

HOUSE OF LORDS

Merits of Statutory Instruments Committee

3rd Report of Session 2006-07

Drawing special attention to:

**Draft Accession (Immigration and Worker
Authorisation) Regulations 2006**

**Equality Act (Sexual Orientation)
(Northern Ireland) Regulations 2006**

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Home Office

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The Select Committee on the Merits of Statutory Instruments

The Committee has the following terms of reference:

- (1) The Committee shall, subject to the exceptions in paragraph (2), consider—
 - (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
 - (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (3).
- (2) The exceptions are—
 - (a) Orders in Council, and draft Orders in Council, under paragraph 1 of the Schedule to the Northern Ireland Act 2000;
 - (b) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
 - (c) draft orders (including draft subordinate provisions orders) under section 1 of the Regulatory Reform Act 2001, subordinate provisions orders under that Act and proposals in the form of a draft order under that Act;
 - (d) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.
- (3) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—
 - (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
 - (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
 - (c) that it may inappropriately implement European Union legislation;
 - (d) that it may imperfectly achieve its policy objectives.
- (4) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (3) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Current Membership

The Members of the Committee are:

Lord Armstrong of Ilminster	Lord Filkin (<i>Chairman</i>)	Baroness Morgan of Drefelin
Viscount Colville of Culross	Lord James of Blackheath	Baroness Thomas of Winchester
Baroness Deech	Lord Jopling	Lord Tunnicliffe
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Contacts

If you have any queries about the Committee and its work, please contact the Clerk of the Merits of Statutory Instruments Committee, Delegated Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; facsimile 020-7219 2571; email merits@parliament.uk. The Committee's website, www.parliament.uk, has guidance for the public on how to contact the Committee if you have a concern or opinion about any new item of secondary legislation.

Third Report

INSTRUMENTS REPORTED

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

A. Draft Accession (Immigration and Worker Authorisation) Regulations 2006

Summary: These Regulations will make it an offence during a five-year transitional period to employ a Bulgarian or Romanian, or for nationals of those countries to work in the UK, without specified documentation. We regret that this instrument was debated in the House before we were able to consider it: the additional information which we have obtained from the Home Office, about the security of the documentation, would have informed the debate. Although a snapshot, the material illustrates the commendable efforts which the Home Office have undertaken to make the documentation secure and to inform employers of the new requirements. The information is printed at Appendix 1 to the Report.

These Regulations are drawn 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 Home Office (HO) laid these Regulations on 21 November under section 2 of the European Union (Accessions) Act 2006 together with an Explanatory Memorandum (EM). They were debated in and approved by the House of Lords on 4 December.
2. The Regulations make transitional provision to take account of the free movement rights that Bulgarian and Romanian nationals will acquire on 1 January 2007 when their countries accede to the European Union. They also set up a worker authorisation scheme restricting access to the United Kingdom labour market by Bulgarian and Romanian nationals during a five-year transitional period (from 1 January 2007 to 31 December 2011). The Regulations will make it an offence to employ a Bulgarian or Romanian, or for nationals of those countries to work in the UK, without the documentation specified in the regulations.
3. We regret that this instrument was scheduled in the House before we were able to consider it because we consider that the additional information from the Home Office, about the security of the documentation (which we publish at Appendix 1), would have informed that debate. Although a snapshot, this material illustrates the commendable efforts which the Home Office have undertaken to make the documentation secure and to inform employers of the new requirements. We shall monitor this issue of timetabling and may need to return to the Procedure Committee to invite them to consider a scrutiny reserve.

B. Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (SR 2006/439)

Summary: These Regulations are intended to prohibit discrimination on the grounds of sexual orientation. Concerns have been expressed by a large number of consultation respondents; the Government believe that these have been met by a religious exemption.

These Regulations are drawn 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.

4. The Office of the First Minister and Deputy First Minister of Northern Ireland have made these Regulations under section 82(1), (3), (4) and (5) of the Equality Act 2006. An Explanatory Memorandum (EM) has also been provided. The Regulations prohibit discrimination on the grounds of sexual orientation in the provision of goods, facilities, services, education, functions of public authorities and the disposal of property.
5. The EM states that the Regulations will: protect people from direct discrimination, where a person treats another person less favourably because of his sexual orientation; prohibit indirect discrimination, where the discrimination is often an unintended consequence of the action, and harassment on the ground of sexual orientation; and also prohibit victimisation, to ensure that no-one feels that they cannot bring a claim under the Regulations.
6. The EM explains that the main areas where the Regulations will impact include: the provision of education, where the Government believe that no child should be denied a place at a school because of sexual orientation; and the area of religion, where the Government have acknowledged a difficulty with doctrinal teaching and practice and provided an exemption within the Regulations for such bodies. The Regulations will also impact on hotel and bed and breakfast owners, who will not be able to deny a same-sex couple accommodation on the basis of their sexual orientation. The Government have also extended the Regulations to cover private members clubs.
7. The Department undertook an eight-week consultation from July to September 2006. The EM states that there were 375 responses, and that a significant majority of the responses addressed only the questions concerning exemptions for religion and religious organisations. It comments that “there was, therefore, no significant opposition from the consultees to the basic premise behind the Regulations, which is to ensure equality of treatment for all sections of society”; and that “the Government believes that [the] concerns [regarding exemptions for religion] have been addressed by the wording of the exemption at regulation 16.”
8. The Department have published a detailed analysis of consultation responses, and a statement of the Government’s conclusions, on their website.¹ This makes it clear that the main issues raised covered the use of premises, the education sector, and the religious exemption; and that respondents voicing concerns were both religious organisations and private individuals.

¹ See: <http://www.ofmdfmi.gov.uk/analysisoftheresponsestogettingequal.pdf>

9. The analysis bears out the statement in the EM that the largest number of consultation responses related to the issue of the religious exemption: there were nearly 290 responses to the two consultation questions bearing on this issue. It identifies six main aspects to the concerns expressed: conference centres; care homes; Christian businesses; membership of religious organisations; disposal and use of religious premises; and Bible and theological colleges.
10. In the analysis document, the Department acknowledge that “a great many people, as evidenced by the response rate, have genuine concerns around these Regulations as they apply to certain areas.” However, the Department stress that “there does appear ... from the analysis of the consultation responses to be some misunderstanding about what the Government intends the Regulations to achieve. Many respondents spoke of being forced to accept practices that they were opposed to, or to accept membership in their organisation of people who did not agree with them. The Government would contend that exemption as applied to religious organisations does provide the protection they seek in these areas of concern.” The Committee has itself received a number of representations from concerned groups, which indicate that the Government’s contention has not been accepted by all interested parties.
11. We believe that the House will be interested in the proposals in these Regulations aimed at prohibiting discrimination on the grounds of sexual orientation, and in the manner in which the Department have sought to allay the concerns which have been expressed by consultation respondents.

OVERVIEW OF ACTIVITY THIS WEEK

12. The **Employment Equality (Age) (Amendment No.2) Regulations 2006 (SI 2006/2931)** preserve many age-based rules in existing pension schemes, the removal of which, otherwise required under anti-age-discrimination legislation, could significantly reduce the benefits paid to employees. The objective is to provide clarity for employers who run schemes as to which age-based rules are permitted, so that they do not run a continued risk of tribunal cases from individuals contesting each scheme’s interpretation of the law. Although this runs counter to the general intention of the Equal Treatment Directive to remove all discrimination, the Directive allows for age-based provisions of occupational pensions to remain lawful if they are justified by a legitimate aim: these Regulations clarify what that means. Further information is provided at Appendix 2.
13. The **Medicines for Human Use (Clinical Trials) Amendment (No.2) Regulations 2006 (SI 2006/2984)** provide an exception to the general rule that incapacitated adults can only participate in trials after the consent of their legal representative has been obtained. The exception will only apply to trials of emergency medicines, e.g. first-line treatment of cardiac arrest or car-crash victims. The exemption is limited to clinical trials that have been approved by an ethics committee, and does not extend to further treatment after the initial crisis is past. This is a sensitive subject and we commend the consultation exercise as described in the Regulatory Impact Assessment.
14. The **Radioactive Substances (Emergency Exemption) (England and Wales) Order 2006 (SI 2006/3169)** was laid by DEFRA on 29 November

and brought into force the following day. The Order exempts radioactive waste relating to the death of Alexander Litvinenko from the normal and potentially lengthy authorisation processes under the Radioactive Substances Act 1993. In view of the unusual circumstances surrounding Mr Litvinenko's death, and the level of public interest in it, we were pleased to note the assurance given by DEFRA that the exemption will not prejudice the orderly and appropriate disposal of the radioactive waste, which will be undertaken with the agreement of the Environment Agency.

15. The House may also wish to note the draft **Films (Definition of "British Film") (No 2) Order** which is scheduled for debate on 7 December. Designed to encourage the making of films by means of tax relief, it amends a similar instrument laid earlier this year, SI 2006/643. The changes were necessary after the European Commission expressed concerns that the points system proposed was weighted too heavily towards economic aspects, which might act as a barrier to trade. The reformed scheme proposed here places greater emphasis on the Britishness of the film's content and the contribution the film makes to British culture. The revised scheme needs to be in effect before relevant elements of Chapter 3 of Part 3 of the Finance Act 2006 take effect on 1 January 2007.

CORRESPONDENCE

16. At Appendix 3, we print further correspondence between the Committee and the Home Office about explanatory memoranda and the management of secondary legislation.

INSTRUMENTS NOT REPORTED

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 requiring affirmative approval

Employment Act 2002 (Amendment of Schedules 3, 4 and 5)
Order 2006
Films (Definition of "British Film") (No. 2) Order 2006
Petroleum Act 1998 (Third Party Access) Order 2007
Science and Technology Facilities Council Order 2007
Technology Strategy Board Order 2007

Instruments subject to annulment

SI 2006/2931 Employment Equality (Age) (Amendment No. 2) Regulations 2006
SI 2006/2951 Transfer of Functions (Third Sector, Communities and Equality) Order 2006
SI 2006/2967 Housing Benefit and Council Tax Benefit (Amendment) (No. 2) Regulations 2006
SI 2006/2968 Housing Benefit and Council Tax Benefit (Electronic Communication) Order 2006

- SI 2006/2984 Medicines for Human Use (Clinical Trials) Amendment (No. 2) Regulations 2006
- SI 2006/2991 Office for Standards in Education, Children's Services and Skills (Transitional Provisions) Regulations 2006
- SI 2006/3039 Trade Marks (Amendment) Rules 2006
- SI 2006/3045 Employment Rights (Increase of Limits) Order 2006
- SI 2006/3086 Occupational Pensions (Revaluation) Order 2006
- SI 2006/3087 National Health Service (Clinical Negligence Scheme) Amendment (No. 2) Regulations 2006
- SI 2006/3088 Social Security (Incapacity Benefit Work-focused Interviews) Amendment (No. 2) Regulations 2006
- SI 2006/3094 Consumer Credit (Enforcement, Default and Termination Notices) (Amendment) Regulations 2006 (PB)
- SI 2006/3095 Enterprise Act 2002 (Enforcement Undertakings) (No. 2) Order 2006
- SI 2006/3096 Local Authorities (Categorisation) (England) Order 2006
- SI 2006/3102 Local Government (Best Value Authorities) (Power to Trade) (Amendment) (England) Order 2006
- SI 2006/3104 Single European Sky (Functions of the National Supervisory Authority) Regulations 2006
- SI 2006/3107 Banks (Former Authorised Institutions) (Insolvency) Order 2006
- SI 2006/3169 Radioactive Substances (Emergency Exemption) (England and Wales) Order 2006

Instrument subject to annulment (Northern Ireland)

- SR 2006/469 Justice (Northern Ireland) Act 2002 (Addition of Listed Judicial Offices etc.) Order 2006

APPENDIX 1: EXPLANATORY INFORMATION

Draft Accession (Immigration and Worker Authorisation) Regulations 2006

The Registration Certificates and Worker Authorisation Cards issued to Bulgarians and Romanians will have a personalised vignette which incorporates individual information on the holder, and their employment entitlements. In its construction are incorporated over 20 security features which include the composition of the paper, the inks used, holograms and printing features which make accurate reproduction extremely difficult. Many features are already used in the vignettes given to other applicants under the Immigration Rules and have proved to be robust. In any case the vignettes are produced in relatively short print runs so that if a feature is “attacked” i.e. that forgers learn to replicate it, it can be changed at short notice.

Because the design is based on the one already used for EEA nationals exercising full Treaty Rights, employers will have a good degree of familiarity with it, and there has been a positive reaction to the general move away from ink-stamps to more secure and personalised documents. A mailing is being sent to half a million employers in the sectors in which illegal workers are frequently encountered, alerting them to their responsibilities and the penalties for failing to abide by them. In addition, the employers’ website <http://www.employingmigrantworkers.org.uk/index.html> which provides general advice regarding the employment of migrant workers will, from January, give illustrations of what a legitimate permit looks like.

The Home Office is also enhancing its current helpline to support employers. From 1 January it will become an eligibility and verification service, through which employers will be able to check the work status of individuals if required, as well as providing the more general advice that is currently offered. For the first quarter of the year this service will be offered to employers enquiring about Bulgarian and Romanian workers only, but around April 2007 it is planned to expand the service to include workers from other countries.

The limited number of Bulgarian and Romanians who will be allowed to work in the UK under the arrangements of the Seasonal Agricultural Workers Scheme, will also receive secure documents. These are the standard work permit documents already used for the scheme, and which contain similar security features such as watermarked paper, printing features and embossing, as well as being personalised for the individual worker. As these documents are only issued to the nine approved contractors who operate the scheme, they are already wholly familiar with their format.

APPENDIX 2: EXPLANATORY INFORMATION (SI 2006/2931)

Employment Equality (Age) (Amendment No2) Regulations 2006 (SI 2006/ 2931)

The Age Regulations

The Age Regulations in Great Britain implement the age strand of Directive 2000/78 EC establishing a framework for equal treatment in employment and vocational training. This requirement makes it unlawful for pension schemes to discriminate against member or prospective members of a pension scheme. However, the Government recognises that many age related rules and practices are necessary for the proper operation of schemes. The Regulations, therefore, effectively exempt the most common age related pension schemes and practices. For those rules not specifically exempted, employers must consider whether they can justify their ongoing use.

The Directive allows direct or indirect discrimination if it is 'objectively justified' i.e. if it pursues a 'legitimate aim' and is a 'proportionate' means of achieving that aim. Legitimate aims might include business needs, efficiency, reducing staff turnover or providing promotion opportunities to retain good people. To be 'proportionate', there must be a balance between the discriminatory effect of a measure and the importance of the aim being pursued.

The Regulations were introduced (April 2006 with an implementation date of 1 October 2006) against a background of frantic activity in the pensions' sector to comply with sweeping changes introduced by the Finance Act 2004

Despite previous consultation – particularly with the pensions industry – and prompt publication of pension's guidance, both DTI and DWP received a range of comments in relation to the impact of the age regulations on occupational pension schemes as the 1 October date approached.

Employees and trustees were calling for a 'blanket' exemption for pension provision, rather than specific exemptions. The Directive does not allow for a blanket exemption for all age-related aspects of occupational pensions and, the UK Government cannot objectively justify all of the age related practices within pension schemes operating at present, as they are direct discrimination on the basis of age. As the UK cannot demonstrate that these practices have a proportionate means of achieving a legitimate aim, the Government cannot give a blanket exemption for all rules with regard to age in pension schemes

Without a 'blanket' exemption, the pensions industry, therefore, wanted further specific exemptions to make clear that other common practices are legal and to remove the risk that they will have to defend their practices in court. With so many different arrangements in existence, it was not possible, even with amendments, to cover all of them and keep the regulations manageable and understandable. There will be occasions where employees, trustees and/or scheme administrators will have to exercise the option of seeking to objectively justify them by reference to their particular circumstances. But they will need to demonstrate that it is a proportionate means of achieving a legitimate aim.

Through correspondence and meetings with the pensions industry it is clear that, if the Government did not clarify and include further limited exemptions there is a danger that employers would decide that the legal and financial risks of continuing certain practices were too great. Therefore, they would level down or close their schemes to new member post October 2006 in order to prevent any future legal challenge and to comply with the Regulations as they were presently drafted. This could lead to a reduction in overall pension provision.

It was agreed that the Age Regulations should be delayed until 2 December 2006, to give industry more time to ensure their rules were compliant with Schedule 2 and time to discuss and respond to an informal consultation about the proposed amendments. The delaying Age Regulations were laid before Parliament on 8 September 2006, to come into force on 29 September 2006 (The Employment Equality (Age) (Amendment) Regulations 2006 (SI 2006/2408)).

In the light of consultation since the delaying regulations came into force, DWP have worked closely with key stakeholders to formulate amending regulations. These further amendments have been laid (Employment Equality (Age) (Amendment No 2) Regulations 2006 (SI 2006/2931)) and it is the Government (rather than schemes) which bear the risk of any legal challenge and to justify the exemptions objectively.

The exemptions

The Regulations include exemptions for a wide range of age-related rules and practices that commonly exist in pension schemes. The Government consider these to be objectively justified at a national level. If a practice is covered by an exemption, then there is no need for the practice to be objectively justified by the employer/trustee or manager of the pension scheme.

The changes that were made are:

Regulation 3 – Amendment of regulation 11

Regulation 11 makes it unlawful for trustees and managers of an occupational pension scheme to discriminate against a member or a prospective member of a scheme, or to harass such a member. This regulation amends Regulation 11 to include employers as they, too, have responsibilities to their members with regards to the running their occupational pension schemes.

Regulation 4 – Interpretation of Schedule 2

This amends the interpretation provisions in Schedule 2, in particular the definitions of:

- ‘early retirement pivot age’ - to clarify that it is the age specified in scheme rules, practices, actions and decisions at which a benefit is paid without requiring the consent of an employer, trustee or manager, which relates to a particular period of service and is paid without an actuarial reduction. Within this definition it also clarifies that, in the case of ill-health this is disregarded when determining the early retirement pivot age; and
- ‘block transfer’ – added for the purpose of the new definition of ‘section’ (see regulation 23). Such a transfer can consist of all accrued rights.

Regulation 5 – Length of service exemption for trustees, managers or employers

The basic aim of this exemption is to enable trustees to continue to award benefits to employees using the criteria of length of service. At present there is an exemption for employers to continue this practice but not trustees who administer the scheme.

The new paragraph 3A applies where there is a difference in treatment between two members which results from differences in their length of service. The difference in treatment must relate to the admission to a scheme, accrual of benefits and eligibility for any benefits under a scheme.

The difference must be justified where the member who is discriminated against has more than five years service. The justification must be provided by the employer in relation to

the scheme. The employer must ensure that it is reasonably appears to him that it fulfils a business need of his undertaking.

Where the difference in treatment results from the application by the trustees or managers of a scheme rule, they must ask the employer to provide them with the justification for the difference in treatment. The employer must still ensure that he is satisfied that the difference in treatment reasonably appears to him to fulfil a business need of his undertaking.

Regulation 6 – Unlawfulness of rules, practices, actions or decisions relating to Part 2 and 3

This confirms that the existence of an exemption in Schedule 2 does not necessarily mean that, but for the exemption, the rule, action or decision is unlawful.

Regulation 7 – Lower earnings limit and offsets for state retirement pension

These amendments are intended to reflect different scheme practices when making pension provision. For example, when calculating pensionable pay, some schemes deduct from remuneration the full amount of lower earnings limit, while others deduct one and half times the lower earnings limit.

Regulation 8 – Amendments of paragraphs 8 and 9

This amends paragraph 8 to provide further clarification of the use of age criteria in making actuarial calculations in relation to a scheme, and in paragraph 9 to set different rates of contributions for different members, if that difference is due to the level of pensionable pay of those members.

Regulation 9 – Money purchase arrangements

This amendment exempts different age related rates of contributions to schemes provided that the aim is to make benefits equal or more nearly equal. The new wording intends to permit the comparison of the service over the full period to retirement (e.g. comparing the benefits between age 31 and normal retirement age, between age 32 and normal retirement age etc, where the aim is to ensure a more or nearly equal outcome of benefit is achieved for all members other than if the employer had paid the same flat level of contributions throughout the ‘life’ of the scheme).

Regulation 10 – Limits on contributions to a defined benefits arrangements

This amendment exempts setting the rate of employer or members contributions according to a members age, if the aim in setting different rates of contributions is to meet the cost of the benefits defined by the scheme. The additional wording also intends to permit a limitation on employer or members contributions by reference to a maximum level of pensionable pay.

Regulation 11- Early retirement

This replaces paragraph 12 and 13 of Schedule 2.

New paragraph 12 allows schemes to set a minimum age from when an age related benefit is paid. The minimum age must be before the early retirement pivot age which applies to the age related benefit. The age related benefit must be reduced for early payment and must not be enhanced. This amendment clarifies that:

- It applies to both money purchase and defined benefit schemes.

- The minimum age can be subject to the consent of the employer, trustee or manager.
- This does not apply where a member retires on the grounds of ill health.

New paragraph 13 allows a scheme to stipulate a minimum age (before the early retirement pivot age) for existing or prospective members to become entitled to any age related benefit without making an actuarial reduction for early receipt and also allows schemes to credit existing members and prospective members with additional periods of pensionable service.

Regulation 12 – Different early and late retirement pivot ages

This adds a new provision to paragraph 14. It provides that, there can be a different early and late retirement ages for deferred members. This policy intention is to ensure that, in the case of deferred members, they can be treated differently when comparing them with active members.

Regulation 13 – Ill health benefits and death benefits

This replaces paragraph 15 and adds a new paragraph 15A to Schedule 2 to the Age Regulations.

New paragraph 15 allows schemes to set a minimum age from when an age related benefit is paid where retirement is on the grounds of ill health. Paragraph 15 also allows employers to enhance any age related benefit by granting additional years of pensionable service, by not making an actuarial reduction or making an actuarial reduction which is smaller than if retirement had not been on the grounds of ill health.

New paragraph 15A allows schemes to calculate any death benefits by reference to prospective service the member could be treated as having completed if he had not died. New paragraph 15A also exempts payment of benefits to dependants where they are paid when the member dies while in receipt of a pension guaranteed for a particular period.

Regulation 14 – Bridging pensions and state scheme integration

This replaces paragraph 16 and extends the exemption for payment of bridging pensions. A bridging pension is an additional amount of pension which may be paid by a scheme to a retired man or woman to compensate the fact that they do not qualify for the State Pension at the time of their retirement. The exemption means that pensioners can not bring age discrimination claims complaining that they are not longer in receipt of the bridging pension once their entitlement to State pension becomes payable. The amended paragraph 16 now covers both men and women.

Regulation 15 – Reduction of pensions payable to younger dependants

This amends paragraph 17 of Schedule 2 to the Age Regulations to clarify that when a pension is paid to a dependant of a deceased member and it is reduced to reflect that the dependant more than ten years younger than the member, that reduction must be an actuarial reduction.

Regulation 16 – Life cover

This amends paragraph 18 (stopping life assurance cover to ill health retirees at their normal retirement age) to clarify that paragraph 18 only applies to early retirement on the grounds of ill health.

Regulation 17 – Amendment of paragraph 19

This amends paragraph 19 to widen this exemption, so that it does not relate to defined benefit schemes only, but to all schemes, where there is provision for survivors benefit.

Regulation 18 – Targeted and capped accrual

New paragraph 19A allows different accrual rates for active or prospective members in comparable situations where the aim is that they will, on retirement, get the same fraction of pensionable pay as a pension. This is regardless of whether the members actually continue in pensionable service until retirement. It also allows schemes to cap the level of benefits by reference to a fraction of pensionable pay.

Regulation 19 – Limits on Benefits

This adds a new exemption to paragraph 21 for limits on benefits which arise from a fraction of pensionable pay.

Regulation 20 – Minimum periods of pensionable pay

This clarifies paragraph 22 where a rule which stipulates that pension benefits are only provided to members who have completed more than a minimum period of pensionable pay.

Regulation 21 – Levels of pensionable pay

This clarifies paragraph 24, where schemes impose an upper limit on the level of pensionable pay used to calculate benefits.

Regulation 22 – Closure of schemes

This clarifies that the closure of a scheme is permissible to workers who are not already members or entitled to become members from a particular date.

Regulation 23 – Sections of Schemes

This regulation inserts a definition of the term section of a scheme. In summary, a section can consist of groups of members who are defined by reference to the date they joined a scheme or became eligible to join. This will include those who transferred into a scheme as a result of a transfer. Such groups of members may only be treated as a section provided that the section does not admit new members (closed section), but existing members will be able to continue to accrue benefits.

Regulation 24

This makes some minor drafting amendments to clarify paragraphs 27 and 28 of Schedule 2 which exempt different rates of benefits paid to pensioners and different rates according to length of service.

Regulation 25 – Finance Act 2004

This makes some minor drafting amendments to clarify paragraph 30 which exempts anything done to secure any tax relief under the Finance Act 2004 or to avoid a tax charge under that Act.

Regulation 26 - Personal Pension Schemes

This amendment clarifies that both paragraphs 31 and 32 applies to personal pensions only where the aim is to allow age related contributions.

Regulation 27 – Personal Pension Schemes

This amends the wording in paragraph 31 to clarify that this exemption allows age related contributions where the aim is to yield more equal emerging benefits than would follow from equal contributions at all ages.

Regulation 28 – Personal Pension Schemes

This adds some new exemptions to Part 3 of Schedule 2 to the Age Regulations which makes exemptions for personal pension schemes.

New paragraph 33 allows employers to limit contributions to personal pension schemes by reference to a maximum level of remuneration.

New paragraphs 34 and 35 allow employers to set a minimum age for commencement of payment of contributions to personal pension schemes and to set different minimum ages for different groups or categories of workers.

New paragraph 36 allows employers to make equal contributions in respect of workers to personal pension schemes.

Department for Work and Pensions

1 December 2006

APPENDIX 3: CORRESPONDENCE WITH THE HOME OFFICE ABOUT EXPLANATORY MEMORANDA AND THE MANAGEMENT OF SECONDARY LEGISLATION

Explanatory memoranda to statutory instruments: Local Probation Boards (Appointment and Miscellaneous Provisions) (Amendment) Regulations 2006 (SI 2006/2664)

Letter from the Acting Chairman (Lord Armstrong of Ilminster GCB CVO) to Tony McNulty Esq MP, Minister of State, Home Office

I am writing on behalf of the Merits Committee, whose meeting I chaired this week. You may be aware that the Committee has, over the last year, had concerns about the Home Office's conduct in relation to secondary legislation, particularly with regard to the explanatory memorandum (EM) laid with each instrument. Our Chairman, Lord Filkin, corresponded with Andy Burnham MP, then Parliamentary Under Secretary, on this subject in October 2005 and January 2006. In the hope that the Home Office might soon work better with Parliament in this area, we welcome Sir David Normington's recent appointment of David Seymour as Head of a new Legislation Management Group: he has already opened a constructive and sympathetic dialogue with the Committee's officials.

The Committee has however asked me to write to you about the Local Probation Boards (Appointment and Miscellaneous Provisions) (Amendment) Regulations 2006 (SI 2006/2664). The EM laid with this instrument fell well below the standard expected by the Committee and they have asked me to make this point directly to you as the Minister responsible for parliamentary business. The EM but superficially explained the purpose of the regulations, without setting their policy in context (for example by explaining to the uninitiated the purpose of Local Probation Boards). Nor did it make any mention of consultation, a significant defect in our eyes. We consider that consultation always improves the quality of the legislation laid before Parliament; and the absence of a statutory requirement to consult is no reason to suggest that consultation should not be considered or would not add value to the process. Even when an instrument deals with a small number of stakeholders we expect to see some information on whether and, if so, how they have been consulted.

Most seriously, the EM stated that Local Probation Boards now need "a different set of skills and competencies, focusing on business acumen – and in particular HR, finance, diversity and competition" and that "while many magistrates possess these skills, there is substantial evidence [my emphasis] that many magistrate members of probation boards do not. The same applies to local authority members." (paragraph 7.1). When the Committee's officials asked to see this evidence, the assertion was withdrawn as having been made in error (page 5 of the attached letter). I hope you will agree that it is not appropriate to make such an unfounded assertion to Parliament. Each of these deficiencies has been addressed by a letter from your officials, which we will publish for the information of the House, but I trust you would agree that the EM should not have been so drafted in the first instance.

We understand from the supplementary information provided by your officials that it is your intention to legislate to abolish Local Probation Boards as soon as parliamentary time permits. These Boards are a comparatively recent innovation, having been established by the Criminal Justice and Court Services Act 2000. We question the wisdom both of the policy and use of parliamentary time in making these regulations, if the Boards are soon to be subject to much greater revision: an issue the Government may wish to address in the debate scheduled in the House of Lords on 3 November.

Mr Burnham's letter to the Chairman of 20 January assured the Committee that Heads of Unit would exercise quality control over SIs and EMs: this example suggests that there is some way for the Home Office to go in improving its practice. We recognise that many policy officials only rarely have to lay secondary legislation before Parliament and it is to this end that we have produced Guidance for departments on best practice in the drafting of EMs and dealing with the scrutiny Committees. Any assistance you can give in ensuring that this is well disseminated would be appreciated.

24 October 2006

Letter from Tony McNulty MP, Minister of State, Home Office, to the Acting Chairman

Thank you for your letter of 25 October raising the Committee's concerns about the Local Probation Boards (Appointment and Miscellaneous Provisions) (Amendment Regulations 2006) (SI 2006/2664) and in particular about the standard of the Explanatory Memorandum laid with that instrument. I understand that David Normington will shortly be replying to your letter to him of 26 October and that he will address the more general issues raised about Home Office performance on legislation.

I need to offer you an apology for the deficiencies of the original memorandum as it did not reach the standard required. We have now revised the policy background which expands on the original, making our reasoning clearer and more transparent. I trust this fully meets the standards that the Committee require and expect. The original memorandum has now been withdrawn and has been replaced by a revised version addressing the concerns of the Committee and conforming to its best practice guidance.

In particular, I must also apologise for the error in paragraph 7.1 where it was wrongly asserted that "there was substantial evidence" that magistrate members of probation boards lacked a number of key skills and competencies especially around business acumen. I fully agree with you about the seriousness of making this inappropriate, unfounded assertion to Parliament and wish to reassure you that this was a genuine error and not designed to mislead or deceive.

Finally let me assure you that I am as committed as my predecessor, Andy Burnham, to further improving Home Office's practice in this area. I will make sure this happens by asking David Normington to include in his letter the additional steps we are taking to improve the way we handle our management of legislation.

10 November 2006

The management of secondary legislation

Letter from Sir David Normington KCB, Permanent Secretary, Home Office, to the Chairman

I am writing following the Government's response to your report, submitted by Jack Straw on 9 October 2006, to outline how the Home Office is taking some of the specific work forward. I hope you will also accept this letter as a response to Lord Armstrong's letter to me of 26 October and his exchange with Tony McNulty regarding concerns about an SI relating to local probation boards.

Let me first add my apologies to those already given by Tony McNulty. Prompted in part by the attention raised by your report in March and criticisms from your Committee, we

recognised the need to improve the way we manage and prioritise legislation and produce Statutory Instruments (SIs). As you are aware, we are taking steps to address this. We have established a Legislation Management Group (LMG), chaired by David Seymour our senior legal adviser, and have put greater responsibility on Directors and Heads of Unit to maintain quality. I hope that as these steps, and others described below, bed in you will see a marked improvement.

Clearly, we endorse and support the Government's collective response and will be taking forward the steps it suggests. Additionally, we are continuing to take a special interest in this work in a number of ways.

LMG includes, among others, representatives from our Parliamentary unit and Better Regulation Team and I expect this Group to help improve the management and forward planning of the Department's legislative programme. It will report regularly to Ministers and the Home Office Board and I plan to hold bi-annual meetings with our board of directors to discuss forthcoming legislation and to advise on the forward legislative programme. David Seymour will also take the lead in co-ordinating advice to the Home Secretary. This should go a long way to addressing your first recommendation.

We will also aim to ensure that all legislation complies with Better Regulation requirements to improve quality and have taken steps to embed these principles into new training courses we are developing for policy officials.

I will continue to stress to Home Office Directors and Heads of Unit the importance of accurate reporting and planning of forthcoming legislation, and the need for good quality of forthcoming affirmative SIs. I have required them to sign off SIs which should help in meeting Recommendation 14 that Explanatory Memoranda are understandable to the layman reader. David Seymour is also ensuring that the attention of relevant staff is drawn to the central guidance and his team have invited all responsible Directors and other key officials to workshops early in the New Year to instil best practice. We have had a positive response to this and the first event is already fully subscribed and a further event is planned. I understand that an official from your Committee is also taking part.

As described in the Government's response, there are a number of limitations on publishing future legislative plans. However, we feel that it would be useful to produce rolling quarterly plans that will include primary and secondary legislation (including both negative and affirmative SIs), and the timetable on which it will be delivered. I have asked our new LMG to consider how best to manage and publish such a report.

Earlier this year we published our first Common Commencement statement and in future expect to increase the number of regulations included (although only a limited number of our regulations impact on the private sector). As part of our reform programme we are improving our project management process and this, together with the quarterly legislative management plan and improved guidance, will direct our policy teams to better timetable their laying of SIs.

I hope this reassures you of our commitment to improving the way in which we manage legislation and shows the specific steps we are taking to achieve this.

28 November 2006