the Government believes that it has enabled and encouraged an important degree of "active debate in Parliament" in respect of these Rules changes, the lack of which the Courts have previously indicated[16] has left a vacuum in terms of a clear statement of the public interest and how the balance under Article 8 should be struck.

The new Immigration Rules reflect the Government's view and, in the light of the 19 June Commons debate and subject to the 1971 Act procedure, Parliament's view of how the balance should be struck between that public interest and individuals' rights under Article 8. The Government expects the Courts to have regard to that in reaching their decisions.

Mark Harper MP

18 October 2012

[16] Huang v SSHD [2007] UKHL

APPENDIX 3: CORRESPONDENCE FROM THE DEPARTMENT FOR EDUCATION ON THE TIMING OF STATUTORY INSTRUMENTS

EDUCATION (SCHOOLS GOVERNMENT) (TERMS OF REFERENCE) (AMENDMENT) REGULATIONS 2012

The Department is committed to giving schools on full term's lead-in time between the notification of a new requirement in legislation and the commencement of that requirement. As Nick Gibb said in his letter to you dated 27 October 2010, even when a measure is removing a requirement we will make every effort to comply with the timeframe.

In the case of the Education (School Government) (Terms of Reference) (England) (Amendment) Regulations 2012 it did not prove possible to avoid a short lead-in time. The important point is that schools were able to plan ahead and make preparations as the Department notified all schools of our proposals in January 2012 via e-mail communication, our web site and social media tools, making it clear which policies and other documents schools would be required to have in place from September 2012.

I can again confirm our commitment to making every effort to comply with the timeframe but our strong priority is to give schools increased freedoms as soon as possible. Our view remains that the earlier a burden is removed the more time previously spent on that burden can instead be dedicated to teaching.

On behalf of the Department, I apologise that these Regulations came into force before the Committee had an opportunity to scrutinise them. The Department greatly values the role and commitment of the Secondary Legislation Scrutiny Committee. Only when it is unavoidable will we sat an "in force" date in a recess without giving Parliament the opportunity to scrutinise the instrument first.

On the broader issue, I want to assure you and your colleagues on the Committee that we fully understand the importance of parental engagement as children progress through school. We believe that removing these Regulations reflected that spirit as the former requirement on schools to produce a curriculum policy did not include a requirement to publish that policy.

The introduction of the School Information (England) (Amendment) Regulations 2012 (SI 2012/1124) has extended the information available to parents, enabling parents to make the best choices for and with their child. These Regulations require specified policy and performance information, including on the curriculum content for each subject, to be published on a website by the school. The information should be updated as soon as is practical and at least annually. It will be available to parents on the internet and schools must also provide it in paper form free of charge to any parent who requests it. The website should also include details on how additional information may be obtained.

We did not consider that consultation was necessary before removing this particular burden from schools. The Government announced its intention to require schools to put key information online, including curriculum provision and content, in *The Importance of Teaching — The Schools White Paper*, published in November 2010.

We continue to engage with head teachers, governors and representative groups to ensure our proposals have a meaningful impact on reducing burdens on schools. We have an established Bureaucracy Reference Group (comprising head teachers,

teachers, business managers and governors) to advise the Department on how existing bureaucracy can be reduced and to ensure future burdens are kept to a minimum.

Elizabeth Truss MP

26 October 2012

APPENDIX 4: 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 30 October 2012 Members declared the following interests:

Draft Feed-in Tariffs: Modifications to the Standard Conditions of Electricity Supply Licences (No. 4 of 2012)

Baroness Eaton and Lord Scott of Foscote, as the owners of some solar panelling used for small-scale generation of electricity.

Attendance:

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