Draft Children and Young Persons Act 2008 (Relevant Care Functions) (England) Regulations 2014

Includes 2 Information Paragraphs on 3 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 (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 OPW; telephone 020–7219 8821; fax 020–7219 2571; email seclegscrutiny@parliament.uk.

Statutory instruments
Fifth Report

INSTRUMENT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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

A. Draft Children and Young Persons Act 2008 (Relevant Care Functions) (England) Regulations 2014

Date laid: 24 June

Parliamentary Procedure: affirmative

Summary: These draft Regulations extend the range of children’s social care functions that a body corporate may discharge on behalf of a local authority. The Regulations prevent profit-making bodies from being party to an arrangement for the discharge of the extended functions, while not stopping an otherwise profit-making company from setting up a separate non-profit making subsidiary to enable it to undertake such functions.

The Department for Education, which has laid the draft Regulations, allowed six weeks for the related consultation process. Allocating a relatively short period of time for respondents to consider and comment on a proposal of such significance raises questions about the Department’s own grasp of the impact of its policy; and this, combined with the lack of clarity in its presentation of the proposal in the consultation document, leave us with a concern about the adequacy of the consultation process.

We draw this instrument to the special attention of the House on the grounds that it is politically or legally important or give rise to issues of public policy likely to be of interest to the House; and that there appear to be inadequacies in the consultation process which relates to the instrument.

1. On 17 April 2014, the Department for Education (DfE) published a consultation document, with a six-week deadline of 30 May for comments, seeking views on proposed regulations that would enable local authorities to delegate to third party providers nearly all local authority social services functions related to children. DfE said that the proposed changes would “allow authorities to harness third party expertise, and/or set up more agile delivery structures outside traditional hierarchies.”

2. DfE has now laid these draft Regulations with an Explanatory Memorandum (EM), in order to extend the range of children’s social care functions that a body corporate may discharge on behalf of a local authority. In the EM, DfE states that the Regulations prevent profit-making bodies from being party to an arrangement for the discharge of the extended functions. It explains that only bodies which operate on a not-for-profit basis may discharge these functions; that the overwhelming concern raised in consultation responses related to profit, suggestions that the policy was about privatisation, and the risk of conflicts of interest; and that the proposed Regulations were therefore amended, to include the not-for-profit restriction. DfE says, however, that the Regulations will not prevent an otherwise profit-making company from setting up a separate non-profit making subsidiary to enable them to undertake such functions.

3. DfE published a summary of the consultation, with the Government response, on 20 June 2014.² This states that a total of 1315 responses were received. The consultation asked two questions. The first was whether consultees agreed that the proposed Regulations would give local authorities freedom to explore a wider range of approaches to discharging their social care functions: 14% of respondents said “yes”, 77% said “no”, 5% were not sure. The second was whether consultees agreed with the proposed Regulations: 2% of respondents said “yes”, 94% said “no”, 3% were not sure.

4. In the summary document, DfE states that the Government’s intention in bringing forward the proposals was to allow local authorities to consider a broader range of delivery and reporting structures, and that the proposals were concerned with improving the quality of children’s services rather than savings, privatisation or profit-making. If that was the intention, the overwhelming weight of responses indicates that the Department failed to make it apparent: terms such as “agile delivery structures” may have many meanings (or none). If a consultation exercise is to be truly effective, the Department instigating the exercise must ensure that its proposals are clear from the outset.

5. There can be little argument about the significance of making it possible for local authorities to delegate nearly all local authority social services functions related to children. The scale of this change requires careful consideration, and allowing only six weeks for the consultation process seems disproportionate to the importance of the issues to be addressed. Allocating a relatively short period of time for respondents to consider and comment on a proposal of such significance raises questions about the Department’s own grasp of the impact of its policy; and this, combined with the lack of clarity in its own presentation of the proposal, leaves us with a concern that there appear to be inadequacies in the consultation process which relates to the Regulations.

INSTRUMENTS OF INTEREST

Draft Financial Services and Markets Act 2000 (Excluded Activities and Prohibitions) Order 2014
Draft Financial Services and Markets Act 2000 (Ring-fenced Bodies and Core Activities) Order 2014

6. HM Treasury (HMT) has laid these two draft Orders, each with an Explanatory Memorandum (EM). HMT states that the financial crisis of 2007–09 revealed the urgent need for structural reform of the UK banking system to tackle the problem posed by banks seen as “too big to fail”; a central element of the Government’s programme of such structural reform is the ring-fencing of retail from wholesale/investment banking. The framework for this is in the Financial Services (Banking Reform) Act 2013 (“the 2013 Act”), which provides for the separation of core activities (deposit-taking), which must be carried out by ring-fenced bodies, from excluded activities (trading in investments) which ring-fenced bodies are not permitted to do.

7. The draft Financial Services and Markets Act 2000 (Ring-fenced Bodies and Core Activities) Order defines which banks are ring-fenced bodies, and the activities which can only be done by ring-fenced bodies. It exempts two classes of institutions: non-bank institutions such as insurers, co-operatives and community benefit societies, which would otherwise be captured by the definition of “ring-fenced body” in the 2013 Act because they accept deposits; and banking groups which hold less than £25 billion in “core deposits”, an exemption to avoid imposing what HMT calls the disproportionate costs of ring-fencing requirements on small banks. The Order also provides that the deposits of organisations with a turnover greater than £6.5 million, more than 50 employees or a balance-sheet total greater than £3.26 million, and individuals with more than £250,000 worth of financial assets will not be “core deposits”, allowing high net worth individuals and large organisations the ability to bank outside the ring-fence, as an active choice.

8. The 2013 Act provides that the regulated activity of dealing in investments as principal is an “excluded activity”, and may not be carried out by ring-fenced bodies except in circumstances specified by the Treasury. The draft Financial Services and Markets Act 2000 (Excluded Activities and Prohibitions) Order 2014 provides that dealing in commodities (e.g. precious metals, oil, agricultural products) is an excluded activity: HMT says that this will insulate ring-fenced bodies against swings in global commodity prices. The Order also creates exceptions to excluded activities: ring-fenced bodies will be permitted to deal in investments as principal (for the purpose of reducing exposure to specified risks); to trade with central banks (so that they are not prevented from accessing central bank liquidity); and to sell a narrow range of simple derivatives to their customers, such as interest rate swaps and simple foreign exchange options (to allow them to provide the basic risk-management services used by business customers).
9. HMT consulted on these instruments over 12 weeks from 17 July to 9 October 2013. Little information is provided about the responses in the EMs. In the consultation summary published in December 2013, HMT explains that 51 responses were received, and that the Government’s proposals received broad support.


10. This instrument extends the circumstances in which the Attorney General can refer a case to the Court of Appeal where he considers that the sentencing has been unduly lenient. This instrument amends the Unduly Lenient Sentence Scheme to include offences of slavery, servitude and forced or compulsory labour under section 71 of the Coroners and Justice Act 2009, including attempts to commit these offences and inciting, encouraging and assisting the commission of these offences.

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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

- Community Interest Company (Amendment) Regulations 2014
- Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014
- Financial Services and Markets Act 2000 (Excluded Activities and Prohibitions) Order 2014
- Financial Services and Markets Act 2000 (Ring-fenced Bodies and Core Activities) Order 2014
- Legal Services Act 2007 (Approved Regulator) (No.2) Order 2014
- Licensing Act 2003 (Mandatory Licensing Conditions) (Amendment) Order 2014
- Paternity and Adoption Leave (Amendment) Regulations 2014
- Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc) (England) Order 2014

Instruments subject to annulment

- SI 2014/1607 National Health Service Pension Scheme (Amendment No.2) Regulations 2014
- SI 2014/1610 Criminal Procedure Rules 2014
- SI 2014/1611 National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) (Amendment) (No. 3) Regulations 2014
- SI 2014/1621 Child Support (Consequential and Miscellaneous Amendments) (No 2) Regulations 2014
- SI 2014/1625 National Health Service (General Medical Services Contracts) (Prescription of Drugs etc.) (Amendment) Regulations 2014
- SI 2014/1627 Local Audit (Professional Qualifications and Major Local Audit) Regulations 2014
- SI 2014/1628 Local Audit (Liability Limitation Agreements) Regulations 2014
| SI 2014/1629 | Public Interest Reports and Recommendations (Modification of Consideration Procedure) Regulations 2014 |
| SI 2014/1643 | Energy Savings Opportunity Scheme Regulations 2014 |
| SI 2014/1648 | Electricity and Gas (Billing) Regulations 2014 |
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 8 July 2014 Members declared the following interests:

Legal Services Act 2007 (Approved Regulator) (No.2) Order 2014

Lord Bowness

Solicitor (non-practising)

Attendance:

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