

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

26th Report of Session 2014–15

**Draft General Medical Council (Fitness to Practise and
Over-arching Objective) and the Professional
Standards Authority for Health and Social Care
(References to Court) Order 2015**

**Draft Renewables Obligation Closure (Amendment)
Order 2015**

**Special Educational Needs and Disability Code of
Practice: 0 to 25 years**

**Special Educational Needs and Disability (Detained
Persons) Regulations 2015**

Construction (Design and Management) Regulations 2015

Includes 7 Information Paragraphs on 8 Instruments

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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;
 - (e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument’s policy objective and intended implementation;
 - (f) that there appear to be inadequacies in the consultation process which relates to the instrument.
- (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

Baroness Andrews	Lord Eames	Baroness Stern
Lord Bichard	Rt Hon. Lord Goodlad (<i>Chairman</i>)	Lord Plant of Highfield
Lord Borwick	Baroness Hamwee	Lord Woolmer of Leeds
Lord Bowness	Baroness Humphreys	

Registered interests

Information about interests of Committee Members can be found in Appendix 3.

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 hlseclegscrutiny@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 Sixth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the following instruments and has determined that the special attention of the House should be drawn to them on the grounds specified.

A. Draft General Medical Council (Fitness to Practise and Over-arching Objective) and the Professional Standards Authority for Health and Social Care (References to Court) Order 2015

Date laid: 29 January

Parliamentary Procedure: affirmative

Summary: The purpose of the Order includes, amongst other things: strengthening the independence of decision-making at the adjudication stage of fitness to practise procedures involving doctors by establishing the Medical Practitioners Tribunal Service (MPTS) as a statutory committee of the General Medical Council (GMC); introducing a new “over-arching objective” for the GMC of “protection of the public”; amending the grounds for the Professional Standards Authority for Health and Social Care referring a final fitness to practise decision to the High Court; and, introducing a new right of appeal for the GMC to the higher courts in order to challenge MPTS decisions. Whilst the consultation demonstrated “strong support” for enhancing the separation between the GMC’s investigative and adjudication roles, we note that 52% of respondents took the view that creating an entirely independent body would be preferable and only 27% supported the proposal to put the MPTS on a statutory footing.

We draw this Order 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.

1. The Department of Health (DH) has laid this “Section 60 Order” under the Health Act 1999, along with an Explanatory Memorandum (EM). The purpose of the Order includes, amongst other things: strengthening the independence of decision-making at the adjudication stage of fitness to practise procedures involving doctors by establishing the Medical Practitioners Tribunal Service (MPTS) as a statutory committee of the General Medical Council (GMC); introducing a new “over-arching objective” for the GMC of “protection of the public”; amending the grounds for the Professional Standards Authority for Health and Social Care (PSA) referring a final fitness to practise decision to the High Court; and, introducing a new right of appeal for the GMC, corresponding to the PSA’s power to refer cases, to the higher courts in order to challenge MPTS decisions.

2. The EM (paragraph 7.1) states that “reform of the GMC’s adjudication function has been a long term policy objective” and notes that the Fifth Report of the Shipman Inquiry (published in December 2004) recommended that the adjudication stage of fitness to practise procedures should be undertaken by a body independent of the GMC. Subsequently, an independent body called the Office of the Health Professions Adjudicator (OHPA) was set up but, following a consultation in 2010, it was decided not to proceed with the OHPA and instead to improve the independence of the adjudication function within the GMC. The OHPA was abolished by the Health and Social Care Act 2012.
3. Section 8 of the EM purports to set out the consultation outcome associated with the Order. The consultation took place during the period 31 July to 25 September 2014. 81 responses were received from a range of respondents, including the medical and legal professions, patient representative organisations, healthcare recruitment organisations, regulatory bodies and members of the public. 39 of the responses were identical from a co-ordinated group. Very little information was provided in the EM about the results of the consultation and the Committee requested further information which is set out in full in Appendix 1 to this report.
4. The further information provided by the Department does not offer any statistical analysis. For this, it has been necessary to turn to the DH Consultation Response published in January 2015.¹ This document provides a far more complex picture of the range of support for, and opposition to, the proposals contained in the Order.
5. We note, for example, that, on the issue of putting the MPTS on a statutory footing, the additional information provided by DH states: “The consultation responses demonstrated strong support for the principle of enhancing the separation between the GMC’s role in investigating fitness to practise concerns and its role in adjudicating on whether those concerns amount to impaired fitness to practise”. The same statement appears in the Executive Summary of the Consultation Response. The statistical analysis, however, which appears later in the Consultation Response, provides a clearer account. In response to the question “do you agree with the proposal that the MPTS should be set up as a statutory committee of the GMC to govern the adjudication of fitness to practise processes for doctors?”, 52% of respondents took the view that creating an entirely independent body (like the OHPA) would be preferable and only 27% supported the proposal to put the MPTS on a statutory footing. 7%, including the PSA, did not agree that the proposal would achieve the aim of additional separation within the GMC.
6. We note also that, on the issue of whether the GMC should have a right of appeal to the higher courts in order to challenge MPTS decisions, 70% of respondents did not agree with the proposal (page 13 of the Consultation Response). Some respondents took the view that the PSA was the appropriate independent body to review the MPTS, and others thought that

¹ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/396205/Consultation_Response.pdf

the MPTS could be undermined if the GMC could appeal against its decisions. Only 17% of respondents supported the proposal.

7. In April 2014, the Law Commissions published a report on the regulation of healthcare professionals,² which included reference to the separation of investigation and adjudication functions. The Consultation Response states that “the Government will be publishing a full response ... in due course”, and that it “agrees with the principle of the Law Commissions’ recommendations regarding enabling greater separation of functions for all regulators and would propose to do so at a suitable opportunity” (page 11). The EM (at paragraph 7.2) explains that this Section 60 Order is being brought forward in advance of the response to the Law Commissions’ report because “making these amendments now in relation to the way that fitness to practise decisions [are] made is a priority”.

B. Draft Renewables Obligation Closure (Amendment) Order 2015

Date laid: 27 January

Parliamentary Procedure: affirmative

Summary: The Order provides for an early closure date, of 31 March 2015 (rather than 31 March 2017), after which the Renewables Obligation will be closed to solar photovoltaic (“pv”) generating stations, where the generating capacity of the station is over five megawatts in size. The Department for Energy and Climate Change has justified its decision to apply this early closure date by the need to ensure affordability within the Levy Control Framework, which limits the aggregate amount levied from consumers by energy suppliers to implement Government policy. The Department’s estimates made at the end of 2012 of the likely growth in large-scale solar pv deployment were clearly well off the mark.

We draw this Order 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.

8. In July 2014, the Department for Energy and Climate Change (DECC) laid the draft Renewables Obligation Closure Order 2014 (“the 2014 Order”): it was made on 8 September 2014 and came into force the following day, as SI 2014/2388. DECC explained at the time that, as part of Electricity Market Reform, the Contract for Difference (CfD)³ was intended to open for applications in autumn 2014. After a two-and-a-half year transition period in which new renewable electricity projects would be able to apply for either the CfD or the Renewables Obligation (RO, which at the time was the main support mechanism for large-scale renewable electricity generation), the Government intended to close the RO to new renewable capacity on 31 March 2017.

² <http://lawcommission.justice.gov.uk/publications/Healthcare-professions.htm>

³ DECC has stated that CfDs will support investment in low carbon generation by providing long-term revenue stabilisation to low-carbon plant, allowing investment to come forward at a lower cost of capital and therefore at a lower cost to consumers.

9. DECC has now laid this draft Order (“the 2015 Order”), with an Explanatory Memorandum (EM) and impact assessment (IA). The 2015 Order, in amending the 2014 Order, provides for an early closure date, of 31 March 2015, after which the RO will be closed to solar photovoltaic (“pv”) generating stations, where the generating capacity of the station is over five megawatts (“MW”) in size. The 2015 Order makes a number of exceptions to the closure, for existing generating capacity and for new generating capacity meeting specified criteria: the exceptions for new generating capacity are sometimes known as grace periods.
10. DECC refers to the Levy Control Framework (“LCF”), which places limits on the aggregate amount levied from consumers by energy suppliers to implement Government policy. The Department explains that the early closure of the RO to large-scale solar pv capacity is being effected because large-scale solar pv is being deployed more rapidly than originally estimated, and there is a need to control the costs of large-scale solar pv in order to ensure it is affordable within the LCF.
11. In a consultation paper issued in May 2014, DECC stated that, at the conclusion of the last comprehensive banding review of RO support in December 2012, the Government’s expectation was the support offered through the RO would lead to the deployment of approximately 900MW (or 0.9 of a gigawatt (GW)) of new large-scale solar pv by the end of 2016–17. In the event, however, in May 2014 the latest published data and projections indicated that, after an additional 1GW of large-scale solar pv deployment in each of 2015–16 and 2016–17, more than 5GW would be deployed by 2017. DECC stated that this exceeded the upper end of the potential range set out in the Delivery Plan for 2020, by some margin; and was more than the Government could afford and would have adverse consequences for the management and use of the LCF as a whole.
12. In the EM, DECC says that it carried out two public consultations on the early closure of the RO to large-scale solar pv. The first, on the closure itself and the grace period, for significant financial investments, ran from 13 May to 7 July 2014. There were 65 responses. 57% of respondents were opposed to the early closure; 69% were opposed to the proposal to introduce a grace period based on the stage projects had reached by 13 May 2014, though not to the idea of a grace period itself; and 86% disagreed with the forms of evidence to demonstrate eligibility for the grace period.⁴ The second consultation, from 2 to 24 October 2014, proposed an additional grace period to protect projects against the risk of missing the early closure date due to delays in getting connected to the electricity grid. The majority of the 29 respondents supported the need for a grid delay grace period and were content with the grace period’s eligibility criteria.⁵
13. DECC has justified its decision to close the RO to large-scale solar pv deployment projects two years earlier than previously announced by the need to ensure its affordability within the LCF; and it has clarified that such projects would be eligible to apply for CfD support. **It is clear, however,**

⁴ DECC has published a summary: <https://www.gov.uk/government/consultations/consultation-on-changes-to-financial-support-for-solar-pv>

⁵ DECC has again published a summary: <https://www.gov.uk/government/consultations/consultation-on-further-changes-to-financial-support-for-solar-pv>

that the Department's estimates made at the end of 2012 of the likely growth in large-scale solar pv deployment were well off the mark. In the IA to the 2015 Order, DECC states that the Government's view is that the CfD is a more cost-effective mechanism than the RO; that the CfD provides for earlier certainty of support levels than the RO and greater stability of revenue streams by providing a fixed strike price; and that investors are protected from wholesale price volatility and should benefit from a reduction in their cost of capital, making the development of low carbon generation cheaper. Market participants must hope that these predictions are more soundly based than DECC's 2012 estimates of future deployment of large-scale solar pv.

**C. Special Educational Needs and Disability Code of Practice: 0 to 25 years
Special Educational Needs and Disability (Detained Persons)
Regulations 2015 (SI 2015/62)**

Date laid: 28 January 2015

Parliamentary Procedure: negative

Summary: The Regulations provide that local authorities must have regard to facilitating the development of children and young people with special educational needs; and, in particular, that they must work with other responsible bodies to assess the requirements of detained children and young people who have such needs, within set time-frames. The revised Special Educational Needs and Disability Code of Practice has been prepared to reflect the Regulations and to help provide greater clarity to all concerned, including parents and young people. While bodies obliged to follow the Code may well find the revision easier to understand, a document of some 300 pages in length and such a depth of detail cannot readily serve as a conduit of information for parents and young people.

We draw these Regulations, and the accompanying Code of Practice, to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House.

14. The Department for Education (DfE) has laid these Regulations with an Explanatory Memorandum (EM). DfE states that large numbers of detained children and young people (under age 19) have special educational needs (SEN), and that approximately 18% of those in custody have an SEN statement, compared to 3% of children and young people overall in England.
15. To address these needs, the Special Educational Needs and Disability (Detained Persons) Regulations 2015 ("the 2015 Regulations") require local authorities to have regard to facilitating the development of these children and young people. In particular, they require authorities to work with other responsible bodies (including Youth Offender Teams, NHS England, the person in charge of relevant youth accommodation) to assess the needs of detained children and young people who have SEN, within set time-frames: where necessary, those needs must be met continuously in custody and on release. DfE says that this is a new entitlement for detained children and young people, who previously had to wait until they were released for any SEN, identified during their detention, to be addressed.

16. The 2015 Regulations are laid alongside a revised Special Educational Needs and Disability Code of Practice (“the revised Code of Practice”), which has been revised to reflect the requirements of the 2015 Regulations and, as stated by DfE, to help provide greater clarity to local authorities, the secure estate, health commissioning bodies, parents and others.
17. DfE says that it held a formal consultation on the Regulations and Code over a four-week period from 22 October to 19 November 2014. There were workshops and meetings with interested parties held in parallel. DfE adds that the previous version of the Code, published in July 2014, already broadly set out the proposed requirements for meeting the needs of young offenders, and had itself been consulted upon over nine and a half weeks in 2013. Since the 2015 Regulations provide the detail to these requirements, they did not need a full 12-week consultation.
18. DfE says that there were 40 respondents to the consultation: the majority found the draft Regulations and the draft Code clear on the duties and requirements on local authorities, youth offending teams and other bodies responsible for meeting the needs of detained children and young people. Respondents’ main concern was to ensure that the Regulations provided continuity for young offenders with SEN. DfE published a summary of consultation responses⁶ at the time of laying the 2015 Regulations before Parliament. Among other things, this sets out the changes that the Department has made to the Regulations to meet this concern, recognising the need to ensure that, as custodial sentences are on average only 85 days, any identified needs (education, health or care) are promptly and continuously met whether the person remains in custody, or is released from it.
19. We brought the previous version of the Code to the special attention of the House in our 3rd Report of the current Session.⁷ We noted that the Department had said that the Code not only included statutory guidance which some bodies were legally obliged to follow, but also provided useful information for parents, young people and practitioners. We commented that, while this was a desirable objective, we were concerned that the Code might be far too lengthy and complex to be of use to families concerned with SEN issues. In both the EM and the consultation summary, the Department has stressed its commitment to making the 2015 Regulations and the revised Code clear and comprehensible. While bodies obliged to follow the Code may well find the revision easier to understand, a document of some 300 pages in length and such a depth of detail cannot readily serve as a conduit of information for parents and young people.

⁶ See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/398993/Consultation_gov_re_sp_detainees_with_SEN_280115.pdf

⁷ HL Paper 12.

D. Construction (Design and Management) Regulations 2015 (SI 2015/51)*Date laid: 29 January**Parliamentary Procedure: negative*

Summary: These Regulations (“the 2015 Regulations”) are the third implementation of Commission Directive 92/57/EEC on the minimum safety and health requirements at temporary or mobile construction sites and replace the current Regulations made in 2007 (“the 2007 Regulations”). They follow a post-implementation evaluation of the 2007 Regulations in 2011–12 and are intended to meet concerns raised during the consultation. These included, amongst other things, the bureaucratic burden of the 2007 Regulations. The 2015 Regulations are described as “deregulatory” but what is not evident from the Explanatory Memorandum is that they also include new provision to close a transposition gap, namely the current exemption of “domestic clients” (in effect, homeowners) from the scope of the 2007 Regulations. To overcome the cost and regulatory burden of removing the exemption, the Department has adopted what is described as “the deeming approach option” whereby the contractor (or contractors) for the project will, by default, carry out domestic client duties without further intervention required from the client. Given the costs and practical advantages of the deeming approach, this seems reasonable. We note however that the IA suggests that compliance with the new duties by contractors, even though not a significant addition to their current duties, is expected to be low. We also refer in this report to correspondence received about the implications for the entertainment and leisure sector of falling within scope of the 2015 Regulations.

We draw these Regulations to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House.

Background

20. The Department for Work and Pensions (DWP) laid these Regulations (“the 2015 Regulations”) with an Explanatory Memorandum (EM) prepared by the Health and Safety Executive (HSE) on behalf of the DWP, a Transposition Note (as Appendix 1 to the EM) and an Impact Assessment (IA). The Regulations are the third implementation of Commission Directive 92/57/EEC (“the 1992 Directive”) on the minimum safety and health requirements at temporary or mobile construction sites. The first was in 1994 (“the 1994 Regulations”)⁸ and the second in 2007 (“the 2007 Regulations”).⁹ The construction industry employs about 2.1 million people in Great Britain. It remains one of the most dangerous industries in which to work, with about 45 fatal injuries to workers every year. 60 to 70% of these injuries occur on smaller projects. The IA comments that although the larger, more structured part of the industry has made significant improvements in ensuring worker protection, “smaller sites” are “responsible for an increasingly large proportion of serious and fatal accidents” (paragraph 10).

⁸ The Construction (Design and Management) Regulations 1994.

⁹ The Construction (Design and Management) Regulations 2007.

21. The 2015 Regulations revoke and replaced the 2007 Regulations, and follow a post-implementation evaluation of the 2007 Regulations in 2011–12 by the HSE. According to the EM (paragraphs 7.2 to 7.5), there was found to be “broad support for the structured approach to the management of health and safety” provided by the 2007 Regulations but concerns emerged in three key areas:
- the co-ordination function provided by the Construction (Design and Management) Regulations (CDM) coordinator was not in many cases “well-embedded in construction projects” and, as a result, often caused “considerable costs without concomitant benefit”;
 - the prescriptive and detailed approach taken towards the competence of the construction workforce had increasingly driven the industry to adopt bureaucratic, costly and repetitive systems for the demonstration of competence; and
 - the industry showed a strong tendency to over-interpret both the Regulations and the supporting Approved Code of Practice (ACOP), adding to the bureaucratic burden of the Regulations.
22. The 2015 Regulations are intended to “retain the key elements of worker protection from the 2007 Regulations and the 1992 Directive itself but seek to deliver them in a more streamlined and easily understandable way ...” (EM at paragraph 7.6).

Consultation

23. A consultation on the proposed 2015 Regulations took place between 31 March and 6 June 2014 (having been preceded by a period of stakeholder consultation). 1,427 responses were received. A third supported the proposals. A third offered qualified support, raising concerns, amongst other things, about the clarity of drafting with regard to the application of the Regulations to domestic construction clients (see paragraphs 24 to 27 below). Only a third supported the removal ACOP and, as a result, a new ACOP will be published to support the 2015 Regulations.

Remedying insufficient transposition

Removing the exemption of homeowners from client duties

24. The EM describes the 2015 Regulations as “deregulatory” and states that they remove “some gold plating” (paragraph 4.3). What is not evident from the EM is that the 2015 Regulations also include new provision to close a transposition gap (see the IA Summary: Intervention and Options). This incomplete description in the EM contrasts with the IA which describes the proposals in the 2015 Regulations as falling into two distinct groups: (a) those which are intended to streamline the Regulations (described in sections A to D of the IA) and (b) those which remedy the transposition gap (sections E and F). This latter group result from a view taken by the HSE that the current transposition is insufficient because it exempts “domestic clients” (in

effect, homeowners)¹⁰ from the duties which are imposed on other construction clients. The view is now taken that domestic clients should be subject to the same client duties as commercial clients because the Directive definition of “client” is very broad and “it imposes client duties on all clients as defined with no derogations” (paragraph 134 of the IA).

What are client duties?

25. Client duties are set out in Part 2 of the 2015 Regulations. They are described in the IA (paragraph 131) as “largely administrative and, in summary, are to ensure that management arrangements for the project are sufficient, to provide relevant information to other duty holders, appoint coordinators for health and safety ..., and ensure that the principal contractor has drawn up a health and safety plan before work commences on site.” Both the 2007 Regulations and the 1994 Regulations “protected” domestic clients from these client duties on the grounds, according to the IA, that, “in view of the nature of domestic construction projects, it was reasonable to shelter such clients from the criminal liability inherent in these duties”, that for most small projects for domestic clients “the householder was not in a position to exercise control over how the work is managed or sequenced in the way that a more informed commercial client would be”, and that “the informal arrangements in place in such projects do not lend themselves easily to the structured approach to client duties which the Directive would indicate” (paragraph 123 of the IA).

Deeming approach

26. The Department considered two approaches to making good this gap in transposition. The first was to apply client duties to domestic clients so that the duties would be discharged by the homeowner (“the copy-out option”); and the second was to provide that the contractor (or contractors) for the project would, by default, carry out domestic client duties without further intervention required from the client (“the deeming approach option”). We are told (paragraph 20 of the IA) that the cost implications of the two options are very different: the first would result in costs to homeowners of £170 million a year, and the second would have an average annual cost of £1.3 million to homeowners and £4.6 million to contractors. It is unsurprising therefore that the 2015 Regulations adopt the deeming approach option which, according to the IA (paragraph 135), is permissible under the Directive because it allows for the principle that client duties can be carried out by another person.

Likelihood of compliance

27. Aside from the cost implications, the adoption of the deeming approach option is supported by evidence to the effect that, on the one hand, were the client duties to fall on homeowners, compliance would be very low (see, for example, the IA at paragraph 153), and, on the other hand, shifting them to the contractor would add little to the duties which fall upon contractors in any event (see paragraphs 159 and 162 of the IA). The advantages of the

¹⁰ “Domestic clients” are defined in Part 1 of the 2015 Regulations as “a client for whom a project is being carried out which is not in the course or furtherance of a business of that client”.

deeming approach therefore appear incontestable. The IA however suggests that compliance by contractors with the new duties, even though not a significant addition to their current duties, is expected to be low because they will tend to fall on small contractors used to undertaking small domestic contracts and less likely to keep up with regulatory requirements. As a result, the HSE considered what action was needed to improve compliance by small contractors with the new client duties. They concluded that it “would require substantial proactive regulatory activity on the part of the HSE” (paragraph 182). They further concluded however that this activity should not be undertaken because “the net effect of focusing on domestic client duties would be a lowering of health and safety standards overall in the construction industry” (paragraph 187).

Application to the entertainment and leisure sector

28. The Committee is aware¹¹ that organisations within the entertainment and leisure sector have expressed their concern about the application of the 2015 Regulations to that sector and, in particular, to “temporary demountable structures”; and that they are critical of the consultation process. According to the HSE paper on the outcome of the public consultation,¹² of the 1,427 responses, 400 were from the entertainment sector. We note that, in that document, HSE states: “HSE cannot disapply [the Regulations] to such work ... Nonetheless, HSE has acknowledged the difficulties which the entertainment sector faces in applying [the Regulations] to minor construction work and will continue to work with the sector to take a proportionate approach to managing risks within the sector”. We are aware that, despite this assurance, the sector remains concerned.

Conclusion

29. These Regulations have two functions: one deregulatory and the other to remedy a transposition gap. In the absence of explanation in the EM, this report has focused on the issues arising from the latter function (Part 2 of the Regulations). **It would have been helpful to the House had the EM provided a more complete account.**
30. The purpose of Part 2 is to meet a Directive requirement and, to that extent, the policy objective is achieved. As to the achievement of the wider policy objective of ensuring that client duties in small domestic projects are properly discharged, that is less certain given that the evidence on likely compliance is pessimistic. We are aware however that the evidence in relation to the alternative to the deeming approach, namely placing the responsibility on the homeowners themselves, suggests that likely compliance would be even lower and that the costs would be considerably higher.

¹¹ Andy Lenthall of the Production Services Association, on behalf of PACT (the Producers Alliance for Cinema and Television), submitted to the Committee a copy letter, dated 5 February 2015, sent by PACT to Judith Hackitt, HSE Chair. The letter is not published with this report.

¹² <http://www.hse.gov.uk/aboutus/meetings/hseboard/2014/130814/paugb1462.pdf>

INSTRUMENTS OF INTEREST

Draft Financial Services and Markets Act 2000 (Banking Reform) (Pensions) Regulations 2015

31. These draft Regulations, laid by HM Treasury (HMT) with an Explanatory Memorandum (EM) and impact assessment (IA), are intended to ensure that ring-fenced banks cannot become liable for the pension liabilities of other bodies (except ring-fenced banks in the same group or wholly owned subsidiaries of ring-fenced banks in the same group). As HMT states in the EM, this serves the wider objective of making sure that the failure of another group member cannot threaten the viability of an otherwise healthy ring-fenced bank.
32. In the EM, HMT gives limited information about the consultation process which was held from July to October 2014, referring only to a number of technical changes made in the light of consultation responses, as well as to two substantial changes in order to limit the burden on the banks and regulators. Though the draft Regulations were laid on 21 January, HMT had not published the summary of responses by 10 February. We are clear that Departments should publish their consultation summaries no later than the time of laying the instruments concerned before Parliament, as we set out in the report of our inquiry into Government consultation practice.¹³ In our view, Parliament should be asked to consider secondary legislation only when Government have provided adequate information, including about consultation, to support such consideration.

Draft Groceries Code Adjudicator (Permitted Maximum Financial Penalty) Order 2015

33. In the Explanatory Memorandum (EM) to this Order, the Department for Business, Innovation and Skills (BIS) says that the Groceries Supply Code of Practice (“the Code”) was introduced in 2008 to ensure fairness in the commercial relationships between the ten largest UK supermarkets (those with turnovers over £1 billion) and their direct suppliers in respect of a range of groceries.¹⁴ The Groceries Code Adjudicator (“the Adjudicator”) was created by the Groceries Code Adjudicator Act 2013 (“the 2013 Act”) to enforce the Code, and given the role of arbitrating in disputes between retailers and their direct suppliers.
34. The 2013 Act gives the Adjudicator the power to carry out investigations if she has reasonable grounds to suspect that one of the ten large retailers has broken the Code. A financial penalty is the most onerous sanction available to the Adjudicator; while she already has the power to launch an investigation, she does not have the power to impose a fine until this Order is made. The Order sets the maximum financial penalty at 1% of UK turnover of the relevant retailer, but does not extend to group turnover where a

¹³ See paragraph 46, 22nd Report, Session 2014–15, HL Paper 98.

¹⁴ Currently ten retailers are subject to the Code: Aldi, Asda, Cooperative, Iceland, Lidl, Marks and Spencer, Morrisons, Sainsbury’s, Tesco and Waitrose.

retailer is a subsidiary of a larger group. It has been laid following a 12-week consultation process held between 31 July and 22 October 2013.

35. We note that, in its 5th Report of the current Session (HC 817), on “Dairy Prices”, the Environment, Food and Rural Affairs Committee of the House of Commons devoted one chapter to the Adjudicator. It called for this Order to be made during the present Parliament; and, in the context of its inquiry into dairy prices, it also called for urgent consideration of how the Adjudicator’s remit could be extended to incorporate suppliers throughout the supply chain.

Draft Legal Services Act 2007 (Warrant) (Approved Regulator) Regulations 2015

Draft Legal Services Act 2007 (Warrant) (Licensing Authority) Regulations 2015

36. The Ministry of Justice has laid these two sets of Regulations under the Legal Services Act 2007 (“the 2007 Act”), with a joint Explanatory Memorandum (EM) and an Impact Assessment (IA). The 2007 Act allows the Legal Services Board (LSB) to apply for a warrant in certain circumstances authorising it to enter and search the premises of an approved regulator or a licensing authority. The 2007 Act also provides that the Lord Chancellor must make regulations (a) specifying further matters of which a judge or Justice of the Peace must be satisfied, or must have regard to, before issuing a warrant and (b) regulating the exercise of a power conferred by a warrant. This is the purpose of the two instruments. The Committee requested further information about the consultation on the new provisions and the Department’s response is set out in Appendix 2 to this report. We note that the IA suggests the new powers “are expected to be used very rarely”. This view was confirmed when, in response to a query to the Department about the length of time it had taken for these instruments to be laid, we were told that the power of entry under warrant was “a power of last resort” and that it was a power which the LSB had not needed and did “not envisage having to use in the immediate future”. Given this, we question why these measures have been brought forward and the value of expending resources in doing so.

Draft Mortgage Credit Directive Order 2015

37. This Order, laid by HM Treasury (HMT) with an Explanatory Memorandum (EM), makes the changes necessary to ensure that the UK complies with the EU Mortgage Credit Directive (MCD).¹⁵ HMT says that, principally, these changes provide the Financial Conduct Authority (FCA) with the appropriate powers to design, supervise and enforce rules required to achieve compliance with the MCD. It states that most of the MCD’s provisions are concerned with setting the minimum regulatory requirements that Member States are required to meet, in order to protect consumers taking out credit agreements relating to residential property. The Government do not believe that the MCD offers many benefits to UK consumers beyond those already provided by the high level of protection offered by the existing FCA regime for mortgages.

¹⁵ Directive 2014/17/EU on credit agreements relating to residential immovable property.

38. In addition, however, the Order introduces a new framework for the regulation of buy-to-let lending to consumers, and provides the FCA with the appropriate powers to supervise and enforce this framework. HMT carried out a consultation over eight weeks in September and October 2014, which received 33 responses, generally supportive of the Government's proposals. HMT published a summary of consultation in January 2015.¹⁶ In the summary, HMT explains that existing UK legislation does not include buy-to-let mortgage lending within the scope of FCA regulation. This approach has rested on two key considerations: unlike an owner-occupier, the borrower's home is not at risk; and buy-to-let borrowers tend to be acting as a business. While Member States have the option to make use of the exemption for buy-to-let from the full requirements of the directive, the MCD requires those States using this option to apply an appropriate framework for such mortgages where they are taken out by consumers. HMT says that the Government will use this option to put in place the minimum requirements to meet the UK's legal obligations, as they are not persuaded of the case for the full conduct regulation of buy-to-let mortgage lending.

Draft Shared Parental Leave and Leave Curtailment (Amendment) Regulations 2015

39. In July 2014, the Department for Business, Innovation and Skills (BIS) laid the Shared Parental Leave Regulations 2014 ("the SPL Regulations 2014") and the Maternity and Adoption Leave (Curtailed of Statutory Rights to Leave) Regulations 2014 ("the Curtailment Regulations 2014")¹⁷ which, together with the Children and Families Act 2014 and other instruments, were intended to give effect to the Government's commitment to encourage shared parenting from the earliest stages of pregnancy, including the promotion of a system of flexible parental leave. The SPL Regulations 2014 provided an entitlement for a mother/adopter and a child's father/adoptive parent or a mother's or adopter's partner to take shared parental leave. The Curtailment Regulations 2014 enabled an expectant mother or a mother on maternity leave (or an adopter or a prospective adopter) to give notice to end her maternity leave (or his or her adoption leave) on a specific future date, so that the balance of the untaken leave might be taken as shared parental leave if the parents satisfied entitlement and notification criteria. These Regulations were brought into force on 1 December 2014.
40. The Shared Parental Leave and Leave Curtailment (Amendment) Regulations 2015 ("the Amendment Regulations 2015") correct drafting errors in the SPL Regulations 2014 and the Curtailment Regulations 2014. The changes include an amendment to the provision on the variation of period of leave notices in the SPL Regulations 2014 to enable an employee who is on a period of shared parental leave to vary the end-date of that leave by giving their employer at least eight weeks' notice. The Government have proposed that the Amendment Regulations 2015 come into force on 5 April 2015.

¹⁶ See:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397904/implementation_of_the_EU_MCD_summary_of_responses.pdf

¹⁷ We published information about these instruments in our 9th Report, Session 2014–15, HL Paper 47.

41. We asked BIS whether the errors in the 2014 Regulations would have misled people in relation to shared parental leave policy. The Department said that, as most people interested in claiming these new rights would look to the guidance rather than the underlying legislation, it did not think that they would be affected by the errors or their correction. We put to BIS our concern that, since there had been no Parliamentary scrutiny of the guidance, it might not be a robust approach for the Government to rely on it as a sufficient means of informing those affected, and that there might be inconsistencies between the guidance and the content of the Regulations.
42. BIS has responded as follows:
- “It is standard practice for the Government to produce guidance on legislation that is used by individuals and employers. Employer representative bodies and family groups have asked for guidance on the legislation in order to understand the effects and provisions without seeking their own legal advice; so many employers and employees rely on guidance to understand the effect of the legislation, rather than reading the legislation itself. The guidance does not of itself constitute legislation and is, therefore, not subject to Parliamentary scrutiny.
- “The guidance sought to accurately reflect the legislation and, as far as we were aware when the Regulations to be amended were laid, did so. A few errors have since been identified and they are removed by these amending Regulations. In addition, the amending regulations provide clarity and more accuracy in the way regulations 15¹⁸ and 31¹⁹ work.
- “We will not rely on the guidance to inform interested parties of the changes. We will write to the extensive list of stakeholders to draw their attention to the changes.”
43. Earlier this Session we published a report on the number of corrections to statutory instrument in 2014,²⁰ regretting the fact that individual Departments with a poor record on corrections had not done more to improve their performance. We found that BIS was one of several Departments showing correction levels well above the mean. It may be the case, as BIS has told us, that interested parties rely on guidance rather than statutory instruments themselves to understand how they are affected by secondary legislation. However, this cannot take away from the need for Departments to make every effort to avoid errors in that legislation.

¹⁸ Regulation 15 deals with “Variation of period of leave (birth)”.

¹⁹ Regulation 31 deals with “Variation of period of leave (adoption)”.

²⁰ 20th Report, Session 2014–15, HL Paper 93.

Health and Social Care Act 2008 (Regulated Activities) (Amendment) Regulations 2015 (SI 2015/64)

44. The Department of Health has laid these Regulations (“the 2015 Regulations”) under the Health and Social Care Act 2008, with an Explanatory Memorandum and three Impact Assessments. The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (SI 2014/2936) (“the 2014 Regulations”)²¹ set out the requirements (including fundamental standards) that all registered providers (including NHS bodies, independent providers and voluntary sector organisations) had to meet to register with the Care Quality Commission (CQC). In addition, the 2014 Regulations introduced two new requirements which currently only apply to NHS bodies: the duty of candour (requiring, amongst other things, NHS bodies registered with the CQC to be open and transparent with service users) and a requirement to take proper steps to ensure that their directors are fit and proper for their role. The effect of these 2015 Regulations is to extend the duty of candour and the fit and proper persons requirement for directors to all registered providers of regulated activities.

Child Poverty Act 2010 (Extension of Publication Deadline) Order 2015 (SI 2015/83)

45. The Department for Education (DfE) has laid this Order to extend the deadline for publishing the 2015 annual report of the Social Mobility and Child Poverty Commission (“the Commission”) from 8 May 2015 to 18 December 2015. DfE says that, without an extension the Commission’s annual report would have to be laid before Parliament by 8 May 2015; since the General Election is scheduled for 7 May 2015, the Commission would have to publish its report before the dissolution of Parliament at the end of March. This would mean that the 2015 annual report would be published just over five months after the 2014 report (published in October 2014). Moreover, since the next statistics on progress towards meeting the targets in the Child Poverty Act 2010 (“the 2010 Act”) will not be available until the *Households Below Average Income* report is published in May/June 2015, this would also mean that the statistics the Commission would use in making its judgements would be the ones used in its 2014 annual report.
46. The Department acknowledges that the 2010 Act requires the Commission to publish an annual report before 8 May each year. However, because of the need to wait for key child poverty statistics to become available, the power under that Act to extend the publication deadline was exercised for the 2013 and 2014 reports, allowing the Commission to publish its annual report in October of both years. The latest Order means that the 2015 report may be published only at the end of the year. We would comment that these repeated postponements risk giving the impression of undermining the requirement in the 2010 for the regular and timely publication of the Commission’s annual report.

²¹ SLSC, 8th Report, Session 2014–15, HL Paper 42.

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

Companies, Partnerships and Groups (Accounts and Reports) Regulations 2015

Crime and Courts Act 2013 (National Crime Agency and Proceeds of Crime) (Northern Ireland) Order 2015

Financial Services and Markets Act 2000 (Banking Reform) (Pensions) Regulations 2015

Financial Services and Markets Act 2000 (Miscellaneous Provisions) Order 2015

Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2015

General Medical Council (Fitness to Practise and Over-arching Objective) and the Professional Standards Authority for Health and Social Care (References to Court) Order 2015

Groceries Code Adjudicator (Permitted Maximum Financial Penalty) Order 2015

Legal Services Act 2007 (Warrant) (Approved Regulator) Regulations 2015

Legal Services Act 2007 (Warrant) (Licensing Authority) Regulations 2015

Local Authorities (Public Health Functions and Entry to Premises by Local Healthwatch Representatives) and Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) (Amendment) Regulations 2015

Mortgage Credit Directive Order 2015

National Minimum Wage Regulations 2015

Protection of Freedoms Act 2012 (Northern Ireland) (Biometric data) Order 2015

Scotland Act 1998 (Modification of Schedule 5) Order 2015

Shared Parental Leave and Leave Curtailment (Amendment) Regulations 2015

Draft instruments subject to annulment

Modifications to the Smart Energy Code (Smart Meters No. 2 of 2015)

Instruments subject to annulment

- SI 2015/47 Vaccine Damage Payments (Specified Disease) Order 2015
- SI 2015/52 Nursing and Midwifery Council (Fitness to Practise) (Education, Registration and Registration Appeals) (Amendment) Rules Order of Council 2015
- SI 2015/53 Old Oak and Park Royal Development Corporation (Establishment) Order 2015
- SI 2015/58 National Health Service (Pharmaceutical and Local Pharmaceutical Services) (Amendment and Transitional Provision) Regulations 2015
- SI 2015/61 Financial Services and Markets Act 2000 (Regulation of Auditors and Actuaries) (PRA Specified Powers) Order 2015
- SI 2015/63 Batteries and Accumulators (Placing on the Market) (Amendment) Regulations 2015
- SI 2015/64 Health and Social Care Act 2008 (Regulated Activities) (Amendment) Regulations 2015
- SI 2015/81 Federal Republic of Yugoslavia (Freezing of Funds) (Revocation) Regulations 2015
- SI 2015/82 Sexual Offences Act 2003 (Prescribed Police Stations) Regulations 2015
- SI 2015/83 Child Poverty Act 2010 (Extension of Publication Deadline) Order 2015

APPENDIX 1: GENERAL MEDICAL COUNCIL (FITNESS TO PRACTISE AND OVER-ARCHING OBJECTIVE) AND THE PROFESSIONAL STANDARDS AUTHORITY FOR HEALTH AND SOCIAL CARE (REFERENCES TO COURT) ORDER 2015

Additional information provided by the Department of Health

Consultation outcome

1. The Department of Health and the Scottish Ministers consulted on a UK-wide basis for 8 weeks from 31 July 2014 to 25 September 2014.
2. The consultation invited comments on the proposed amendments to the Medical Act 1983 to establish the Medical Practitioners Tribunal Service (MPTS) in statute and other reforms to the GMC regulatory objectives and fitness to practise procedures; as well as the proposed change to the NHS Reform and Health Care Professions Act 2002 in respect of the power of the PSA to refer cases which do not achieve sufficient public protection to the higher courts.
3. The consultation invited respondents to consider 26 questions about the effects that these provisions could have. The consultation received 81 responses from a range of respondents including medical and legal professionals, healthcare recruitment organisations, regulatory bodies and members of the public.
4. The consultation responses demonstrated strong support for the principle of enhancing the separation between the GMC's role in investigating fitness to practise concerns and its role in adjudicating on whether those concerns amount to impaired fitness to practise. Establishing the MPTS as a statutory committee of the GMC with the functions set out in the draft Order, is in the Department's view the right means of achieving this.
5. There was also support for proposals in the consultation paper relating to the modernising the adjudication procedures, including introducing an over-riding objective to ensure that the procedural rules which govern hearings secure that cases are dealt with justly and fairly.
6. A range of views were expressed about the proposals to enhance public confidence and professional accountability. Some respondents felt that these measures were straight forward public protection issues while others were concerned about how they would impact on doctors undergoing the fitness to practise procedures. The Department considers that public protection, in its fullest sense, must be the driving objective of the fitness to practise procedures and considers that its proposals to enhance professional accountability are a proportionate means of achieving that aim.
7. In relation to the proposals to simplify and increase transparency of the Medical Act 1983, there was strong support for some elements but was less support for the proposals to strengthen the GMC's powers of investigation and the consequences for failing to comply with an assessment. However we consider that given the over-arching public protection considerations, these powers are appropriate.
8. Following consultation the Department considers that it should take forward the majority of the proposals, as they will have positive benefits for effective and proportionate public protection.

30 January 2015

**APPENDIX 2: DRAFT LEGAL SERVICES ACT 2007 (WARRANT)
(APPROVED REGULATOR) REGULATIONS 2015 AND LEGAL
SERVICES ACT 2007 (WARRANT) (LICENSING AUTHORITY)
REGULATIONS 2015**

Additional information from the Ministry of Justice

Q1. Section 8 of the Explanatory Memorandum sets out the consultation outcome.

Section 8.1 refers to a consultation from 10 to 24 July 2012. Who responded and why was the period so short?

- A previous version of the approved regulator warrant regulations were laid in Parliament in February 2010, but withdrawn after a request for a memorandum by the JCSI dated 3 March 2010. As a result, the approved regulator regulations were redrafted, to address JCSI concerns.
- The redrafted approved regulator regulations were the subject of a limited consultation from 10 July to 24 July 2012 with regulatory stakeholders – the Legal Services Board (LSB), as oversight regulator for the approved regulators of authorised legal services providers, and all of the approved regulators/licensing authorities – who would be impacted by what is essentially a technical provision, The draft warrant regulations do not impact more widely, for example, on businesses or practitioners.
- We wrote directly to the relevant bodies, ensuring they were aware of the consultation. The consultation was sent to: the LSB; the Law Society; the Solicitors Regulation Authority; the Bar Council; the Bar Standards Board; the Master of the Faculties; the Institute of Legal Executives; the Council for Licensed Conveyancers; the Chartered Institute of Patent Attorneys; the Cost Lawyers Standards Board; the Institute of Trade Mark Attorneys; the Association of Law Costs Draftsmen; the Intellectual Property Regulation Board; the Institute of Chartered Accountants in England and Wales; the Association of Chartered Certified Accountants; the Institute of Chartered Accountants of Scotland; Consumer Focus; the Magistrates Association; and the Attorney General’s office.
- We considered that a two week period was sufficient given the limited nature of the consultation, the limited range and number of bodies consulted, and their existing understanding of and role in the regulatory framework.
- We received responses from the following bodies: the LSB; the Law Society; the Solicitors Regulation Authority; the Bar Council; the Bar Standards Board; and the Institute for Chartered Accountants in England and Wales.

Similarly, section 8.2 refers to a consultation from 24 October to 14 November 2014. Again, who responded and why was this consultation so short?

- This second consultation was as a result of the changes made to the regulations following the 2012 consultation. It was circulated to the LSB and the approved regulators/licensing authorities. We considered that a three week period for consultation was appropriate given that the bodies were familiar with the regulatory framework, had seen the draft regulations before, and it was their second opportunity to comment.

- We received responses from the following bodies: the LSB; the Law Society; the Solicitors Regulation Authority; the Council for Licensed Conveyancers; the Bar Council; the Chartered Institute of Patent Attorneys; the Institute for Chartered Accountants in England and Wales.

In what sense was the second consultation a “technical” consultation?

- Neither of the consultations sought comments on the policy need for the warrant regulations, which is already provided for under the Act, but rather, on the text of the regulations that would apply in respect of such an application for a warrant.
- The second consultation outlined that changes had been made to the draft approved regulator regulations as a result of the 2012 consultation, and asked for stakeholders’ views on the current draft. It was therefore inviting comments on the updated technical detail of regulations with which the stakeholders were already familiar.
- While the licensing authority warrant regulations had not previously been the subject of consultation, the enabling powers in section 79 of the 2007 Act are similar to those in section 48, and the licensing authorities subject to them are also, necessarily, approved regulators. They are therefore similar in form and content to the approved regulator warrant regulations.
- However, reflecting the fact that new approved regulators and licensing authorities had been designated since 2012, and the fact that the licensing authority regulations, while based upon the approved regulator regulations, were not part of the earlier consultation, both sets of regulations were subject to this second technical consultation with stakeholders.

What concerns were raised in the consultations?

Responses to consultation from 10 to 24 July 2012

- The main points raised were:
 - a concern that the territorial scope of the regulations is restricted to England and Wales;
 - a concern that a warrant might be issued for the representative arm of an approved regulator whereas the documents were actually held by the regulatory arm, resulting in the representative body not being able to comply with the warrant;
 - a concern that a judicial officer is defined to include a justice of the peace, and would be preferable to confine the issue of warrants to judges;
 - a concern that it may not be possible to return records copied or seized if the regulator has closed down;
 - that regulation 7, which provided for notice to be given of records copied, should also include the date on which it was copied;
 - that regulation 8, which prevented retention of copies for longer than necessary, also make provision for a record of the date on which records were copied;

- that the notice to be given under regulation 4 stating that records have been taken, could also state the date on which records were seized.
- a concern that provisions relating to applications for, and the content of, warrants had been removed from the regulations since the 2010 version, specifically relating to:
 - a. the scope of a warrant as regards non-regulatory documents and premises;
 - b. the removal of various intended substantive and procedural safeguards and protections;
 - c. inadequate protection for legal professional privilege;
 - d. the absence of provisions for the return of documents that should not have been seized or may not be copied;
 - e. insufficient identification of the purpose for which documents may be copied;
 - f. the absence of a short-term time limit for the copying of documents that may be copied;
 - g. the lack of a requirement to show that there is no reasonable alternative to a warrant;
 - h. the omission of provisions ensuring that only fit and proper persons are given the power to execute warrants;
 - i. the lack of a requirement to prove authority to execute a warrant.
- Following the consultation, amendments were made to the draft regulations where appropriate. This included the insertion of what is now regulation 4, which regulates the exercise of the power conferred by a warrant by preventing records subject to legal professional privilege from being taken or copied.

Responses to consultation from 24 October to 14 November 2014.

- The majority of respondents generally supported the content of both sets of the draft warrant regulations. The main points raised were:
 - a concern that the territorial scope of the regulations is restricted to England and Wales;
 - a query on the definition of “premises”, noting that it is not defined in the regulations;
 - a concern that a warrant might be issued for the representative arm of an approved regulator whereas the documents were actually held by the regulatory arm, resulting in the representative body not being able to comply with the warrant;
 - whether the warrant regulations have been subject to the Powers of Entry Gateway led by the Home Office;
 - various necessary protections which it was considered ought to appear in the warrant regulations:
 - a. the application for a warrant should state what attempts have been made to obtain the records sought by other means, and why the LSB believes that further attempts should not be made;

- b. the application for the warrant should identify the records to be seized, so far as practicable, and the reason why they are sought;
 - c. the judicial officer must be satisfied that the seizure of those records is necessary or desirable for the exercise of the LSB's relevant regulatory function, and does not extend to records in relation to which there is no power to issue or execute a warrant;
 - d. any warrant must identify the records to be seized, so far as practicable;
 - e. the application for a warrant and the warrant itself must identify the premises for which a search is authorised;
 - f. the judicial officer must be satisfied that it is necessary to authorise a search of the whole of the premises for the purpose of seizing records covered by the warrant;
 - g. a warrant should authorise a search of premises only to the extent required for the purpose for which it was issued;
 - h. the power conferred by a warrant must not be exercised to take possession of or copy records held by the approved regulator for any purposes other than the regulatory purposes set out in the Act;
 - i. documents which are seized in error should be returned as soon as they are identified;
 - j. execution only by fit and proper persons, and proof of authority.
- that the length of time records can be held was not clear from the draft regulations, in terms of what was a "reasonable time";
 - that it should be made clear in the regulations that a document which has been taken as part of a search should be used only for the purposes of continued regulation and not for any other purpose.
- The Government responded fully to the points raised by means of a response to the consultation, which was sent on 27 January 2015 to the same bodies the consultation was sent to, namely the LSB and approved regulators/licensing authorities. Some of these points resulted in amendments being made to the draft regulations, where it was considered legally possible to do so; certain other points which did not require amendments to be made to the regulations were clarified in the Explanatory Memorandum.

Q2. The history of the regulations is set out in section 3.1. Why has it taken nearly five years for these regulations to be drafted?

- Progress on the drafts has continued steadily, for example by way of the two consultations and the changes made as a result; the licensing authority regulations have also been drafted during this period, allowing the two sets of regulations to be consulted on and progress through Parliament together. We have also taken care over the drafts to ensure that, so far as possible, the points made in 2010 were properly addressed.
- However, given that these regulations relate to powers of last resort, not to be used until after other LSB powers have been utilised, they were prioritised below other more immediately required orders, such as those required in the implementation of the Act, and subsequently, those recommended by the LSB.

As a recent example of the scale of other higher-priority work, for example, we have produced 11 other legal services statutory instruments between late 2013 and the present date, of which seven were subject to the affirmative Parliamentary procedure.

Q3. The Impact Assessment makes it clear that without regulations the LSB cannot apply for a warrant. The option of “do nothing” is, for this reason, a hypothetical option only. Given the delay in preparing these regulations, is it correct to infer that the LSB has not been able to exercise the power to apply for a warrant for several years? Has this caused any difficulties?

- The power of entry under warrant to an approved regulator’s or licensing authority’s premises is a power of last resort. Not only has the LSB not needed to use this power to date, it also does not envisage having to use it in the immediate future. The LSB has other statutory powers in relation to approved regulators and licensing authorities that it would utilise first, before considering removing all/part of a designation or otherwise intervening in the regulatory work of an approved regulator or licensing authority. None of these other intervention powers have been used either, in the period since the commencement of the Legal Services Act 2007. It has therefore caused no difficulties that the progress of these regulations has unfortunately been delayed.

5 February 2015

APPENDIX 3: 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 10 February 2015 Members declared the following interests:

Draft General Medical Council (Fitness to Practise and Over-arching Objective) and the Professional Standards Authority for Health and Social Care (References to Court) Order 2015

Lord Bowness

The Member's daughter-in-law is a general practitioner

Lord Eames

The Member's wife is a lay member of the General Medical Council

Draft Renewables Obligation Closure (Amendment) Order 2015

Baroness Humphreys

The Member's daughter-in-law works for a 'solar farm' company

Attendance:

The meeting was attended by Lord Bichard, Lord Borwick, Lord Bowness, Lord Eames, Lord Goodlad, Baroness Hamwee, Baroness Humphreys, Lord Plant of Highfield, Baroness Stern and Lord Woolmer of Leeds.