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 (Chairman)  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 1.

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
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


1. HM Treasury (HMT) has laid these draft Orders, each with an Explanatory Memorandum (EM) and impact assessment.

2. In the EM to the first draft Order, HMT says that, in September 2014, the Financial Policy Committee (FPC) of the Bank of England issued a statement on housing market powers of direction. It recommended that HMT should exercise its statutory powers to enable the FPC to direct, if necessary to protect and enhance financial stability, the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA) to require regulated lenders to place limits on residual mortgage lending, both owner-occupied and buy-to-let, by reference to (1) loan-to-value (LTV) ratios, and (2) debt-to-income (DTI) ratios. The draft Order enables the FPC to make any such direction.

3. HMT says that it held a public consultation from 30 October to 28 November 2014 (a period of four weeks); and that it received 20 responses from a range of market participants including banks, non-bank mortgage providers, homebuilders, industry bodies and the FCA’s independent advisory panels. HMT published a summary of consultation responses on 2 February 2015. In that summary, HMT states that “the majority of respondents recognised the benefits of the FPC having powers of direction over DTI and LTV. However, most respondents pointed out that these were blunt tools and raised specific issues which are considered in subsequent questions”; the summary does indeed cover a range of issues raised. It would not be appropriate for the EM to replicate the detailed discussion in the summary, but we look to Departments to provide there some qualitative assessment of consultation responses. This is entirely absent from the EM: comments on the drafting of the instrument, to which HMT briefly refers in the EM, are of minimal importance by comparison with comments on the policy substance of the draft Order, which are passed over in silence.

1 The full FPC statement on housing market powers of direction can be found at: http://www.bankofengland.co.uk/financialstability/Documents/fpc/statement021014.pdf

4. In the EM to the second Order, HMT says that it defines new macro-prudential measures, by reference to which the FPC can issue directions to the regulators – that is, the PRA and the FCA. These new measures, which may be applied to regulated banks, building societies and investment firms, are: a minimum leverage ratio requirement for all PRA-regulated firms; an additional leverage ratio buffer for firms that are subject to systemic risk; an additional leverage ratio buffer for globally systemically important institutions; and a countercyclical leverage ratio buffer for all firms subject to the minimum leverage ratio requirement. HMT says that firms’ leverage ratios (used to evaluate a company’s debt levels) were a useful indicator of failure during the last crisis, and the period immediately preceding the crisis was characterised by sharp increases in leverage. Firms with high leverage ratios have greater amounts of capital to absorb losses which materialise and have less reliance on debt financing; those with low leverage ratios rely relatively more on debt to fund their lending, exposing them to the risks described above. HMT says that the powers conferred by the draft Order will allow the FPC to create a leverage ratio framework for UK firms that will ensure that they hold a minimum amount of capital relative to the size of their balance sheets.

5. HMT provides a little more information in the EM about responses to consultation on the provisions in this draft Order. It notes that, while the majority were in favour of the FPC having a power to set a minimum requirement, the views on the FPC’s other proposed powers were more mixed. We would nonetheless expect to see in an EM more details of views expressed than emerge from the seven lines of text provided in this case.

Draft Insolvency (Protection of Essential Supplies) Order 2015

6. The Department for Business, Innovation and Skills (BIS) has laid this draft Order, with an Explanatory Memorandum (EM) and impact assessment. BIS states that the purpose of the Order is to ensure that insolvency practitioners are able to secure supplies that are essential to facilitate a prospective rescue of businesses in certain formal insolvency procedures. It does so by amending the Insolvency Act 1986 to prevent essential IT and utility suppliers of such businesses from exercising contractual rights to terminate the supply, or to increase charges, to the insolvent company on account of the insolvency. However, it provides safeguards for those suppliers who will be affected to ensure they may terminate the contract or the supply in certain specific circumstances. There was a Ministerial Written Statement about the Order on 9 February 2015.3

7. BIS carried out consultation on the proposals over a three-month period between July and October 2014, and published a summary of consultation responses in February of this year.4 In the EM, BIS states that there were 31 responses (from utility and IT suppliers, card payment service providers, insolvency practitioners and lawyers); while most respondents expressed support for the aims of the proposals, some raised concerns about the adequacy of the safeguards proposed. BIS sets out those concerns and also

3 HLWS239.
changes made to the proposals as a result. **We commend the Department for allowing adequate time for interested parties to respond, and for giving a good account in the EM of concerns raised and changes made.**

*Draft Counter-Terrorism and Security Act 2015 (Code of Practice for Officers exercising functions under Schedule 1) Regulations 2015 (SI 2015/217)*

8. This instrument was made and laid on 12 February 2015, the same day as the Counter-Terrorism and Security Act 2015 (“the Act”) gained Royal Assent, and came into effect the following day. It is subject to approval by Parliament within 40 days from the date on which it was made. Schedule 1 to the Act enables the police to seize and retain a person’s travel documents (including their passport and travel tickets) when there is reasonable suspicion that the person is travelling outside the UK for the purpose of involvement in terrorism-related activity. The Code sets out how this power will operate. The power may be exercised at any port within the UK or in the border area between Northern Ireland and the Republic of Ireland. In all circumstances, authorisation to retain the travel document must be provided by a senior police officer and must be reviewed within 72 hours by a senior police officer of at least the rank of Chief Superintendent. Travel documents should be returned no later than 14 days from the date of seizure. If more time is required, judicial authority must be granted by a District Judge (England and Wales), the Sheriff (Scotland) or a County Court Judge or District Judge (Northern Ireland) to extend the retention period up to 30 days. No further extension will be allowed beyond 30 days. The police are required to monitor the use of the power and consider in particular whether there is any evidence that it is being exercised on the basis of stereotyped images or inappropriate generalizations and the Home Office will report annually on how it has been used. The operation of this power will be subject to review by the Independent Reviewer of Terrorism Legislation, as specified in the Act. In its consideration of the Code the Committee was concerned that directions about when officers may search a member of the opposite sex, particularly a child, were not as clear and consistent as they need to be.

*Dangerous Dogs Exemption Schemes (England and Wales) Order 2015 (SI 2015/138)*

9. The Department for Environment, Food and Rural Affairs (Defra) has laid this Order, with an Explanatory Memorandum (EM). Defra explains that, in replacing an instrument made in 1991, it continues an existing scheme with conditions for prohibited dogs that a court has decided can be exempt from that prohibition. In particular, the latest Order introduces additional

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5 The 40 days begin on the day the instrument is laid and no account is taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days.


7 There are four types of “prohibited dog”: (i) the pit bull terrier, (ii) the Japanese tosa, (iii) the Dogo Argentino, and (iv) the Fila Braziliero.
provisions to the scheme, by allowing suspected prohibited dogs to be kept by their owners or the person in charge of the dog at the discretion of the police, prior to a court considering the case; and restricting change of the registered person in charge of an exempted prohibited dog to cases where the registered person in charge has died or has become seriously ill, a provision which prevents transfer of the responsibility for the exempted dog occurring on a casual basis.

10. Defra carried out consultation on a package of measures aimed at promoting more responsible dog ownership from 23 April to 15 June 2012. It published a summary of consultation responses in February 2013. In the EM, Defra says that the consultation asked whether there was a need for police to have to seize and kennel suspected prohibited dogs considered by the police to be no threat to public safety before the case was considered by a court; and that, of the 16,067 respondents, 85% agreed with the proposal and 15% disagreed. This explanation is less clear than the statement in the consultation summary itself, that, in relation to a question whether respondents agreed “that there should be no need to seize suspected prohibited dogs considered by the police to be no threat to public safety...”, 85% said “yes”, while 15% said “no”. Defra is revising the EM to make this clear.

National Health Service (Charges to Overseas Visitors) Regulations 2015 (SI 2015/238)

11. This is the Department of Health counterpart to the Home Office’s Immigration (Health Charges) Order 2015 on which we reported last week. These Regulations introduce the same immigration health charges into the NHS charging system. The instrument also consolidates provision on other NHS charges for treatment provided to non-UK residents and includes revised exemptions. The policy changes in the Regulations are the outcome of the cross-government Visitor and Migrant Cost Recovery Programme, which has an overarching aim of improving identification and recovery of appropriate charges from overseas visitors and migrants and to ensure that the NHS in England receives fair contribution for the cost of healthcare it provides them. The Explanatory Memorandum states that these changes are expected to recover up to £500 million annually. The Regulations also allow the Government to exercise provisions of the National Health Act 2006 which permit charges for visitors from outside the EEA to be levied at a commercial rate, set at 150% of the “tariff” for the relevant services they receive. That rate includes administrative costs and a reasonable profit element modelled on the cost for the same service through private providers.

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9 27th Report, Session 2014–15, HL Paper 120
# 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**

- False or Misleading Information (Specified Care Providers and Specified Information) Regulations 2015
- Insolvency (Protection of Essential Supplies) Order 2015

**Instruments subject to affirmative approval**

- SI 2015/217 Counter-Terrorism and Security Act 2015 (Code of Practice for Officers exercising functions under Schedule 1) Regulations 2015

**Instruments subject to annulment**

- SI 2015/94 National Health Service Pension Scheme Regulations 2015
- SI 2015/95 National Health Service Pension Scheme (Transitional and Consequential Provisions) Regulations 2015
- SI 2015/96 National Health Service Pension Scheme, Injury Benefits and Additional Voluntary Contributions (Amendment) Regulations 2015
- SI 2015/124 Social Security (Information-sharing) (NHS Payments and Remission of Charges etc.) (England) Regulations 2015
- SI 2015/127 Delegation of Additional Functions to the NHS Business Services Authority (Awdurdod Gwasanaethau Busnes y GIG) Regulations 2015
- SI 2015/137 Care Act 2014 (Health Education England and the Health Research Authority) (Consequential Amendments and Revocations) Order 2015
- SI 2015/139 National Health Service (Cross-Border Healthcare) (Amendment) Regulations 2015
- SI 2015/142 Road Vehicles (Construction and Use) (Amendment) Regulations 2015
- SI 2015/162 Social Security (Invalid Care Allowance) (Amendment) Regulations 2015
- SI 2015/168 Ozone-Depleting Substances Regulations 2015
SI 2015/169  Appointed Person (Designs) Rules 2015
SI 2015/170  Education (School Inspection) (England) (Amendment) Regulations 2015
SI 2015/172  Merchant Shipping (United Kingdom Wreck Convention Area) Order 2015
SI 2015/174  Social Security Contributions (Decisions and Appeals) (Amendment) Regulations 2015
SI 2015/175  Social Security and Tax Credits (Miscellaneous Amendments) Regulations 2015
SI 2015/183  Social Fund Cold Weather Payments (General) Amendment Regulations 2015
SI 2015/185  Social Security Pensions (Flat Rate Accrual Amount) Order 2015
SI 2015/180  Companies (Cross-Border Mergers) (Amendment) Regulations 2015
SI 2015/181  Further Education Loans (Amendment) Regulations 2015
SI 2015/189  Statutory Shared Parental Pay (General) (Amendment) Regulations 2015
SI 2015/190  National Health Service (Licence Exemptions, etc.) Amendment Regulations 2015
SI 2015/191  Sea Fishing (Enforcement and Miscellaneous Provisions) Order 2015
SI 2015/193  Retention and Sale of Registration Marks Regulations 2015
SI 2015/196  National Health Service (General Medical Services Contracts and Personal Medical Services Agreements) (Amendment) Regulations 2015
SI 2015/198  Charities (People’s Dispensary for Sick Animals) Order 2015
SI 2015/212  Football Spectators (Corresponding Offences) (Revocation) Order 2015
SI 2015/219  Cattle Identification (Amendment) Regulations 2015
SI 2015/226  Employment Rights (Increase of Limits) Order 2015
SI 2015/227  Control of Noise (Code of Practice for Construction and Open Sites) (England) Order 2015
SI 2015/233 Health Service Medicines (Control of Prices and Supply of Information) (Amendment) Regulations 2015
SI 2015/234 Accounts and Audit Regulations 2015
SI 2015/235 Public Processions (Electronic Communication of Notices) (Northern Ireland) Order 2015
SI 2015/238 National Health Service (Charges to Overseas Visitors) Regulations 2015
SI 2015/239 Railways (Crossrail Services) Exemption Order 2015
SI 2015/241 M3 Motorway (Junctions 2 to 4a) (Variable Speed Limits) Regulations 2015
SI 2015/244 Animals (Scientific Procedures) Act 1986 (Fees) Order 2015
SI 2015/310 Fluorinated Greenhouse Gases Regulations 2015
APPENDIX 1: 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 3 March 2015 Members declared no interests.

Attendance:

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