HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

17th Report of Session 2016–17

# Draft Greater Manchester Combined Authority (Functions and Amendment) Order 2016

## Correspondence:
## Immigration (European Economic Area) Regulations 2016
## Rail Passengers' Rights and Obligations (Exemptions) Regulations 2014

Includes 4 Information Paragraphs on 4 Instruments

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## *Secondary Legislation Scrutiny Committee*

The Committee was established on 17 December 2003 as the Merits of Statutory Instruments Committee. It was renamed in 2012 to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

The Committee's terms of reference are set out in full on the website but are, broadly, to 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 these specified grounds:

> (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.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

## *Members*

| | | |
|---|---|---|
| Baroness Andrews | Lord Hodgson of Astley Abbots | Lord Rowlands |
| Lord Bowness | Baroness Humphreys | Baroness Stern |
| Lord Goddard of Stockport | Rt Hon. Lord Janvrin | Rt Hon. Lord Trefgarne *(Chairman)* |
| Lord Haskel | Baroness O'Loan | |

## *Registered interests*

Information about interests of Committee Members can be found in the last Appendix to this report.

## *Publications*

The Committee's Reports are published on the internet at www.parliament.uk/seclegpublications

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at http://www.legislation.gov.uk/uksi

## *Information and Contacts*

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hlseclegscrutiny@parliament.uk.

# Seventeenth Report

## INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

### Draft Greater Manchester Combined Authority (Functions and Amendment) Order 2016

***Date laid: 21 November 2016***

***Parliamentary procedure: affirmative***

*The Order carries forward implementation of the devolution deals which the Government have agreed with Greater Manchester, by proposing to confer powers on the Greater Manchester Combined Authority in the areas of housing and planning, transport, education and training, and culture. That Authority has made considerable efforts to seek views on the proposals; the response from the public appears to have been very limited, however, and to suggest that there may be little popular enthusiasm to buttress the local authorities' own commitment to taking the devolution process forward.*

**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 devolution agreement[1] concluded on 3 November 2014 between the Government and Greater Manchester provided for an offer of powers and budgets from Government, on the basis that Greater Manchester would deliver certain reforms, including the adoption of a model of a directly elected mayor covering the whole of the Greater Manchester Combined Authority (GMCA) area. The position of interim Mayor for the GMCA was established by the Greater Manchester Combined Authority (Amendment) Order 2015 (SI 2015/960); the position of elected Mayor for the GMCA was established by the Greater Manchester Combined Authority (Election of Mayor with Police and Crime Commissioner Functions) Order 2016 (SI 2016/448).

*Powers proposed in the draft Order*

2. In the Explanatory Memorandum (EM) to the latest draft Order, the Department for Communities and Local Government (DCLG) says that the instrument is a significant step in the implementation of the devolution deals which the Government have agreed with Greater Manchester. Specifically, the Order proposes to confer powers on the GMCA in the areas of housing and planning, transport, education and training, and culture.

3. In brief, the powers now proposed are as follows:

   - housing and planning: a duty is to be conferred on the GMCA, to be exercisable by the Mayor, to prepare a spatial development strategy; and powers of land acquisition and disposal are to be given to the GMCA, with compulsory purchase powers to be exercisable by the Mayor;

1 See: https://www.gov.uk/government/publications/devolution-to-the-greater-manchester-combined-authority-and-transition-to-a-directly-elected-mayor. Subsequent agreements have been reached in February, July and November 2015.

- transport: the GMCA is to be enabled to make grants to bus service operators in Greater Manchester, to promote road safety in the same way as a local authority, and to engage with Highways England and local highway authorities about construction, improvement, and maintenance of roads;

- education and training: the GMCA is to be empowered to require further education institutions to provide suitable education for persons aged 16–17, to promote high educational standards, enable fair access, and promote fulfilment of learning for those aged under 20, and to secure education opportunities for those aged 16–18 or with learning difficulties;

- culture: the GMCA is to be empowered to take a role in cultural activities, in both provision and support of cultural events and entertainments, in its area, being given the same powers as local authorities to do so.

*Consultation*

4. We drew both the earlier Orders mentioned above to the special attention of the House. In the case of the draft Greater Manchester Combined Authority (Amendment) Order 2015 (the "2015 Order"),[2] we commented that DCLG had progressed the policy implemented in the Order at a pace which might have left insufficient time for local communities to understand the full implications. We noted that the Department had carried out only a three-week consultation in early 2015, and that views had been actively sought only from local government and business organisations.[3]

5. In the case of the draft Greater Manchester Combined Authority (Election of Mayor with Police and Crime Commissioner Functions) Order 2016,[4] we asked DCLG about the extent to which local communities had been consulted about these changes in the period since the 2015 Order was made. The Department told us that no consultations had taken place with the wider population "other than such consultation and engagement [that] those elected locally may have chosen to undertake to support their role as the people's representatives".[5]

6. In the EM to the latest Order, DCLG says that the GMCA undertook consultation on the proposals in conjunction with constituent local authorities and other partners who managed public communications locally, over an eight-week period from 21 March to 18 May 2016. 238 responses were received, including 169 from members of the public, 19 from public bodies, seven from businesses, and 15 from representative bodies. DCLG says that the outcome of consultation on the GMCA's proposals was generally favourable, though it acknowledges that support was less clear-cut on the education and skills proposals, with 30 respondents being positive and 36 not; and also that 34 respondents to proposed constitutional arrangements for the mayoral combined authority were not supportive, while 21 were.

2 After approval by the House, this Order was made as SI 2015/960.
3 29th Report, Session 2014–15 (HL Paper 133).
4 Made as SI 2016/448 after approval by the House.
5 25th Report, Session 2015–16 (HL Paper 101).

7. In June 2016, the GMCA published a summary of consultation responses.[6] While this is consistent with the headline findings mentioned in DCLG's EM, there is a wealth of other detail. In its introductory section, GMCA says of the consultation that its "ambition was to offer the general public, the electorate of c.1.9 [million] people, businesses and other stakeholders the opportunity to share their views on the additional functions proposed to be conferred on the GMCA as set out in the Scheme". In describing its engagement with the general public, GMCA says that there were more than 16,000 page views on the dedicated consultation area of the GMCA website, and that more than 6,130 people opened the online consultation form.

8. The summary confirms, however, that there were only 169 responses from members of the public: in other words, fewer than one in 10,000 of the electorate responded to the consultation. This outcome may point to lessons to be learnt about how best to design a consultation process in order effectively to engage the public. The summary also gives more detail of the concerns voiced by members of the public who did comment on the proposals for the Mayor's duties. Confirming that 34 were not supportive, the summary pinpoints comments made by opponents, including that "clear accountability [was] needed", that the area did not need a Mayor and that this would be "a waste of money", and that the Mayor had not been democratically elected.

*Conclusion*

9. As DCLG itself says, the draft Order is a significant step in implementing the devolution of functions to the Greater Manchester Combined Authority. That Authority has made considerable efforts to seek views on the proposals in the draft Order; the response from the public appears to have been very limited, however, and to suggest that there may be little popular enthusiasm to buttress the local authorities' own commitment to taking the devolution process forward.

6 See: https://www.greatermanchester-ca.gov.uk/download/meetings/id/999/16_gmca_consultation_-_governance_review_and_scheme_phase_1

## CORRESPONDENCE

### Immigration (European Economic Area) Regulations 2016 (SI 2016/1052)

10. We drew attention to this instrument in our 14th Report of the current Session.[7] We noted that its general purpose is to consolidate the transposition into domestic law of Council Directive 2004/38/EC on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States. We also noted, however, that Schedule 1 adds, for the first time, a non-exhaustive list of the "fundamental interests of society" to which courts or tribunals must have regard when considering whether to restrict that right to freedom of movement and includes as grounds for excluding someone from the UK "protecting public services" or "preventing social harm". In our Report, we expressed concern about how such broad terms could be interpreted consistently and objectively by the courts, and stated our strongly held view that the definition of key terms should not be consigned to guidance that would not be available to the Committee, the House or the public until months after the instrument had completed its journey through Parliament.

11. The Committee has written to the Minister, Robert Goodwill MP, Minister of State for Immigration at the Home Office, twice on this matter. Following a disappointing response to our first letter, also published in our 14th Report, the Committee wrote again on 16 November. The Minister's reply of 24 November was again unsatisfactory. He was invited to provide a fuller response which he did in a letter dated 5 December. Although this second response goes some way towards addressing the points we originally raised, it fails to deal with the Committee's core concern that such open definitions may be inconsistently applied in different parts of the country and result in injustice for individuals. Both of the Minister's letters are published in Appendix 1.

12. This instrument exemplifies our more general concern that guidance is being used to supplement secondary legislation with material that should have been included in the legislation itself. In this case, the Home Office has told us that the relevant guidance will not be published until February 2017 when the legislation comes into effect. Our concern about the late availability of the guidance, which we expressed in our 14th Report, has since been aggravated by the publication by the Home Office of guidance in relation to determining the "genuineness" of a marriage (which forms another part of the same instrument) which includes a number of redacted sections which are "for Home Office use only". We question how the courts and individuals can assess their position correctly if a number of the determining factors are kept from them.

13. The Minister's letter of 5 December provides some information about the meaning of "protecting public services" in that he says the expression "could be interpreted as benefit fraud or tax evasion, though these examples are not exhaustive". He fails entirely, however, to address our concern that the term could also be interpreted in a number of less obvious ways, creating a problem for the courts and potential inequality among individual cases. It would, in our view, be more appropriate for such definitions to be fully set out in the

7 14th Report, Session 2016–17 (HL Paper 67).

Regulations; and, if not, then, as we said in our 14th Report, the relevant guidance should be laid *with* the Regulations and be available to Parliament throughout the scrutiny process. This is not a new concern, in relation to the Draft Social Security (Personal Independence Payment) Regulations 2013, for example, we said, when **"guidance is so material to the House's understanding of how the system will operate for individuals, rather than on a theoretical level, … proper scrutiny is not possible if the guidance is not published.** [8]"

### Rail Passengers' Rights and Obligations (Exemptions) Regulations 2014 (SI 2014/2793)

14. The Committee has received a letter from Paul Maynard MP, Parliamentary Under Secretary of State at the Department for Transport (DfT), about progress on implementing rail passengers' rights legislation (see Appendix 2). This letter is the latest in a series dating back to 2009 which relates to exemptions from EU Regulations that would give passengers' rights to compensation for rail cancellations etc. While the continued delay is disappointing, the Minister's courtesy in informing the Committee of current developments is appreciated.

15. In his letter of 22 November, the Minister states that the continued delay in deciding which exemptions to lift is because review and renegotiation of EC Regulation 137/2007 have overtaken the implementation of its original provisions. To aid the Committee, DfT provided a statement of the current position both in EC negotiations and in domestic schemes for passenger compensation which is published on the Secondary Legislation Scrutiny Committee website.[9] We note with disappointment that the improved Delay Repay scheme announced in October, which offers compensation for delays of more than 15 minutes, is not expected to be provided by any Train Operating Company "for some months". [10] Progress in rolling it out more widely also seems likely to be slow as DfT states that they "will explore opportunities to roll this out for all existing franchises during this Parliament".

8 See our 23rd Report, Session 2012–13 (HL Paper 101).
9 See http://www.parliament.uk/documents/lords-committees/Secondary-Legislation-Scrutiny-Committee/DfT-additional-information-Rail-Passengers.pdf
10 Although in a statement on 2 December the Minister said that Delay Repay 15 will be available to customers on the Govia Thameslink Railway from 11 December 2016. See: HLWS305.

## INSTRUMENTS OF INTEREST

### Draft Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Codes C, D and E) Order 2016

16. This Order will bring into force three revised Codes of Practice issued under the Police and Criminal Evidence Act 1984 ("PACE"): Code C (detention under PACE), Code D (identification of suspects) and Code H (detention under terrorism legislation). The revisions made by this Order will bring the three Codes in line with changes in legislation, policy, operational policing practice and case law. In particular the revisions enable the use of live-link technology for interpreters and the use of electronic recording devices and records; update and extend the provisions and safeguards for the detention and care of juveniles[11] at police stations before and after charge; and update procedures for obtaining eye-witness identification evidence and the provisions for taking and retaining fingerprints and DNA. Other revisions in Code C strengthen the protections under section 38(6) of PACE, which requires juveniles who are not released on bail after being charged to be moved to local authority accommodation pending appearance at court unless transfer is impracticable. To promote compliance, the Code requires that the reasons why transfer is not practicable must be shown on the certificate provided to the court and that the process requires supervision by a police inspector or above. Further provisions in Code C permit an appropriate adult to be removed from interview if they prevent proper questioning. These are consistent with the existing provisions in Code H and are modelled on Code C paragraph 6.9 (removal of solicitor) with additional safeguards for suspects.

### Draft Non-Domestic Rating (Chargeable Amounts) (England) Regulations 2016

17. The Department for Communities and Local Government (DCLG) has laid these draft Regulations with an Explanatory Memorandum. DCLG says that properties subject to non-domestic rates are subject to regular revaluations, which can result in unexpectedly large increases or reductions in rate bills for some ratepayers. The next business rates revaluation takes effect from 1 April 2017, updating rateable values to reflect the market as at 1 April 2015. While overall the revaluation will not raise any more or less tax, some ratepayers will see increases, and some reductions. To support ratepayers with the change, these draft Regulations introduce a transitional relief scheme, to provide £3.6 billion of transitional relief for those facing increases. The scheme will be self-financing within each year (i.e. the cost of limiting increases in bills matches the revenue from limiting reductions) and run for five years.

18. DCLG consulted on the possible arrangements for the transitional scheme between 28 September and 26 October 2016, and published a summary of responses in November.[12] The consultation paper set out two options, both with annual caps on increases and reductions over five years: option 1 provided more protection for large businesses facing increases, while option 2 allowed more reductions to flow through for medium businesses. There were

11 Amendments made by the Criminal Justice and Courts Act 2015, define a "juvenile" for these purposes as someone under the age of 18, rather than under the age of 17.

12 See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/571567/Transitional_Relief_consultation_response.pdf

173 responses: 16% from sector bodies, 8% from rating agents, 23% from local government, 51% from ratepayers and 2% from professional bodies. Overall, 10% of respondents favoured option 1 and 24% favoured option 2. DCLG says that the Government have decided to proceed with an amended version of option 2 which provides a little more support to large businesses than offered at consultation.

19. We have received a letter from Marcus Jones MP, Minister for Local Government, and Jane Ellison MP, Financial Secretary to the Treasury, explaining that draft 2017 rateable values were published by the Valuation Office Agency only on 30 September 2016, and that the Government wanted to ensure that ratepayers could see their new rateable values while consultation on the transitional relief scheme took place. Since that consultation ended only on 26 October, the Ministers say that the draft Regulations could not be finalised before announcing final decisions at the Autumn Statement.

### Improving planning performance: draft Criteria for designation (revised 2016)

20. The Department for Communities and Local Government (DCLG) has laid this document with an Explanatory Memorandum. The Growth and Infrastructure Act 2013 ("the 2013 Act") provides that a planning application may be made directly to the Secretary of State where the local planning authority (LPA) has been designated by him, provided that the application relates to major development. The 2013 Act also provides that the power of designation may be exercised only if an LPA is not adequately performing its function of determining planning applications and if, prior to that decision, a document setting out the criteria for designation has been formally laid before Parliament. We brought the first criteria document—providing for an assessment of LPAs' performance on the speed and quality of decisions—to the attention of the House in our 5th Report of Session 2013–14.[13]

21. Earlier this year, DCLG laid the Town and Country Planning (Section 62A Applications) (Amendment) Regulations 2016,[14] which served to extend the designation regime to include an assessment of LPAs' performance on determining applications for non-major development (as well as major development). The latest revision of the Criteria Document sets out the thresholds for designation and introduces new separate thresholds for designation for applications for non-major development. DCLG says that it has seen continued improvement in the speed with which applications for major development are determined: the figures for the latest quarter show that local authorities decided 83% of major applications within 13 weeks or the agreed extended period. It wants to ensure that performance continues to improve: the revised document includes more challenging criteria.

22. On 22 November 2016, the Minister of State for Housing and Planning made a Written Ministerial Statement[15] about these criteria, which included the statement that "speed of decision-making for the purposes of the non-statutory identification scheme for on-shore oil and gas applications[16] … will be assessed by reference to the revised criteria, including the revised

13 5th Report, Session 2013–14 (HL Paper 28).
14 SI 2016/944: we published information about the Regulations in our 10th Report, Session 2016–17 (HL Paper 53).
15 HCWS276.
16 As set out in the Written Ministerial Statement of 16 September 2015, HCWS201.

threshold for major development." The applications mentioned include those for shale gas and oil resources, which may be recovered using hydraulic fracturing—"fracking". We obtained further information from DCLG about the implications of the revised criteria for on-shore oil and gas applications, which we are publishing at Appendix 3. DCLG states that the Government have decided not to identify any authorities as underperforming at this time. This means that, for the present, the Secretary of State will not actively consider whether to call in relevant applications to such underperforming authorities along the lines set out in an earlier Statement.[17]

### Education (School Teachers' Qualifications and Induction Arrangements and Special Educational Needs Co-ordinators) (Amendment) Regulations 2016 (SI 2016/1123)

23. The Department for Education (DfE) has laid these Regulations with an Explanatory Memorandum (EM) and Transposition Note. In the EM, DfE explains that fully qualified teachers in other Member States of the European Economic Area (EEA) are entitled to the automatic recognition of Qualified Teacher Status in England and are exempt from induction requirements, in line with an EU Directive from 2005.[18] Some EEA member states have arrangements for a teacher to be qualified to work with Special Educational Needs and Disabilities (SEND) pupils only. No such status currently exists in England, and these teachers are therefore not entitled to the automatic award of QTS.

24. DfE says, however, that the 2005 Directive was amended in 2014[19] to require Member States to recognise professional qualifications from other Member States when these qualify a professional to work only in parts of a domestic profession. In amending earlier instruments,[20] these Regulations therefore grant European SEND teachers partial access to the teaching profession, such that they are qualified only to teach pupils in SEND specialist schools and specialist units within mainstream settings. They will not be recognised as qualified to teach mainstream classes, nor will they be able to take the role of special educational needs co-ordinator. Such teachers will be exempt from serving a period of statutory induction.

17 Ibid.
18 The European Community Recognition of Qualifications Directive (2005/36/EC).
19 By Directive 2013/55/EC.
20 The Education (School Teachers' Qualifications) (England) Regulations 2003; the Education (Induction Arrangements for School Teachers) (England) Regulations 2012; the Education (Special Education Needs Co-ordinators) (England) Regulations 2008; and the Special Educational Needs and Disability Regulations 2014.

## 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

Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Codes C, D and H) Order 2016

Non-Domestic Rating (Chargeable Amounts) (England) Regulations 2016

### Instruments subject to affirmative approval

SI 2016/1126 Misuse of Drugs Act 1971 (Temporary Class Drug) (No. 2) Order 2016

### Draft instruments subject to annulment

Improving planning performance: draft Criteria for designation (revised 2016)

Modifications to the Smart Energy Code (Smart Meters No.1 of 2017)

### Instruments subject to annulment

SI 2016/1102 Occupational Pensions (Revaluation) Order 2016

SI 2016/1112 European Communities (Designation) (No. 2) Order 2016

SI 2016/1113 Transfer of Functions (Chequers and Dorneywood Estates) Order 2016

SI 2016/1121 Northern Ireland (Stormont Agreement and Implementation Plan) Act 2016 (Immunities and Privileges) Regulations 2016

SI 2016/1123 Education (School Teachers' Qualifications and Induction Arrangements and Special Educational Needs Co-ordinators) (Amendment) Regulations 2016

SI 2016/1124 Misuse of Drugs (Designation) (Amendment) (England, Wales and Scotland) Order 2016

SI 2016/1125 Misuse of Drugs (Amendment) (England, Wales and Scotland) Regulations 2016

SI 2016/1127 Tobacco and Related Products (Amendment) Regulations 2016

SI 2016/1138 Lyon Court and Office Fees (Variation) (Reserved Functions) Order 2016

SI 2016/1143 Crime and Courts Act 2013 (Application and Modification of Enactments) Order 2016

SI 2016/1146 Producer Responsibility Obligations (Packaging Waste) (Amendment) Regulations 2016

## APPENDIX 1: CORRESPONDENCE: IMMIGRATION (EUROPEAN ECONOMIC AREA) REGULATIONS 2016 (SI 2016/1052)

### Letter from Lord Trefgarne, Chairman of the Secondary Legislation Scrutiny Committee, to Robert Goodwill MP, Minister of State for Immigration at the Home Office

*Immigration (European Economic Area) Regulations 2016 (SI 2016/1052)*

Thank you for your response to my letter of 9 November about these Regulations. I attach a copy of the Committee's Report and draw your attention in particular to the Committee's criticisms of the process undertaken in relation to this and other Home Office instruments.

The Committee was disappointed that your letter did not fully address our concerns about how the courts would be able to interpret the new provisions in the Regulations consistently and objectively. You stated that assistance would be provided by the publication of guidance. This statement in no way met the Committee's concerns since the guidance will not be available until the date on which the Regulations come into force and, meanwhile, you have not provided us with a draft for our information. As a result, we have reported the Regulations to the House on the ground that we had insufficient information to form a proper view of the instrument.

Other recent Home Office instruments have also caused us concern for similar reasons:

- the Explanatory Memorandum for the Statement of Changes in Immigration Rules (HC667) states that there is an Impact Assessment but, despite repeated requests, we have not been provided with a copy; and
- in relation to the Births, Deaths, Marriages and Civil Partnerships Records Regulations 2016 (SI 2016/980), there was a delay of three weeks in replacing a defective Explanatory Memorandum, meaning that the House and the public were deprived of the full explanation of the policy for 33 days of the 40-day praying period.

Following my meeting with Lord Bates in July 2015, the Home Office improved the standard of paperwork accompanying secondary legislation. I hope that these three instances represent a minor lapse. I would welcome your views on this matter.

**16 November 2016**

### Letter from Robert Goodwill MP to Lord Trefgarne

Thank you for your further letter of 16 November regarding the Immigration (European Economic Area) Regulations 2016 (SI 2016/1052) ("the Regulations".) In your latest correspondence you have raised particular concerns linked to both the provision of guidance underpinning the Regulations and how the Courts will be able to interpret the legislation's new provisions.

As outlined in my previous response of 9 November, the existing regulations have been amended in certain areas such as in the sphere of public policy. Where changes have been made, updated guidance will be published in order to give clarity to the courts, decision makers and applicants. As is normal practice, areas of the guidance that require updating will be in place when the new Regulations come into force. This is being further enhanced on the caseworking side by a series of extensive training.

Until the changes to the Regulations come into force, the courts will still be able to rely on the existing legislation and the related modernised guidance that underpins it. Clearly, not every aspect of the current regulations will be modified by the forthcoming amendments. Such unaffected provisions will continue to operate as normal in conjunction with the appropriate guidance.

Your letter also mentioned two other Home Office instruments. I understand that your Committee received the revised EM for the Births, Deaths, Marriages and Civil Partnership Records Regulations last week.

On the Impact Assessment referred to in the EM for the Statement of Changes in Immigration Rules, the Migration Advisory Committee (MAC) set out its view of the likely impacts arising from its recommendations on Tier 2 in its report 'Balancing migrant selectivity, investment in skills and impacts of UK productivity and competitiveness' which was published in January 2016- https://www.gov.uk/government/publications/migration-advisory-committee-mac-review-tier-2-migration. To supplement the MAC's work, a Home Office impact assessment was prepared for publication alongside the Statement of Changes. However, quality assurance checks identified a problem with the underlying data at a late stage in its preparation, which suggested that the impact assessment was flawed and potentially misleading. We are undertaking further checks and quality assurance as a matter or urgency and will publish the impact assessment as soon as possible. I can assure you that we will send the Committee a copy as soon as it is available. I hope you can agree that it would have been wrong of us to publish a flawed impact assessment.

**24 November 2016**

## A further letter from Robert Goodwill MP to Lord Trefgarne

Following the discussion we had last Wednesday and my letters of 11 and 24 November, I am writing to provide further clarification on the wording of Immigration (European Economic Area) Regulations 2016 (SI 2016/1052) ("the Regulations").

During our meeting you raised concerns on behalf of the Secondary Legislation Scrutiny Committee about the apparent vagueness of the terminology used in the Regulations, particularly around subparagraph 7(e) of Schedule 1 in which it is stated that "protecting public services" is one of the fundamental interests of society.

As set out in my previous responses to the Committee, the Regulations need to relate to a broad and varied array of circumstances in which an individual may pose a threat and so it is inevitable that some of the provisions are somewhat general in nature. We will however publish guidance which will assist decision makers and the courts in interpreting the wording of the Regulations through examples. A threat to the UK's fundamental interest in protecting public services could be interpreted as benefit fraud or tax evasion, though these examples are not exhaustive.

The Regulations do not significantly change the legal position set out in the current Immigration (European Economic Area) Regulations 2006, they do however provide a non-exhaustive list of the sort of substantive areas that could fall within "public policy", which is not defined in Directive 2004/38/EC ("the Free Movement Directive").

The fact that "protecting public services" was not previously specified on the face of the legislation does not mean this is an extension of the term 'public policy'; it always fell within in it. The approach taken in Schedule 1 is an attempt to reduce the vagueness in the current Regulations in order to help decision makers and the courts. However there is a limit to how specific the text can be without it becoming impractical and unwieldy.

As we also discussed at the meeting, please accept my apologies for the delay in replacing the EM for the Births, Deaths, Marriages and Civil Partnerships Records Regulations. I trust that the Committee found the replacement EM satisfactory.

**5 December 2016**

## APPENDIX 2: CORRESPONDENCE: RAIL PASSENGERS' RIGHTS AND OBLIGATIONS (EXEMPTIONS) REGULATIONS 2014 (SI 2014/2793)

### Letter from Paul Maynard MP, Parliamentary Under Secretary of State at the Department for Transport, to Lord Trefgarne, Chairman of the Secondary Legislation Scrutiny Committee.

*Update on the Rail Passengers' Rights and Obligations (Exemptions) Regulation (SI 2014/2793)*

I am writing to update you on the work my Department is doing to benefit passengers, including through possible reductions in the scope of the Rail Passengers' Rights and Obligations (Exemptions) Regulations (SI 2014/2793), following the letter sent to you by my predecessor in June.

As you know, we have taken a significant step forward recently on improving passenger rights, as from 1 October this year the Consumer Rights Act 2015 was brought into force in full for all remaining passenger transport sectors. Rail passengers now benefit from all the rights and protections available under the CRA, in the same way as other consumers.

We have also formulated a UK response to the European Commission consultation on options for reforming Regulation (EC) 1371/2007 on rail passengers' rights and obligations and officials have recently written to the Commission with that response.

However, we feel that timing factors mean that we should pause the work on the rail passenger rights regulation exemptions for the moment. Most significantly, the Commission intend to present proposals in December this year for revising their Regulation on rail passenger rights, following their consultation mentioned above. Their proposals could bear directly on any work we would do in the UK to lift exemptions, and I would like to avoid unnecessary duplication of effort. The UK will of course be able to participate in the further development of any changes to the Regulation at EU level until we leave the EU.

Once we have more clarity on the Commission's revision of the Regulation, we will be in a better position to target further work on the exemptions so that we can maximise the benefit to passengers, while making the most efficient use of the resources we have available. We also need to consider the shape of any further legislative programme in the context of the Government's wider consideration and review of EU-derived legislation.

I will provide a further update to the Committee once we have considered Commission proposals on revising the Regulation and thought further about how we should proceed.

**22 November 2016**

## APPENDIX 3: IMPROVING PLANNING PERFORMANCE: DRAFT CRITERIA FOR DESIGNATION (REVISED 2016)I

### Additional Information from the Department for Communities and Local Government

*Onshore Oil and Gas applications*

We have undertaken the exercise of first identifications in the final quarter of 2016, and the Government decided not to identify any authorities as underperforming at this time.

The Written Ministerial Statement in September 2015 announced how the non-statutory onshore oil and gas underperformance scheme would operate, cross-referencing the application of relevant criteria (like the thresholds) from the "Improving planning performance : criteria for designation" document, as a means of providing a way of assessing performance under that scheme.

The revised criteria for designation in relation to speed of decisions set out in the criteria document laid before Parliament on 22 November therefore has similar read across to the operation of the non-statutory underperformance scheme for onshore oil and gas. In particular, the revisions in the criteria document that would be relevant to the oil and gas scheme are:

- from 2018, the threshold for identification being less than 60 per cent of an authority's decisions made within the statutory determination period or such extended period as has been agreed in writing with the applicant;
- removal of the previous limited exemption threshold where authorities who decided two or fewer applications during the two year assessment period would not be liable for identification (to allow for the exemption of authorities where they have decided a higher number of applications than the previous limited exemption threshold but identification would still be unreasonable based on the limited number of applications decided);
- the clarification on the Government's approach to considering if any exceptional circumstances exist prior to confirming a identification, enabling the Secretary of State to take into account other interventions: specifically any directions relating to, or intervention in the local authority's development scheme or local plan during the 24 month assessment period, where likely to impact on performance.

These revisions do not present any issues to the integrity of the oil and gas underperformance scheme.

We have aligned the timing of the onshore oil and gas underperformance scheme with that for the statutory scheme, so that going forward the next onshore oil and gas identification round will be in the first quarter of 2018, and annually in the first quarter thereafter, rather than in the last quarter of the calendar year. The revised criteria will therefore be relevant, in respect of identifying underperforming oil and gas local planning authorities, in the first quarter of 2018.

**30 November 2016**

## APPENDIX 4: 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 6 December 2016 Peers declared no interests.

### Attendance:

The meeting was attended by Baroness Andrews, Lord Goddard of Stockport, Lord Haskel, Lord Hodgson of Astley Abbotts, Lord Janvrin, Baroness O'Loan, Lord Rowlands and Baroness Stern