
Draft Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2014

Includes 4 Information Paragraphs on 5 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 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 OPW; telephone 020–7219 8821; fax 020–7219 2571; email seclegscrutiny@parliament.uk.

Statutory instruments

Fifteenth Report

PUBLIC BODIES ORDER


Introduction

1. The draft Public Bodies (Abolition of the Library Advisory Council) Order 2014 has been laid by the Department for Culture, Media and Sport (DCMS) under section 11(1) of the Public Bodies Act 2011 (“the 2011 Act”). The draft Order has been laid with an Explanatory Document (ED).

Overview of the proposal

2. The draft Order proposes the abolition of the Library Advisory Council for England, known as the Advisory Council on Libraries (“ACL”), which was established by section 2 of the Public Libraries and Museums Act 1964 (“the 1964 Act”). It should be noted that the 1964 Act imposes a duty on the Secretary of State to promote the improvement of the public library service provided by local authorities in England and Wales, and also sets out a statutory duty for all local authorities to provide a “comprehensive and efficient library service for all persons”.

3. In the ED, DCMS states that the 1964 Act provides, as the ACL’s sole statutory function, that the Council has the duty “to advise the Secretary of State upon such matters connected with the provision or use of library facilities whether under this Act or otherwise as it thinks fit and upon any questions referred to it by him”.

4. DCMS explains that, historically, ACL comprised eight members – four Heads of Public Library Services plus four members from other related sectors (one of which was the Chair) – all of whom were appointed by the Secretary of State. Prior to July 2010 ACL met three times per year, with little contact outside of meetings. In July 2010 the Minister for Culture wrote to all ACL members to notify them that the 2011 Act would be used to wind up the ACL. The terms of appointment of the eight members of ACL have expired in the intervening period. DCMS states in the ED that, since July 2010, the Department “has conducted itself on the basis that the ACL is effectively defunct”.

Role of the Committee

5. The Committee’s role, as set out in its Terms of Reference, is to “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)”. A key aspect of this role is the Committee’s power to trigger the enhanced affirmative procedure which would require the Government to have regard to any recommendations made by the Committee during a 60-day period from the date of laying. The Committee may also take oral or written evidence in order to aid its consideration of the orders.
Tests in the Public Bodies Act 2011: assessment of the proposals – section 8 of the Explanatory Document

6. A Minister may make an Order under sections 1 to 5 of the 2011 Act only if he considers that it serves the purpose of improving the exercise of public functions, having regard to efficiency, effectiveness, economy, and securing appropriate accountability to Ministers (section 8 of the 2011 Act). Section 8(2) of the 2011 Act specifies two conditions: that an Order does not remove any necessary protection, and does not prevent any person from continuing to exercise any right or freedom which they might reasonably expect to continue to exercise. The ED for the draft Public Bodies (Abolition of the Advisory Council on Libraries) Order 2014 deals with the statutory tests in paragraphs 8.1 to 8.6, and with the conditions in paragraph 9.

**Efficiency**

7. DCMS states its view that the ACL is no longer a relevant structure and is an unnecessary duplication of the knowledge and sector expertise already found amongst other statutory and non-statutory organisations and within DCMS. It adds that, while the ACL no longer exists as an operating body, the legislation which established ACL does not provide for its abolition.

**Effectiveness**

8. The Department says that essentially the ACL is a defunct body; it has no staff, premises, assets or liabilities. In the absence of the ACL, DCMS has worked closely with relevant stakeholders (including the Arts Council England, the Local Government Association, the Society of Chief Librarians and the Chartered Institute for Library and Information Professionals) to ensure that “appropriate intelligence about the library sector is captured”.

**Economy**

9. DCMS states that, although there is no budget allocated for the ACL, its abolition will result in savings in the region of £2,500 per annum. In the absence of the ACL, DCMS officials will continue to support the Secretary of State to fulfil his duty to superintend public library services, but will no longer be required to provide a secretariat function, process members expenses or administer the appointments process for members.

**Accountability**

10. The Department says that abolition of the ACL will not affect accountability for the library sector, because the Secretary of State’s duty to superintend and promote the library service under the 1964 Act will remain intact. In addition, local authorities still have a statutory duty to provide a comprehensive and efficient library service under the 1964 Act in a way which meets the needs of local library users taking into account available resources.

**Necessary protection; right or freedom**

11. DCMS states that there will be no impact on personal protections, rights or freedoms, as the abolition of the ACL will have no impact on the ability of the Secretary of State and library authorities to meet their statutory duties. The Department says that the library authorities’ duty to provide a
comprehensive and efficient library service and the Secretary of State’s duty to superintend remain intact; that the ACL was a purely advisory body; and that the power to take action and intervene rests with the Secretary of State.

Consultation – section 11 of the Explanatory Document

12. DCMS carried out a twelve-week consultation on the proposed abolition of the ACL between 17 February and 9 May 2014. The Department received nine responses: four from stakeholder organisations, three from library advocacy organisations and two from individuals.

13. In the ED, DCMS states that six of the seven respondents to the relevant question did not think that the advisory function of ACL should be transferred to another existing body; while what it terms “a small majority, four out of seven, of respondents” considered that the ACL should be retained and improved. In September 2014, the Department published a summary of the consultation.¹ This clarifies that two of the respondents who agreed with the abolition of the ACL did so “with caveats”, namely that DCMS needed to hold properly organised and regular liaison meetings with interested parties, to allow them to put their views and concerns to Government (paragraph 18 of summary). It seems clear from this that such support as has been expressed for abolition of the ACL is limited and subject to qualifications.

14. In the ED, DCMS also states that four of the respondents said that decisions on the future of the ACL should not be taken in advance of the publication and consideration of the recommendations of the Independent Library Report. In the consultation summary, DCMS states that this report is due to be published in autumn 2014. Information provided about the report on DCMS’ website indicates that a consultation relevant to the report was carried out in February and March 2014, but that no outcome of that consultation has yet been published.² We obtained additional information from the Department which we are publishing as Appendix 1. DCMS has told us that it aims to publish the report in December 2014.

Conclusion

15. It is noteworthy that, in discussing the ALC and arrangements to be made following its abolition, DCMS refers to duplication of knowledge, and acquiring appropriate intelligence. Yet the ALC’s role as set out in the 1964 Act refers to a duty to give the Secretary of State advice – a function which includes the acquisition of knowledge, but extends beyond it. In the ED, DCMS states that two respondents said that there was a need for an independent body to provide public libraries with leadership and guidance; and that one respondent said that the organisations identified with which DCMS will engage are narrow in their focus, and none offers outspoken criticism of the Department. If these comments carry weight, it is not immediately apparent that abolishing the ALC can be seen to improve the exercise of public functions, as set out in the 2011 Act.

16. We have noted the view expressed by several consultation respondents that the outcome of the Independent Library Report (ILR) should be seen before a decision is taken on the abolition of the ALC. DCMS has told us that, since the terms of reference of the ILR did not include consideration of the statutory requirement of the 1964 Act, it does not consider that there is a direct link and therefore the decision on the abolition of the ALC is not dependent upon the Report publication. The website for the ILR states that it is considering what should be the core principles of a public library service into the future; whether current delivery of the public library service is the most comprehensive and efficient; and what should be the role of community libraries in the delivery of a library offer. We recognise that this is not presented as reviewing the statutory requirements of the 1964 Act (as described in paragraph 2); but it seems to us that the considerations of the ILR clearly intersect with the practical implementation of the duties placed upon the Secretary of State and local authorities by the 1964 Act, and that it is therefore reasonable to see the outcome of the ILR as relevant to the decision on the ALC.

17. In the light of the above, we do not consider that the Government have adequately demonstrated that the draft Order serves the purpose of improving the exercise of public functions as set out in the 2011 Act; or that it is sensible to proceed with abolition of the ALC before the outcome of the ILR is known. **We therefore recommend that the draft Order should be subject to the 60-day enhanced affirmative procedure set out in section 11(6) of the Public Bodies Act 2011, and we invite the Minister in the meantime to provide further justification of the proposed abolition of the ALC in the light of the outcome of the ILR.**
INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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

B. Draft Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2014

Date laid: 11 November

Parliamentary Procedure: affirmative

Summary: These draft Regulations require that, in the case of jobs where the employee will usually work in Great Britain, employment agencies and employment businesses will have to advertise such jobs in English in Great Britain before, or at the same time as, advertising them elsewhere in the European Economic Area. The Business Department allowed only a five-week period for formal consultation, a period which largely coincided with the month of August. This is not the first example of a consultation held by BIS over a summer holiday period. We see this as bad practice, serving the interests of Government rather than those of organisations and individuals likely to be affected by new legislation.

We draw these Regulations to the special attention of the House on the ground that there appear to be inadequacies in the consultation process which relates to the instrument.

18. The Department for Business, Innovation and Skills (BIS) has laid these draft Regulations with an Explanatory Memorandum (EM) and impact assessment. BIS says that the Government want to create a level playing-field for workers by requiring employment agencies and employment businesses to ensure that all advertisements for jobs based in Great Britain are advertised in Great Britain and in English. In amending an earlier instrument,3 the Regulations provide for a prohibition to restrict advertising of jobs by the recruitment sector elsewhere in the European Economic Area (EEA). The prohibition applies in the case of jobs where the employee will usually work in Great Britain; employment agencies and employment businesses will have to advertise these jobs in English in Great Britain before (but no more than four weeks before), or at the same time as, advertising them elsewhere in the EEA.

Compliance with EU law

19. In response to a query which we raised, BIS confirmed that in formulating this policy it needed to have regard to the impact of EU law: principles relating to the free movement of workers and, possibly, freedom of establishment are relevant, the former because the draft Regulations are about the recruitment process, the latter because they may conceivably make it more difficult for overseas recruitment businesses to establish in Great Britain. BIS concluded that the policy underlying the draft Regulations, namely to ensure that people based in Great Britain are not discriminated

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against in the way that recruitment businesses advertise vacancies for British jobs, was one that could potentially justify some interference with these freedoms. The draft Regulations have only an indirect impact on the freedoms and, in BIS’ assessment, go no further than is necessary to achieve their legitimate policy objective. In particular, they do not prevent advertising overseas or in languages other than English, and provide a defence where advertising in English in Great Britain would be disproportionate. Consequently, BIS’ view is that the draft Regulations comply with EU law. This is not made clear in the EM.

Consultation on the draft Regulations

20. A consultation was carried out between 29 July and 2 September 2014. There were 31 responses. The majority were broadly supportive of the Government’s objective to create a level playing-field for workers in Britain, although some respondents commented that overseas-only advertising was not a problem in the recruitment sector and, if it did occur, would potentially be a breach of the Equality Act 2010. BIS published a summary of consultation in November 2014.

21. BIS allowed only a five-week period for formal consultation, a period which largely coincided with the holiday month of August. We asked the Department to explain its decision on timing, and were told that the Government’s wish to bring the new provisions into force by the end of 2014 meant that BIS was working to a tight deadline. BIS has told us that, since an earlier Government announcement (in April 2014) meant that the intention to consult was public knowledge, the Department held meetings with some key stakeholders prior to publishing the consultation document, and gave them an opportunity to share their views. BIS met the following: Trades Union Congress; Equality and Human Rights Commission; Recruitment and Employment Confederation; Association of Professional Staffing Companies; Employment Agents Movement; and Association of Recruitment Consultancies. We note that, while BIS has listed only six organisations with which it held meetings prior to issuing the consultation document, it received 31 responses to that document: in other words, the large majority of respondents were not included in BIS’ pre-consultation meetings.

Previous consultation by BIS

22. In autumn 2012, the Committee carried out an inquiry into the consultation principles which the Government adopted in July of that year. It received a good deal of written evidence from interested parties which expressed concern about the impact of the new principles on the ability of individuals and organisations to respond in an effective and timely way to consultations. When we published our inquiry report, we referred to a number of these pieces of evidence. In particular, we quoted from the evidence provided by

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the British Retail Consortium, which told us that it had strongly objected to the process for the Government’s consultation on the Midata scheme,7 carried out by BIS and the Cabinet Office between 27 July and 10 September 2012: “not only was it limited to six weeks but also the six weeks chosen were over the summer period which this year coincided with the Olympics”, a period of peak activity for the retail sector.

23. The Government subsequently reviewed the 2012 principles, and in October 2013 announced a revision, which we published in a further report.8 We noted that the revised principles said that “timeframes for consultation should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response and where the consultation spans all or part of a holiday period policy makers should consider what if any impact there may be and take appropriate mitigating action”. For these purposes, the Government gave as a holiday period that August represented 22 working days. In our report, we said that we would prefer that holiday periods be avoided altogether but noted a suggestion (from the Government’s own advisory panel) that, where it is unavoidable, an extra two weeks should always be added.

Conclusion

24. We rehearse this history because it demonstrates that this is not the first time that BIS has held a consultation over the summer holiday period, and that the Government have acknowledged that doing so poses problems for interested parties, which should be mitigated. Yet, two years on from the Midata scheme consultation, the Department again arranged a consultation which was limited almost exactly to the month of August. BIS has told us that none of the consultation responses referred to the timing of the exercise: in our view, it would be unwise to assume that silence equated to approval of that timing. If in this case BIS was unable to launch the consultation any earlier (despite the fact that more than three months had elapsed since the intention to consult was announced in April of this year), it could have set a later deadline for responses than 2 September, a date which itself was more than two months before the Regulations were laid before Parliament. We see it as bad practice to arrange a consultation over a holiday period: this serves the interests of Government rather than those of organisations and individuals likely to be affected by new legislation.

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7 This was a consultation on creating an order-making power to enable the Government to require data which businesses collect about consumer transactions to be released in an electronic, machine readable format at the consumer’s request.

INSTRUMENTS OF INTEREST

Draft Keeping and Introduction of Fish (England and River Esk Catchment Area) Regulations 2015

25. The Department for Environment, Food and Rural Affairs (Defra) has laid these Regulations with an Explanatory Memorandum (EM) and impact assessment. Defra states that the Regulations would replace the current controls on placing live fish into inland waters with a new permitting system, which would require all introductions of fish into, and subsequent keeping of fish in, inland waters to be permitted by the Environment Agency. The effect of the Regulations is also that transporting fish for introduction into inland waters must also be permitted. Existing controls are being repealed or amended, to allow for the more streamlined and cost-effective system contained in the Regulations to be introduced. Defra says that the main objective is to support the economic value of the angling sector, whilst ensuring adequate protection for the aquatic environment from the risks associated with the use of invasive non-native and locally absent fish species. The proposed permitting scheme enables the adoption of a risk-based approach to the use of such species, whereby those that are high-risk are given greater scrutiny and low-risk fish movements are allowed to take place more freely.

26. Public consultation on the proposal took place between December 2009 and March 2010. A total of 21 responses were received: most (17 responses) agreed that the proposed risk-based permit scheme should be introduced. In response to our query about the lapse of time since then, Defra has said that progress with the Regulations was held up by the change of Government in May 2010. Departments were required to delay work on proposed legislation until they could be fully evaluated against the new Government priorities. Further delay flowed from the requirement to re-consult on the proposal as part of the Water and Marine Red Tape Challenge initiative. Defra has confirmed that, although the Regulations have taken a long time to produce, they reflect the policy and operational requirements of the Environment Agency that will be responsible for administering them.

School Companies (Amendment) Regulations 2014 (SI 2014/2923)

27. The Department for Education (DfE) has laid these Regulations with an Explanatory Memorandum (EM). In amending an earlier instrument, the Regulations reduce burdens on schools by allowing school companies to be exempt from stringent and expensive audit requirements if they meet the criteria for small companies under the Companies Act 2006. They also remove the requirement to provide accounts for the first six months of their operation. They introduce a requirement for unaudited accounts to be independently examined in line with the Charities Act 2011.

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10 The School Companies Regulations 2002 (SI 2002/2978).
28. DfE has said that, by setting up a school company, individual school governing bodies are able to enter into contracts as a group and to pool resources; for example, the company structure enables schools to save money and free up staff time by sharing the cost of employing a person to deal with purchasing and supply issues.

29. In the EM, DfE states that the changes will provide “parity with other small companies”; that school companies will no longer need to provide accounts for the first six months of operation to the supervising local authority; and that there was no consultation on the changes. We obtained further information on these points from the Department, which we are publishing as Appendix 2. **We note the re-affirmation by DfE’s own Finance and Risk Analysis Teams of the general expectation that public funds channelled through school companies are used with regularity and propriety, and we look to the Government to ensure that the changes made by these Regulations do nothing to impair the performance of schools in meeting this expectation.**

**Civil Jurisdiction and Judgments (Amendment) Regulations (SI 2014/2947)**

**Civil Procedure (Amendment No. 7) Rules 2014 (SI 2014/2948)**

30. These instruments facilitate the application of Regulation EU/1215/2012 of 12 December 2012 which deals with cross-border jurisdiction, recognition and enforcement of judgments in civil and commercial matters (“the recast Judgments Regulation”) which comes into force on 10 January 2015. The Regulations simplify the previous arrangements, removing the process known as *exequatur*, under which the original Judgments Regulations required the judgment of a court in another Member State to be registered and “recognised” before it could be enforced in the United Kingdom. The associated instrument, Civil Procedure (Amendment No. 7) Rules 2014 (SI 2014/2948), makes consequential changes to the rules of court.

**Weights and Measures (Food) (Amendment) Regulations 2014 (SI 2014/2975)**

31. The Department for Business, Innovation and Skills (BIS) has laid these Regulations with an Explanatory Memorandum (EM). The Regulations amend the weights and measures legislation that regulates the quantity labelling aspects of the sale of food. They revoke any provisions which overlap or conflict with the quantity labelling requirements that apply to prepacked foods under the EU Regulation on the provision of Food Information to Consumers (EU Regulation 1169/2011: “the FIC Regulation”), and provide for breaches of the quantity labelling requirements of the FIC Regulation to be brought within the existing weights and measures enforcement regime.

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12 The Committee drew the Food Information Regulations 2014 (SI 2014/1855) to the special attention of the House in its 8th Report of the current Session (HL Paper 42). Those Regulations, laid by Defra, were described as having as their main purpose to enable enforcement in England of certain provisions of the FIC Regulation; and also to consolidate existing general food and nutrition labelling Regulations in England.
32. BIS says in the EM that, while consultation was undertaken at an earlier stage on the EU policy underlying the instrument, a draft of the Regulations was also published for consultation to ensure that the provisions were clear and workable; a total of 10 responses were received; and several drafting changes and additions were made as a result in the interests of clarity. In the Government summary of the consultation exercise, carried out over seven weeks in September and October 2014, BIS makes the point that slotting together parallel regimes for those products subject to the FIC Regulation and those subject to national law is inherently complicated. BIS acknowledges that two respondents commented that it was unfortunate that the consultation was not published until 11 September 2014, leaving only a short period in which to comment. In response, BIS regrets that there was not more time available for stakeholders to comment, but says that the main driver was to meet the deadline for implementation of 13 December 2014, and that other priorities meant that this process could not be started earlier.

**We hope that the Department will draw the lesson from this exercise that Government should plan and observe a timetable for policy implementation which affords a proper opportunity to interested parties to offer their comments.**

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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**

- Electricity Capacity (Supplier Payment etc.) Regulations 2014
- Keeping and Introduction of Fish (England and River Esk Catchment Area) Regulations 2015
- Olympic Lottery Distribution Fund (Winding Up) Order 2014
- Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No. 3) Order 2014
- Transfer of Tribunal Functions (Transport Tribunal) Order 2014
- Water Industry (Specified Infrastructure Projects) (English Undertakers) (Amendment) Regulations 2014

**Draft instruments subject to annulment**

- Modifications to the Smart Energy Code and the Smart Meter Communication Licences (Smart Meters No. 1 of 2015)

**Instruments subject to annulment**

- SI 2014/2920 Air Navigation (Amendment) (No. 3) Order 2014
- SI 2014/2923 School Companies (Amendment) Regulations 2014
- SI 2014/2925 Air Navigation (Overseas Territories) (Amendment) Order 2014
- SI 2014/2926 Air Navigation (Overseas Territories) (Environmental Standards) Order 2014
- SI 2014/2931 Recovery of Costs (Remand to Youth Detention Accommodation) (Amendment) (No. 3) Regulations 2014
- SI 2014/2933 Associated British Ports (Fisher Fleet Quay) Harbour Revision Order 2014
- SI 2014/2947 Civil Jurisdiction and Judgments (Amendment) Regulations 2014
- SI 2014/2948 Civil Procedure (Amendment No. 7) Rules 2014
- SI 2014/2949 Dartford-Thurrock Crossing (Amendment) Regulations 2014
- SI 2014/2958 Armed Forces Pension Scheme and Armed Forces Early Departure Payments Scheme (Amendment) Order 2014
- SI 2014/2975 Weights and Measures (Food) (Amendment) Regulations 2014
APPENDIX 1: PUBLIC BODIES (ABOLITION OF THE LIBRARY ADVISORY COUNCIL FOR ENGLAND) ORDER 2014

Additional Information from the Department for Culture, Media and Sport

Q1. What is the timescale of the Independent Library Report?
A1. The aim is to publish the Report in December, subject to necessary approval.

Q2. What is DCMS’ response to the argument that the ILR should be available before abolition of the ACL is decided?
A2. The terms of reference of the ILR did not include consideration of the statutory requirement of the Public Libraries and Museums Act 1964. DCMS does not consider that there is a direct link and therefore the decision on the abolition of the ACL is not dependent upon the Report publication.

Q3. Why, if DCMS made it known in 2010 that the ACL would be wound up, did DCMS carry out consultation, and lay this PBO, only in 2014?
A3. Since Royal Assent of the Public Bodies Act in December 2011 there has been on-going and detailed discussion about the proposed abolition of the ACL including consideration of suitable alternative options. Care was taken to ensure that a robust open public consultation document was developed to explain why the Government considered the change was necessary, and to seek opinions from stakeholders and interested parties about the potential effects of such a change, as well as their views on the alternative options. This was supported by an appropriate Impact Assessment. A twelve week period for public consultation was allowed, which was followed by careful consideration and analysis of the replies received to inform the Minister’s decision and to prepare a robust Government response. Completion of this task has had to be set against a number of competing priorities.

11 November 2014
APPENDIX 2: SCHOOL COMPANIES (AMENDMENT) REGULATIONS 2014 (SI 2014/2923)

Additional Information from the Department for Education

Q1: Given the special position and responsibilities of schools, why do the Government see it as appropriate to provide parity with small companies in general?

A1: A school company is not a special type of company or business. It is simply a company set up by one or more local authority maintained schools exercising their statutory powers under section 11–13 of the Education Act 2002. Therefore, school companies are private companies limited either by shares or by guarantee and are required to register under the Companies Act 2006. The members of a school company can be:

- The governing body of a maintained school;
- A local authority;
- The proprietor or governing body of an independent school;
- A company who has a significant proportion of its business for the provision of education or ancillary services or goods;
- The governing body of a further or higher education institution;
- Any other individual that is not in the list of excluded bodies in Schedule 1 of The School Companies Regulations 2002 ("the 2002 Regulations"; references in this document to "regulations" relate to the 2002 Regulations).

By setting up a company it allows individual school governing bodies to enter into contracts as a group and to pool resources; for example, the company structure enables schools to save money and free up staff time by sharing the cost of employing a person to deal with purchasing and supply issues.

Schools are able to follow a well-established procedure for forming a company and the National College for Teaching and Leadership can provide help and support in setting up a new school company.

When a school company is formed it becomes a separate legal entity, and schools have considerable flexibility in how the company is run. If the company gets into financial trouble, there will be no risk to the school’s assets or the employment of the school’s staff. Teachers are not expected to transfer to the company.

The anomaly was first identified by a partnership that was looking to set up a school company to be a small £20k in–out company. The 2002 Regulations required them to have a full annual audit, which they expected would cost the company around £2–3k. The partnership considered this to be a disproportionate cost and a disincentive to them setting up the company.

Therefore, as school companies are separate legal entities registered under the Companies Act 2006, the department considered the audit arrangements for school companies should be brought into line with small companies in general.
Q2: *If the supervising authority is a local authority, how is the latter expected to exercise adequate and timely scrutiny if it no longer sees school company accounts for the first six months of operation? How will scrutiny be achieved under the new arrangements being introduced by the Regulations?*

A2: In line with the government’s aim of increasing school autonomy and reducing bureaucracy, the department sought to address the anomaly in the 2002 Regulations to create an audit requirement that is more proportionate to the size of such companies, while retaining an appropriate and proportional level of scrutiny.

The requirement for school companies to provide a set of audited accounts after the first six months of operation was originally put into place to allow the supervising authority to quickly identify and rectify issues in the initial set-up period of the company, when there is a higher risk of financial difficulties.

The department consider there are sufficient powers and duties remaining within the 2002 Regulations for the local authority as supervising authority to maintain adequate and timely scrutiny over the company. For example:

- The supervising authority has a duty to monitor the management and finances of the school company and notify members of the company and relevant local authorities if it considers that company is poorly managed or there is a risk of the company becoming insolvent [regulation 26].

- The local authority can be on the board of a school company [regulation 5(2)(b)] so will receive regular information about the company.

- The supervising authority can “direct the company to provide it with such information on the company’s constitution, finance, management and contracts to which the company is a party, as the supervising authority requests” [regulation 29]

- A school company cannot borrow any funds, whether secured or unsecured, without the permission of the supervising authority [regulation 11].

- If a maintained school whose governing body is a member of a school company has its delegated budget suspended, then the school’s governing body must either reduce their involvement in the company or resign from the company [regulation 13].

- The local authority may refuse permission for a school’s governing body to become a member of a school company for various reasons, including: if the school has serious weaknesses or the local authority considers it will likely have serious weaknesses within the next year; the school has a deficit budget; or the governing body of a school has within last three years been a member of school company which became insolvent at a time when governing body was a member [regulation 15].

The new amendments to the 2002 Regulations also require audit-exempt school companies to have their annual accounts examined by an independent examiner, and to provide a copy of these accounts to the supervising authority within four months of the end of the financial year [regulation 28, as amended].

The amendments to the 2002 Regulations therefore make auditing arrangements more proportionate while maintaining a level of scrutiny.
**Q3:** Why did DfE not consult other interested parties on these changes?

A3: Although there was no legislative requirement to consult on the changes, the department did give full and careful consideration to consulting on them, and to the risks of not consulting. In line with Cabinet Office guidance on consultation, the department is committed to improving policy-making and implementation, with a greater focus on robust evidence, transparency and early engagement with key groups.

However, the department decided on this particular occasion not to consult, because the changes simply bring school companies into line with other companies and reduce the administrative burdens on schools and local authorities.

The department was asked to look into the auditing anomaly by a partnership including maintained schools, confederations and 14–19 networks that were looking to set up a school company. They pointed out that this was “a worthwhile initiative which has hit a stumbling block due to an accident of timing of legislation.” The Legal Services department of the local authority had worked with the potential new company along with a local law firm and the National College to draw up all the legal documents and see if they could find a way past this anomaly. The partnership had explored all the different ways in which they could work in partnership, including a Community Interest Company, but the option they considered most met their requirements was the school company option as it meant the company would stay within the oversight of the local authority. The partnership welcomed the news that the department intended to look at amending the 2002 Regulations with the response “things like this really do make a difference to practical school partnership and co-operation.”

**Q4:** The EM states that there was internal consultation with legal representatives and financial risk assessment advisers on the implications of the changes. What advice did you receive from these internal consultees?

A4: The main internal consultees were the Finance and Risk Analysis Teams who provided the following advice:

- The schools concerned need to bear in mind that companies that they have a financial interest [which] may need to be consolidated into their accounts. Even if that interest doesn’t trigger a particular audit requirement, there’s still a general expectation that public funds channelled through school companies are used with regularity and propriety. The role of the school’s auditors, if it has them (academies certainly do) may then extend to examining the company’s activities for regularity and propriety even if not a full audit.

- The Regulations are essentially a means of allowing local authority maintained schools to trade, collaboratively or otherwise. Sections 4 and 5 provide for a company to be formed, that must include a local authority school as one of its members but can include other entities.

- Since the Regulations apply to local authority school companies, rather than directly to schools, we don’t think the proposals for reduced financial scrutiny of those companies would conflict unduly with the parallel proposals for more frequent audit of the schools themselves.

- On the main issue about the level of audit, we can see that regulation 28 currently requires the company to produce accounts and have them
audited in all cases, so we can understand the desire to align the Regulations with the tiered audit approach in the Companies Act 2006. Under the Act, small companies would still have to produce accounts (there is no getting away from that) but would be exempt from audit. However if you are keen to maintain some form of scrutiny of the companies, albeit falling short of a full audit, you might consider something analogous to the requirement placed upon smaller charities to have their accounts reviewed by an independent examiner. Essentially this would be someone with the requisite ability and practical experience to review the accounts, without necessarily being a practising auditor (e.g. a bank official, retired accountant, or a treasurer).

- Independent examination is light touch. So, for example, it will involve a review of accounting records (ledgers) and accounts, but will not cross check items in the accounts against original documents such as invoices, unless the examiner identifies significant concerns, or does not receive satisfactory explanations. Nevertheless it could be a proportionate approach for school companies of the size you describe. Indeed very small charities (those with income of less than £25k) are not required even to have an independent exam.

18 November 2014
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 25 November 2014 Members declared no interests.

Attendance:

The meeting was attended by Baroness Andrews, Lord Bichard, Lord Borwick, Lord Eames, Lord Goodlad, Baroness Hamwee, Baroness Humphreys and Lord Woolmer of Leeds.