Secondary Legislation Scrutiny Committee

21st Report of Session 2017–19

Draft Renewable Heat Incentive Scheme Regulations 2018

Education (Student Support) (Amendment) Regulations 2018

Criminal Legal Aid (Remuneration) (Amendment) Regulations 2018

Includes 5 Information Paragraphs on 5 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.

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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.
Twenty First Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft Renewable Heat Incentive Scheme Regulations 2018

Date laid: 7 February 2018

Parliamentary procedure: affirmative

Summary: These Regulations propose a number of amendments to the existing Renewable Heat Incentive (RHI) scheme, including: the scheme eligibility criteria; methods for calculating and issuing scheme payments; budget control mechanisms; powers to impose sanctions for non-compliances under the scheme; and the levels of tariffs for making payments to scheme participants. A recent report by the National Audit Office highlights the ways in which the scheme has failed to live up to its original prospectus: take-up has been disappointing, projections of renewable energy and carbon reductions have been scaled back, and control of non-compliance and related overpayments has been inadequate. It is clear that the Department’s commitment to reforming the RHI scheme needs to be rigorous and ongoing if the deficiencies of the past are to be redressed.

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

1. The Department for Business, Energy and Industrial Strategy (BEIS) has laid these Regulations (“the Non-Domestic RHI Regulations”) with an Explanatory Memorandum (EM) and Impact Assessment. In parallel, BEIS has also laid the draft Domestic Renewable Heat Incentive Scheme (Amendment) Regulations 2018.

2. In the EM, BEIS says that the Non-Domestic RHI Regulations propose a number of amendments to the existing scheme, including to: the scheme eligibility criteria; methods for calculating and issuing scheme payments; budget control mechanisms; powers to impose sanctions for non-compliances under the scheme; and the levels of tariffs for making payments to scheme participants. BEIS says that the purpose of the amendments is to reform the RHI in line with the Department’s objectives, to ensure that the scheme focuses on long-term decarbonisation, promotes technologies with a credible role to play in that transition, and offers better value for money.

3. BEIS says that the Regulations have been brought forward after consultation on the reform of both the Domestic RHI and Non-domestic RHI schemes in spring 2016; a consultation on support for biomass combined heat and power plant in the Non-domestic RHI in early 2017; and a consultation on further proposed amendments to the Non-domestic RHI in autumn 2017. The Department provides a good deal more information about these consultations in section 8 of the EM.
NAO report

4. Not mentioned by BEIS is a report from the National Audit Office (NAO) on “Low-carbon heating of homes and businesses and the Renewable Heat Incentive”,1 which was published only on 23 February 2018 (two weeks after the draft Regulations were laid). The NAO report shines a bright light on the RHI scheme, and illuminates a number of deficiencies.

5. The NAO report finds, for example, that take-up of the RHI scheme has been much lower than originally anticipated. In its 2012 business case, the Department planned to deliver 513,000 new installations in Great Britain by 2020. The NAO notes that the Department decided to delay the launch of the Domestic scheme by 18 months to prioritise its limited internal capacity on introducing cost control measures into the Non-domestic scheme. However, the NAO comments that “initial assumptions about take-up were too optimistic... As at December 2017, the RHI had delivered just 78,048 new installations in Great Britain. At current rates of take-up, we estimate the RHI will achieve around 111,000 new installations by March 2021, just 22% of its original expectations.”2

6. The NAO report also says that the Department has reduced its ambitions for the renewable energy produced by the RHI by 65%, and for carbon reductions by 44%, and now sees the role of the RHI to be more focused on a smaller number of homes and businesses which are not connected to the gas grid. The NAO says that “the Department has lowered forecast lifetime spending from £47 billion to £23 billion (cash terms) and reduced ambitions for producing renewable energy and reducing carbon emissions”, but comments that BEIS has not fully replaced the reduced ambitions of the RHI for renewable heat with equivalent contributions from other sources.3

7. A further critical finding in the NAO report is that the Department cannot reliably estimate the amount overpaid to participants that have not complied with the scheme’s Regulations.4 While (in May 2017) Ofgem estimated that overpayments were worth 4.4% and 2.5% of Non-domestic and Domestic RHI expenditure respectively, equating to £3 million in 2016-17, the NAO found significant weaknesses in Ofgem’s estimate.5 Moreover, the NAO has commented that “Ofgem could be more effective in how it is aiming to reduce the rates of non-compliance” and, in particular, “Ofgem could do more to pinpoint the root causes of non-compliance and target its activities accordingly.”6

Conclusions

8. In proposing wide-ranging changes to the RHI scheme, BEIS is seeking to reform the scheme in recognition of the need to achieve more effective decarbonisation and better value for money than was secured by its operation in earlier years. The recent NAO report highlights the ways in which the

2 Paragraph 9 of the NAO report.
3 Paragraph 10 of the NAO report.
4 Non-compliance includes generating heat for ineligible uses (such as heating domestic swimming pools), using unsustainable fuel sources and inaccurate metering.
5 Paragraph 14 of the NAO report.
6 Paragraph 15 of the NAO report.
scheme has failed to live up to its original prospectus: take-up has been disappointing, projections of renewable energy and carbon reductions have been scaled back, and control of non-compliance and related overpayments has been inadequate. It is clear that BEIS’ commitment to reforming the RHI scheme needs to be rigorous and ongoing if the deficiencies of the past are to be redressed.

**Education (Student Support) (Amendment) Regulations 2018 (SI 2018/136)**

*Date laid: 6 February 2018*

*Parliamentary procedure: negative*

**Summary:** These Regulations provide that eligible full-time students starting postgraduate pre-registration courses in nursing, midwifery, and the allied health professions from 1 August 2018 onwards will be funded through the standard student support system, rather than through the NHS Bursary. This mirrors the change in funding introduced for undergraduate students starting pre-registration courses in the same sectors from August 2017. We have received comments on the Regulations from the Royal College of Nursing (RCN) and the Chartered Society of Physiotherapy, and a response from the Department of Health and Social Care to the RCN’s comments.

The RCN has pointed to data about applications to nursing courses as evidence of a negative impact of the change in funding from bursaries to loans, while the Government warn against premature interpretation of the data, and stress the initiatives being taken to encourage people to pursue healthcare careers.

We consider that it must now be the time for the Government to take a definitive view of the effect of the changes from the 2017 Regulations on participation in nursing courses, and judge the funding reforms by results, rather than by aspirations. The review of post-18 education now underway includes assessing whether the funding system promotes the skills needed by our society: evidence already available from the healthcare education sector must surely be central to this assessment.

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

**2017 Regulations**

9. In our 26th Report of Session 2016-17,7 we drew an earlier instrument – the Education (Student Fees, Awards and Support) (Amendment) Regulations 2017 (SI 2017/114) – to the attention of the House, noting that the Regulations put in place arrangements to allow undergraduate healthcare students to draw on the loan-based student support system, once bursaries had been withdrawn by the Department of Health (DH), from 1 August 2017.

10. We received and published comments on those Regulations from UNISON and from the Royal College of Nursing (RCN), with a Government response. We highlighted the divergence of views about the impact of the changes, as between the Government and those representing the professions affected, and we commented that it would be essential for the Government to monitor
and evaluate the effects of the changes on student nurses, midwives and allied health professionals.

2018 Regulations

11. The Department for Education (DfE) has laid the latest Regulations (SI 2018/136) with an Explanatory Memorandum (EM) and Equality Analysis (EA). In the EM, DfE refers to the changes already made by the Department of Health and Social Care (DHSC), which have meant that, from 1 August 2017, eligible undergraduate students starting pre-registration courses in nursing, nursing and social work, midwifery, operating department practice and the allied health professions are funded through the standard student support system administered by the Student Loans Company rather than through the NHS Bursary scheme. DfE says that, in amending earlier instruments, SI 2018/136 provides that eligible full-time students starting postgraduate pre-registration courses in nursing, midwifery, and the allied health professions from 1 August 2018 onwards will also be funded through the standard student support system, rather than through the NHS Bursary.

12. In the EA, DfE says that its overall assessment of the proposed change from bursaries to loans is in line with the conclusion reached by DHSC in its own EA, that “although to a lesser extent than undergraduate nursing, midwifery and AHP [allied health professions] courses the postgraduate courses have a disproportionately female intake and so the reforms will possibly have an adverse impact on women.” DfE adds that there is also some evidence that women, older students, those with a lower income and students from some religions are slightly more likely to be averse to taking out increased borrowing, and that the increased student loan borrowing burden for postgraduate and dental profession students may therefore make their participation on courses less likely. However, DfE stresses that the DHSC initiative “should be seen in context; these changes are designed to enable growth in the postgraduate healthcare student intake by lifting student number controls; ensure the long-term sustainability of university provision, and support the needs of the healthcare workforce.”

13. DfE’s EA contains an assessment of the impact of the undergraduate healthcare changes, namely the switch from NHS bursaries to the standard student support system from August 2017. In sum, DfE says that the UCAS end-of-cycle report shows that the total number of applicants to nursing fell by 18% in 2017 compared with the number of applicants in 2016, equating to 11,750 fewer applicants. DfE comments that, while this fall in applicants to nursing was bigger than the overall 2.6% fall in applicants across the sector for 2017-18, it did not translate into an equivalently large fall in acceptances, which fell by 0.9% compared with 2016.

14. In our report on the 2017 Regulations, we noted that DH had stressed that the changes from August 2017 would place new nursing, midwifery and Allied Health Professionals (AHP) students on the same support system as the general student population, and that evidence had shown that increases in fees in the wider Higher Education (HE) system had not had a detrimental

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impact on the numbers of students applying to university. It appears from
the latest UCAS end-of-cycle report that such experience from the wider
HE system has not been replicated in the nursing sector: a fall of 18% in
applicants is a very different outcome.

Comments from Royal College of Nursing: Government response

15. We have received comments on the latest Regulations from the RCN, which
we are publishing on our website.10 We obtained a response from the DHSC
to these comments, which we are also publishing on our website.

16. The RCN has said that, in the EA, the Government accept that the change
could adversely affect participation of female, disadvantaged, older and ethnic
minority students due to increased debt aversion. DHSC has responded that,
while the Government’s EAs have indeed acknowledged that some research
suggests some groups may be more averse to debt, it has outlined steps taken
to mitigate these risks. In particular, the response itemises several additional
allowances available to eligible students owing to the unique demands of
healthcare courses.

17. The RCN has referred to the Government claim that the change to funding
arrangements will “increase the supply of nurses, midwives and allied health
professionals to the NHS”. It has commented that, overall, applications to
nursing courses have fallen by 33% since the same time in January 2016,
and that this runs contrary to the Government’s aspiration to grow the
pipeline supply of the future nursing workforce through this policy. DHSC
has responded that, while it acknowledges that early indications of the latest
UCAS application data (published in February 2018) show that the number
of students applying to study nursing has decreased from this point in the
cycle last year, the 2018 university application cycle is not over, and that
cautions should be applied when interpreting the figures at this point. DHSC
has said that it is also prioritising new routes into nursing, which will allow
thousands of people from all backgrounds to pursue careers in the Health
and Care sector and allow employers to grow their own workforce.

18. Finally, the RCN’s has said that “… the policy [of replacing postgraduate
bursaries with student loans] represents poor and ineffective public policy
as it undermines the Government’s commitment to increase the number
of nurses entering the workforce”. DHSC has responded that universities
have consistently argued that the healthcare postgraduate market was prime
for growth if the Government offered a loan product, and that the reforms
which it is proposing follow the approach which the Government take across
the wider HE sector in making a contribution towards, but not fully funding,
postgraduate courses.

NHS Improvement data

performance report11 which, among other things, showed that 10.3% (35,835)
nursing posts were unfilled (as reported in the “Guardian” newspaper).12

10 See http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary- 
legislation-scrutiny-committee/publications/ [accessed 7 March 2018]
11 See: https://improvement.nhs.uk/resources/quarterly-performance-nhs-provider-sector- 
quarter-3-2017-18/ 
We asked DHSC to comment on the data, and we are also publishing its response to the data on our website. DHSC has said that the data show 35,835 nursing and midwifery vacancies, and that, of these, approximately 31,351 (87%) are filled by temporary staff (32% agency and 55% bank). It has stressed that NHS Improvement is working with the Department, NHS Digital and Health Education England to collect a range of data on vacancies and to validate the raw vacancy data. It has also said that the NHS employs more staff now than at any other time in its 69-year history, and that the latest NHS Digital figures show there are almost 42,700 more professionally qualified clinical staff working in the NHS since 2010, including almost 14,200 more nurses on wards and over 14,900 more doctors working in the NHS.

Comments from the Chartered Society of Physiotherapy

20. We have also received a letter from the Chief Executive of the Chartered Society of Physiotherapy which states that it is essential to put in place revised funding arrangements, notably, access to loan funding for those physiotherapy students who enter the profession by the route of a Master’s degree. We are publishing this letter on our website.

Conclusions

21. Commenting on the 2017 Regulations (SI 2017/114), we previously remarked on the divergence of views between the Government and the nursing profession about the impact on the take-up of nursing courses of the change in funding from bursaries to loans. It is clear that those views have, if anything, moved further apart in the intervening period. The RCN has pointed to data about applications to nursing courses as evidence of a negative impact, while the Government warn against premature interpretation of the data, and stress the initiatives being taken to encourage people to pursue healthcare careers.

22. While the EM states that DHSC made it clear that there would be only a one-year delay between changing the funding for undergraduate and postgraduate courses, we understand that the change was not anticipated by some of those recruited to courses starting in the autumn of this year, who may now be deterred by the introduction of loans. We note as well that in mid-February of this year the Prime Minister launched a review of post-18 education and funding, and that the terms of reference for the review which the Department for Education has published refers to the need for “a funding system that provides value for money and works for students and taxpayers, incentivises choice and competition across the sector, and encourages the development of the skills that we need as a country”.13

23. We consider that it must now be the time for the Government to take a definitive view of the effect of the changes from the 2017 Regulations on participation in nursing courses, and judge the funding reforms by results, rather than by aspirations. The review of post-18 education now underway includes assessing whether the funding system promotes the skills needed by our society: evidence already available from the healthcare education sector must surely be central to this assessment.

Criminal Legal Aid (Remuneration)(Amendment) Regulations 2018 (SI 2018/220)

Date laid: 23 February 2018

Parliamentary procedure: negative

Summary: This instrument reforms and restuctures payments made under the Advocates’ Graduated Fee Scheme ("AGFS"), the fee scheme through which criminal defence advocates are paid for carrying out publicly-funded work in the Crown Court. A key element of the reform is to move away from past reliance on Pages of Prosecution Evidence as a means of calculating the work done, because of the increasing use of electronic evidence, such as mobile phone, hard drive and video material. Instead payment is based on a more detailed categorisation of the offence that the defendant is charged with, moving from the current 11 categories to 48 which are set out in document, Banding of Offences in the Advocates’ Graduated Fee Scheme. The Impact Assessment (IA) states that these changes will increase legal aid spend by an additional £9 million per year. Submissions from the Bar Council and the Criminal Bar Association dispute this conclusion and we have written to the Minister seeking an explanation for the disparity of figures in the Explanatory Memorandum and the IA.

These Regulations are drawn to the special attention of the House on the ground they give rise to issues of public policy likely to be of interest to the House

24. These Regulations have been laid by the Ministry of Justice (MOJ) under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, and are accompanied by an Explanatory Memorandum (EM) and an Impact Assessment (IA). The Regulations cross-refer to the document Banding of Offences in the Advocates’ Graduated Fee Scheme14 ("the Banding Scheme"), which categorises offences. In conjunction with the instrument, this will determine the level of the payment an advocate will receive. We have received submissions on the revisions from the Bar Council and the Criminal Bar Association, and these are published on our website. 15

25. This instrument reforms and restuctures payments made under the Advocates’ Graduated Fee Scheme (AGFS), the fee scheme through which criminal defence advocates are paid for carrying out publicly-funded work in the Crown Court. The AGFS was last subject to major change in 2007. The MOJ states that these amendments are intended to reward the work done by defence advocates in Crown Court cases more accurately, are simpler and clearer, and support other reforms to the criminal justice system, such as the Better Case Management (BCM) programme.

The current scheme

26. The current AGFS calculates advocates’ fees through a complex formula, which comprises a “graduated” fee and several “fixed” fees. Key considerations in calculating the complexity of the case, and therefore the level of graduated fee, are the number of witnesses or the number of Pages of Prosecution Evidence served (PPE). The graduated fee also includes several “bundled”

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payments that include, amongst other things, attendance at the first and second day of a trial, attendance at the Plea and Trial Preparation Hearing (PTPH), and attendance at four “standard appearances” (for example, the preliminary hearing, or pre-trial review). These bundled payments are paid regardless of whether they occur in a case or not.

**The changes proposed**

27. A key element of the reform is to move away from PPE as a means of calculating the work done by an advocate in a case. Electronic evidence such as mobile phone, hard drive or video material, is being used increasingly, and the complex formula currently used to convert this into “pages” means PPE is no longer an accurate method for assessing the amount of work done. The formula also makes it difficult for advocates to know how much they will be paid before they take on a case.

28. Nor will the number of witnesses be taken into account; instead payment will be based on a more detailed categorisation of the offence that the defendant is charged with. Under the current scheme, there are 11 offence categories, the reformed AGFS, set out in the Banding Scheme Document, has 48. Tables set out in the Regulations may then increase the weight given to the amount of time spent by an advocate on a case, to determine the fee to be paid. The instrument also provides that certain tasks (for example, standard appearances, PTPHs) will in future be paid for individually, which the MOJ states is consistent with BCM reforms which aim to reduce the number of unnecessary hearings.

**Consultation outcome**

29. The Government consulted on proposals to reform the AGFS for eight weeks and received 408 responses from members of the legal profession and representative bodies. 43% to 50% of respondents agreed that the new categorisation of offences in the Banding Document should be introduced. Respondents expressed concern, however, about the potential impact of the proposed scheme on junior advocates who typically take the less complex cases. The MOJ states that the new AGFS has been adjusted to assist them, for example, by increased fees for standard appearances and PTPHs that are often undertaken by juniors. Both the Bar Council and the Criminal Bar Association acknowledge that the consultation was constructive and the MOJ responded to their most pressing concerns about fees for junior advocates.

**Impact**

30. The MOJ indicates that the impact of the new AGFS on individual advocates will vary according to the mix of work they undertake: for example, those conducting more trials are likely to be paid more under it, but those who take guilty pleas are likely to receive lower fees. Although it is difficult to predict the likely outturn, as it now depends more on the mix of cases, the IA states that these payment changes will not be cost neutral, and paragraph 10.3 of the EM estimates that the new scheme is “likely to increase legal aid spend by an additional £9 million per year”.

31. We have received submissions from both the Bar Council and the Criminal Bar Association contesting this statement. Both point to Table 9 on page 21 of the IA which does confirm that MOJ anticipates that the spend will be £9 million above the figures for 2014-15, but goes on to state that this would be
£3 million above the figures for 2015-16, and £2 million below the figures for 2016-17. So rather than being more generous as indicated in the EM, the MOJ’s figures in the IA indicate that the restructuring will represent a cut in funding of around £2 million (with the caveats set out in paragraph 15 above).

32. Both submissions also mention that there is no inflation protection built into the scheme and that there is no mechanism for regular review. The Criminal Bar Association goes on to describe the negative effects this change will have on the recruitment and retention of self-employed practitioners whose costs will rise but whose income will not.

33. The Criminal Bar Association also mentions a transitional impact from the restructuring. Because the restructuring changes from 11 to 48 categories of offences and is to come into effect only five weeks after being laid before Parliament, this will create problems with billing. They state that the company that provides the majority of chambers with their billing systems (Lex) has indicated that it will not be able to update its systems for several months. This will mean that all billing is likely to be manual for a significant period of time. This will be slower and negatively affect the cash flow of advocates, with the most junior advocates being the worst affected.

Conclusion

34. We understand that the MOJ’s standard policy with any review of fees is that the outcome should be cost neutral: the fees may be distributed in a different way but the total sum expended should not increase or decrease. Although the deviation in question is a small percentage of the total expenditure, there is a clear disparity between the figures in the IA and the way the information is presented in the EM. We have therefore written to the Minister to seek an explanation.
CORRESPONDENCE

Merchant Shipping (Prevention of Pollution from Noxious Liquid Substances in Bulk) Regulations 2018 (SI 2018/68)

Merchant Shipping (International Load Line Convention) (Amendment) Regulations 2018 (SI 2018/155)

35. In our 20th Report\textsuperscript{16} we drew attention to these two instruments because they implemented a number of provisions in international maritime conventions that were more than a decade overdue. Although the Department for Transport (DfT) stated that UK-flagged ships are operating to the enhanced standards, we pointed out that their compliance appeared to be because those ships would not otherwise be accepted at foreign ports which do fully enforce the legislation. The reciprocal position for enforcement for foreign ships in UK waters appears to be adequate but not complete. There would also be real consequences for the UK shipping industry if the UK was audited and lost its “low risk status”. We therefore drew the matter to the attention of the House and wrote to the Minister to enquire how significant the overall backlog of maritime legislation is, and how long DfT expect to take to put their legislation in order.

36. The Minister’s comprehensive response is published at Appendix 1. It does indicate however that this will be a “work in progress” for some time. We also commented in our 20th Report on the Department’s future reliance on the use of ambulatory references to the international conventions to keep the legislation up to date. While the mechanism is a pragmatic solution to preventing a backlog for the industry, we note that it removes Parliament’s ability to influence the legislation.

\textsuperscript{16} 20th Report, Session 2017-19 (HL Paper 82).
INSTRUMENTS OF INTEREST

Draft Data Protection (Charges and Information) Regulations 2018

37. In the Explanatory Memorandum (EM) to these draft Regulations, the Department for Digital, Culture, Media and Sport (DCMS) says that the General Data Protection Regulation (GDPR)\(^\text{17}\) will come into force on 25 May 2018 and apply directly to all EU Member States: the GDPR requires Member States to ensure that their supervisory authorities are provided with the financial resources necessary for the effective performance of their tasks. DCMS states that these Regulations give effect to this requirement, replacing notification fees with new charges on data controllers, to be paid to the Information Commissioner (IC), unless they are exempt. DCMS estimate for the costs associated with implementing the GDPR is that the IC’s income requirements in terms of its data protection functions will increase from some £19 million in 2016-17 to approximately £33 million in 2020-21. The new charges are arranged in three tiers: Tier 1, for “micro organisations”,\(^\text{18}\) is £40; Tier 2 is £60; Tier 3 is £2,900. There are a number of exemptions from the requirement to register with the IC and pay the requisite fee, which include manual processing, and processing for personal, family or household purposes. DCMS intends to review these exemptions, and to publish a public consultation in 2018. It states that it is “especially minded to consider an exemption for elected representatives”, though this does not make clear whether such an exemption might also include members of the House of Lords.

Draft First-Tier Tribunal and Upper Tribunal (Composition of Tribunal) (Amendment) Order 2018

38. The Government have committed to improving the efficiency of the tribunals as part of the wider reform of the justice system. As part of this initiative this Order moves away from the existing formats and allows the Senior President of Tribunals (SPT) greater flexibility in deciding whether a Tribunal panel should be composed of one, two, or three members, having regard to the nature of the dispute, the means by which it is to be determined, and the need for the members of tribunals to have particular expertise, skills or knowledge. To provide oversight and to ensure that resources are used appropriately, amendments also introduce a requirement for the SPT to set panel composition by means of a practice direction, which would require consultation with the Lord Chancellor.

Draft Mandatory Use of Closed Circuit Television in Slaughterhouses (England) Regulations 2018

39. The Department for Environment, Food and Rural Affairs (Defra) has laid these draft Regulations with an Explanatory Memorandum (EM). The Regulations propose that all slaughterhouses in England will be required to

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\(^{17}\) “The EU General Data Protection Regulation (GDPR) replaces the Data Protection Directive 95/46/EC and was designed to harmonize data privacy laws across Europe, to protect and empower all EU citizens’ data privacy and to reshape the way organizations across the region approach data privacy”. See: https://www.eugdpr.org/

\(^{18}\) Tier 1 applies to data controllers that have less than or equal to 10 members of staff or turnover of less than or equal to £632,000 per annum; Tier 2 applies to small and medium data controllers, namely those that are not in Tier 1 and have less than or equal to 250 members of staff or turnover of less than or equal to £36 million per annum; Tier 3 applies to large data controllers with more than 250 members of staff and turnover of more than £36 million per annum.
have installed an operational a closed circuit television (CCTV) system in all areas of the slaughterhouse where live animals are present, for example, where they are unloaded, kept, handled, stunned and killed. CCTV recordings must be retained by the slaughterhouse operator for 90 days, and inspectors, such as Official Veterinarians of the Food Standards Agency (FSA), must be granted access to recordings in order to monitor and verify animal welfare standards in the slaughterhouse. In the EM, Defra says that the Regulations fulfil a manifesto commitment from 2017 to make CCTV recording in slaughterhouses mandatory, following widespread concern about several well-publicised cases of animal welfare abuse in slaughterhouses. Defra held a public consultation on these proposals over six weeks to 21 September 2017: nearly 4000 responses were received, and over 99% of these were in favour of mandatory CCTV recording in slaughterhouses. A summary of responses was published in November 2017.19

Independent Educational Provision in England (Inspection Fees) and Independent School Standards (Amendment) Regulations 2018 (SI 2018/205)

40. The Department for Education (DfE) has laid these Regulations with an Explanatory Memorandum (EM) and Regulatory Triage Assessment. The Regulations set out the fees that may be charged by Ofsted20 for the inspection of independent schools, from 2018-19. Fees charged for standard inspections will be increased, and new charges will be introduced for several categories of inspection.21 The changes to the fees are in line with the principle that Ofsted should move towards full cost recovery for inspection of institutions which are not publicly funded. Inspection fees have not been increased since 2009. DfE says that, overall, only around £0.8 million of the £4.5 million total costs incurred by Ofsted on the inspection of independent schools are being recovered at 2016-17 cost levels. Fees charged for the inspection of schools are in many cases well below cost levels. The RTA shows that the cost of a standard inspection for a school with 50 pupils would rise from £650 to £900, an increase of almost 40%. In the EM, DfE says that it consulted on these changes over eight weeks to 6 December 2017: 60 responses were received, 58 of them from schools, with many respondents objecting to higher fees for standard inspections. In February 2018, DfE published a summary of responses.22 This explains that 60% of respondents commented that the increase in fees for standard inspections was not reasonable; the principal concern was the impact of the proposals on small schools. DfE comments that it accepts that for many smaller schools the increase is high in percentage terms, but says that the fee increases affect all sizes of school, and that smaller schools will still pay a lower proportion of actual cost than larger schools.

20 In formal terms, Her Majesty’s Chief Inspector of Education, Children’s Services and Skills.
21 These include pre-registration inspections and standard inspections during the first year of a school’s operation.
The Ministry for Housing, Communities and Local Government (MHCLG) has laid these Regulations with an Explanatory Memorandum (EM). In the EM, MHCLG says that the number of homeless households in England is increasing: 59,090 households were accepted as statutorily homeless and in priority need in 2016-17, up 48% since 2009-10; the total numbers in temporary accommodation are also rising. It says that, currently, local housing authorities (LHAs) are likely to focus their resources on households in “priority need”, such as families with dependent children; but that in 2016-17 an estimated total of 214,480 successful cases of homelessness prevention or relief took place outside the main provisions of the statutory homelessness framework in England. MHCLG says that the Homelessness Reduction Act 2017 (“the 2017 Act”) will mean that homelessness prevention and relief becomes part of the statutory homelessness framework in England, extending support to all eligible applicants. It adds that the 2017 Act allows LHAs to issue notices bringing their duties to an end when applicants deliberately or unreasonably refuse to cooperate, in order to encourage applicants to work proactively with the LHA. While the 2017 Act contains safeguards to prevent LHAs from ending the prevention or relief duties too soon (such as the requirement for a warning to be given by the LHA before any notice is issued), these Regulations contain additional safeguards to ensure that LHAs develop written procedures for issuing notices which are kept under review, and to guarantee that a notice is authorised by a second officer before it is served to an applicant.
INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Draft Companies (Disclosure of Address) (Amendment) Regulations 2018
Draft Data Protection (Charges and Information) Regulations 2018
Draft Domestic Renewable Heat Incentive Scheme (Amendment) Regulations 2018
Draft European Union (Definition of Treaties) (Work in Fishing Convention) Order 2018
Draft First-tier Tribunal and Upper Tribunal (Composition of Tribunal) (Amendment) Order 2018
Draft Mandatory Use of Closed Circuit Television in Slaughterhouses (England) Regulations 2018

Instruments subject to annulment

SI 2018/194 Employment Rights (Increase of Limits) Order 2018
SI 2018/198 Prosecution of Offences Act 1985 (Specified Proceedings) (Amendment) Order 2018
SI 2018/199 Human Medicines (Amendment) Regulations 2018
SI 2018/200 Export Control (North Korea Sanctions) Order 2018
SI 2018/201 National Health Service (Charges for Drugs and Appliances) (Amendment) Regulations 2018
SI 2018/204 Financial Services and Markets Act 2000 (Benchmarks) (Amendment) Regulations 2018
SI 2018/205 Independent Educational Provision in England (Inspection Fees) and Independent School Standards (Amendment) Regulations 2018
SI 2018/209 Housing (Management Orders and Financial Penalties) (Amounts Recovered) (England) Regulations 2018
SI 2018/210 Criminal Justice Act (Alcohol Abstinence and Monitoring Requirement) (Prescription of Arrangement for Monitoring) Order 2018
SI 2018/212 Electronic Monitoring (Responsible Persons) Order 2018
SI 2018/213 Non-Domestic Rating (Designated Areas) Regulations 2018
SI 2018/219 Communications (Television Licensing) (Amendment) Regulations 2018
SI 2018/223 Homelessness (Review Procedure etc.) Regulations 2018
SI 2018/228 Social Security and Child Support (Regulation and Inspection of Social Care (Wales) Act 2016) (Consequential Provision) Regulations 2018
APPENDIX 1: MERCHANT SHIPPING (PREVENTION OF POLLUTION FROM NOXIOUS LIQUID SUBSTANCES IN BULK) REGULATIONS 2018 (SI 2018/68); MERCHANT SHIPPING (INTERNATIONAL LOAD LINE CONVENTION) (AMENDMENT) REGULATIONS 2018 (SI 2018/155)

Letter from Lord Trefgarne, Chairman of the Secondary Legislation Scrutiny Committee, to Ms Nusrat Ghani, MP, Parliamentary Under Secretary of State for Transport

Implementation backlog for international maritime conventions

I am writing as Chairman of the Secondary Legislation Scrutiny Committee which this week considered the Merchant Shipping (Prevention of Pollution from Noxious Liquid Substances in Bulk) Regulations 2018 and the Merchant Shipping (International Load Line Convention) (Amendment) Regulations 2018, and reported them to the House on the ground of policy interest.

Both sets of Regulations implement part of a considerable backlog of international maritime conventions. Although we have been assured that the deficiencies in relation to these particular Regulations are comparatively minor, the Committee would be grateful if you could give an indication of the following:

- the overall extent of the backlog and how many gaps are left in the UK’s power to enforce maritime legislation; and
- how long your department expects to take to bring UK legislation into conformity with all outstanding international obligations

We note that for future changes these Regulations enable use of the ambulatory reference mechanism (under section I 06 of the Deregulation Act 2015). The Committee notes that this is the first use of this mechanism and would welcome an explanation why there has been such a long delay in using this mechanism to remedy deficiencies that your department was aware of in 2014.

The Committee would be grateful to receive your response to these concerns by Monday 5 March.

27 February 2018

Letter from Ms Nusrat Ghani, MP, to Lord Trefgarne

Implementation backlog for international maritime conventions

Thank you for your letter of 27 February.

I share your desire to see the situation regularised and the backlog tackled. Generally, I am reassured that the backlog does not have any material impact on ship safety—this is a stable, mature sector with a strong international network of complementary intergovernmental and state regulators. But you raise three specific points: the extent and impact of the backlog; the timetable for remediating the situation; and the delay in making use of the ambulatory reference mechanism.

Extent and impact of the backlog

The global nature of the maritime sector results in a complex and extensive set of international obligations emanating predominantly from the International
Maritime Organization (IMO) and the International Labour Organization (ILO). There is also an extensive programme of EU legislation on maritime matters which the UK has been required to transpose, although many of these duplicate, at least in part, the content of international Conventions, e.g., the Port State Control and Port Waste Reception Facilities Directives. Given the long history of maritime regulation, many regulatory changes are incremental.

To understand the extent of the UK’s compliance with maritime international convention amendments, my department commissioned ChartCo Training & Consultancy to undertake a gap analysis to compare IMO conventions amendments with that of UK domestic legislation and identify where UK legislation is out of step with international obligations. This extensive package of work, which concluded in May 2017, identified that of 10 International conventions considered, a total of 381 amendments had been introduced with 43% of those not yet introduced into UK law.

Whilst this seems a significant number, the impact is far more limited in practice. Many amendments to international instruments are simply clarifications, explanations, improvements to outdated drafting and incremental improvements to reflect technological advances. A significant number apply only to “new build” ships, and those which are retrospective are only ones which can be accommodated in the design of existing ships.

The international nature of shipping means that, even if a change is more significant in nature, it is generally adhered to by ship builders as ships are not constructed or equipped so they can be registered on only one flag – this would limit the market for builders – and port State Control inspections which international ships undergo when visiting foreign ports ensure that standards are consistently applied across the globe, even if some nations have not fully kept pace in their domestic law with the latest amendments. But despite the incremental nature of many of the amendments, they are important steps and have the cumulative effect of improving safety over a period of time. This does not mean that delay in implementation is desirable or acceptable, but it does mitigate the risk.

**The timetable for remedying the backlog**

Whilst we are seeking to reduce the backlog as quickly as practical, we are also mindful of the hard deadline of the International Maritime Organization (IMO) flag State administration audit, which is expected to take place in 2020 at the latest. The IMO has put in place a programme of audits of flag States who are IMO members, including the UK. This is known as the “IMO Instruments Implementation Code” audit or “Triple I” audit. Therefore, the conventions which are part of the “Triple I” programme have been prioritised.

The main international conventions which form part of the “Triple I” regime are:

- a) the International Convention on Load lines 1966, as amended by its 1988 Protocol (1 SI);
- b) the International Convention on the Safety of Life at Sea 1974 (SOLAS) and its 1998 Protocol (potentially 12 Sis);
- c) the International Convention for the Prevention of Pollution from Ships 1973 (MARPOL) as modified by Protocols of 1978 and 1997 (6 Sis);
d) the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) (1 SI);

e) the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS) (1 SI); and,

f) the International Convention on Tonnage Measurement of Ships, 1969 (1 SI).

In order to implement the full backlog of outstanding amendments for all of these “Triple I” conventions, it is estimated that 22 SIs will be required (the number of SIs which are expected to be required for each Convention are indicated after the name of the Convention on the above list). Of these 22 SIs, two have been laid in Parliament, two are awaiting pre-consultation write-round (SOLAS chapter V, the Merchant Shipping (Safety of Navigation) Regulations, and MARPOL Annex I the Merchant Shipping (Prevention of Oil Pollution) Regulations), and a further five are in various stages of progress, leaving a further 13.

Our “Roadmap” for the immediate future is to implement the outstanding amendments to the following conventions into UK law, using cross-referencing of convention requirements and ambulatory reference to the fullest extent possible to enable future amendments to be implemented into UK law automatically:

SOLAS Chapter V (Safety of Navigation)

MARPOL Annex I (Prevention of Pollution by Oil)

SOLAS Chapter III (Life-Saving Appliances)

MARPOL Annex V (Prevention of Pollution from Garbage from Ships)

MARPOL Annex IV (Prevention of Pollution from Sewage from Ships)

SOLAS Chapter IV (Radio Installations)

SOLAS Chapter 11-2 (Construction: Fire Protection, Detection and Extinction)

SOLAS Chapter 11-1 (Construction: Structure, Subdivisions and Stability, Machinery and Electrical Installations)

The delay in making use of the ambulatory reference mechanism in 2014, through the Red Tape Challenge process, my Department took the opportunity to identify an alternative, more agile and responsive solution to delivering international obligations and therefore, in March 2015 introduced primary powers that would allow the use of ambulatory reference for subsequent technical changes to international conventions. Since then we have been working through a steady implementation process which is now coming to fruition.

The Department quickly identified a suitable ongoing project that could test limited initial use of ambulatory reference: the Convention on Limitation of Liability for Maritime Claims (LLMC). The use of ambulatory reference was limited to only future increases to liability limits agreed at the international level but provided the Department with valuable feedback on their approach to ambulatory reference, most notably that following the inclusion of an ambulatory reference provision in an SI, any subsequent changes to the international convention would be required to follow the principles of Better Regulation. This SI, the Merchant Shipping Act 1995 (Amendment) Order 2016, came into effect on 30 November 2016.
In October 2015, my Department’s Maritime and Coastguard Agency established a small team dedicated to developing a long term radical programme to restructure maritime legislation to provide a legislative framework that is responsive to change and reflects the latest requirements, whilst adhering to the principles of Better Regulation.

Throughout 2016 the team identified a roadmap of long term projects and commenced a further three pilot projects suitable to fully test ambulatory reference. They also worked with the Better Regulation Executive to develop a streamlined and robust process that all future changes implemented pursuant to ambulatory reference provisions would need to comply with.

Inevitably, the introduction of novel approaches to introducing statutory requirements rightly invites an additional level of interest and scrutiny and the maritime ambulatory reference programme has been no exception. My Department has been, and continues to be, challenged throughout the process of this programme, most recently to ensure that Parliamentary sight is still maintained for future changes, which has prompted my Department, working with the Cabinet Office, to agree the introduction of a Ministerial Statement to announce agreement to amendments to international conventions ahead of their ‘in force’ date and implementation into domestic law by way of ambulatory reference.

Traditional transposition of conventions into UK law takes a long time and is very resource intensive, involving many public servants in government and Parliament. Ambulatory references have the potential to make the process much more efficient for future amendments, ensuring the UK does not fall behind in its international obligations to keep domestic legislation in step with the international requirements, and provide industry with “one version of the truth” which is available immediately, instead of having to wait for two years or more for domestic legislation to be produced and to undergo the normal stages to pass into law.

It has been necessary to adapt existing processes to ensure that any international amendments which may pass into UK law as a result of an ambulatory reference provision are appropriately scrutinised with industry and unions, sufficiently notified to Parliament, published to the public, and that a mechanism is present to ensure that in the unlikely event that any amendment agreed internationally is deemed undesirable for UK, it can be prevented from coming into UK law.

The pilot projects are intended to pave the way for ambulatory reference to be rolled out across the full scope of international conventions. During the lifetime of the MCA’s Ambulatory Reference Team, several other ambulatory reference Sis have been started, but these are not at such an advanced stage as the three pilot projects. Additionally, the Regulations implementing the latest amendments to MARPOL Annex II, the Merchant Shipping (Prevention of Pollution from Noxious Liquid Substances in Bulk) Regulations 2018, which were originally progressing as a traditional transposition SI, have had an element of ambulatory reference introduced into them, and were laid in Parliament on 15 February 2018, at the same as the Merchant Shipping (International Load Line Convention) (Amendment) Regulations 2018.

1 March 2018
APPENDIX 2: INTERESTS AND ATTENDANCE

Committee Members’ registered interests may be examined in the online Register of Lords’ Interests at http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 6 March 2018, Members declared the following interests:

**Education (Student Support) (Amendment) Regulations 2018 (SI 2018/136)**

Baroness Watkins of Tavistock
- Nurse Adviser, BUPA Medical Advisory Panel and Global Quality Committee
- Registered Nurse (non-practising)
- Visiting Professor of Nursing, King’s College London

**Financial Services and Markets Act 2000 (Benchmarks) (Amendment) Regulations 2018 (SI 2018/204)**

Lord Janvrin
- Senior Adviser, HSBC Private Bank (UK) Ltd

**Criminal Legal Aid (Remuneration)(Amendment) Regulations 2018 (SI 2018/220)**

Lord Trefgarne
- Close relative a barrister at the Criminal Bar

Baroness Blackstone
- Chair of the Bar Standards Board

**Attendance:**

The meeting was attended by Baroness Blackstone, Lord Faulkner of Worcester, Lord Goddard of Stockport, Lord Haskel, Lord Janvrin, Lord Kirkwood of Kirkhope, Baroness O’Loan, Lord Sherbourne of Didsbury, Lord Trefgarne, and Baroness Watkins of Tavistock.