Draft Onshore Hydraulic Fracturing (Protected Areas) Regulations 2015
Asylum Support (Amendment No. 3) Regulations 2015
School Governance (Federations) (England) (Amendment) Regulations 2015

Correspondence:
Home Office – Secondary Legislation
Homes and Communities Agency (Transfer of Property etc.) Regulations 2015

Includes 6 Information Paragraphs on 6 Instruments

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Historical Note
In January 2000, the Royal Commission on the Reform of the House of Lords said that there was a good case for enhanced Parliamentary scrutiny of secondary legislation and recommended establishing a “sifting” mechanism to identify those statutory instruments which merited further debate or consideration. The Merits of Statutory Instruments Committee was set up on 17 December 2003. At the start of the 2012–3 Session the Committee was renamed to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

The Committee has the following terms of reference:

(1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), scrutinise—
   (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
   (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament, with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (2).

(2) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—
   (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
   (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
   (c) that it may inappropriately implement European Union legislation;
   (d) that it may imperfectly achieve its policy objectives;
   (e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument’s policy objective and intended implementation;
   (f) that there appear to be inadequacies in the consultation process which relates to the instrument.

(3) The exceptions are—
   (a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
   (b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;
   (c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.

(4) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.

(5) The Committee shall also consider such other general matters relating to the effective scrutiny of secondary legislation and arising from the performance of its functions under paragraphs (1) to (4) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members
Baroness Andrews  Lord Hodgson of Astley Abbots  Baroness Stern
Lord Bowness  Baroness Humphreys  Rt Hon. Lord Trefgarne (Chairman)
Lord Goddard of Stockport  Rt Hon. Lord Jankrvin  Lord Woolmer of Leeds
Lord Haskel  Baroness O’Loan

Registered interests
Information about interests of Committee Members can be found in Appendix 7.

Publications
The Committee’s Reports are published on the internet at www.parliament.uk/sectlegalpublications

Information and Contacts
If you have a query about the Committee’s work, or opinions on any new item of secondary legislation, please contact the Clerk of the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A OPW; telephone 020–7219 8821; fax 020–7219 2571; email hlseclegscrutiny@parliament.uk.

Statutory instruments
Eighth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft Onshore Hydraulic Fracturing (Protected Areas) Regulations 2015

Date laid: 16 July 2015

Parliamentary procedure: affirmative

Summary: These Regulations define the protected areas where the Secretary of State may not issue a consent for onshore hydraulic fracturing (commonly called “fracking”) in England and Wales. There is already an absolute prohibition on hydraulic fracturing in any land (in England and Wales) at a depth of less than 1,000 metres beneath the surface: as a result of the definitions in these Regulations, that prohibition is extended to land less than 1,200 metres beneath the surface of protected areas.

The Department refers to Parliamentary consideration of the Infrastructure Act 2015 to explain why there was no public consultation about the definitions in the Regulations and why no Ministerial Statement was made about them. We suggest that this level of Parliamentary interest could equally have justified both public consultation and a Ministerial Statement.

We draw this instrument to the special attention of the House on the ground that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House.

1. The Infrastructure Act 2015 inserted sections 4A and 4B into the Petroleum Act 1998 (“the 1998 Act”), in order to set out certain safeguards in relation to onshore hydraulic fracturing (commonly called “fracking”) in England and Wales. These included conditions which must be met before the Secretary of State may issue a hydraulic fracturing consent: conditions 5 and 6 provide that associated hydraulic fracturing is not to take place in “protected groundwater source areas” or “other protected areas”. Under the 1998 Act, as amended, the Government are required to lay Regulations defining these terms by 31 July 2015.

2. The Department for Energy and Climate Change (DECC) has laid these Regulations for that purpose, with an Explanatory Memorandum (EM) and Impact Assessment. In the EM, DECC explains that the 1998 Act (in section 4A(1)) introduces an absolute prohibition on hydraulic fracturing in any land (in England and Wales) at a depth of less than 1,000 metres beneath the surface. DECC adds that both “protected groundwater source areas” and “other protected areas” must therefore be defined in a manner which affords them an additional level of protection, beyond the basic 1,000 metre prohibition, which will automatically apply to these areas of land.
**Protected groundwater source areas**

3. DECC says that the Environment Agency (EA) and Natural Resources Wales (NRW) currently regulate groundwater in England and Wales. Areas of groundwater that are deemed particularly sensitive are referred to as Source Protection Zones (SPZ). These Regulations seek to align the definition of a “protected groundwater source area” with the concept of an SPZ. While it has not so far been necessary to provide a formal definition in legislation of how deep beneath the surface SPZs extend, these Regulations specify that a “protected groundwater source area” extends to a depth of 1,200 metres.

**Other protected areas**

4. The Regulations define “other protected areas” as National Parks, the Broads, Areas of Outstanding Natural Beauty and World Heritage sites. Here too these Regulations apply a depth limit of 1,200 metres in these areas.

**Balance between area protection and industry development**

5. DECC says that there is a need to strike the right balance between affording additional protections for these areas, whilst enabling the shale gas industry to develop. The Government believe that a depth of 1,200 metres achieves this balance, and that defining a depth limit of more than 1,200 metres below these protected areas would hinder the exploitation of potentially valuable shale gas reserves, and have an adverse impact on the Government’s energy security and economic policy aims.

**Consultation**

6. In the EM, DECC says that there was no public consultation in relation to these Regulations, but that, in accordance with the 1998 Act, the Government consulted both the EA and NRW about the definition of “protected groundwater source areas”. Both bodies are fully supportive of the proposed definition.

**Additional Information**

7. We sought additional information from DECC, and are publishing the Department’s responses in Appendix 1 to this Report.

8. DECC told us that the draft Regulations do not themselves prevent a well from being drilled from the surface in a protected area. However, in guidance on shale gas development in National Parks, the Broads, Areas of Outstanding Natural Beauty and World Heritage Sites issued in July 2014, the Government indicated that planning authorities should refuse a planning application where it is considered to be major development, unless it could be demonstrated that both exceptional circumstances existed and it was in the public interest. DECC has said that it also plans to consult shortly on ensuring that hydraulic fracturing cannot be conducted from wells that are drilled in the surface of National Parks and other protected areas, but without having an impact on conventional drilling operations.
9. We asked why there was no public consultation in relation to these definitions, given the high level of public interest in “fracking”. DECC referred to the statutory position: “As the nature of protected areas had been the subject of much helpful discussion during the Parliamentary passage of the [Infrastructure] Bill, no public consultation requirement was included in section 50 / section 4A or 4B. Instead, a requirement to consult the environmental regulators on the proposed definition of ‘protected groundwater source areas’ was included in order to ensure that the proposed definition was workable in light of existing groundwater regulatory practices.” DECC referred again to its consultation of the EA and NRW.

10. The Department told us that a specific Ministerial Statement to Parliament alongside the laying of these Regulations was not felt necessary in the light of the statements made to Parliament about these Regulations by the previous Government, and during Parliamentary consideration of the Infrastructure Act 2015.

Conclusion

11. The Regulations provide that onshore hydraulic fracturing may not be permitted if it is carried out at a depth of less than 1,200 metres below the surface of protected areas: groundwater source areas, and National Parks, the Broads, Areas of Outstanding Natural Beauty and World Heritage sites. The Government leave open the possibility of “fracking” at greater depths below such areas, in order to facilitate the exploitation of potentially valuable shale gas reserves. We note that the Department refers to Parliamentary consideration of the Infrastructure Act 2015 to explain why there was no public consultation about the definitions in the Regulations and why no Ministerial Statement was made about them. We suggest that this level of Parliamentary interest could equally have justified both public consultation and a Ministerial Statement.
Asylum Support (Amendment No. 3) Regulations 2015 (SI 2015/1501)

Date laid: 16 July 2015

Parliamentary procedure: negative

Summary: These Regulations reduce the payments made to asylum seekers by introducing a per capita rate and removing the higher rates of allowance for child and adolescent asylum seekers. The Home Office state that this is to reflect the economies of scale that can be achieved when several persons are living as a household. The Committee noted that the Explanatory Memorandum lacks the sort of information that it would regard as standard: for example, cost/benefit analysis, the number of households that would be affected by the change, and the definition of the key term “essential needs”. As a result, the Minister was asked to provide further information. Correspondence from the Minister is published in the Report. The Committee is disappointed that this was necessary and that gaining an understanding of the policy background to this instrument has been achieved only by persistent questioning of the Government.

These Regulations are drawn to the special attention of the House on the ground that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument’s policy and intended implementation.

12. These Regulations were laid by the Home Office under provisions of the Immigration and Asylum Act 1999, along with an Explanatory Memorandum (EM), on 16 July 2015 and came into force on 10 August 2015. Further correspondence with the Minister is included in Appendix 2 to this Report.

13. These Regulations replicate the effect of the Asylum Support (Amendment) Regulations 2015 (SI 2015/645) which were laid on 12 March 2015, and subsequently revoked by SI 2015/944 laid on 27 March 2015. They reduce the payments made to asylum seekers by introducing a per capita rate and removing the higher rates of allowance for child and adolescent asylum seekers.

Background

14. In considering SI 2015/645, the Committee took the view that the change brought about by the instrument had been poorly managed, particularly given the sudden change to claimants’ income (there were no transitional provisions). The Committee was also concerned that there was no indication of how the change was to be communicated to those affected. We therefore published a paragraph in our final report of the last Session drawing attention to these issues.¹

15. On the final day of the last Session, the Home Office laid SI 2015/944 to reverse the proposed changes, stating it was the result of “reflection”. In our 2nd Report of this Session, we published a report criticising the Home Office for “another example of a correcting instrument being required due to a

policy not having being properly thought through before Regulations are made”.  

16. These Regulations (SI 2015/944) were laid just before the summer recess and, apart from the start date, are identical to the original instrument (SI 2015/645), proposing the same reduction in payments by the introduction of a per capita rate. The Committee considered the instrument at its meeting on 21 July. Although the EM has been re-written in several places, the Committee was disappointed that the new version made no reference to the concerns it had raised in its earlier report, and also noted that the EM lacked the sort of information that it would regard as standard: for example, cost/benefit analysis, the number of households that would be affected by the change, and the definition of the key term “essential needs”. The Committee therefore wrote to the Minister for clarification. That correspondence is published in Appendix 2 to this Report.

**Costs and benefits**

17. The Home Office provides support to destitute asylum seekers and their dependants in the form of furnished accommodation plus a weekly cash allowance to enable them to meet other "essential living needs".

18. Under the previous system, the level of payment depended on the age of the individual, with the amount for each child (£52.96) and under 18 year old (£39.80) being higher than for adults. Following a recent review, the Home Office decided that the sums provided to families significantly exceed what is necessary to meet essential living needs because the sum took no account of the economies of scale available to a household. These Regulations therefore moved payments to a simplified system where a standard rate (£36.95) is provided to each supported person of whatever age. The effect of this will be that a couple with two children, formerly paid £178.44 a week, from 10 August has received £147.80 per week.

19. No indication is given in the EM of the number of households likely to be affected by this change. The Minister’s letter states that about 6,000 households will be affected. There is still no indication of the sum expected to be saved by this new arrangement.

**“Essential living needs”**

20. To determine whether the sum allocated meets the policy objective of being adequate for the claimant’s “essential living needs”, it would have been helpful to know what that term encompassed. But not only does the EM not explain what needs the money is intended to cover, it refers to the fact that a previous methodology used in 2014 had been adversely commented on by a judicial review. Among other things, the court identified particular categories of essential living costs that had been overlooked by the Government when setting the rates of support: for example, nappies, baby clothes and other baby products, non-prescription medication, washing powder and cleaning products.

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2 [2nd Report, Session 2015–16, HL Paper 7.](#)
21. Paragraph 8.1 of the EM does state that the new methodology was described in detail in letters sent to members of the National Asylum Stakeholders Forum (“NASF” - a consultative group of refugee groups and other interested parties). Unhappily, the EM does not include a link to the information. The Minister has corrected that oversight and a copy of the NASF letter is published in Appendix 2 to this Report: it includes a table showing how much of the £36.95 weekly allowance is intended for food, toiletries, household items etc.

22. Paragraph 7.5 of the EM states that the assessment review used various sources of information including data published by the Office for National Statistics relating to household expenditure by the lowest 10% income group among the UK population. The EM does not indicate whether the asylum payment rate is above or below the lowest 10% income rate, nor does it set out any evidence that those in the lowest 10% income group in the UK eat healthily.

**Timing**

23. We note that, although the Minister’s letter indicates that the Government decided that no transitional provisions were necessary, at least, on this occasion, recipients were given advance notice of the change by a letter sent to them on 16 July.

24. In response to our question why an instrument which contained a controversial policy change had been laid so close to a recess, leaving no time for debate before the legislation came into effect, the Minister attributes this to the clearance process within Government.

25. We find this explanation unconvincing: both this instrument and its predecessor were laid on the cusp of a recess. **The Committee has for many years stated its view that important or controversial instruments should not be laid at a time that gives Parliament no opportunity to react before the legislation comes into effect.**

**Conclusion**

26. During the last session we several times criticised the Home Office for failing to include basic information in EMs and that has continued into the current session (see for example our 7th Report of this Session).\(^3\) This Committee and the House cannot perform their important scrutiny task without adequate information. We therefore raised the general issue of the quality of EMs with the Home Office and have been assured that the deficiencies will be addressed (see correspondence with the Rt Hon. Lord Bates, Minister of State at the Home Office, in Appendix 4).

27. **The Committee is disappointed that further information had to be sought about this instrument and that gaining an understanding of the background to the policy change required such persistent questioning of the Government.**

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School Governance (Federations) (England) (Amendment) Regulations 2015 (SI 2015/1554)

Date laid: 21 July 2015

Parliamentary procedure: negative

Summary: These Regulations enable a maintained school within a federation to make an application to become an academy if at least 50% of the prescribed description of governors agree to do so: they undo the effect of Regulations from 2012 which enabled individual prescribed governors to override the majority view of others and block an application. It is surprising that a problem arising out of the 2012 Regulations has come to light only now; it appears that the legislation concerned is not fully comprehended by those involved. The Department for Education should take steps to improve understanding of the legal framework in this policy area.

We draw this instrument to the special attention of the House on the ground that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House.

28. On 21 July 2015, the Department for Education (DfE) laid these Regulations, with an Explanatory Memorandum (EM), to come into force on 1 September 2015. In amending the School Governance (Federations) (England) (Amendment) Regulations 2012 (SI 2012/1035: “the 2012 Regulations”), the latest instrument enables a maintained school within a federation to make an application to become an academy if at least 50% of the prescribed description of governors agree to do so.

29. In the EM, DfE acknowledges the recommendation in Statutory Instrument Practice to avoid laying instruments during recess, and also the concern which this Committee has expressed about the difficulty in commenting on statutory instruments laid shortly before parliamentary recess periods. The Department says, however, that it would not have been possible to lay these Regulations any earlier because it was alerted to the difficulties arising out of the 2012 Regulations only in May of this year.

30. DfE also says that it is mindful of its commitment to this Committee that instruments requiring implementation by schools should be laid by 1 April with a commencement date of 1 September. It adds, however, that in this case the Department considers that the number of schools affected by the change is so small that departing from that commitment is appropriate.

31. In the EM, DfE says that the 2012 Regulations require that all the prescribed governors of a school in a federation⁴ need to support an application for an academy order for the school. The Department was made aware in May that the effect of the 2012 Regulations has been to enable individual prescribed governors to override the majority view of others and block an application. It says that it considers this undesirable: the amendment made by the latest

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⁴ The prescribed governors are: the head teacher of the federated school (unless the head teacher has resigned the office of governor); any parent governor elected by parents of registered pupils at the federated school or appointed to represent the federated school; any staff governor employed by the federated governing body or local authority to work at the federated school; and, where the proposed application for an academy order is in respect of a foundation or voluntary school, any foundation governors appointed in respect of the federated school.
instrument ensures that an application need only have the support of at least 50% of the prescribed governors.

32. Between 12 June and 3 July 2015, the Department carried out a targeted consultation on the change, with members of its Advisory Group on Governance (AGOG) and other national organisations representing the interests of academies and a number of Multi-Academy Trusts. DfE says in the EM that, since the change will only affect a small number of schools, it did not consider a 12-week public consultation proportionate. A majority of the seven responses supported the proposal, though DfE comments that, from several of the responses, it appeared that there was a misunderstanding of a federated governing body’s constitution.

33. Given our concern that the period for Parliamentary scrutiny of secondary legislation should not be unnecessarily curtailed, and that schools should be given adequate notice of changes affecting them, we put a number of questions to the Department about the timing with which it had taken these changes forward, and about the consultation process which it followed. We are publishing DfE’s answers at Appendix 3.

34. We understand the reasons which the Department has given for its decision to lay Regulations at the end of July, to take effect from the beginning of September. Nonetheless, it is surprising that a problem arising out of Regulations implemented in 2012 should have come to light only in May 2015; taken together with DfE’s statement that its recent consultation process showed that several respondents misunderstood the constitution of a federated governing body, this suggests that the legislation concerned is not fully comprehended by those involved. We urge the Department to take steps to improve understanding of the legal framework in this area of policy.

AGOG includes representatives of the Catholic Church, the Church of England, the National Governors’ Association, the head teacher associations, Freedom and Autonomy for Schools National Association, Information for School and College Governors, National Co-ordinators of Governor Services, Ofsted and SGOSS (Governors for Schools).
CORRESPONDENCE

Home Office – Secondary Legislation

35. In July of this year, we wrote to the Minister of State in the Home Office to set out a number of issues relating to secondary legislation laid by that Department about which we had concerns. We have received a reply from the Minister, and we are publishing the correspondence at Appendix 4.

Homes and Communities Agency (Transfer of Property etc.) Regulations 2015 (2015/1471)

36. In our 7th Report of the current Session, we drew these Regulations to the special attention of the House on the ground that the explanatory material laid in support was inadequate. In particular, the Explanatory Memorandum made no mention of a report from the National Audit Office, published in June of this year, which highlighted a number of concerns about the Government’s 2011–15 programme to dispose of public sector land to allow houses to be built. We wrote to the Minister of State for Housing and Planning to express our own concern. We are publishing that letter, and the Minister’s reply, at Appendix 5.

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INSTRUMENTS OF INTEREST


37. On 26 March 2015, the Department for Communities and Local Government (DCLG) laid a first version of these draft Regulations, which specify a procedure for making and bringing into force certain byelaws without central Government confirmation. We published information in our 2nd Report of this Session.\(^2\) DCLG has withdrawn the first version of the instrument and laid this revised version, in response to concerns expressed by the Joint Committee on Statutory Instruments. The Explanatory Memorandum makes no reference to this. It also fails to explain why the Department has taken so long to progress the proposals from a consultation process held in 2008, through a Ministerial announcement in 2011 confirming that the proposals would be taken forward, to implementation through Regulations laid only in 2015. Local authorities, and others interested in this policy area, may reasonably expect the Government to offer an explanation of a four-year delay in acting on an undertaking to reduce unnecessary bureaucracy.


38. In the Explanatory Memorandum to this draft Order, HM Treasury (HMT) states that amendments to the Financial Services and Markets Act 2000 made by the Financial Services (Banking Reform) Act 2013 ("the 2013 Act") put in place the legal framework for reforms to strengthen the regulation of individuals working in the UK banking sector: the Senior Managers and Certification Regime. These reforms will apply to banks incorporated in the UK, UK building societies and credit unions and to certain UK-based investment firms which are regulated by the Prudential Regulation Authority. The 2013 Act also gave HMT the power to extend the reforms to cover the UK branches of foreign banks and investment firms by statutory instrument. Following consultation over 12 weeks to the end of January of this year, the Economic Secretary to the Treasury announced the Government's intention to extend the new regulatory regime to UK branches of foreign banks in a Ministerial Statement in March,\(^7\) that is the purpose of the draft Order.

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\(^7\) See: [http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm150303/wmstext/150303m0001.htm#15030311000003](http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm150303/wmstext/150303m0001.htm#15030311000003)
39. This instrument removes the bar on the Chair of the NHS Trust Development Agency (“TDA”) from having other roles, which will permit the next Chairman to also oversee Monitor. This is part of a wider strategy which will slim down the administration to allow the TDA (which governs 89 NHS Trusts) to be absorbed into Monitor (which governs 152 Foundation Trusts). The Department of Health informed the Committee that there is, as yet, no published strategy document, but the intention is that “Monitor and the TDA will come together under a single joint leadership (Chief Executive and Chair) and operating name – “NHS Improvement”. Whilst Monitor and the TDA are not formally merging - they will continue to operate in line with their current legal underpinnings as two separate agencies – there will be much more alignment between the two organisations, ensuring that all NHS Trusts and NHS Foundation Trusts have access to the same kinds of support and interventions if their performance isn’t delivering the level of care that patients have a right to expect.”

Childcare (Miscellaneous Amendments) Regulations 2015 (SI 2015/1562)

40. The Department for Education (DfE) has laid these Regulations with an Explanatory Memorandum (EM) and Impact Assessment. DfE explains that, as a result of changes made to the Childcare Act 2006 (“the 2006 Act”) by the Small Business, Enterprise and Employment Act 2015 (“the 2015 Act”) childminders may in future provide up to half of their provision on non-domestic premises; and other types of providers will be able to register once in respect of multiple premises. Before these changes, childminders could provide childminding only on domestic premises; and other providers had to complete a separate registration for each of the premises they proposed to use for providing childcare.

41. The amendments made by these Regulations follow the changes made by the 2015 Act: the prescribed requirements for registration are amended so that the premises used by early years and later years providers for providing childcare must have been approved as suitable by the Chief Inspector or a childminder agency before childcare is provided there. Failure to comply with this requirement will be an offence under the 2006 Act. The amendments also specify the information that a provider who is already registered must supply when seeking approval of additional premises for the provision of childcare. Voluntary providers can choose whether or not to seek approval of additional premises. The amendments also create a right of appeal to the Tribunal if the Chief Inspector or a childminder agency refuse to approve additional premises as suitable.

42. In the EM, DfE gives details of the relevant consultation which it carried out between 16 July and 30 September 2013. There were 356 responses to the question of enabling childminders to operate on non-domestic premises for part of the working week: 38% were in favour, 27% were unsure, and 35% were against the proposal. Of the 372 responses on the proposal to allow providers to register multiple premises in a single process, 48% were in favour, 22% were unsure, and 30% opposed the change.
Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2015 (SI 2015/1571)

43. In response to a High Court judgement on 15 July 2015,8 these Regulations amend the criteria which the Legal Aid Agency must apply when determining whether an applicant qualifies for civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The High Court found that the current system would be unlawful in some cases where an application for legal aid was refused because the applicant’s prospects of success were estimated to be below 50% (defined as “borderline” or “poor” prospects in the previous Regulations) if that refusal would breach, or risk breaching, the applicant’s human rights. The High Court accepted, however, that certain cases could have a prospect of success so low that a case would not need to be funded and, to address this, these Regulations introduce a new category of “very poor” prospects, defined as cases having less than a 20% chance of success. The High Court gave the Government leave to appeal and the current Regulations are intended to ensure that the legislation is compliant with the decision of the High Court until the Court of Appeal makes its decision.

Town and Country Planning (Operation Stack) Special Development Order 2015 (SI 2015/1635)

44. The Department for Communities and Local Government (DCLG) laid this Order on 1 September, and brought it into force the following day. In the accompanying Explanatory Memorandum (EM), DCLG says that the Order grants planning permission, subject to limitations and conditions, for the temporary use of identified land at Manston Airport for the purpose of parking goods vehicles diverted there under Operation Stack. DCLG describes Operation Stack as a co-ordinated multi-agency response to situations where the capacity of the Port of Dover and/or Channel Tunnel becomes restricted, which involves closing sections of the M20 motorway to hold freight traffic in a number of phases and locations along the M20 motorway and within the approach to the Port and Tunnel. Since 23 June 2015 it has been in place for a total of 24 days, as compared with a total of only four occasions between 2010 and 2014. From 5 August 2015, the Manston Airport site operated under a planning permission for temporary use of land, but this use was restricted to 28 days expiring on 1 September. In order to allow the continued use of the site, the Department brought this Order into force on 2 September, granting permission for nine months, subject to a number of conditions and limitations, for use of the site for the purposes of stationing goods vehicles in relation to Operation Stack.

45. In the EM, DCLG says that the urgent timetable for developing the policy allowed no opportunity for formal public consultation on the Order, but that Government did consult Highways England, Kent Police, Kent County Council, the Environment Agency, Natural England, Historic England and Thanet District Council in relation to the use of the land. We obtained further information from DCLG about views expressed, and about plans to manage the impacts on local roads, and we are publishing this at Appendix 6.

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8 IS v The Director of Legal Aid Casework and the Lord Chancellor [2015] EWHC 1965 Admin.
INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft instruments subject to affirmative approval

- English Apprenticeships (Consequential Amendments to Primary Legislation) Order 2015
- Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 3) Order 2015
- Renewables Obligation Order 2015

Draft instruments subject to annulment

- Bristol (Electoral Changes) Order 2015
- Cherwell (Electoral Changes) Order 2015
- Hertfordshire (Electoral Changes) Order 2015
- Improving planning performance, Draft criteria for designation (revised 2015)
- Warwickshire (Electoral Changes) Order 2015

Instruments subject to annulment

- SI 2015/1452 Occupational Pension Schemes (Schemes that were Contracted-out) Regulations 2015
- SI 2015/1490 Criminal Procedure Rules 2015
- SI 2015/1503 Human Medicines (Amendment) (No. 3) Regulations 2015
- SI 2015/1515 Bodmin Moor Commons Council Establishment Order 2015
- SI 2015/1523 Sexual Offences Act 2003 (Prescribed Police Stations) (No. 2) Regulations 2015
SI 2015/1529  State Pension Credit (Amendment) Regulations 2015
SI 2015/1530  European Communities (Designation) (No. 2) Order 2015
SI 2015/1534  Immigration (Passenger Transit Visa) (Amendment) (No. 2) Order 2015
SI 2015/1542  Housing (Right to Buy) (Prescribed Forms) (Amendment) (England) Regulations 2015
SI 2015/1546  Export Control (Democratic Republic of Congo Sanctions and Miscellaneous Amendments and Revocations) Order 2015
SI 2015/1553  Pyrotechnic Articles (Safety) Regulations 2015
SI 2015/1556  Safety of Sports Grounds (Designation) (Amendment) Order 2015
SI 2015/1557  Mortgage Credit Directive (Amendment) Order 2015
SI 2015/1559  National Health Service Trust Development Authority (Amendment) Regulations 2015
SI 2015/1562  Childcare (Miscellaneous Amendments) Regulations 2015
SI 2015/1563  First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order 2015
SI 2015/1564  Education (Destination Information) (Prescribed Activities) (England) Regulations 2015
SI 2015/1567  Education (Student Information) (England) Regulations 2015
SI 2015/1569  Civil Procedure (Amendment No. 4) Rules 2015
SI 2015/1571  Civil Legal Aid (Merits Criteria) (Amendment) (No. 2) Regulations 2015
SI 2015/1580  Welfare Food (Amendment No. 2) Regulations 2015
SI 2015/1582  School Teachers’ Pay and Conditions Order 2015
SI 2015/1586  Export Control (Yemen Sanctions) Regulations 2015
SI 2015/1587  Competition Act 1998 (Redress Scheme) Regulations 2015
SI 2015/1614  Unfunded Public Service Defined Benefits Schemes (Transfers) Regulations 2015
SI 2015/1615  British Nationality (Proof of Paternity) (Amendment) Regulations 2015
| SI 2015/1625 | Export Control (Iran Sanctions) (Amendment) Order 2015 |
| SI 2015/1629 | Consumer Contracts (Amendment) Regulations 2015 |
APPENDIX 1: DRAFT ONSHORE HYDRAULIC FRACTURING (PROTECTED AREAS) REGULATIONS 2015

Additional information from the Department for Energy and Climate Change

Q1: Has there been a Ministerial Statement to Parliament about these Regulations?

A1: There was no specific Ministerial Statement to Parliament alongside the laying of these Regulations. This was not felt necessary as statements were made to Parliament about these regulations by the previous Government, and indeed during the Parliamentary passage of the Infrastructure Act 2015.

On 11 February 2015, during a debate into the then Infrastructure Bill, Amber Rudd told the House of Commons that the Government’s “clauses put a duty on the Secretary of State to lay draft regulations containing a definition of ‘protected areas’ by 31 July 2015. We must not rush this now, because we would risk putting in place restrictions in areas in a way that does not achieve the intended aim of the condition, or that goes beyond it and needlessly damages the potential development of the shale industry”. Amber Rudd said the Government would “look at the evidence to ensure we get [the definitions of protected areas] right when setting out the details in secondary legislation. The regulations will be subject to the approval of both Houses, so now is not the time for this”.

Q2: In Regulation 1 of the draft instrument, it is stated that the Regulations come into force on the same day as section 4A(3) of Petroleum Act 1998. In the Explanatory Memorandum it is stated: “Section 50 of the Infrastructure Act 2015, which inserts new sections 4A and 4B into the Petroleum Act 1998, will initially be commenced (by 31 July 2015) only for the purposes of exercising the powers to lay and make these Regulations.” Does this mean that the Regulations come into force on 31 July 2015? Since they are subject to affirmative resolution, and no debate is scheduled, this would be problematic. If the intention is that they come into force on another date, what date do you have in mind?

A2: These Regulations do not come into force on 31 July 2015. As you say they are subject to the affirmative resolution procedure and so will not be made and brought into force unless and until approval has been given by both Houses of Parliament.

The text mentioned relates to Section 50 of the Infrastructure Act 2015 inserting new sections 4A and 4B into the Petroleum Act 1998. Sections 4B (4) to (7), which require the Government to lay, but not make, the protected areas regulations by 31 July, will commence before 31 July. This is so that there will be a clear legal requirement in force to lay these regulations. The remainder of sections 4A and 4B of the Petroleum Act will be commenced later and, subject to Parliamentary approval, the Protected Areas regulations will be timed to enter into force at the same time.

See: http://www.publications.parliament.uk/pa/cm201415/cmhansrd/cm150211/debtext/150211-0004.htm#15021110000002.
Q3: In the Explanatory Memorandum it is stated: “The Regulations define “other protected areas” as National Parks, the Broads, Areas of Outstanding Natural Beauty and World Heritage sites. 7.13 As with the definition of “protected groundwater source areas”, these Regulations also apply a depth limit of 1200 metres in these areas. Here again, the Government needs to ensure that appropriate additional protections is accorded to these areas, whilst ensuring that it will not impact wider energy security and economic policy aims. The Government believes that a depth of 1,200 metres achieves this balance.”

A DECC press release of 16 July says that: “Ministers also set out their clear commitment to ensure that fracking cannot be conducted from wells that are drilled in the surface of National Parks and other protected areas in such a way as to not impact on conventional drilling operations.” Does this mean that fracking can be carried out in the area of National Parks, provided that the drills concerned are outside the National Parks and any fracking takes place more than 1200 metres below the NPs’ surface?

A3: The draft regulations are concerned with areas where hydraulic fracturing is prohibited. Because the activity of hydraulic fracturing can only take place, by definition, at depth, these regulations are concerned only with areas of land beneath the surface. To this end, the draft regulations do not themselves prevent a well from being drilled from the surface in a protected area—they set out that, for protected groundwater source areas and National Parks, Areas of Outstanding National Beauty, the Broads and World Heritage Sites, hydraulic fracturing can only take place below a depth of 1,200 metres.

Separately, the Government clarified its planning policy on shale gas development in National Parks, the Broads, Areas of Outstanding Natural Beauty and World Heritage Sites in July 2014. Guidance was issued explaining that planning authorities should refuse a planning application where it is considered to be major development, unless it can be demonstrated that both exceptional circumstances exist and it is in the public interest.

The Government has further committed to ensuring that hydraulic fracturing cannot be conducted from wells that are drilled in the surface of National Parks and other protected areas. We also want to ensure that an outright ban on fracking from wells that begin in these areas does not impact on conventional drilling operations. Our current preference is to do this through our existing licensing powers, and we plan to consult on this shortly.

Q4: What undertakings in relation to protected areas were given by Ministers at the time that Infrastructure Act 2015, as a Bill, was amended to insert new sections 4A and 4B into the Petroleum Act 1998?

A4: The Government made statements about where the hydraulic fracturing prohibition would apply during the passage of the Infrastructure Act 2015, but also made a clear commitment to review definitions of protected areas so that they could be set out appropriately in law.

On 26 January 2015, Amber Rudd told Parliament that the previous Government had “agreed an outright ban on fracking in national parks, sites of special scientific interest and areas of outstanding natural beauty”.
Clarifying the Government’s position, Baroness Verma then told the House of Lords on 9 February that “the precise definition of protected areas will be decided at a later stage...We must be very careful not to put in place restrictions in areas that do not achieve the intended aim of the condition or that go beyond it and needlessly damage the potential development of the shale industry.”

Elaborating, Amber Rudd told Parliament on 11 February that “the Government amendment [to the then Infrastructure Bill] does not refer to “within or under” protected areas because the meaning of this term needs to be flexible to allow proper provisions to be made in secondary legislation. There is a strong case that sites such as World Heritage sites and the Norfolk Broads should be protected from fracking taking place under them. In other cases, that would not be sensible. For example, in the case of areas of outstanding natural beauty and national parks, given their size and dispersion, it might not be practical to guarantee that fracking will not take place under them in all cases without unduly constraining the industry. However, that is something we need to consider in more detail, and we will do that in due course.”

Q5: In the Explanatory Memorandum it is stated: “No public consultation related to these regulations was conducted.” Given the high level of public interest, why was there no public consultation? Was there nonetheless any non-public consultation, and if so, with whom?

A5: Parliament approved a provision of the Infrastructure Act 2015 / Petroleum Act 1998 which requires the Secretary of State to lay draft regulations in Parliament on or before 31 July 2015. As the nature of protected areas had been the subject of much helpful discussion during the Parliamentary passage of the Bill, no public consultation requirement was included in section 50 / section 4A or 4B. Instead, a requirement to consult the environmental regulators on the proposed definition of “protected groundwater source areas” was included in order to ensure that the proposed definition was workable in light of existing groundwater regulatory practices. The Government complied with this obligation prior to the draft regulations being laid in Parliament–both the Environment Agency and Natural Resources Wales agree with the definitions set out in the draft regulations.

22 July 2015
APPENDIX 2: ASYLUM SUPPORT (AMENDMENT NO. 3) REGULATIONS 2015 (SI 2015/1501)

Letter from Rt Hon. Lord Trefgarne, Chairman of the Secondary Legislation Scrutiny Committee, to Rt Hon. James Brokenshire MP, Minister for Immigration at the Home Office

The Committee yesterday considered SI 2015/1501 laid on 16 July, which changes the payment of asylum support to a per capita rate. Its content appears to be exactly the same as SI 2015/645 which was commented on by the SLSC in its 33rd Report of the last session. The Committee's concerns about transitional provisions and how the decision was to be communicated to recipients were reiterated in its 2nd Report of this session in relation to SI 2015/944 which revoked the previous instrument. Given its critical comments, the Committee was therefore surprised and disappointed that no attempt has been made in the Explanatory Memorandum accompanying the current instrument to address those concerns.

We also note the Home Office's continuing failure to provide in its Explanatory Memoranda what is generally regarded as standard information; for example, in this instance, the number of households which are likely to be affected by the change and what is included in the definition of "essential needs".

This Committee has for many years made clear its view about the undesirability of laying controversial instruments, such as this one, on the cusp of a Recess, leaving no time for debate in Parliament before the legislation comes into effect. I made that point clearly in a recent discussion with Lord Bates. In the light of this, the Committee would be grateful if you could explain why this instrument was not laid earlier, particularly as no re-drafting was required.

22 July 2015

Letter from Rt Hon. James Brokenshire MP to Rt Hon. Lord Trefgarne

You raised three issues. First, concerning transitional provisions and communication of the decision to existing recipients of asylum support, it was not considered appropriate for the implementation of the rate change made by this statutory instrument to be the subject of transitional provisions in respect of existing recipients affected by it. They were given advance notice of the change, which took effect on 10 August, by a letter sent to them on 16 July.

Section 95 of the Immigration and Asylum Act 1999 enables provision to be made for the “essential living needs” of destitute asylum seekers and the courts have given guidance on the various items which should be treated as essential and therefore taken into account in the overall assessment of the amount of money required to prevent destitution. Having conducted a full review and found that a simplified payment system providing £36.95 per week for each person in the household was sufficient to cover the essential living needs of all families, it would have been anomalous and unfair to allow those already in receipt of support to continue to receive higher payments than necessary to cover those needs.
Second, concerning the content of the Explanatory Memorandum, this aimed to provide sufficient information to explain the key reasons for the change, without covering every aspect of the findings of the review, which would have entailed a very lengthy memorandum. The full detail of the review was set out in a letter of 16 July to the National Asylum Stakeholder Forum, which as requested was forwarded to the Committee on 21 July and is enclosed here for ease of reference. The Explanatory Memorandum referred to this letter and I agree that it should have indicated where the letter could be found and referred to the number of households affected by the change (just under 6,000).

Third, concerning the timing of the laying of the statutory instrument, you are right that its text was substantially the same as SI 2015/645 (laid in March and revoked shortly afterwards by SI 2015/944). However, its laying reflected a full consideration by this government of whether to make this change to the payment rate for asylum support, including advice from officials and the normal cross-government clearance process. These matters necessarily took some time to resolve, which is why the statutory instrument was not laid earlier. I regret that this meant that there was not sufficient Parliamentary time before Recess for this statutory instrument to be debated before it came into effect.

9 September 2015

Letter from the Home Office to NASF Members

Levels of support to asylum seekers provided by the Home Office

In my letter of 8 April I informed you that consideration would be given after the General Election to the level of cash payments provided to destitute asylum seekers in family groups.

After careful consideration, the Government has decided to move to a simplified system where a standard rate (£36.95 per week) is provided to each supported person (of whatever age). £36.95 is already the payment provided to adult asylum seekers who do not have dependants.

This approach is already taken in respect to failed asylum seekers and their dependants supported under section 4 of the Immigration and Asylum Act 1999 (where every supported person receives a standard payment of £35.39).

In taking this decision, we have fully considered our legal duty to have regard to the need to safeguard and promote the welfare of children. The changes involve reductions in cash payments to families, but still ensure that sufficient funds are available to enable parents to care for their children safely and effectively and provide for their development.

Background

Asylum seekers and their dependants who are destitute are supported under the provisions set out in section 95 of the Immigration and Asylum Act 1999. The support package generally consists of accommodation and a cash allowance. The cash allowance is designed to meet “essential living needs” as specified in section 96(1)(b) of the 1999 Act which are not covered elsewhere (housing and utility costs, for example, are provided without charge).
In 2014 we developed a methodology to assess the level of cash necessary to meet the essential needs of asylum seekers. The methodology was designed to give effect to the decision of the High Court in the case of R (Refugee Action) v SSHD (2014) and was used to review the payment levels in that year and in 2015.

Our approach is to identify all essential needs (for example the need to eat healthily) and assess the amount of money required to meet the particular need. Various sources of information are used in the assessments, including data published by the Office of National Statistics (ONS) relating to household expenditure by low income groups among the UK population.

The table below sets out our assessment, following the 2015 review, of the amount of cash needed to cover each of the needs of a single asylum seeker that have been identified as essential.

In respect to toiletries, household cleaning items and non-prescription medicines the amounts reflect the most recent available ONS data (taken from the Living Costs and Food Survey for the 2013 calendar year) relating to expenditure on the items by the lowest 10% income group in the United Kingdom. We consider that the expenditure levels of this group on these items cover the sums necessary to meet the particular need and it is therefore unnecessary to make any adjustments.

In respect to food, an adjustment to the ONS expenditure level was made upwards to compensate for the fact that the survey records expenditure on takeaways separately.

The 2014 review considered in detail the amounts necessary to meet the other needs found to be essential (adequate clothes, and provision for travel and communications), basing the assessment on market research rather than ONS expenditure levels. It was considered unnecessary to adjust the amounts for 2015.

The methodology used (and allowing for inflation since the ONS Survey was compiled) provides an overall figure of £36.95. The breakdown is illustrated in the table.

<table>
<thead>
<tr>
<th>Item</th>
<th>2013 ONS Expenditure data</th>
<th>After Reasonable Adjustment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Food and non-alcoholic drinks</td>
<td>£23.46</td>
<td>£24.96</td>
</tr>
<tr>
<td>Clothing and footwear</td>
<td>Not relevant</td>
<td>£2.51</td>
</tr>
<tr>
<td>Toiletries</td>
<td>£1.23</td>
<td>£1.23</td>
</tr>
<tr>
<td>Healthcare</td>
<td>£0.69</td>
<td>£0.69</td>
</tr>
<tr>
<td>Household cleaning items</td>
<td>£1.00</td>
<td>£1.00</td>
</tr>
<tr>
<td>Travel (bus &amp; train)</td>
<td>Not relevant</td>
<td>£3.00</td>
</tr>
<tr>
<td>Communications &amp; Post</td>
<td>Not relevant</td>
<td>£3.00</td>
</tr>
<tr>
<td>Subtotal</td>
<td></td>
<td>£36.39</td>
</tr>
<tr>
<td>After 2014 CPI (1.55% as at Nov 2014)</td>
<td></td>
<td>£36.95</td>
</tr>
</tbody>
</table>
Asylum seekers with dependants (Family Groups).

Our review recognised that the needs of children are not always identical to adults and that is possible to envisage some circumstances where meeting the particular need requires greater expenditure of cash than would be required for an adult (e.g. because children need to replace clothes more often as they are growing). Equally, however, some needs essential for adults (e.g. the need to keep in contact with legal advisors or communicate with friends and families overseas) do not apply at all to their children.

More importantly, any extra needs particular to children are comfortably offset by the economies available to a larger household. The ONS data (2012 and 2013) confirms that expenditure on food and other items reduces considerably per head in multi-person households.

The United Kingdom’s previous approach to supporting asylum seeking families was, in fact, different to the approach of other EU states which support large numbers of destitute asylum seekers. Sweden, Germany and France, for example, all use payments systems that take into account the economies of scale available to multi-person households.

Taking all of these factors into consideration the review found that the existing payment levels to all families exceed the amounts necessary to cover their essential living needs. In light of these findings the Government has decided they should be reduced.

A payment system that provides a single payment rate of £36.95 for every supported person simplifies the support system and ensures all families, no matter their size and composition, receive sufficient cash to cover their essential needs.

The impact of the changes on the main family groups is illustrated in the table below.

<table>
<thead>
<tr>
<th></th>
<th>Lone Parent +1 Child</th>
<th>Lone Parent +2 Children</th>
<th>Couple +1 child</th>
<th>Couple +2 children</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Current payment</strong></td>
<td>£96.90</td>
<td>£149.86</td>
<td>£125.48</td>
<td>£178.44</td>
</tr>
<tr>
<td><strong>New Payment</strong></td>
<td>£73.90</td>
<td>£110.85</td>
<td>£110.85</td>
<td>£147.80</td>
</tr>
</tbody>
</table>

I hope this letter is helpful in explaining how our review was conducted. The Home Office has invested significant resources in speeding up decision making and the improvements we have made will ensure that asylum support is a temporary measure to alleviate destitution, as genuine refugees are swiftly recognised and therefore able to access the labour market and mainstream benefits.

We will of course keep the adequacy of the payment rates under review through our annual review cycle and in line with the statutory test to ensure that we are providing the right level of support to asylum seekers and their families.

16 July 2015
APPENDIX 3: SCHOOL GOVERNANCE (FEDERATIONS) (ENGLAND)
(AMENDMENT) REGULATIONS 2015 (SI 2015/1554)

Additional information from the Department for Education

Q1: How many schools are in fact affected by the change made by these Regulations? If the number is “so small”, why does the change have to be made to take effect from 1 September? Why could the change not take effect from 1 January 2016, to avoid the timing difficulties which have now arisen?

A1: We acknowledge that the timing of the introduction of this change is not ideal. The purpose of the change is to end some difficulties that have arisen. However, the change needs to be introduced swiftly as it has the potential to affect the 32 federated schools that are in the process of becoming academies and also any schools within a federation which may be proposing to make an application to become an academy from September 2015.

Q2: If the difficulties caused by the Federations Regulations 2012 were known in May of this year, why did DfE not lay these Regulations sooner than 21 July?

A2: It is correct that the Department was made aware of the difficulties caused by the Federations Regulations 2012 in May. It sought Ministerial views on the appropriate response, drafted the proposed changes, consulted key stakeholders, and then considered their representations before making a final decision to amend the Regulations. In the circumstances the Department considers that the change was made as quickly as possible.

Q3: Was the provision that individual prescribed governors could override the majority view of others no more than an accidental oversight, or was there alternatively some policy reason for giving individual prescribed governors a “privileged” position?

A3: When the Department introduced the amendment to section 3 of the Academies Act 2010, the policy position was that an application for an academy order would only require the support of 50% of the “prescribed” group of governors. We believe that the difficulty arising from the Federations Regulations 2012 was an accidental oversight. The amendment is intended to rectify this.

Q4: Who made DfE aware of this effect, and why was it not apparent in 2012 when the Federations Regulations 2012 came into force?

A4: This was brought to the Department’s attention through a pre-action protocol letter challenging the legality of an Academy Order. Prior to this application there had never been an occasion where a party had objected to an application for an Academy Order from a Federation.
Q5: Did any of those consulted criticise the time allowed for the consultation?

A5: The Department received no criticism from any of the consultees regarding the length of time of the consultation.

Q6: Did DfE ensure that all the small number of affected schools were notified of the consultation?

A6: The Department checked the applications from the 32 schools and also any new registrations of interest to ensure that federated schools were compliant with the regulations when they made the application (generally made following a vote of governors) to become an academy. Project leads dealing with federated schools have made them aware of the consultation about the proposed amendments to the regulations. The academy order is the in-principle agreement from the Secretary of State to proceed with the conversion process. If anything changes during the four / five months it takes to complete the process either party could decide not to enter into the funding agreement and the school could withdraw its application before it becomes an academy.

Q7: Given that “several of the responses [showed] a misunderstanding of a federated governing body’s constitution”, is DfE confident that this was an effective consultation process?

A7: We are confident that an effective consultation process has been followed. Consultation was conducted through the Department’s Advisory Group on Governance (AGOG) and with a number of Multi Academy Trusts and National organisations representing the interests of academies. The consultation document gave a full breakdown of what was being proposed and a draft of the proposed new legislation. A verbal explanation was also provided to AGOG members at its termly meeting prior to the consultation ending.

23 July 2015
APPENDIX 4: HOME OFFICE – SECONDARY LEGISLATION

Letter from Rt Hon. Lord Trefgarne, Chairman of the Secondary Legislation Scrutiny Committee, to Rt Hon. Lord Bates, Minister of State at the Home Office

Our concerns about the Immigration and Nationality (Fees) Regulations 2015 (SI 2015/768) are set out in the correspondence published in the Committee's 4th Report of this Session (HL Paper 13) and I will not rehearse them further in this letter.

However, I raised with you a number of other issues which it may be helpful to set out briefly below:

- **Uneven flow of instruments.** Despite having known for some time the date of dissolution, the Home Office laid over a quarter of its output for the entire session (42 instruments) in the last five sitting weeks, 25 of them in March alone. I know that you are aware of the difficulties that this causes the House and the Committee and we look forward to a more even flow in the future. It may be helpful also to reiterate the Committee's strongly held view that, except in exceptional circumstances, significant instruments should not be laid immediately prior to or in recess, leaving no opportunity for scrutiny before they come into effect.

- **Emergency measures.** As I said yesterday, we recognise that there may be occasions when the Home Secretary needs to take urgent action; and, so long as the Minister is able to justify to the Committee (in writing) why an instrument needs to be expedited, the Committee will do its utmost to oblige. I drew your attention at our meeting, however, to the impracticality of being asked to deal with a 90 page instrument overnight.

- **Quality of Explanatory Memoranda.** We also discussed how the principal way for any Government department to reduce delay in the scrutiny of secondary legislation was for Explanatory Memoranda to be complete, comprehensive and clear. I drew your attention to Memoranda in the last session which had omitted basic information about costs or the way the legislation was designed to operate. You are of course aware that Committee staff already collaborate in the Home Office's training courses but we agreed at our meeting that standards were not perhaps being enforced consistently in the clearance procedure. I welcome your suggestion that the Home Office training programme should be reviewed, with the involvement of your Parliamentary unit, and that steps should be taken to ensure that senior officials who sign off documents accompanying instruments, such as Explanatory Memoranda, are aware of the requirements. We look forward to these initiatives going some way to reducing the rather high number of Home Office correcting instruments, the error rate having reached 10% last session (nearly 17% for affirmatives alone).

8 July 2015
Letter from Rt Hon. Lord Bates to Rt Hon. Lord Trefgarne

I will take each of your points in turn:

**Uneven flow of instruments:** We will continue to examine the way in which statutory instruments are planned and processed in the Department. Home Office Legal Advisors (HOLA) provide policy leads with a checklist/spreadsheet to enable them to draw up a realistic timetable for managing any Sl. HOLA also run regular training sessions for policy leads, and I have asked them to update their training to ensure that it emphasises concerns around timetabling and in particular the Committees' message that it is preferable to avoid laying significant instruments immediately prior to or in a Parliamentary recess period. Whilst it will not be possible to avoid this entirely, by ensuring this message is reinforced with policy teams and senior officials, we can aim to reduce it. Of course, the common commencement dates in April and October inevitably mean there will always be a cluster of instruments vying for scrutiny at the same time ahead of those dates.

**Emergency measures:** Due to the nature of the issues which the Home Office is responsible for, there will always be a need for some Sis to be fast tracked through the affirmative process, or for negative Sis to breach the 21 day rule. I am grateful to the Committee for its understanding of that point. Where the need for emergency measures arises, I will aim to engage with the Committee at the earliest opportunity, as will the rest of the Home Office Ministerial Team.

**Quality of Explanatory Memoranda:** I have noted the Committees concerns about the quality of some Explanatory Memoranda submitted by the Home Office and have asked officials to ensure that this is covered in greater detail in training. They will also ensure that this message reaches those at senior level who should pick up concerns about quality before EMs are submitted.

Finally, I should like to reassure you that I intend to engage with the Committee at the earliest opportunity should any future issues arise. I look forward to receiving performance data again at the end of the year.

22 July 2015
APPENDIX 5: HOMES AND COMMUNITIES AGENCY (TRANSFER OF PROPERTY ETC.) REGULATIONS 2015 (2015/1471)

Letter from Rt Hon. Lord Trefgarne, Chairman of the Secondary Legislation Scrutiny Committee, to Brandon Lewis MP, Minister for Housing and Planning at the Department for Communities and Local Government

The Regulations specify eight public bodies whose land can be transferred to the Homes and Communities Agency (HCA), which is now the Government's land disposal agent in England outside London. The Explanatory Memorandum (EM) sets this in the context of plans for the future disposal of surplus public sector land, sufficient to allow 150,000 homes to be built.

The EM also refers to the Government's 2011–15 programme for disposing of public sector land. However, it fails to mention that, on 24 June 2015, the National Audit Office (NAO) published a report on the "Disposal of public land for new homes" which highlighted a number of significant concerns with this earlier programme. Among other things, the NAO report pointed out that Departments did not routinely monitor what happened to a site after disposal, and that your Department (DCLG) did not collect information on the amount of money raised from the sales.

The NAO recommended that, in taking forward the new programme, DCLG and the HCA should share the lessons from land disposals between 2011 and 2015, including the need for DCLG to clarify how it intends to measure progress through sales proceeds or number of potential homes; and for someone to take responsibility for monitoring what happens to land after disposal within the target period.

The Committee found it regrettable that the EM to these Regulations made no mention of this report or its recommendations, which, in our view, should be taken very seriously. Your Department has told us that monitoring a disposal site's progress through the planning system and build-out phase is likely to be resource-intensive, but that it is considering how it might be able do this in a cost-effective way. This is not a response that suggests a firm commitment to acting effectively on the lessons from the 2011–15 programme.

We would ask you to explain to us more fully the extent to which the Government intend to follow up the recommendations from the NAO report in the programme for land disposal over the next five years; and also to address the failure of your Department to refer to the NAO report in the Explanatory Memorandum to these Regulations. As well as replying to us on this failure, we suggest that DCLG revises and re-lays the Explanatory Memorandum to include appropriate reference to the NAO report.

22 July 2015
Letter from Brandon Lewis MP to Rt Hon. Lord Trefgarne

The Secretary of State announced on 31 May 2015 that the Government intends to continue with a programme of releasing surplus public sector land, setting a target that land with capacity for up to 150,000 homes should be brought forward for disposal by 2020.

The National Audit Office (NAO) report was published on 24 June, just over a week before these regulations were made. The regulations list the arm's length bodies that can transfer land to the Homes and Communities Agency (HCA) and the NAO report made no direct comments on the substance of these Regulations.

Given the importance of giving proper consideration to the issues raised by the NAO, there was insufficient time to reflect how we intend to respond to the issues raised in the memorandum. It was important that we made these regulations as there are a number of sites awaiting transfer to the HCA, having been declared surplus by the current landowner.

The NAO report, however, was very timely and its recommendations are now helping to frame the way we design and monitor the new programme. The Public Accounts Committee (PAC) took evidence from the Permanent Secretary on 15 July, and Government will formally respond to the PAC after their report is published.

I would like to reassure the Committee that, as the Permanent Secretary made clear in her evidence to the PAC, we are committed to learning the lessons from the previous programme as we begin the new programme. The NAO made some important points about data and record-keeping which we are taking very seriously. As suggested by the NAO, we will issue guidance to government departments to ensure transparency and consistency of approach in the new programme.

These regulations are a small part of the overall framework of the new public sector land programme. The Regulations list the ALBs that can transfer land to the HCA, and enables these transfers to take place. The majority of surplus public sector land is held by departments, but being able to transfer land direct to the HCA from ALBs will help to deliver the consistent approach to decision-making, monitoring and disposal of sites that the NAO has recommended. It will also allow the HCA to undertake its enhanced role as the single land disposal agent for government and use their expertise to drive delivery, which frees up government departments to concentrate on their core business.

I am currently working with colleagues across Whitehall to discuss how we will manage the new programme and deliver against the target, and I will publish the methodology for scoring against our new target. I am also considering the best and most proportionate way to measure progress against the new target and monitor the impact and will share this publicly later in the Autumn.

Given the concerns expressed by the Secondary Legislation Scrutiny Committee I am laying a revised Explanatory Memorandum which sets out how DCLG intends to respond to the NAO's recommendations.

4 September 2015
APPENDIX 6: TOWN AND COUNTRY PLANNING (OPERATION STACK) SPECIAL DEVELOPMENT ORDER 2015 (SI 2015/1635)

Further information from the Department for Communities and Local Government

Q1: In the Explanatory Memorandum you say: “In considering the proposed development at this site, the Department has carried out targeted consultation with stakeholders to identify the potential impacts of the development. This has included direct engagement with the Environment Agency, Natural England, Historic England, the Highways Authority (Kent County Council) and the Local Planning Authority (Thanet District Council).” What comments did you receive from these bodies? In particular, what has been the response of Thanet District Council? Has that council indicated that local residents are, or are not, content with the use of Manston Airport in this way?

A1: Thanet District Council highlighted the importance of working with the appropriate bodies to address any potential environmental impacts and sought assurances that the permission granted by the Order was temporary and that the land would be returned to its original condition. We have liaised directly with the planning department at Thanet Council on the drafting of the conditions and limitations on the permission.

Thanet District Council provided advice on how the site is under a large degree of scrutiny locally. We understand there are some locally who want to see the site brought back into use as an airport, such as the elected Council members and local pressure groups, and others, such as the owners of the site, who would like to see the site utilised for other purposes. The use of the site for temporary stationing lorries as part of Operation Stack (should it be needed for that purpose) should not affect the future plans of the owners or those who wish to see it brought back into use as an airport. The Council did not advise us on whether the local residents would be either content or not content with the temporary use of the site in this manner.

The Environment Agency and Natural England did not raise significant concerns about the proposed use of the site given that it was for a temporary period. However, they did seek assurances that through the appropriate use of conditions and limitations on the permission any potential impacts on the designated, sensitive sites in the area or on the local water supply would be mitigated. In particular, the potential impact of fuel leaks from the goods vehicles stationed on the runway. We have therefore taken steps, in the planning conditions, to ensure that the drainage system is well-maintained and suitable action is taken in the event of a leak, including containing any substances through operation of pollution control valves. Vehicles carrying Class 1 and 7 hazardous goods\(^\text{10}\) are prioritised and sent to the front of the queue. It is considered that the restriction of Class 1 and 7 materials and the condition that no refuelling or unloading of vehicles is permitted will minimise and mitigate the risks associated with the stationing of goods vehicles at the site. Overall, the conditions imposed through the Order seek to mitigate any potential environmental impacts and were agreed with the Environment Agency and Natural England.

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\(^{10}\) Class 1 hazardous goods are explosives; Class 7 hazardous goods are radioactive materials.
Similarly, Historic England considered that given the temporary nature of the permission and that no physical works (in particular, no excavations) were proposed it would be unlikely to amount to a significantly adverse effect on any sites of archaeological significance.

The Highways Authority, who are responsible for the roads around the site, were satisfied that the Operation Stack implementation plans were sufficient to address the potential impacts during the roll out of Operation Stack.

**Q2: Who owns Manston Airport? Is DCLG liaising with the owner in relation to this Order?**

A2: We understand the site is privately owned by Stone Hill Park Ltd. We and DfT have been liaising with the land owner’s agent (ParkServe) to ensure that arrangements for the management of the site when in operation support the permission granted by the Order.

**Q3: In the EM you say: “In addition the Department recognises the important part played by cross-agency plans to manage the highways impacts of Operation Stack when it is in force, including impacts at the entrance and exit to the site permitted by this Order. Furthermore, the role of the Strategic Coordination Group in liaising with relevant stakeholders to ensure relevant information is communicated, including to the local authority who is a member of the group.” Can you expand on this? How will impacts at the entrance and exit to the site be managed, and will consideration be given to impacts on nearby residents? What is the input of Thanet District Council to the Strategic Coordination Group?**

A3: The location of the entrance and exit to the site will mean that goods vehicles diverted under Operation Stack would avoid the built up villages of Manston and Cliffs End and will be routed to and from the site via the A-road network. The Operation Stack implementation plans have been devised to control the flow of lorries to and from the site, which will also reduce the risk of queuing on these roads, and minimise the traffic impact on the local community. The plans include lorries being sent to the site to be released from the motorway stack in convoys of small numbers of vehicles at a time with gaps between these releases in order to maintain flows of local traffic on surrounding roads. Similar plans are in place for lorries leaving the site. The Local Highways Authority (Kent County Council) have confirmed that they believe these plans are sufficient to address the potential impact. In addition Kent County Council, on behalf of the DFT and Highways England also, issued a letter to local residents on the 28 August detailing the route to be taken by goods vehicles during Operation Stack, and the diversion route for local residents of specific roads. The diversions will only be put into force if Operation Stack is invoked and the site is needed for the temporary stationing of lorries.
The overall strategic intention of the Strategic Co-ordination Group, that all strategic partners have signed up to, is to keep Kent moving, minimising the impact of cross channel disruption on the community, freight and non-freight traffic and the environment. Thanet District Council have indicated that in addition to the Strategic Co-ordination Group they will establish a more detailed dialogue if needed to discuss any day to day operational concerns that arise if Operation Stack is invoked.

The routes will be clearly signposted and at various junctions towards Manston there will be a Highways England or Kent Police patrol. Vehicle recovery resources will be positioned at strategic pinch points to keep the route moving in the event of a breakdown and will work under the supervision of traffic officers.

To help make the exit of vehicles from the site as smooth as possible, Canterbury Road West will become a one way route heading West towards the Hengist Way/Canterbury Road West roundabout if Operation Stack is invoked.

7 September 2015
APPENDIX 7: INTERESTS AND ATTENDANCE

Committee Members’ registered interests may be examined in the online Register of Lords’ Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 15 September 2015 Peers declared the following interests:

Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 3) Order 2015
Financial Services and Markets Act 2000 (Relevant Authorised Persons) Order 2015

Lord Janvrin

*Deputy Chairman, HSBC Private Bank (UK) Ltd*

Attendance:

The meeting was attended by Baroness Andrews, Lord Goddard of Stockport, Baroness Humphreys, Lord Janvrin, Baroness O’Loan, , Lord Trefgarne.