

HOUSE OF LORDS

Merits of Statutory Instruments Committee

11th Report of Session 2009-10

Drawing special attention to:

**Draft Health and Social Care Act 2008
(Regulated Activities) Regulations 2010**

**Statement of Changes in Immigration
Rules**

**Volume of Statutory Instruments coming
before the Committee**

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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) 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.
- (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.

Members

The members of the Committee are:

Rt Hon. the Baroness Butler-Sloss GBE	The Baroness Morris of Yardley
The Baroness Deech DBE	The Lord Norton of Louth
The Lord Hart of Chilton	The Lord Rosser (<i>Chairman</i>)
The Lord James of Blackheath CBE	The Lord Scott of Foscote
The Lord Lucas	The Baroness Thomas of Winchester
The Lord Methuen	

Registered interests

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 House of Lords Record Office and is available for purchase from the Stationery Office.

Declared interests for this Report are in Appendix 3.

Publications

The Committee's Reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/parliamentary_committees/merits.cfm

Contacts

If you have a query about the Committee or 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; fax 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.

Statutory instruments

The Government's Office of Public Sector Information publishes statutory instruments on the internet at www.opsi.gov.uk/stat.htm, together with an explanatory memorandum (a short, plain-English explanation of what the instrument does) for each instrument.

Eleventh Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

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 Health and Social Care Act 2008 (Regulated Activities) Regulations 2010

Summary: These Regulations put in place an expanded registration system covering private and voluntary sector care providers as well as the NHS in a wider range of regulated activities. This instrument was first laid on 29 October 2009 but the Joint Committee on Statutory Instruments (JCSI) raised a number of issues and the instrument was withdrawn and relaid with some significant changes (see section 3 of the Explanatory Memorandum). The House may wish to seek further information on how inspectors will be trained, and what measures are in place to ensure a consistent interpretation of the requirements throughout the country, particularly where prosecutions are being considered. The Regulations introduce fines of up to £50,000 for breach of the service requirements and the House may wish to seek more specific information on why these large maximum penalties are justified for such a wide range of requirements. The House may also wish to reassure itself that the Department of Health (DH) has got right the balance between protection of the service users and giving operators, particularly of small care establishments, sufficient clarity and encouragement to enable them to comply with the requirements.

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

1. The Department of Health (DH) has re-laid a revised draft of the instrument under the Health and Social Care Act 2008 along with an Explanatory Memorandum (EM) and an Impact Assessment (IA). These Regulations replace (and revoke) SI 2009/660 which set up aspects of the new Care Quality Commission established as regulator by the 2008 Act and puts in place an expanded registration system covering private and voluntary sector care providers as well as the NHS in a wider range of regulated activities.
2. This instrument was first laid on 29 October 2009 and an overview paragraph was published in our 31st Report of Session 2008-09. Since then the Joint Committee on Statutory Instruments (JCSI) reported that original draft to both Houses on a number of grounds. The Department has now withdrawn and relaid the instrument with some significant changes (see section 3 of the Explanatory Memorandum).
3. The JCSI is now satisfied that the draft is within the Secretary of State's powers but in its 3rd report of this session drew attention to the drafting of the terms used in the service provision requirements (notably regulations 9, 10, 11, 14, 15, 16, 17, 23 and 24) stating that they were set out in general terms more often seen in advisory guidance documents than in regulations. Clarity is important because regulation 27 makes failure to comply with *any* of these requirements an offence punishable by a maximum fine of £50,000.

4. The JCSI were concerned that even though guidance might indicate the sort of behaviours that would attract prosecution, it was not subject to Parliamentary procedure and the regulations themselves were insufficiently clear. If the legislation is insufficiently precise to enable a person to decide what must be done to avoid committing an offence then a defence of due diligence is of reduced value. For example, the Secretary of State's policy intention is that a person should not be prosecuted for a failure to comply with regulation 14 unless a service user had become inadequately nourished or was clearly at risk of that, but under these regulations a registered person would appear to commit an offence, even where nobody has been inadequately nourished, if the menu did not also provide "a choice of suitable.....food". This does not seem to follow the "outcome focus" of the Department's policy described in paragraph 3.5 of the EM.
5. Much will depend on how the Care Quality Commission (CQC) inspectors interpret the requirements and how they chose to enforce them. Since the JCSI reported, the CQC's guidance for operators about compliance has been published.¹ It has also published its *Judgement Framework* which sets out how CQC inspectors will assess operators' compliance with the requirements.² ***The House may wish to seek further information on how inspectors will be trained, and what measures are in place to ensure a consistent interpretation of the requirements throughout the country.***
- Penalties*
6. Another matter which the JCSI raised with DH but concluded was a matter of policy was the high maximum penalty of £50,000 set out in regulation 27 for breach of the service care provisions in regulations 9-24. The JCSI report (paragraph 1.17) pointed out that this maximum penalty of £50,000 contrasts with the £5,000 maximum penalty set by Parliament for other offences which seem similar (for example under sections 65 and 64 of the 2008 Act and section 67 of the Medicines Act 1968). The Department's view is that these high penalties are appropriate as they are attached to the regulations that set the essential safety and quality requirements that providers are expected to meet and that failure to comply with these regulations could place patients and service users at risk of harm. However the risk of harm to patients is not immediately apparent in all cases; for example, regulations 10(3) and 19(3) are only about the provision of information to the CQC. There are questions over whether an operator can be prosecuted where no actual harm has taken place and over the interpretation of the degree of risk; ***the House may wish to consider whether the Judgement Framework provides a sufficiently clear basis for the courts to use and how the CQC will exercise its powers of prosecution.***
7. In the first draft of the instrument interpretation of what behaviours might attract such a fine was very open. That is still the case, but in the revised regulations a new element has been inserted, regulation 27(2), which states that the Commission may not prosecute the registered person unless they have given him a warning notice which sets out the action he must take to

¹ Guidance on compliance Essential Standards of Quality and Safety published December 2009 (279 pages): http://www.cqc.org.uk/db/documents/Essential_standards_of_quality_and_safety_FINAL_081209.pdf

² Care Quality Commission - Judgement Framework (152 pages): http://www.cqc.org.uk/db/documents/Judgement_Framework_FINAL_081209.pdf

comply and a time limit to do so. Prosecution is now only permissible if the registered person still fails to meet the required standard set out in the notice after this period. This seems a fairer position but *the House may wish to press DH for more specific information on how these large maximum penalties are thought to be justified for all the provisions of regulations 9-24. The House may wish to reassure itself that the DH has got right the balance between protection of the service users and giving operators, particularly of small care establishments, sufficient clarity and encouragement to enable them to comply with the requirements.*

B. Statement of Changes in Immigration Rules (HC 367)

Summary: The purpose of this Statement of Changes in Immigration Rules (“the Statement”) is to implement changes to Tier 4 of the Points Based System (PBS). Tier 4 of the PBS caters for international students who wish to study in the United Kingdom. The changes being made by the Statement follow a joint UK Border Agency (UKBA) and Department for Business, Innovation and Skills (BIS) review of Tier 4. The changes include: a new restriction on the amount of work that can be carried out by students below degree level and further restrictions on family members of some students. A linked change to be made in guidance (not in this Statement) will require all students below degree level to demonstrate an existing level of English language at just below GCSE standard. There are some concerns with these changes in some parts of the education sector. As UKBA have provided only limited information on the consultation outcome, and have not yet completed an Impact Assessment, the Committee has been unable to take an informed view of the policy development processes behind this statement.

This instrument is drawn to the special attention of the House on the ground that it may imperfectly achieve its policy objectives.

8. The purpose of this Statement of Changes to the Immigration Rules (“the Statement”) is to implement changes to Tier 4 of the Points Based System (PBS). Tier 4 of the PBS caters for international students who wish to study in the United Kingdom and has two categories: Tier 4 (General) Student and Tier 4 (Child) Student. The changes being made by the Statement follow a joint UK Border Agency (UKBA) and Department for Business, Innovation and Skills (BIS) review of Tier 4. The aim of the review was to assess whether Tier 4 policy strikes the right balance between facilitating the access of genuine students to education in the UK, and preventing abuse by economic migrants (see paragraph 7.2 of the Explanatory Memorandum (EM)). The changes were announced in a Written Statement on 10 February [HL WS 10 February 2010, Cols 56 to 58].
9. The specific changes to the Immigration Rules being made by this Statement are:
 - a new restriction in the Tier 4 (General) category on students studying courses below degree level (except for those on a foundation course), so that such students may only work up to 10 hours per week during term-time. These students will still be permitted to take full-time employment during their vacation periods as at present;

- the Tier 4 (Child) Student category is being amended in the same way, so a Tier 4 (Child) Student, aged 16 or over, will be permitted to work 10 hours per week during term-time, and full-time during vacations;
 - family members of a Tier 4 Migrant who is following a course of study which is six months or less in duration, will not be permitted to accompany the Tier 4 Migrant to the UK; and
 - where a Tier 4 Migrant is following a course of study which is below degree level (except for those on a foundation degree course), family members will not be permitted to take employment, unless they qualify in their own right under other specified parts of the PBS.
10. The Government is also raising the minimum level of English Language course which can be studied under Tier 4 (General). They also intend to require all students on courses below degree level (except those on foundation degree courses) to demonstrate an existing level of English language at B1 level on the Common European Framework of Reference (see Appendix 1). However, these amendments will be set out in Tier 4 guidance as they do not require a Rules change.
11. In further information submitted to the Committee (Appendix 1) UKBA say that 17 sector representative organisations submitted written evidence to the review of Tier 4, and over 300 representations were received from individuals and individual education providers and related businesses. Meetings were also held with key representative bodies. However, UKBA say that they are not planning to publish an analysis of consultation responses (Appendix 1). This is disappointing and could be considered a missed opportunity to help the House understand the full range of opinions on the changes.
12. In response to questioning from the Committee, UKBA say (Appendix 1) that there is significant support for the introduction of the new Highly Trusted Sponsor (HTS) scheme and also for the introduction of formal English language testing. But they are also aware of some dissatisfaction in the education sector with some of the changes. This includes: English UK (a national association of accredited English language centres) being unhappy about raising the bar for English language students; and English UK and Study UK (which represents both the private higher education and further education sector) being concerned that publicly funded bodies are likely to have HTS status by default whilst their sectors will have to apply. The Committee is also aware that the Independent Schools Council (ISC) believes the changes may have a number of unintended effects for independent schools stemming from the lack of a clear distinction in Tier 4 between adult students and school pupils. ISC are pursuing their concerns with UKBA.
13. English UK and UK Council for International Student Affairs (UKCISA) have also written to the Committee to raise a number of concerns about the Statement (see Appendix 1). UKCISA make a number of procedural and policy points, including that the new prohibition on bringing family members if a student's course is six months or under in duration will have a disproportionate effect on female students and students from the Middle East. The English UK letter focuses mainly on the proposal to raise the requirement for English language competence for students coming to learn English.

14. The Explanatory Memorandum (EM) says that an Impact Assessment (IA) of all the changes stemming from the Tier 4 review will be published on the UKBA website in March 2010. In response to questioning from the Committee, UKBA have said that the IA is being prepared and will be published when the changes take effect. The Committee questions the policy development merit of completing an IA after an instrument has already been laid, let alone having come into effect. The House may wish to satisfy itself that UKBA has followed the Government's own policy on the use of IAs in this respect.
15. The parliamentary scrutiny process for this type of instrument is unusual. The Statement is laid before the House under Section 3(2) of the Immigration Act 1971 ("the 1971 Act"). As set out in the Statement, the changes to the Immigration Rules will come into force on 3 March 2010. Within a period of forty days beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), either House may pass a resolution disapproving the statement. (In this case the 40 day period is expected to expire on 1 April, subject to any adjournments.) The 1971 Act provides that in the event of such a disapproval, the Secretary of State shall, as soon as may be practical, make such changes or further changes in the rules as appear to him to be required in the circumstances, so that the statement of those changes be laid before Parliament, at latest, by the end of the period of forty days beginning with the date of the resolution (but with the exclusions as above).
16. In neglecting to provide an IA or full information on the consultation responses, UKBA has failed to provide the information necessary to allow the Committee to take an informed view of the policy development processes behind these changes. The lack of this contextual information in particular has impeded the Committee's ability to gauge the significance of the concerns with the changes that has been expressed in some parts of the education sector. Taking this into account, the Committee cannot be satisfied that this Statement will achieve its policy objectives.

OTHER INSTRUMENTS OF INTEREST

Draft Building Societies (Insolvency and Special Administration) (Amendment) Order 2010

17. This draft Order amends the Building Societies (Insolvency and Special Administration) Order 2009 ("the 2009 Order") which exercised the powers in the Banking Act 2009 ("the 2009 Act") to apply the bank administration and insolvency procedure provisions of the 2009 Act to building societies. The 2009 Order was made on an urgent basis under the 'made affirmative' procedure to enable the resolution of the Dunfermline Building Society in March 2009. The 2009 Order was drawn to the special attention of the House by this Committee along with a number of linked SIs, on the ground that they gave rise to issues of public policy likely to be of interest to the House (see 14th Report of Session 2008-09, published 30 April 2009). This draft Order follows a Government commitment at the time of the 2009 Order to carry out a post implementation consultation, and to bring an amending Order if necessary. The detailed amendments being made to the

2009 Order by this draft Order are listed in paragraph 4.4 of the Explanatory Memorandum (EM). The EM says (paragraph 8.7) that the Government's position on two of the Committee's earlier questions were highlighted in the consultation document and the Order has not been amended in this respect (see Appendix 1 of the 14th Report of Session 2008-09).

Draft Environmental Civil Sanctions (England) Order 2010

Draft Environmental Civil Sanctions (Miscellaneous Amendments) (England) Regulations 2010

18. These linked draft SIs give the Environment Agency and Natural England the power to impose civil sanctions for a range of environmental offences. The sanctions are those permitted under the Regulatory Enforcement and Sanctions Act 2008 ("the 2008 Act"), which are: Compliance notice; Restoration notice; Enforcement undertakings; Fixed monetary penalty notices; Variable monetary penalty notices; and Stop notices. The Order and Regulations are the first to make use of the powers to introduce civil sanctions enabled by the 2008 Act. The House may be interested in the new power of entry given to Natural England by Article 15 of the Draft Environmental Civil Sanctions (England) Order 2010 (see paragraph 4.7 of the EM). The scope of the power appears quite broad and the House may wish to use the debate on these affirmative instruments to satisfy itself that such a power is justified.

Draft Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2010

19. These Regulations complete the legislative implementation of the Financial Assistance Scheme (FAS) which provides help to members of certain occupational pension schemes who have lost part or all of their pensions as a consequence of their scheme winding up without having sufficient assets to pay full pension benefits. These Regulations allow part of the funding of an enhanced level of the FAS to be achieved through the transfer of pension scheme assets to government and for the FAS to make payments to those pension scheme members whose assets are taken over by government and who would otherwise have been paid solely by their pension schemes. Members may wish to note from section 3 of the Explanatory Memorandum that there are differing interpretations of which part of government the law allows to receive these assets, the Secretary of State or the Board of the Pension Protection Fund, and may wish to ask the Government for clarification at the time of the debate.

Draft Modifications to the Standard Conditions of Electricity Supply Licences

20. This draft will amend the Standard Licence Conditions of electricity supply licences. The amendments will require suppliers of electricity with more than 50,000 domestic customers to offer Feed In Tariffs (FITs) subsidy payments to accredited small scale (capacity of 5MW or less) generators of electricity using an eligible low-carbon energy source. Suppliers with fewer than 50,000 customers will be able to offer FITs voluntarily. The purpose of the licence modifications is to promote the take-up of small scale low-carbon electricity generation in order to help meet the UK's target to achieve 15% of its energy

consumption from renewable sources by 2020 and to contribute to the UK's low carbon targets. The impact on business, charities, public sector and voluntary bodies is an average increase in annual electricity bills of approximately 1.5% for the period 2011-2030 (Explanatory Memorandum paragraph 10). The average increase in annual household electricity bills over this period is estimated at approximately £8.50 (Impact Assessment page 3).

Draft Royal Parks and Other Open Spaces (Amendment) etc. Regulations 2010

21. The principal regulations governing the Royal Parks were last revised in 1997 and these draft negative amending regulations have a number of objectives, including: reducing the vehicle speed limit in Greenwich and Bushy Parks to 20 mph, allowing private licensed hire vehicles including taxis into the Parks, clarifying where model boats can be sailed in Bushy Park, and the responsibilities for clearing up horse faeces. In addition the Regulations propose to increase the parking charges in Greenwich, Regent's and Hyde Parks and to introduce parking charges in Richmond and Bushy Parks. The proposals for the introduction of parking charges in Richmond and Bushy Parks met with considerable opposition in the consultation exercise (84% of respondents were opposed: see paragraph 8.3 of the Explanatory Memorandum). The Department has responded by commissioning further research on parking habits in the areas and in consequence has decided to continue with the charge for parking but not with the proposal for limiting the stay to six hours.

Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010/103) and four associated instruments³

22. This suite of statutory instruments sets out the procedures which applicants for Nationally Significant Infrastructure Projects will be required to follow after submitting an application to the Infrastructure Planning Commission ("IPC") under the Planning Act 2008. These Rules detail the procedure for the examination of such applications by the IPC or by the Secretary of State, (including where the Secretary of State has made a direction restricting the disclosure of evidence on grounds of national security). Other instruments set out the procedure to be followed where projects involve the compulsory acquisition of land; specify who are "statutory parties" for the purposes of section 102(3) of the Act; prescribe how "relevant representations" must be made under the Act; and prescribe a number of miscellaneous matters such as the duration of a development consent order and the fees that may be charged by the IPC. From 1 March applications to the IPC will be considered according to these Rules and will initially result in recommendations to the Secretary of State. As the various National Policy Statements are agreed, they will set the framework for the IPC to make decisions in its own right.

³ Infrastructure Planning (Interested Parties) Regulations 2010 (SI 2010/102), Infrastructure Planning (Compulsory Acquisition) Regulations 2010 (SI 2010/104), Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations 2010 (SI 2010/105) and Infrastructure Planning (Fees) Regulations 2010 (SI 2010/106)

Business Rate Supplements (Administrative Expenses) (England) Regulations 2010 (SI 2010/134)

Business Rate Supplements (Collection and Enforcement) (England) Regulations 2010 (SI 2010/187)

23. The Business Rate Supplements Act 2009 provided a new discretionary power for county councils, unitary district councils and, in London, the Greater London Authority to levy a supplement on the national business rate. The Business Rate Supplement (BRS) is a separate tax set at a local level which levying authorities will be able to retain to fund additional projects to promote the economic development and infrastructure of their local area. These regulations set out the administrative details to enable its collection for the first time from 1 April 2010.

Ordinary Statutory Paternity Pay (Adoption), Additional Statutory Paternity Pay (Adoption) and Statutory Adoption Pay (Adoptions from Overseas) (Persons Abroad and Mariners) Regulations 2010 (SI 2010/150) and four related instruments⁴

24. These five negative instruments are part of a package of instruments that introduce the right to Additional Paternity Leave and Pay, provision for which was made by the Work and Families Act 2006. A further six affirmative instruments complete the package. Specifically, these five instruments govern the administration of Additional Statutory Paternity Pay (ASPP) for employers and Her Majesty's Revenue and Customs. They also provide for ASPP to be paid where eligible earners are working abroad, are mariners or are employed by more than one NHS body. The House may wish to note the provisions of these negative instruments when the affirmative instruments are debated.

Draft Human Fertilisation and Embryology (Disclosure of Information for Research Purposes) Regulations 2010: Further information

25. The Committee published an overview paragraph on this instrument in the 10th Report of this session regarding the grounds for which the Human Fertilisation and Embryology Authority 'may' or 'must' refuse an application for information under these regulations. The Committee has since received further information from the Department for Health on this issue, which is published at Appendix 2.

⁴ Statutory Paternity Pay and Statutory Adoption Pay (Persons Abroad and Mariners) Regulations 2002 (Amendment) Regulations 2010 (SI 2010/151), Additional Statutory Paternity Pay (National Health Service Employees) Regulations 2010 (SI 2010/152), Social Security Contributions and Benefits Act 1992 (Application of Parts 12ZA and 12ZB to Adoptions from Overseas) Regulations 2003 (Amendment) Regulations 2010 (SI 2010/153) and Additional Statutory Paternity Pay (Birth, Adoption and Adoptions from Overseas) (Administration) Regulations 2010 (SI 2010/154)

VOLUME OF STATUTORY INSTRUMENTS COMING BEFORE THE COMMITTEE

26. Recent weeks have seen a significant increase in the number of statutory instruments coming before the Committee. From 2004 to 2009, the average number of affirmative and negative statutory instruments laid before the House of Lords in January was 65. In January 2010, 117 statutory instruments were laid.
27. Many of these instruments were significant. Instruments subject to the affirmative procedure (which are normally deemed to be more important than negative instruments) usually make up around 10% of the instruments considered by the Committee. In January 2010, nearly 60% of the instruments laid (69 out of 117) were affirmatives. It is not yet clear that this flood of affirmatives is easing. 30 affirmatives have been tabled thus far in February. In total, there are currently 84 affirmative instruments before the Lords awaiting approval.
28. The Committee understands the apparent desire of Ministers and their departments to 'clear the decks' of affirmative instruments ahead of the forthcoming general election. But the end of the Parliament is not coming as a surprise to Departments, and better planning to avoid such a surge in affirmatives should have been possible. The number of instruments has made it more difficult for this Committee effectively to fulfil its responsibility to the House of sifting instruments and identifying any significant issues. It also makes it more difficult for this House, and the Commons, to ensure that every instrument is examined with appropriate care.
29. We emphasise how important it is for Members of the House to seek to ensure that every affirmative instrument is carefully scrutinised, even at this busy time and despite the number of instruments coming forward. The Committee will continue to play its part, wherever possible highlighting any instruments and issues of significance.
30. Thus far this year the Committee has observed an excess of affirmative instruments. If the pattern preceding the 2005 election is repeated, the coming weeks may see an increase in the number of negative instruments laid before the House. We similarly urge that these negative instruments should receive the appropriate level of scrutiny, especially where the Committee highlights concerns, and not proceed en masse and unnoticed.

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 requiring affirmative approval

Draft Apprenticeships, Skills, Children and Learning Act 2009 (Consequential Amendments) (England and Wales) Order 2010

Draft Building Societies (Insolvency and Special Administration) (Amendment) Order 2010

Draft Child Benefit Up-rating Order 2010

Draft Charities (Disclosure of Revenue and Customs Information to the Charity Commission for Northern Ireland) Regulations 2010

Draft Concessionary Bus Travel Act 2007 (Variation of Reimbursement and Other Administrative Arrangements) Order 2010

Draft Criminal Procedure and Investigations Act 1996 (Code of Practice for Interviews of Witnesses Notified by Accused) Order 2010

Draft Employee Study and Training (Qualifying Period of Employment) Regulations 2010

Draft Environment Civil Sanctions (England) Order 2010

Draft Environmental Civil Sanctions (Miscellaneous Amendments) (England) Regulations 2010

Draft European Union (Definition of Treaties) (Stabilisation and Association Agreement) (Bosnia and Herzegovina) Order 2010

Draft Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2010

Draft Financial Services and Markets Act 2000 (Amendments to Part 18A etc.) Regulations 2010

Draft Guardian's Allowance Up-rating Order 2010

Draft Guardian's Allowance Up-rating (Northern Ireland) Order 2010

Draft Legal Services Act 2007 (Warrant) Regulations 2010

Draft Local Education Authorities and Children's Services Authorities (Integration of Functions) Order 2010

Draft National Assembly for Wales (Legislative Competence) (Local Government) Order 2010

Draft Police (Northern Ireland) Act 2000 (Renewal of Temporary Provisions) Order 2010

Draft Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) (England and Wales) Order 2010

Draft Representation of the People (Timing of the Canvass) (Northern Ireland) Order 2010

Draft Safeguarding Vulnerable Groups Act 2006 (Controlled Activity and Miscellaneous Provisions) Regulations 2010

Draft Tax Credits Up-rating Regulations 2010

Draft Youth Rehabilitation Order (Review by Specified Courts) Order 2010

Draft Instruments subject to annulment

Draft Modifications to the Standard Conditions of Electricity Supply Licences

Draft Royal Parks and Other Open Spaces (Amendment) etc. Regulations 2010

Instruments subject to annulment

SI 2010/98 Civil Enforcement of Parking Contraventions Designation Order 2010

SI 2010/99 Bus Lane Contraventions (Approved Local Authorities) (England) (Amendment) Order 2010

SI 2010/102 Infrastructure Planning (Interested Parties) Regulations 2010

SI 2010/103 Infrastructure Planning (Examination Procedure) Rules 2010

SI 2010/104 Infrastructure Planning (Compulsory Acquisition) Regulations 2010

SI 2010/105 Infrastructure Planning (Miscellaneous Prescribed Provision) Regulations 2010

SI 2010/106 Infrastructure Planning (Fees) Regulations 2010

SI 2010/134 Business Rate Supplements (Administrative Expenses) (England) Regulations 2010

SI 2010/140 Council Tax and Non-Domestic Rating (Demand Notices) (England) (Amendment) Regulations 2010

SI 2010/150 Ordinary Statutory Paternity Pay (Adoption), Additional Statutory Paternity Pay (Adoption) and Statutory Adoption Pay (Adoptions from Overseas) (Persons Abroad and Mariners) Regulations 2010

SI 2010/151 Statutory Paternity Pay and Statutory Adoption Pay (Persons Abroad and Mariners) Regulations 2002 (Amendment) Regulations 2010

SI 2010/152 Additional Statutory Paternity Pay (National Health Service Employees) Regulations 2010

SI 2010/153 Social Security Contributions and Benefits Act 1992 (Application of Parts 12ZA and 12ZB to Adoptions from Overseas) Regulations 2003 (Amendment) Regulations 2010

- SI 2010/154 Additional Statutory Paternity Pay (Birth, Adoption and Adoptions from Overseas) (Administration) Regulations 2010
- SI 2010/155 Employee Study and Training (Procedural Requirements) Regulations 2010
- SI 2010/156 Employee Study and Training (Eligibility, Complaints and Remedies) Regulations 2010
- SI 2010/167 Hill Farm Allowance Regulations 2010
- SI 2010/172 Court Funds (Amendment) Rules 2010
- SI 2010/180 Scottish Register of Tartans Act 2008 (Consequential Modifications) Order 2010
- SI 2010/187 Business Rate Supplements (Collection and Enforcement) (England) Regulations 2010
- SI 2010/188 Social Security (Contributions) (Amendment No. 2) Regulations 2010
- SI 2010/189 Personal Injuries (NHS Charges) (Amounts) Amendment Regulations 2010
- SI 2010/190 School Budget Shares (Prescribed Purposes) (England) (Amendment) Regulations 2010
- SI 2010/195 Offender Management Act 2007 (Establishment of Probation Trusts) Order 2010
- SI 2010/196 Pension Protection Fund and Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2010
- SI 2010/198 Pedal Bicycles (Safety) Regulations 2010
- SI 2010/207 Sexual Offences Act 2003 (Prescribed Police Stations) Regulations 2010
- SI 2010/210 School Finance (England) (Amendment) Regulations 2010
- SI 2010/211 National Assistance (Sums for Personal Requirements and Assessment of Resources) Amendment (England) Regulations 2010
- SI 2010/214 Criminal Procedure and Investigations Act 1996 (Notification of Intention to Call Witnesses) (Time Limits) Regulations 2010
- SI 2010/219 Local Authorities (Alteration of Requisite Calculations) (England) Regulations 2010
- SI 2010/228 Immigration and Nationality (Cost Recovery Fees) Regulations 2010
- SI 2010/250 Warehousekeepers and Owners of Warehoused Goods (Amendment) Regulations 2010
- SI 2010/265 Mercury Export and Data (Enforcement) Regulations 2010
- SI 2010/279 National Health Service (Quality Accounts) Regulations 2010
- SI 2010/284 M6 Motorway (Junctions 8 to 10A) (Actively Managed Hard Shoulder and Variable Speed Limits) Regulations 2010

- SI 2010/291 National Savings Bank (Amendment of Obligation of Secrecy Provisions) Regulations 2010
- SI 2010/292 Learning and Skills Council for England (Strategy for Greater Manchester) Order 2010
- SI 2010/299 Pharmacy Order 2010 (Commencement No. 1) Order of Council 2010
- SI 2010/300 General Pharmaceutical Council (Constitution) Order 2010

APPENDIX 1: STATEMENT OF CHANGES IN IMMIGRATION RULES (HC 367)

Information from the UK Border Agency

Q1. *In the media coverage of these changes, there was a suggestion that applicants to study would need to speak English to near-GCSE level. Is this the case? If so, can you point me to the relevant provision in the Rules?*

A1. We are raising the bar for the minimum level of English language course which can be studied under Tier 4 -general - from its current level of

A2 on the Common European Framework of Reference to B2. This means all EL students will have to demonstrate an existing level of EL at B1 which is roughly equivalent to being just below GCSE standard in a foreign language. We are also going to require all students on courses below degree level (except those on foundation degree courses) to demonstrate an existing level of EL at a minimum of B1 although sponsors will be able to require a higher level if they feel the course demands it.

These requirements will be set out in our Tier 4 Guidance as they do not require a Rules Change. The minimum level of course which can be studied under Tier 4 as well as any sponsor duties are set out in Guidance. To coincide with the Rules changes on 3 March we will therefore change the Tier 4 Guidance to give effect to these changes and we wrote to sponsors yesterday to alert them so that they know that any Confirmations of Acceptance for Studies they issue now which will not be used in an application under Tier 4 until on or after 3 March will need to be in line with these new requirements otherwise the CAS will be invalid as it will not match our Guidance.

There are however 2 exemptions from these EL changes as students sponsored by overseas Governments and students on pre-sessional English language courses which prepare them for full degree courses will not be required to be already at B1, as these students are lower risk.

In addition we are not stopping complete beginners or those with a level below B1 from coming to the UK to improve their English as they can continue to use the Student Visitor route outside of PBS and spend up to 6 months on a course without any entitlement to work or extend their stay in-country at the end.

Consultation

Q2. *With whom did you consult on the specific changes and what are their views?*

A2. A total of 17 sector representative organisations submitted written evidence to the review and in addition, over 300 representations were received from individuals and individual education providers (particularly English language schools) and related businesses (including home-stay providers and airport transfer firms). Meetings were also held with key representative bodies including Universities UK, UKCC, UKCISA, Study UK, English UK and ABLIS.

Whilst stakeholders were concerned about the uncertainty created by the review when the sector was still getting to grips with the new Tier 4 system, there was significant support for introducing a new category of Highly Trusted Sponsor (HTS) and also for the introduction of formal English language testing which will follow on from the introduction of the minimum of B1 level. Some respondents also supported reducing the number of hours students were able to work during term-time, particularly for those studying below degree level as 20 hours was seen as too much and could distract students from their studies. There was less support for raising the bar for EL students though some in that sector acknowledged the student visitor route was appropriate for these students and the

concessions for Government sponsored and pre-sessional degree students have been welcomed.

Q3. *Are you aware of any dissatisfaction, particularly amongst the education sector?*

A3. English UK is unhappy about raising the bar for EL students although other EL respondents are less concerned.

EUK and Study UK which represents the private HE/FE sector are both concerned that publicly funded are likely to be HTS by default when their sectors will have to apply but we have made it clear that the new category will include the best private providers and any publicly funded providers which are not good enough will lose their HTS status.

Q4. *Will you be publishing an analysis of the consultation responses?*

A4. This was not a formal consultation and this is not planned.

Impact

Q5. *Is there any information available on the impact of these changes which I can put to the Committee to help them with their consideration?*

A5. A formal impact assessment is being prepared and will be published when the changes take effect in a couple of weeks. We do not expect any significant impact on genuine students as these are targeted measures to tackle the abuse of lower level courses which are more open to exploitation by economic migrants as they tend to have lower level entry requirements.

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Letter from the UK Council for International Student Affairs

Drafting and correcting errors

The drafting on this occasion is clear. This is a welcome contrast with other recent statements of changes implementing Tier 4, all of which have contained errors and ambiguities which we have highlighted and which, unfortunately, have not all been corrected.

For example, the paragraphs of Appendix C which relate to the maintenance requirements of Tier 4 are not clear and attempts to explain them in the Tier 4 policy guidance have resulted in several different interpretations regarding which Tier 4 students can rely on the reduced maintenance ('established presence in the UK') provision. The same applies to the subparagraphs of paragraphs 245ZV and 245ZX which explain who requires an Academic Technology Approval Scheme clearance certificate. There are no exceptions. However, the Tier 4 policy guidance has exceptions, the details of which have changed in different versions and these are different again from the exceptions on the website of the FCO, which administers the scheme. The UK Border Agency has acknowledged that these disparities exist. It is, therefore, disappointing that yet again the opportunity was not taken to make the necessary amendments to these provisions, which have been causing confusion since Tier 4 came into force on 31 March 2009, at the same time as introducing new requirements.

The definition of "foundation degree" is quite wide and appears to apply to qualifications other than those called foundation degrees. We understand this implements the policy intention but we hope that this made clear in any guidance as it could lead to confusion on the part of institutions and possibly caseworkers.

We welcome the inclusion of transitional protection for those applying before 3 March 2010. This has not always been included, even when it was intended (for example, Cm 7701).

Rules and guidance

As explained above, there have been differences between the Tier 4 policy guidance and the Immigration Rules since Tier 4 came into effect. Since the Immigration Rules for Tier 4 were first published just under 12 months ago, there have been six versions of the Tier 4 policy guidance, some making substantive changes and others renumbering paragraphs and correcting grammatical errors. We asked how many versions of the policy guidance and application forms will be published between 22 February and 6 April 2010 when three changes of policy will be implemented, including the changes to be brought about by HC 367 on 3 March. We were informed that there would probably be one set of forms and guidance for each change in that period of under two months. At least most of these changes will, hopefully, be tied to changes in the Immigration Rules.

However, the scheme is becoming quite unworkable because of the number of changes and the fact that information is published in so many different places, in many cases saying different things. For example, there are the Immigration Rules, the Tier 4 policy guidance, the guidance for sponsor applications, the PBS Dependants guidance, the FAQs for Tier 4 sponsors, the FAQs for Tier 4 students, the web pages for Tier 4 students and their dependants, and the web pages for Tier 4 sponsors. Where there is a discrepancy between the Immigration Rules and some other document or source of information, we cannot assume that the Immigration Rules will be applied and have to ask on every occasion which version reflects the real policy intention. As the policy guidance is changed so often, there appears to be little legal certainty on which students and advisers can rely.

Consultation

Our comments on how the consultation was carried out are included in our response of 29 November 2009 to the consultation (copied below [not printed]). In summary, we consider that the three-week period of consultation was too short, the review was premature and we were provided with no details of the perceived abuse of Tier 4 which triggered the review.

Having provided a response at very short notice, we found it disappointing that no summary of responses was made available and that we were given no indication of recommendations, although we attended a meeting with the UK Border Agency at which it was supposed to have been a major agenda item.

We were consulted on only one change which will be implemented through HC 367, namely reducing or removing permission to work from Tier 4 students. All other changes were not subject to consultation, at least not with us, or will be introduced outside the Immigration Rules through amendments to the policy and sponsor guidance.

Policy

Dependants

Dependants did not form part of the consultation, so we were surprised to see the changes in the Immigration Rules which affect them.

The prohibition of work for dependants of students who are studying courses below degree level is likely to make little difference as the dependants of students whose leave was under 12 months long were not granted permission to work anyway. We have no idea of the abuse it is meant to address, especially as the Migration Advisory Committee stated in paragraph 8.16 of its report of August 2009 that there was no evidence that PBS dependants have an adverse impact on the UK labour market.

It is not clear why the explanatory memorandum attached to HC 367 states that such family members must have permission to work in their own right as Tier 1 (General) etc migrants. Surely these are just examples of how dependants might have permission to work in their own right, and they might equally qualify under other routes. Although the explanatory memorandum is not legislation, this statement could lead to confusion.

We are concerned about the new prohibition on bringing family members if a student's course is six months or under in duration. Many students, who are often in receipt of full funding for them and for their family members, come to the UK in order to undertake a series of short English courses, followed by short pre-sessional courses and then full-time degree courses. They cannot successfully undertake degree courses without having first improved their English language skills, but they are unlikely to want to be without their family for a period of a year or more when in the past this has been perfectly acceptable. This is likely to have a disproportionate effect on female students and on students from the Middle East, who are often in receipt of generous funding for them and their families from their government. Again, we have no idea what perceived abuse this change is meant to address, particularly as the dependants of students whose leave is under 12 months long never had permission to work.

This follows the previous change to the Rules affecting students' family members, which has had an adverse effect on those with children. HC 314 introduced the requirement that children cannot join a student parent in the UK unless both parents are here. Whilst we understand that child protection issues play a role in this, this has meant that a student supported financially by a partner working at home cannot have her children with her, even if the partner has to travel for work. In some cases, babies have been born in the UK and the other parent has had to return home for work or other reasons, which means that the new mother cannot apply to have her baby remain with her in the UK. We have asked that children be allowed to join or stay with the student parent if the other parent provides written consent but this request has been rejected on the grounds that this is a matter of convenience for students and the rule applies to all PBS migrants. It is not clear why the Government wishes to disrupt so severely the family life of students, particularly when family support in a new country can be so helpful in ensuring that students successfully complete their studies.

Work restriction

The restriction of employment to 10 hours a week in term-time for students on courses below degree level, except foundation degree courses, seems reasonable. However, we do not yet know how it will be made clear to employers which students are affected by this. It is to be hoped that entry clearance vignettes and Identity Cards for Foreign Nationals will be worded very clearly in order to avoid confusion, as this has not always been the case.

We have not yet seen any details of how the restriction on work placements is to be implemented.

English language courses

The raised minimum level of English language courses, from CEFR level A2 to B2, with exceptions for government-sponsored students and those on pre-sessional courses, is not dealt with in HC 367, and we have not yet seen any details. This is one of the difficulties with running a system partly through Immigration Rules and partly through guidance, which can be changed at any time. We very much hope that any exceptions to the minimum level will be explained clearly and will be subject to consultation with the sector, the results of which are heeded by the UK Border Agency.

Tier 4 partners can now switch to Tier 1 (General) and Tier 2

This is a welcome development although again we were not consulted on it. We would have expressed the wish to see this extended to Tier 4 partners who have been awarded degrees (or PGCEs, PGDEs or HNDs in Scotland) in the UK who still cannot switch to Tier 1 (Post-Study Work).

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Letter from English UK

Thank you for asking us if we wish to make comments on the above Statutory Instrument changes.

The changes outlined in the Statement relate largely to the work rights of students on courses below degree level, and the work rights of their dependants. The impact of these is relatively minimal: for example, dependants who accompany students on short courses usually do not wish to work, so removing their rights has little effect. It is more of a moot point as to why students on a degree course should be allowed to work 20 hours a week during term, but students on courses below degree level should be allowed to work for only 10 hours; in both cases surely it could be argued that the expectation of research, reading around the subject, preparation of assignments etc is similar. In the English language sector however the restriction is in fact perverse: one of the main ways that students learning English can practise the language in real-life situations outside the classroom is to work, especially in contexts where they can learn specialist vocabulary.

However in this particular case, and a point for the Committee's wider consideration, is that the changes to the Immigration Rules which are *not* covered in the Statement are more important and have a far more damaging impact than the changes which *are* covered in the Statement.

The key point here is the proposal to raise the requirement for English language competence for students wishing to come to the UK on a Points Based System Tier 4 General Student Visa*. The proposal is to raise this by two levels, from the present where a student must be at level A1 of the Common European Framework of Reference for languages to take a course at A2, to requiring a student to be at level B1 to take a course at B2. The former means in plain English being lower elementary for a course at elementary level; the latter means being at about GCSE grade A*-B for a course at AS level. It is a huge increase in demand and will mean the loss of possibly as many as 100,000 students, £400 million of income to the sector, and thousands of jobs both in language centres and associated businesses. There will be consequential damage to the recruitment of international students into higher education, with losses there being easily over £1 billion as some universities recruit as many as 70% of their international students from those already in the UK for English language and foundation year programmes. Since international student fee income is vital to the sustainability of a significant number of university departments, loss of such income could well mean that such departments will close, in turn denying more university places to UK students whom they effectively subsidise.

This proposal is not part of the Statement. When I enquired under what powers it could be introduced, the answer from the UK Border Agency was as follows.

'Our ability to make such changes via guidance stems from the Immigration Rules. Paragraph 120 of Appendix A, the attributes section of the Immigration Rules, outlines when points will be awarded for a CAS.'

For ease of reference, this is the relevant section on the following page <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/appealindex>:

120. Points will only be awarded for a Confirmation of Acceptance for Studies (even if all the above requirements are met) if the course in respect of which it is issued meets each of the following requirements:

(a) The course must meet the United Kingdom Border Agency's minimum academic requirements, as set out in sponsor guidance published by the United Kingdom Border Agency.'

So it would seem that this is being proposed as an administrative change to 'guidance'. This seems utterly wrong on at least the following counts:

- It cannot be said this was envisaged under the provisions of the superior legislation, the Immigration Act 1971
- It is a major change with huge impact and to make it under 'guidance' as an administrative matter is a blatant attempt to avoid the proper scrutiny of Parliament
- The clause 120 (a) confers an excessive power on the UKBA which Parliament probably did not notice or intend: technically the UKBA could decide without debate or consultation that a UK bachelor's degree did not meet their 'minimum academic requirements' and that people would be permitted to come here only to study for a PhD.

I would hope that the Select Committee might decide to review this as a matter of general principle associated with the Statement in question. I should be pleased to provide further information if they wish.

* We should note here that our objection is solely in relation to students coming to learn English. For those coming for other courses below degree level but at about National Qualifications Framework level 3 (equivalent to A levels), starting competence in English at level B1 or threshold B1 is about right since they will be taught in English, required to read study materials in English, and complete assignments and assessments in English. But it is absurd to require people who wish to come to learn the language already to be competent in it, which is the effect of this proposal.

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**APPENDIX 2: DRAFT HUMAN FERTILISATION AND EMBRYOLOGY
(DISCLOSURE OF INFORMATION FOR RESEARCH PURPOSES)
REGULATIONS 2010: FURTHER INFORMATION**

Information from the Department of Health

The Merits Committee has expressed concerns about regulation 7(3)(b) of the Human Fertilisation and Embryology (Disclosure of Information for Research Purposes) Regulations 2010 (“the Regulations”). The Committee asks whether a failure to satisfy the Human Fertilisation and Embryology Authority (“the HFEA”), the authorising authority in the Regulations, that the disclosure or processing of information for the purposes of a research project would be in the public interest or in the interests of improving patient care should be a mandatory ground of refusal and, accordingly, included in the list of grounds for refusals in regulation 7(1).

It is the Government’s intention that the HFEA will only grant an application where the research is in the public interest or will benefit patient care. Nonetheless, the Government considers that it is appropriate to provide an element of discretion to the HFEA to consider and reach a view about the value of research where the benefits to the public may only be established clearly in the longer term, or which may be of importance to a narrow group of persons where it might not be clear whether the interests of such persons equates precisely with the public interest.

The Government does not know as yet who will seek to make an application under the proposed Regulations nor in relation to which areas of research. However, it is possible that there could be studies where the public interest test could not be definitively identified until the earliest stages of the research were complete, perhaps because the amount and quality of the data held by the HFEA was unknown at the time that the application was being considered by the HFEA. The assisted reproduction field offers a number of examples of research where the benefits were only established many years later. For example, the earliest work in the development of in vitro fertilisation (IVF) dates back to the 1930s (the first work in human models took place in the 1940s) but a live birth was only achieved in 1978.

The work of IVF pioneers Steptoe and Edwards was viewed with opposition and even hostility in many quarters. Those who opposed that work would have been strongly of the view that the research was not in the public interest. In such cases, the Government would not wish to place the HFEA in the position of not being able to consider whether or not to grant the application.

We do not believe that, in giving a discretion to the HFEA to grant an application where the public interest or interest in improving patient care is not established beyond doubt, the HFEA will grant applications inappropriately or in a wide range of circumstances. The HFEA will have to act reasonably and will have to act compatibly with the Convention rights.

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APPENDIX 3: INTERESTS

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 House of Lords Record Office and is available for purchase from The Stationery Office.

For the meeting on 23 February 2010 the following Members declared interests on the following instruments of interest:

Draft Modifications to the Standard Conditions of Electricity Supply Licences

Baroness Butler-Sloss and Lord Scott of Foscote: as having installed solar panels.

Draft Human Fertilisation and Embryology (Disclosure of Information for Research Purposes) Regulations 2010

Baroness Deech: as a former chair of the Human Fertilisation and Embryology Authority.