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

Historical Note

In January 2000, the Royal Commission on the Reform of the House of Lords said that there was a good case for enhanced Parliamentary scrutiny of secondary legislation and recommended establishing a “sifting” mechanism to identify those statutory instruments which merited further debate or consideration. The Merits of Statutory Instruments Committee was set up on 17 December 2003. At the start of the 2012-3 Session the Committee was renamed to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

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 Hamwee    Lord Plant of Highfield
Lord Blackwell    Lord Methuen    Rt Hon. Lord Scott of Foscote
Lord Eames    Rt Hon. Baroness Morris of Yardley    Lord Woolmer of Leeds
Rt Hon. Lord Goodlad (Chairman)    Lord Norton of Louth

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’s work, 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

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

1. Originally laid in December 2012, this Order was subject to prolonged scrutiny due to the Ministry of Justice’s (MoJ) difficulties in providing the Committee with complete and accurate responses to its questions about the Administrative Justice and Tribunals Council (AJTC)(see our 25th, 32nd and 35th Reports of Session 2012-13).

2. Following an oral evidence session on 14 May 2013 with the Parliamentary Under-Secretary of State, Helen Grant MP, the Committee’s 2nd Report of this session concluded, at paragraph 26, that:

“The MoJ has made a valid case that, in regard to the monitoring of the day-to-day performance of tribunals, there are functions of the AJTC that have been overtaken by events and that could more appropriately be delivered in–house by MOJ or HMCTS.”

3. The Committee was less sanguine about the proposed arrangements for replacing the AJTC’s function as an independent observer of the justice system. At paragraphs 29 and 31 of the 2nd Report, we said:

“We found unconvincing the Minister’s arguments why the Advisory Group represented equivalent protection to that of the AJTC. The AJTC has rights set out in statute\(^1\) ‘to scrutinise and comment on legislation, existing or proposed, relating to tribunals or any particular tribunal’ which do not seem to be replicated. Nor does the Advisory Group appear to have a budget to commission consultation or research. Such decisions are at the discretion of the MOJ...\textbf{We therefore conclude that the tests in the [Public Bodies Act 2011] are not fully satisfied and the case for the complete abolition of the AJTC is not made.”}

4. The Minister has now written to the Chairman in response to our 2nd Report undertaking to revise the constitution of the Advisory Group to appoint an independent Chair. Further details are to be provided when the Order is debated in the House of Commons on 3 July. No date for the debate in the Lords has yet been set. This letter is published in Appendix 1.

\(^1\) Schedule 7, Part 2, paragraph 14 (2) of the Tribunals, Courts and Enforcement Act 2007.
INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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

INSTRUMENTS OF INTEREST

Draft Armed Forces (Retrial for Serious Offences) Order 2013
5. This draft Order, laid by the Ministry of Defence (MOD), provides that persons acquitted of certain serious offences by a service court (for example the Court Martial) may be retried in the service justice system if new and compelling evidence comes to light in relation to those offences.
6. In the accompanying Explanatory Memorandum, MOD states that Part 10 of the Criminal Justice Act 2003 (“the 2003 Act”), which came into force in 2005, reformed the law on double jeopardy by permitting retrials in serious cases where a person is acquitted of an offence but where new and compelling evidence subsequently comes to light against the acquitted person.
7. The provisions of the 2003 Act do not apply to the service justice system. The draft Order makes equivalent provision, with some modifications, for retrial in the service justice system of persons previously acquitted in that system of a “qualifying” offence. Qualifying offences include certain criminal conduct offences such as murder, manslaughter and rape: MOD states that these mirror the offences for which an acquitted person might be retried in the criminal justice system. However, qualifying offences under this Order also include some service offences which are not criminal in character but which, MOD states, are commensurate in seriousness to the qualifying criminal conduct offences, such as assisting the enemy, and obstructing operations.
8. MOD states that the Order imposes certain safeguards, which include a provision that the service police may not investigate the commission of a qualifying offence by an acquitted person unless the Director of Service Prosecutions consents or unless urgent steps are required to avoid the investigation being substantially and irrevocably prejudiced.

Draft Green Deal Code of Practice
9. The Department for Energy and Climate Change (DECC) has laid this revised draft Code of Practice, which sets out requirements for those acting as Green Deal Providers, Green Deal Assessors, or Green Deal Installers (“GD Participants”), or Certification Bodies. In the accompanying Explanatory Memorandum (EM), DECC states that the Code of Practice is designed to ensure that all GD Participants and Certification Bodies will operate fairly and transparently; deliver good customer service; have appropriate levels of training and expertise, and provide appropriate redress mechanisms for customers. All GD Participants must comply with the Code
of Practice; their compliance is monitored by Certification Bodies and the Green Deal Oversight and Registration Body (GD ORB).2

10. The Government launched the Green Deal on 28 January 2013. In the EM, DECC states that, since the launch, stakeholder engagement has continued through a number of fora set up by the GD ORB; and that this underlies the changes to the Code of Practice provided for in this revised draft, reflecting lessons learned from the initial operation phase of the Green Deal. The EM itemises the changes.

11. On 26 June 2013, the Committee on Climate Change (CCC) published its fifth report on progress towards meeting carbon budgets.3 We note the CCC’s observation, in that report, that, while loft and cavity wall insulation rates increased in 2012 as energy companies aimed to meet targets in the final year of the supplier obligation schemes,4 there was “a significant risk around future delivery of these measures given weaker incentives under the new Green Deal and Energy Company Obligation”.

12. On 27 June 2013, DECC published the first quarterly Green Deal and Energy Company Obligation statistical release, for the period January to March 2013.5 The release focused on assessments, as the “first step in the Green Deal process”, and showed that 9,224 such assessments were completed in England and Wales in that period. The most common measure recommended was to upgrade the existing boiler with the same fuel: this accounted for 17% of all recommended measures. Other common recommendations included different types of solid wall insulation (11%), solar PV, heating controls for wet central heating systems and floor insulation (each accounting for 10% of all recommended measures).

Draft Judicial Appointments Regulations 2013

Draft Judicial Appointments Commission Regulations 2013

Draft Supreme Court (Judicial Appointments) Regulations 2013

13. The Crime and Courts Act 2013 (“the 2013 Act”) creates regulation-making powers to take the procedural detail of the selection for specified judicial appointments out of the Constitutional Reform Act 2005 (“the 2005 Act”). The important elements of principle remain on the face of the 2005 Act but the changes mean that minor details of the selection process can now be altered without recourse to primary legislation. As well as being subject to public consultation, all three sets of Regulations were shared with Parliament during the course of the Crime and Courts Act 2013 which the Committee commends as good practice.

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2 GD ORB manages the authorisation scheme for Green Deal participants and is responsible for providing administration and oversight of the scheme.


4 These schemes are the Carbon Emissions Reduction Target (CERT), which from 2008 required energy suppliers with more than 50,000 customers to reduce carbon dioxide emissions; and the Community Energy Saving Programme (CESP), which from 2009 required gas and electricity suppliers and electricity generators to deliver energy-saving measures to domestic consumers in specific low-income areas.

These Regulations amend the process and, in particular, in line with the 2013 Act, they broaden the scope for consultation during the selection process and introduce measures to increase the diversity of those selected for judicial office. However we note that provisions\(^6\) restrict Supreme Court Judges who can participate in selection panels to those who have experience as a judge in the Appeal Court or High Court of England and Wales which may counteract the stated intention of increasing diversity.

**Draft Working Time (Amendment) Regulations 2013**

14. The Department for Environment, Food and Rural Affairs (Defra) has laid these draft Regulations, in order to align the position for agricultural workers in England and Wales, in relation to the commencement of the leave year and notice for taking leave, with the position for workers in most other sectors under the Working Time Regulations 1998.\(^7\) In the Explanatory Memorandum (EM), Defra states that these are technical amendments to the 1998 Regulations, as a consequence of the move to a single employment regime.

15. As background, Defra explains that, through the Enterprise and Regulatory Reform Act 2013, the Government legislated to abolish the Agricultural Wages Board for England and Wales (AWB) in order to bring employment in agriculture in line with other sectors of the economy. From 1 October 2013, there will no longer be a separate employment regime for agricultural workers in England and Wales, but they will be protected by the National Minimum Wage Act 1998 and the 1998 Regulations.

16. Defra states that that there was no consultation on these technical amendments, but adds that it previously invited views on its proposals to abolish the AWB and agricultural minimum wage regime. That consultation took place between 16 October and 12 November 2012, a period of four weeks; a Government response was published in December 2012.\(^8\) The House may recall that the proposals were discussed during the Report stage of the Enterprise and Regulatory Reform Bill.\(^9\) Speakers in that debate voiced concern about the very short time allowed for the consultation process. *Albeit that the 2012 exercise related to the wider policy context, rather than the specific details of these Regulations, we share a concern that allowing so short a period for consultation is not consistent with good policy-making.*

\(^6\) For example, see Draft Judicial Appointments Regulations 2013, Regulation 2(3).

\(^7\) SI 1998/1833.


\(^9\) HL Deb, 6 March 2013, col. 1551.
Transfer of Functions (Age-Related Payments) Order 2013 (SI 2013/1442)

17. This instrument makes changes to the Age-Related Payments Act 2004 to enable Her Majesty’s Treasury to make ‘ex gratia’ payments in cases where a With-Profits Annuity was bought from Equitable Life on or before 31 August 1992. People who are not the policyholder were excluded from the compensation scheme under the Equitable Life (Payments) Act 2010. However in the 2013 Budget, the Chancellor recognised the particular financial pressures this group have been under, and announced that ex gratia payments would be made to these With-Profits Annuitants, or to their estates if they died after the Budget on 20 March 2013.\footnote{The Draft Age-Related Payments Regulations 2013, laid on 1 July by HM Treasury, propose to set the compensation at £5,000. These Regulations will be considered by the Committee at its forthcoming meeting.}
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**

- Armed Forces Act (Continuation) Order 2013
- Armed Forces (Court Martial) (Amendment) Rules 2013
- Armed Forces (Retrial for Serious Offences) Order 2013
- Judicial Appointments Regulations 2013
- Supreme Court (Judicial Appointments) Regulations 2013
- Judicial Appointments Commission Regulations 2013
- Working Time (Amendment) Regulations 2013

**Draft Instruments subject to annulment**

- Green Deal Code of Practice (Version 3)

**Instruments subject to annulment**

- SI 2013/1407 Family Proceedings Fees (Amendment) Order 2013
- SI 2013/1408 Non-Contentious Probate Fees (Amendment) Order 2013
- SI 2013/1409 Magistrates’ Courts Fees (Amendment) Order 2013
- SI 2013/1410 Civil Proceedings Fees (Amendment No. 2) Order 2013
- SI 2013/1442 Transfer of Functions (Age-Related Payments) Order 2013
- SI 2013/1445 European Communities (Designation) Order 2013
- SI 2013/1472 Family Procedure (Amendment No. 2) Rules 2013
- SI 2013/1473 Merchant Shipping and Fishing Vessels (Health and Safety at Work) (Asbestos) (Amendment) Regulations 2013
- SI 2013/1474 Social Security (Croatia) Amendment Regulations 2013
- SI 2013/1477 Plant Health (England) (Amendment) (No.2) Order 2013
- SI 2013/1478 Cosmetic Products Enforcement Regulations 2013
APPENDIX 1: DRAFT PUBLIC BODIES (ABOLITION OF THE ADMINISTRATIVE JUSTICE AND TRIBUNALS COUNCIL) ORDER 2013

Letter from Helen Grant, Parliamentary Under-Secretary of State for Justice

Following my appearance before your committee on 14 May and the committee’s subsequent 2nd Report of Session 2013-2014, I have carefully considered the concerns the Committee has raised over the ability of the Administrative Justice Advisory Group to provide a meaningful independent challenge to the Government in its role as overseer of the administrative justice and tribunals system. Although I consider the Advisory Group to have already proved itself capable of challenge, I can see merit in amending its constitution to ensure that it remains so. I am writing, therefore, to inform you that I have decided to appoint an independent Chair to the Group, upon abolition of the Administrative Justice and Tribunals Council.

I have asked my officials to work up the detailed criteria for the independent Chair’s role and a proposal for the recruitment and appointment process. I shall be able to provide more detail on this during the debate on the draft Order in the House of Commons on 3 July.

In advance of that, I am clear that the Chair’s immediate focus should be on supporting delivery of the Government’s Administrative Justice and Tribunals Strategic Work Programme, which forms the basis of work over the coming three years. I expect the Chair to provide the strong leadership required for the Advisory Group to challenge and guide Government policies in this area as they are developed and implemented. I believe this will help to bring about real improvements for the users of the administrative justice and tribunals system.

Helen Grant

27 June 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 2 July 2013 Members declared no interests.

Attendance:

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