

HOUSE OF LORDS

Merits of Statutory Instruments Committee

14th Report of Session 2006-07

Drawing special attention to:
**Draft Equality Act (Sexual Orientation)
Regulations 2007**

**Draft Parliamentary Constituencies
(England) Order 2007**

**Home Information Pack (Redress Scheme)
Order 2007**

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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:

Baroness Adams of Craigielea	Viscount Eccles	Baroness Maddock
Lord Armstrong of Ilminster	Lord Filkin (<i>Chairman</i>)	Baroness Thomas of Winchester
Viscount Colville of Culross	Lord James of Blackheath	Lord Tunnicliffe
Baroness Deech	Lord Jopling	

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Publications

The Committee's Reports are published by the Stationery Office by Order of the House. All publications of the Committee are on the internet at: www.parliament.uk/parliamentary_committees/merits.cfm

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.

Fourteenth 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 Equality Act (Sexual Orientation) Regulations 2007

Summary: These Regulations prohibit discrimination on grounds of sexual orientation in Great Britain. They take effect on 30 April 2007 and follow similar Regulations for Northern Ireland which came into force on 1 January 2007. The GB and NI Regulations differ in their approach and the House may wish to press the Government for an explanation of these differences. The House will also wish to consider the Government's approach to faith-based adoption agencies.

The Regulations were first laid on 7 March and withdrawn and re-laid twice by 13 March due to drafting defects. The Government will seek the House's approval on 21 March. The Government's timetabling, by contracting the usual period between laying and seeking the approval of the House, has meant that we have had to expedite consideration of this instrument.

The 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 Department for Communities and Local Government (DCLG) have laid these Regulations under section 81(1) of the Equality Act 2006. An Explanatory Memorandum (EM), Regulatory Impact Assessment (RIA) and Equality Impact Assessment (EIA) have also been provided.
2. The EM states that the Regulations prohibit discrimination on the grounds of sexual orientation in the provision of goods, facilities, services, education, management and disposal of premises and the exercise of public functions. In particular, the Regulations prohibit:
 - direct discrimination: when a person treats another person less favourably on the grounds of his/her sexual orientation, or what is believed to be his/her sexual orientation, or the sexual orientation/perceived sexual orientation of another person with whom they associate; and
 - indirect discrimination: when an apparently neutral provision, criterion or practice results in a disproportionate adverse effect on persons of a particular sexual orientation, as compared to persons who are not of that orientation.
3. The Regulations will also cover:
 - victimisation: less favourable treatment of a person as a consequence of complaining of discrimination under the Regulations;

- discriminatory advertisements: publishing an advert, or causing an advert to be published, which indicates an intention by any person to discriminate unlawfully under the Regulations;
 - instructions to discriminate: the act of instructing someone to discriminate, or causing another to discriminate unlawfully under the Regulations, for example, by offering a financial inducement;
 - discriminatory practices: adopting or maintaining a practice likely to result in unlawful discrimination under the Regulations; and
 - validity of contracts: the Regulations will provide that contractual terms that result from or would result in unlawful discrimination will be void.
4. In a statement on 7 March 2007,¹ the Secretary of State for Communities and Local Government acknowledged the strength of feeling that had been expressed by those commenting on the proposed Regulations, albeit that the need to tackle discrimination was not in doubt:
- “While the case for this new legislation was widely accepted, opinion was divided on the issue of how the Regulations ought to balance the competing rights of individuals to hold and manifest a religious belief against the rights of lesbian, gay and bisexual people to live free from discrimination. It is exactly because of these complex issues about how to reconcile potentially competing rights and freedoms that the Government consulted so extensively on these measures. I have listened carefully to the many points raised, and I believe that the balance we have reached—which is the same as that achieved in the Northern Ireland Regulations and endorsed by the Joint Committee on Human Rights—is the right one.”
5. The Secretary of State also referred to the concerns that had been expressed about the application of the Regulations to the adoption and fostering sector: “The Prime Minister addressed these issues in his statement of 29 January 2007, when he acknowledged the excellent and valuable work undertaken by faith-based adoption agencies and announced that, in the interests of vulnerable children, the regulations will provide for a transition period for these agencies until the end of 2008.” The Government’s policy, embodied in these Regulations, is that “nobody will be required to act in a way that contravenes their core religious beliefs, but where religious organisations enter into an agreement to provide services to the wider community, on behalf of and under contract to a public authority, the rights of lesbian, gay and bisexual people to have equal access to those services comes to the fore.”²
6. The EM describes the consultation process which was carried out by DCLG over a 12-week period from March 2006. 2,747 responses were received, of which a large majority (almost 97%) accepted the principle of legislating in this area to prohibit unfair discrimination on grounds of sexual orientation.³

¹ HC Deb 7 March 2007 col 129WS.

² HC Deb 7 March 2007 col 129WS.

³ DCLG have published the Government response to the consultation process as “Getting Equal: Proposals to outlaw sexual orientation discrimination in the provision of goods and services”: see: <http://www.communities.gov.uk/pub/503/GettingEqualProposalsToOutlawSexualOrientationDiscriminationInTheProvisionOfGoodsAndServices.pdf>

7. The EM acknowledges that there was “an exceptionally strong response on the scope of the proposed religious organisation exemption, with almost every response specifically addressing this question. Overall, roughly two-thirds of all respondents sought a wider exemption. The Government believes that the concerns expressed have been addressed by the wording of the exemption at Regulation 14.”
8. The EM also refers to the position of faith-based adoption agencies, and the decision that there will be no specific exemption. It reiterates that the Regulations will provide for a transition period until the end of 2008, and states that “the Prime Minister will be commissioning an ongoing independent assessment of the issues agencies will need to address during this period to comply with the Regulations”.
9. The EM states that the Regulations take a similar approach in terms of substance, to the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (SR 2006/439). “Both draw on the approach set out in Part 2 of the Equality Act 2006. However, where the Northern Ireland Regulations often follow drafting precedent from that jurisdiction, these Regulations, for reasons of consistency within Great Britain, tend to follow the wording of the provisions in Part 2.”
10. The Committee drew SR 2006/439 to the special attention of the House in the Third Report of the current Session (HL Paper 11). The issues raised by the Northern Ireland Regulations were inevitably similar to those raised by these Regulations. In our commentary, we said in particular that concerns had been expressed by a large number of consultation respondents, but that the Government believed that these had been met by a religious exemption.
11. The Northern Ireland Regulations were debated in this House on 9 January 2007 (HL Deb, 9 January 2007, col 179 *et seq*). Concern was expressed that those Regulations were being implemented at an earlier date than the Regulations for the rest of Great Britain. In particular, Lord Trimble referred to the possibility that consultation might result in changes to the British regulations, and he sought, and was given, an assurance by Lord Rooker that the Northern Ireland Regulations would then be amended to be brought into line with the British regulations and thus keep the parity that was there at the outset.⁴
12. In this regard, it is notable that the RIA provided by DCLG contains the following statement:

“In many respects, the regulations will mirror the approach taken in the Northern Ireland regulations, to ensure consistency across the United Kingdom. However, we have taken a different approach in a number of areas to reflect the different equality framework and policy considerations in Great Britain. In particular, the GB Regulations:

 - provide for a transition period for faith-based adoption and fostering agencies until the end of 2008. In the interim, any agency wishing to take advantage of the transitional arrangements will have to refer gay, lesbian and bisexual couples to agencies who are able to assist;

⁴ HL Deb 9 January 2007 col 208.

- will make clear that married couples and civil partners are in materially the same position when considering whether discrimination has taken place on grounds of sexual orientation;
 - will provide targeted exemptions for the Blood Service and insurance companies to allow differential treatment where supported by sound epidemiological and actuarial evidence respectively. It is our intention that the exemption for insurance will not apply beyond the end of 2008;
 - will not encompass harassment. As made clear in the consultation of March 2006, this issue will be considered and legislated upon in the context of the Discrimination Law Review.”
13. We have no doubt that the House will take a close interest in the Regulations which the Government have now laid to prohibit discrimination on grounds of sexual orientation in Great Britain. The Regulations, which are to take effect on 30 April 2007, follow similar Regulations for Northern Ireland which came into force on 1 January of this year, albeit that there are differences of approach in a number of areas. The House may wish to press the Government for further explanation of these differences.
14. The Regulations were first laid on 7 March and withdrawn and re-laid twice by 13 March due to drafting defects, possibly revealing an overload on the Department for Communities and Local Government. The Government will seek the House’s approval of the Regulations on 21 March. We have received, and continue to receive, representations about the adequacy of the instrument’s provision about faith-based adoption agencies. The Government’s timetabling, by contracting the usual period between laying, twice relaying, and seeking the approval of the House, has meant that we have had to expedite consideration of this instrument and has prevented the usual period for receiving evidence. The significance of the policy in the instrument is not in doubt and we draw it to the attention of the House, but it is for the House to decide its response.

B. Draft Parliamentary Constituencies (England) Order 2007

Summary: This Order gives effect, without modification, to the recommendations made in the Boundary Commission for England’s fifth periodical report on parliamentary constituencies. This will increase the number of English Parliamentary constituencies by 4 to 533. The changes will not take effect until after the dissolution of the current Parliament.

This Order is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

15. The Department for Constitutional Affairs (DCA) have laid this Order under section 3(1) of the Parliamentary Constituencies Act 1986 together with a copy of the Boundary Commission’s report and an Explanatory Memorandum (EM).
16. The draft Order in Council gives effect, without modification, to the recommendations made in the Boundary Commission for England’s Fifth Periodical Report on Parliamentary Constituencies (HC 7032) of 31 October

2006. The proposed changes will increase the number of English Parliamentary constituencies by 4, from 529 to 533.

17. After approval by both Houses, the Order will come into force fourteen days after the day on which it is made by Her Majesty. However it will not affect any parliamentary election or by-election until the next general election.

C. Home Information Pack (Redress Scheme) Order 2007 (SI 2007/560)

Summary: This Order requires estate agents in England and Wales to belong to a redress scheme in relation to the marketing of residential property with Home Information Packs. The Department of Trade and Industry have acknowledged the lack of clarity over the issues that the redress scheme will have to address. We urge the Government to take stock of the state of policy development, to guard against the risk of making secondary legislation that has to be amended in short order.

This Order is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

18. The Department of Trade and Industry (DTI) have made this Order under section 172 of the Housing Act 2004 (“the 2004 Act”). An Explanatory Memorandum (EM) and Regulatory Impact Assessment (RIA) have also been provided.
19. The EM explains that, under section 155 of the 2004 Act, from 1 June 2007 every person who markets a residential property in England and Wales will be required to provide a Home Information Pack (HIP) in relation to that property. In most cases, the person marketing the property will be an estate agent. The Secretary of State has approved a redress scheme, under which complaints relating to HIPs can be referred to the Ombudsman for Estate Agents. The Order requires estate agents in England and Wales to belong to this approved redress scheme.
20. The RIA acknowledges that there are matters to be resolved before the redress scheme can be definitively formulated:

“At present, as the HIP scheme is not up and running, it is not known with certainty the issues that the HIPs redress scheme will be required to address. For instance, we expect the legislation to provide sellers and buyers with a statutory option for redress should the compilation of the HIP by an estate agent be done incorrectly. However this would not extend to the quality of the professional advice contained in documents provided as part of the HIP, as the estate agent cannot be expected to assess quality where this is out of their professional competency. Additionally, redress could be available should the estate agent fail to advise the seller that a HIP is required ...”

In our 39th Report of session 2005-06 (HL Paper 214), we commented on the Home Information Pack Regulations 2006 (SI 2006/1503), which the Department for Communities and Local Government (DCLG) laid before Parliament on 14 June 2006. Those Regulations prescribed the contents of HIPs, provided for exceptions from the HIP duties set out in Part 5 of the 2004 Act, and also made provision for the approval of certification schemes in connection with Home Condition Reports (HCRs), which were to be a mandatory element of HIPs. They too envisaged that the HIP requirements would be introduced from 1 June 2007.

21. In our 39th Report (published on 29 June 2006), we commented that the Government and others concerned faced a major organisational challenge to ensure that there were enough qualified Home Inspectors by June 2007. We stressed the need for the Government to keep under review whether full implementation of the HIP scheme should go ahead in June 2007.
22. On 18 July 2006, the Government announced that HCRs would a voluntary, not a mandatory, element of HIPs from June 2007. “Mandatory introduction of Home Condition Reports remains on the table, however the Government wants to encourage market led take up first, in order to allow a more flexible roll-out that responds to consumer demand and the results of further testing.” In its new proposals to phase the introduction of HIPs, the Government intended to prioritise the delivery of energy efficiency information through the Energy Performance Certificates (EPCs) to be included in HIPs.⁵
23. We are aware that the Government have continued the work of preparation for the introduction of HIPs from June of this year, and that this has included a consultation launched by DCLG at the end of January 2007 which, among other things, covered the proposal that estate agents should include EPCs with their property particulars.⁶ DCLG’s “Home Information Pack - Update: Towards 1 June”,⁷ which contained these consultation proposals, states that, on 29 March 2007, the Department will lay Regulations to amend the 2006 Regulations, setting out requirements to produce a HIP when marketing a property, and specifying both the mandatory and authorised contents of HIPs.
24. However, we are concerned that, while maintaining the date of June 2007 for the start of the HIP scheme, the Government have left it to such a late stage to resolve a number of uncertainties that surround the scheme; and, in particular, that the Government propose to amend the Regulations laid in June 2006 only two months before the date set for the introduction of HIPs. In the case of the Home Information Pack (Redress Scheme) Order 2007, DTI have acknowledged that there is a lack of clarity over the issues that the redress scheme will have to address. We urge the Government to take stock of the state of policy development and the extent to which those affected understand and support that policy, to guard against the risk of making secondary legislation that has to be amended in short order.

OTHER INSTRUMENTS OF INTEREST

25. The Department for Environment, Food and Rural Affairs (DEFRA) have made the **Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 (SI 2007/457)**, under powers in the Commons Act 2006 (“the 2006 Act”). The registration of greens was the subject of much debate during the parliamentary stages of the 2006 Act. Section 15 of the Act provides a power which for the first time enables the

⁵ See DCLG press release of 18 July 2006:

<http://www.communities.gov.uk/index.asp?id=1002882&PressNoticeID=2207>

⁶ See DCLG press release of 25 January 2007:

<http://www.communities.gov.uk/index.asp?id=1002882&PressNoticeID=2340>

⁷ http://www.communities.gov.uk/pub/758/HomeInformationPackUpdateTowards1June_id1505758.pdf

owner of land to apply to register it voluntarily as a green. Part 1 of the 2006 Act includes a number of other changes to registration arrangements, which the Government intend to introduce on a phased basis from 2008 onwards. These include new arrangements for the determination of applications for the registration of greens, which may include provision for disputed applications to be referred to a person appointed from an independent panel. As an interim arrangement, SI 2007/457 enables applications to register land using the new criteria under section 15 of the 2006 Act, but adopting procedures similar to those which apply under earlier legislation (the Commons Registration Act 1965).

26. The Department for Education and Skills (DfES) have made the **Childcare Act 2006 (Childcare Assessments) Regulations 2007 (SI 2007/463)**, using powers in the Childcare Act 2006 (“the 2006 Act”). Section 11 of the 2006 Act places a duty on English local authorities to prepare an assessment of the sufficiency of childcare provision in their area. SI 2007/463 sets out the content, criteria for preparation, and form and manner of publication of such assessments, and also specifies the bodies and individuals that local authorities must consult in preparing assessments. Stressing the importance of the Section 11 duty, DfES have said that “working with providers from the private, voluntary, independent and maintained sectors, [local authorities will] look to shape and support a strong, sustainable and diverse childcare market that meets the needs of parents.” We note the commitment given in the accompanying Regulatory Impact Assessment that, “although there is no statutory basis for reviewing implementation of the Childcare Sufficiency Assessments duty the Government will seek to review its implementation on a continued basis in order to assess the extent to which the original aims and objectives have been successfully met.” We welcome this commitment, and expect that Parliament will be kept informed about this review.
27. The **Cattle Identification Regulations 2007 (SI 2007/529)** effect a welcome consolidation of a number of instruments made since 1998 to implement European regulations establishing a system of identification and registration for cattle. They also make two major changes to current procedures: stopping the use of temporary identification or movement documents (“passports”) for calves, and enabling late birth registrations to be supported by DNA test evidence for the issue of a passport. Among minor changes made is the abolition of the existing fee of £50 for a replacement cattle passport, and a provision that the Secretary of State may instead set an appropriate fee to be publicised on DEFRA’s website. DEFRA have said that the new fee will cover administrative costs only, and is likely to be set at £20. The Committee questions whether the flexibility available to the Secretary of State under the new provision will in fact cause uncertainty to those liable to pay the fee.

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

Jobseeker's Allowance (Jobseeker Mandatory Activity) Pilot Regulations 2007

Local Authorities (Mayoral Elections) (England and Wales) Regulations 2007

Instruments subject to annulment

SI 2007/441 Royal Pharmaceutical Society of Great Britain (Registration Rules) Order of Council 2007

SI 2007/442 Royal Pharmaceutical Society of Great Britain (Fitness to Practise and Disqualification etc. Rules) Order of Council 2007

SI 2007/457 Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007

SI 2007/460 Office for Standards in Education, Children's Services and Skills (Children's Rights Director) Regulations 2007

SI 2007/462 Education and Inspections Act 2006 (Inspection of Local Authorities) Regulations 2007

SI 2007/463 Childcare Act 2006 (Childcare Assessments) Regulations 2007

SI 2007/464 Education and Inspections Act 2006 (Prescribed Education and Training etc) Regulations 2007

SI 2007/476 Milk (Cessation of Production) (Revocation) Scheme 2007

SI 2007/477 Dairy Produce (Miscellaneous Provisions) Regulations 2007

SI 2007/492 Meat (Official Controls Charges) (England) Regulations 2007

SI 2007/495 Motor Vehicles (Approval) (Fees) (Amendment) Regulations 2007

SI 2007/498 Road Vehicles (Registration and Licensing) (Amendment) Regulations 2007

SI 2007/500 Public Service Vehicles Accessibility (Amendment) Regulations 2007

SI 2007/501 Council Tax and Non-Domestic Rating (Amendment) (England) Regulations 2007

SI 2007/502 Public Service Vehicles (Conditions of Fitness, Equipment, Use and Certification) (Amendment) Regulations 2007

SI 2007/503 Goods Vehicles (Plating and Testing) (Amendment) Regulations 2007 (JW)

SI 2007/504 NHS Direct Special Health Authority Abolition Order 2007

SI 2007/506 Motor Vehicles (Tests) (Amendment) Regulations 2007

SI 2007/507 Motor Cycles Etc. (Single Vehicle Approval) (Fees) (Amendment) Regulations 2007

- SI 2007/529 Cattle Identification Regulations 2007
- SI 2007/540 Commons Registration (Objection and Maps) (Amendment) (England) Regulations 2007
- SI 2007/541 Social Security (Claims and Payments) Amendment Regulations 2007
- SI 2007/542 National Health Service (Optical Charges and Payments) Amendment Regulations 2007
- SI 2007/543 National Health Service (Charges for Drugs and Appliances) Amendment Regulations 2007
- SI 2007/544 National Health Service (Dental Charges, General Dental Services Contracts and Personal Dental Services Agreements) Amendment Regulations 2007
- SI 2007/547 Road Traffic (Permitted Parking Area and Special Parking Area) (Metropolitan Borough of Tameside) Order 2007
- SI 2007/548 Enduring Powers of Attorney (Prescribed Form) (Amendment) Amendment Regulations 2007
- SI 2007/549 Enduring Powers of Attorney (Welsh Language Prescribed Form) (Amendment) Regulations 2007
- SI 2007/551 Bus Lane Contraventions (Approved Local Authorities) (England) (Amendment) Order 2007
- SI 2007/556 Commission for Social Care Inspection (Fees and Frequency of Inspections) Regulations 2007
- SI 2007/557 Lewisham Primary Care Trust (Transfer of Trust Property) Order 2007
- SI 2007/559 National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) (Amendment) Regulations 2007
- SI 2007/561 Royal Pharmaceutical Society of Great Britain (Fitness to Practise and Registration Appeals Committees and their Advisers Rules) Order of Council 2007
- SI 2007/564 Approved European Pharmacy Qualifications Order of Council 2007
- SI 2007/577 Gambling Appeals Tribunal (Amendment) Rules 2007
- SI 2007/584 Street Works (Inspection Fees) (England) (Amendment) Regulations 2007
- SI 2007/629 Electricity (Class Exemptions from the Requirement for a Licence) (Amendment) Order 2007

Instruments subject to annulment (Northern Ireland)

- SR 2007/2 Rates (Payment by Owners by Agreement) (Amendment) Order (Northern Ireland) 2007
- SR 2007/72 Rates (Recreational Hereditaments) Order (Northern Ireland) 2007
- SR 2007/86 Rates (Social Sector Value) Regulations (Northern Ireland) 2007