HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

29th Report of Session 2016–17

Draft Horserace Betting Levy Regulations 2017

Draft Trade Union (Deduction of Union Subscriptions from Wages in the Public Sector) Regulations 2017

Trade Union (Facility Time Publication Requirements) Regulations 2017

Damages (Personal Injury) Order 2017

Correspondence:

Draft Non-Contentious Probate Fees Order 2017

Universal Credit (Housing Costs Element for claimants aged 18 to 21) (Amendment) Regulations 2017

Includes 6 Information Paragraphs on 8 Instruments

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Secondary Legislation Scrutiny Committee

The Committee was established on 17 December 2003 as the Merits of Statutory Instruments Committee. It was renamed in 2012 to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

The Committee's terms of reference are set out in full on the website but are, broadly, to scrutinise —

> (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
>
> (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of these specified grounds:

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

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Baroness Andrews	Lord Hodgson of Astley Abbots	Lord Rowlands
Lord Bowness	Baroness Humphreys	Baroness Stern
Lord Goddard of Stockport	Rt Hon. Lord Janvrin	Rt Hon. Lord Trefgarne *(Chairman)*
Lord Haskel	Baroness O'Loan	

Registered interests

Information about interests of Committee Members can be found in the last Appendix to this report.

Publications

The Committee's Reports are published on the internet at www.parliament.uk/seclegpublications

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at http://www.legislation.gov.uk/uksi

Information and Contacts

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hlseclegscrutiny@parliament.uk.

Twenty Ninth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft Horserace Betting Levy Regulations 2017

Date laid: 7 March 2017

Parliamentary procedure: affirmative

These draft Regulations propose several changes to arrangements for the Horserace Betting Levy, intended to protect the level of support which the Levy provides to horseracing. Consultation on these reforms over the last two years has failed to close the gap between the horseracing industry, which supports the proposals, and the betting industry, which does not.

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

1. The Department for Culture, Media and Sport (DCMS) has laid these draft Regulations with an Explanatory Memorandum (EM). DCMS explains that the Horserace Betting Levy ("the Levy") is paid by bookmakers for the purposes of aiding the horseracing and equine sector; it recognises the mutual interest which racing and betting share in a thriving racing industry. The Regulations propose several changes:

    - they extend the Levy to all gambling operators who offer bets on horseracing in Great Britain, including operators required to hold a remote operating licence,
    - they change the basis on which the Levy is calculated to a fixed rate, namely 10% of the amount by which an operator's profits on bets that relate to horseracing in Great Britain made by a person in Great Britain exceed £500,000,
    - they provide for the Levy rate to be reviewed within seven years, and
    - they make consequential changes to the powers of the Horserace Betting Levy Board to enable it properly to administer the new Levy scheme.

Extension of the Levy to all betting operators

2. DCMS says that those bookmakers based offshore who take bets on British horseracing are not currently liable to pay the Levy; and that all the major gambling operators active in the British market are based offshore, and remote gambling (primarily via the internet) is now the largest gambling sector. This has contributed to a significant decline in Levy receipts, with the statutory Levy falling from £115 million in 2007–08 to £54.5 million in 2015–16. There have been efforts, ultimately unsatisfactory, to broker voluntary deals to ensure that betting exchange providers and offshore bookmakers benefitting from the British racing product contribute to the

industry; the Government have concluded that there is no alternative to legislative action.

Basis of calculation for the Levy

3. Under the current regime, the Levy scheme is agreed on an annual basis by the Levy Board on the recommendation of the Bookmakers' Committee, or else determined by the Secretary of State where the parties are unable to agree. The Regulations propose that in future the Levy amount payable is to be determined by reference to a fixed rate, namely 10% of profits on leviable bets which exceed £500,000 in any Levy period as a bookmaker or betting exchange provider (Levy periods run from 1 April to 31 March in any given year).[1]

4. DCMS says that, in arriving at a rate of 10%, it considered a range of sources including responses to previous consultations (see below) and Gambling Commission statistics on the levels of betting activity on racing and profit levels on both the remote and land-based market, as well as an independent economic report into racing's costs and income (commissioned by Government). The Department says that it estimates that a rate of 10% would have produced a yield of between £72 million and £84 million, based on the Government's analysis of the market in 2015–16 (subject to a number of assumptions and caveats): setting the rate as a percentage of horserace betting profits ensures that Levy payments are affordable for betting operators, as their payments will adjust in line with the level of benefit they derive from the racing product.

5. DCMS explains that, in recognition of the need to minimise the burden on operators with lower profits on racing, both land-based and offshore, an exempt amount of £500,000 has been adopted; this will mean that the majority of small and medium-sized operators will not incur Levy liability.

Changes to the powers of the Horserace Betting Levy Board

6. DCMS says that the annual process for agreeing the Levy scheme will cease, and that the requirement for the Bookmakers' Committee will fall away. Since the current Levy regime makes the powers of the Levy Board to administer Levy schemes dependent on the scheme agreed with the Bookmakers' Committee, there is a need to provide a new basis for those powers.[2] DCMS says that the powers being given to the Levy Board are not new; the intention has been closely to mirror the existing regime.[3]

1 Paragraph 7.8 of the EM sets out the formula used to determine a bookmaker's horseracing betting profits.
2 Under the Betting, Gaming and Lotteries Act 1963.
3 DCMS says in the EM that these changes constitute the first phase of changes intended to the Levy; a second phase will make changes to the administration of the Levy and abolish the Levy Board; the intention is to make those changes by way of a Legislative Reform Order.

Consultation

7. In the EM, DCMS lists the three public consultations carried out on the Levy in 2014–15,[4] explaining that the options explored ranged from extending the existing Levy to a more radical approach of replacing it with a rights-based model. Overall, responses to the consultations were divided, with very different outcomes favoured by the two industries. The vast majority of respondents from the betting industry argued there was no need for a statutory Levy, but if there was, they favoured retaining or reforming the current Levy system. The racing industry's overarching aim was to secure a fair contribution for the sport from offshore betting operators.

8. In March 2016 the Government published a response to the consultation process,[5] confirming the intention to reform the current Levy (as now proposed in the draft Regulations). DCMS says in the EM that it has continued to engage with both industries on further details of the reform, including through a letter sent in October 2016 from the Minister to the parties indicating the detail of the reforms. In their responses, the racing industry supported the Levy reform proposed, whilst the betting industry argued that a rate of 10% was too high and failed to take account of the commercial deals in place between the industries.

Conclusion

9. There have been large-scale changes in the horseracing and betting industries since the Levy was introduced in the early 1960s, not least the emergence of offshore basing for the major gambling operators active in the British market. The proposals in these Regulations are intended to reform Levy arrangements in order to protect the level of support which it provides to horseracing. Consultation on these reforms over the last two years between the Government and the interested parties has failed to close the gap between the horseracing industry, which supports the proposals, and the betting industry, which does not.

4 The first consultation, "Extending the Horserace Betting Levy", ran for eight weeks from 26 June to 21 August 2014, with 23 responses. The second, "Modernising the Horserace Betting Levy", ran for 10 weeks from 27 August to 5 November 2014, with 101 responses. The third, "Horserace Betting Right", ran for four weeks from 5 February to 12 March 2015, with 143 responses.

5 See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/508313/Implementing_the_replacement_for_the_Horserace_Betting_Levy.pdf

Draft Trade Union (Deduction of Union Subscriptions from Wages in the Public Sector) Regulations 2017

Date laid: 9 March 2017

Parliamentary procedure: affirmative

Trade Union (Facility Time Publication Requirements) Regulations 2017 (SI 2017/328)

Date laid: 9 March 2017

Parliamentary procedure: negative

The draft Trade Union (Deduction of Union Subscriptions from Wages in the Public Sector) Regulations 2017 provide that a relevant public sector employer may make deductions from its workers' wages in respect of trade union subscriptions only if the trade union pays the employer a reasonable amount for this service. The Trade Union (Facility Time Publication Requirements) Regulations 2017 require relevant public sector employers to publish a range of data in relation to the use of, and expenditure on, trade union facility time in their organisations. We have received a submission about the second set of Regulations from the Royal College of Nursing, and a response to it from the Cabinet Office.

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

10. The Cabinet Office has laid both these instruments, in each case with an Explanatory Memorandum (EM) and Impact Assessment (IA):

- the draft Trade Union (Deduction of Union Subscriptions from Wages in the Public Sector) Regulations 2017 ("the Subscriptions Regulations") provide that a relevant public sector employer may make deductions from its workers' wages in respect of trade union subscriptions (commonly referred to as "check-off") only if the trade union pays the employer a reasonable amount for this service, and workers have the option to pay their subscriptions by other means.

- the Trade Union (Facility Time Publication Requirements) Regulations 2017 ("the Facility Time Regulations") require relevant public sector employers to publish, on an annual basis, a range of data in relation to the use of, and expenditure on, trade union facility time in their organisation.

11. The IAs to both instruments assume that 26,453 public sector employers will be affected by these provisions: of these, the Cabinet Office says that 25,375 are smaller organisations (schools/universities), and 1,078 are larger public bodies. The bodies concerned are listed in the schedules to the Regulations.

Subscriptions Regulations

12. In the EM to the Subscriptions Regulations, the Cabinet Office says that the cost of administering check-off varies across the public sector. It refers to the findings of a TaxPayers' Alliance report published in 2014, that, while most public sector organisations deducted union subscription fees from employees' salaries, only 22% of them charged trade unions for the service. The Cabinet Office refers to an estimate that the administration of check-

off costs the public sector upwards of £6.6 million per year, a cost which the Regulations seek to reduce. We obtained further information from the Cabinet Office about the status of the TaxPayers' Alliance report, which we are publishing at Appendix 1.

13. In the IA, the Cabinet Office says that relevant public sector employers will face one-off direct familiarisation and transition costs estimated to total between £7.78 million and £8.85 million. However, a saving to public sector bodies of £9.7 million per annum is estimated, stemming from the remuneration for the cost of administering check-off services across the relevant public sector employers. Conversely, trade unions will incur one-off indirect familiarisation and transition costs estimated between £0.6 million and £0.12 million; and ongoing costs of payment for check-off service where it is provided, estimated between £6.61 million and £8.68 million depending on the take-up of check-off services after the legislation is implemented. The IA also includes the following statement:

> "Costs to public sector employers may include some loss of goodwill with employees and trade unions, particularly for those trade unions where a charging model for check-off has not been in place and they are in receipt of this service. Due to lack of data and difficulty in valuing goodwill, it was not possible to monetise this cost at this time".

Facility Time Regulations

14. In the EM to the Facility Time Regulations, the Cabinet Office says that the percentage of the Civil Service pay bill spent on facility time fell after the implementation of similar reforms, from 0.26% in 2012 to just 0.07% in the first quarter of 2015. It says that, while spending on facility time in the wider public sector is difficult to calculate, it is estimated at approximately 0.14% of the public sector pay bill; these Regulations will help to ensure that expenditure is incurred only on appropriate and accountable trade union work that represents value for money to the taxpayer.

15. In the accompanying IA, costs are estimated as a one-off familiarisation cost of £2.9 million, with recurring annual reporting costs of £3.1 million, which represent the cost for every employer, within the scope of the provision, compiling and publishing the required information. The Cabinet Office says that "taking into account experience in Civil Service departments, it is not expected that the proposed legislation will result in any significant impact on trade union representatives carrying out their trade union duties for which there is a legal entitlement to reasonable paid time off work".

Submission from the Royal College of Nursing

16. We have received a submission on the Regulations from the Royal College of Nursing (RCN), which states the RCN's belief that "facility time is vital to employers as it helps foster positive employment relations and resolve problems at an early stage", and that "the cost-benefits and the potential impact on employment relations of the measures have not been taken into account in drawing up these regulations". We note in particular that the RCN comments that the categorisation of facility time proposed in Schedule 2 to the Regulations—0%; 1–50%; 51–99%; and 100%—is not "a meaningful demarcation of time that would accurately reflect the way that union representatives perform their duties and activities". The RCN

suggests a better categorisation—0%; 1–10%; 10–25%; 25%–50%; 50–75%; 75–100%; 100%.

17. In its response to this submission, the Cabinet Office has said that "the aim of the Trade Union Act 2016 is to modernise Great Britain's industrial relations framework to better support an effective and collaborative approach to resolving industrial disputes, balancing the interests of unions with interests of the wider public sector", and that these Regulations "will help to ensure taxpayers' money is only spent on appropriate and accountable trade union work that represents value for money to the taxpayer." As regards the categorisation of facility time, the Cabinet Office says that Schedule 2 to the Regulations should provide "a broad overview of the percentage of working hours that relevant union representatives spend on facility time, in order that this information is comparable across the wider public sector." **We regard this as a rather broad-brush response which fails to deal with the substance of the RCN's concern which, in our eyes, warrants careful consideration.** We are publishing the RCN's submission and the Cabinet Office's response on our website.[6]

Consultation

18. In the EM, the Cabinet Office says that the Government consulted on which public sector employers should be included in the regulations by working with all relevant Government Departments. We asked why others, such as local authorities and trades unions, were not consulted: the Cabinet Office's full response is published at Appendix 1, but rests on the statement that "the policy principles underlying the scope of which bodies should be caught by the regulations, were debated extensively during the passage of the Trade Union Bill through Parliament." We note that the IAs to both sets of Regulations acknowledge a good deal of uncertainty about the effect of the new requirements. For example, the IA to the Subscription Regulations says:

> "For the purpose of attempting to estimate the potential impacts of the legislation we have considered a number of different scenarios. This is due to the uncertainty over how many public bodies will continue to offer check-off" (para. 86).

The IA to the Facility Time Regulations says:

> "There are uncertainties around the current level of facility time usage in the wider public sector and the extent to which the public sector behavioural response would be the same, or similar, post-transparency reforms as in the Civil Service. Given these uncertainties, this impact assessment does not claim a specified, monetised benefit from the facility time reforms in the final net present value totals".

It seems to us that consultation with local authorities and others directly affected might have served to reduce or remove these uncertainties.

6 See: http://www.parliament.uk/business/committees/committees-a-z/lords-select/secondary-legislation-scrutiny-committee/publications/

Consideration of Trade Union Bill by the House

19. In the EM, the Cabinet Office says that there was "significant engagement from the opposition in the House of Lords, which led to further consideration of the scope of these regulations". In additional information provided to us, the Cabinet Office has clarified this statement as follows:

- following significant debate in the Lords, the Government chose to use the Freedom of Information Act (and its Scottish equivalent) as the starting-point to define the scope of the Regulations, as opposed to the Office for National Statistics' definition of a "public authority";
- the Government changed the drafting of the Bill to ensure that "public authorities", for the purpose of the Bill, would only be captured in scope if they are "funded wholly or mainly from public funds" and with regard to a range of other policy factors (i.e., not predominantly commercially focussed or levy funded);
- the Government placed skeleton regulations in the House Library after Report stage in the interests of transparency and clarity;
- where questions were raised in relation to the inclusion of specific bodies within scope, the Government provided a response in each case. This led to the removal of some bodies from scope (i.e. Legal Service Boards) or clear policy rationale as to why others were included (i.e. Academies).

Damages (Personal Injury) Order 2017 (SI 2017/206)

Date laid: 27 February 2017

Parliamentary procedure: negative

Where personal injury damages are awarded for future losses, such as loss of earnings, care costs or other monetary expenses in the form of a lump sum, the award is adjusted to take account of the benefit to the claimant of being able to invest the money and earn interest. This instrument provides that, from 20 March 2017, the discount rate for this purpose will be - 0.75% (that means that the money paid will need to be slightly more than the sum awarded by the court). This reflects the current low yield of Index-Linked Gilts. Due to the significant impact on the insurance industry the Lord Chancellor plans to publish a consultation document before Easter that will consider options for reforming the way the rate is set. ***We were, however, disappointed that a policy that the insurance industry tells us will have financial impacts on most of the drivers in this country was not accompanied by an Impact Assessment setting out the Government's calculations.***

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

20. This Order has been laid by the Ministry of Justice (MoJ) under the Damages Act 1996 and is accompanied by an Explanatory Memorandum. We wrote to the Secretary of State, the Rt Hon. Elizabeth Truss MP, about the absence of an Impact Assessment, her response is published at Appendix 2.

Background

21. Where personal injury damages are awarded for future losses, such as loss of earnings, care costs or other monetary expenses in the form of a lump sum, the award is adjusted to take account of the benefit to the claimant of being able to invest the money and earn interest. A factor applied to the award represents the expected rate of return on investing the award and is known as the discount rate. It has for some years been 2.5%. This instrument provides that, from 20 March 2017, the discount rate for this purpose will be - 0.75% (that is the money paid will be need to be slightly more than the sum awarded by the court). This reflects the current low yield of Index-Linked Gilts (ILGs).

22. The rate of -0.75% is the result of rounding to the nearest 0.25% the simple average real yield (-0.83%) on ILGs over the three years to 30 December 2016, excluding ILGs with less than five years to maturity.

23. This has been the formula since the Damages Act 1996 and the House of Lords' ruling in the case of *Wells v Wells*[7] which recommended that the rate should ensure that personal injury claimants are compensated (but not under- or over-compensated) on the basis of being risk-averse investors, who may be financially dependent on the lump sum for the remainder of their life and are therefore not going to put their money into high return, high risk shares.

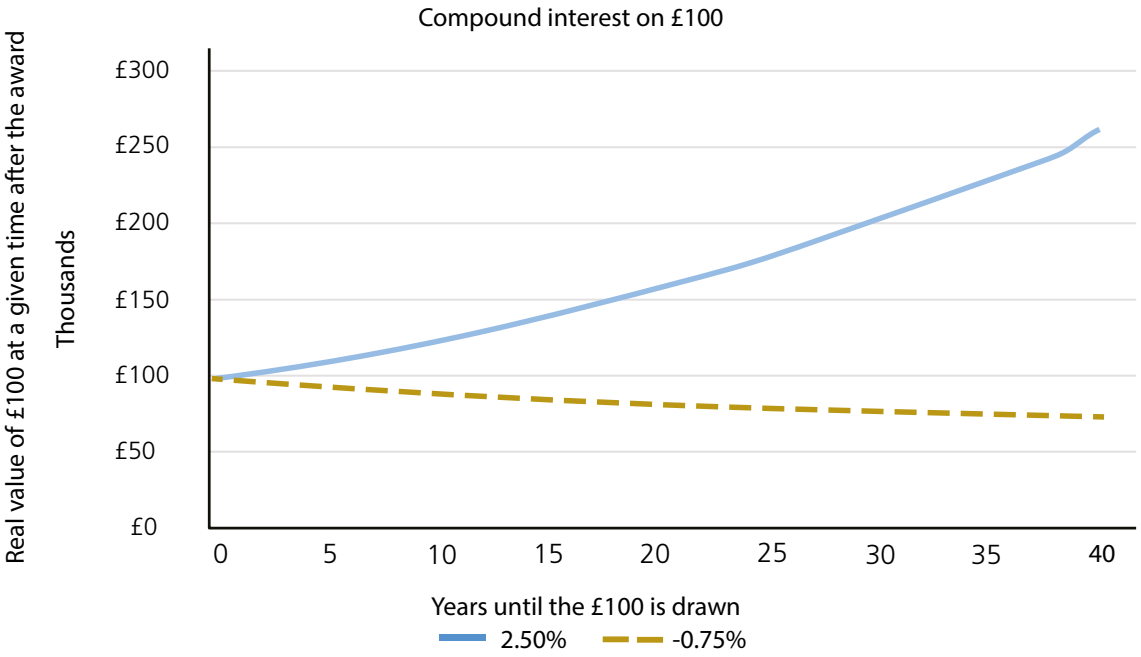
7 Wells v Wells [1999] 1 AC 345.

Effect of compound interest

24. The discount rate operates to ensure that the effect of compound interest is taken into account on the lump sum awards. Because of the good returns on investments in the past that rate has operated to reduce the cash amount that the insurer has had actually to pay. However due to a drop in investment returns the factor has been amended to require the insurer to pay slightly more than the sum set by the courts to make sure that the amount paid achieves the target set by the court in the long term. The example below, provided by the MoJ, illustrates the effect:

"If the claimant sets aside £100k today for future care need in a specific year, the value at in that year will depend on the average (actual) annual return of the portfolio in which the sum is held and the time until the money is needed. Below the claimant has considered two portfolios

- Portfolio 1 has an average annual real return of 2.5%.[8]
- Portfolio 2 has an average annual real return of -0.75%.[9]



In ten years, the £100k invested in Portfolio 1 will have a real value of £128k and in 40 years the £100k will be worth £269k. If the claimant invests into Portfolio 2 the real value of the £100k will be £93k in ten years and £74k in 40 years.

Consequently, if the claimant needs £100k in 10 years, in real terms, they should receive £78k if they are expected to invest in Portfolio 1 and £108k if they are expected to invest in Portfolio 2. If the claimant needs £100k in 40 years, in real terms, they should receive £37k if they are expected to invest in Portfolio 1 and £135k if they are expected to invest in Portfolio 2".

8 This is possible with a diversified portfolio consisting, for example, of equities. However, the actual return in each year can fluctuate. If the claimant has to sell when the equity prices are low it is possible that they will make a net loss.

9 As expected from a portfolio of ILGs under the current conditions.

25. When ILG yields began to decline the then Lord Chancellor published a consultation paper: "The Damages Act 1996: The Discount Rate: How Should it be Set?".[10] The paper sought views on two broad options, one using the ILGs-based methodology and the other using a mixed portfolio of appropriate investments. Responses revealed a lack of consensus on the way forward: broadly, claimant respondents favoured using ILGs returns as the basis for setting the rate, whilst defendant respondents favoured using a mixed portfolio. The subsequent Lord Chancellor appointed an expert panel to provide advice on what the rate should be and how it should be calculated. The expert panel reported in October 2015, with follow-up in January 2016. As required by the Damages Act 1996 the Lord Chancellor then consulted the Treasury and the Government Actuary.

Impact Assessment

26. The Government note that this decision will have an impact on the insurance industry and a number of articles in the media have confirmed that. PwC has estimated an increase of £50–70 on an average comprehensive motor insurance policy with higher increases of up to £1,000 for younger drivers and up to £300 for those over 65 years of age. The Association of British Insurers estimates that up to 36 million individual and business motor insurance policies may be impacted.

27. In the light of the widespread increases in insurance premiums that are expected we were surprised that the MoJ did not provide an Impact Assessment, which we understand from the Cabinet Office to be mandatory for "for measures that have a significant regulatory impact on business and civil society organisations".[11]

28. In her response the Secretary of State says that "the change in the discount rate is not itself regulatory in nature. I am, as Lord Chancellor, providing (non-binding) guidance to the Courts on how they calculate awards of damages in personal injury claims, not providing guidance to businesses on carrying out their activities". **This seems to us too narrow a view of the change being made: first, because any change made by Statutory Instrument must of its nature be "regulatory"; second, because this change will have broad consequences and we expect the supporting documentation to legislation to identify and acknowledge them even if the Government decide to continue with the policy change nonetheless.**

Future Consultation

29. In a statement the 27 February 2017, announcing the new rate, Lord Keen of Elie said that the Government wish to review the framework under which the rate has been set to ensure that it remains fit for purpose.[12] A consultation paper will be published before Easter that will consider options for reform including whether the rate should be set by an independent body, the frequency of uprating, and whether the assumption that claimants would only invest in ILGs is appropriate for the future. In spite of this, the Secretary of State explains in her letter that she needs to take action now, under the law as it currently stands, to ensure that those receiving damages awards are given the appropriate amount. She says that any future review is entirely separate matter which may or may not result in the current legal framework being amended.

10 https://consult.justice.gov.uk/digital-communications/discount-rate/ published on 1 August 2012.
11 11th Report Session 2015–16 (HL Paper 44).
12 HL WS506 27 February 2017.

CORRESPONDENCE

Draft Non-Contentious Probate Fees Order 2017

30. In our 28th Report[13] we drew attention to this instrument which proposes to increase all probate registration fees beyond the cost of providing the service and to make exponential increases in the fee for probate on estates worth more than £300,000. We wrote to the Minister, the Rt Hon Sir Oliver Heald QC MP, to ask for his justification in setting the new fee structure to generate large sums of money to cross-subsidise the Courts and Tribunal system as a whole. The Minister's reply is published in Appendix 3. In sum it states that Parliament agreed to the provision to permit enhanced fees in the Anti-social Behaviour, Crime and Policing Act 2014 and he is simply using that power as intended. The Committee found much to concern them about this instrument, particularly the statement in the penultimate paragraph of the Minister's letter to the effect that given the large deficit in the cost of running the courts, it was "reasonable to ask users to pay more where they can afford to do so". The Committee notes that those seeking *non-contentious* probate are not dealing with the courts as no judgment is required, they are applying to the discrete Probate Registry for certification. In any case such applications can now be done largely online[14] and to charge someone £20,000 for that is indirect taxation rather than a fee for a service. **The Committee remains strongly of the view that to increase the fees to this degree goes far beyond what this House anticipated when the Bill was going through Parliament.**

Universal Credit (Housing Costs Element for claimants aged 18 to 21) (Amendment) Regulations 2017 (SI 2017/252)

31. We drew this instrument to the special attention of the House in our 28th Report[15] on the ground of interest. However there were two points on which we felt the need to seek a response from the Minister: one was the Department for Work and Pensions' (DWP's) dismissal of the view of the National Landlords' Association which we quoted; and the other was the absence of the guidance that will dictate how key decisions will be made that would have aided our understanding of how the legislation will work. The response from the Minister, Caroline Nokes MP, is a step in the right direction, acknowledging that the DWP needs to provide clear communications and reassurance to landlords. She also sent us a "work in progress" version of the guidance and assurance that both the National Landlords Association and Shelter will be involved in its development. This unfinished version was not ideal for our purposes; however, we welcome the undertaking she gave to provide pertinent guidance alongside legislation in future.

13 28th Report, Session 2016–17 (HL Paper 131).
14 See: https://www.gov.uk/wills-probate-inheritance/applying-for-a-grant-of-representation
15 28th Report, Session 2016–17 (HL Paper 131).

INSTRUMENTS OF INTEREST

Draft Electoral Registration Pilot Scheme (England and Wales) Order 2017

Draft Electoral Registration Pilot Scheme (Scotland) Order 2017

Draft Electoral Registration Pilot Scheme (England) Amendment Order 2017

32. Following the introduction of Individual Electoral Registration (IER) these Orders allow a pilot scheme under the Electoral Registration and Administration Act 2013 to test alternative arrangements for the annual canvass. Anecdotal evidence suggests that the current two-stage process of registering to vote (where those identified as missing from the register in a returned canvass form need to complete an individual application successfully before they can be registered) is causing confusion to electors and is costly for local authorities. These pilot schemes give electoral registration officers in 17 local authorities in England, two in Wales and two in Scotland wider discretion over the manner in which they conduct the annual canvass to gather evidence to establish whether alternative methods might be more efficient and cost effective. The third Order extends the three existing English pilots for a further year. There will be 24 pilots in total, they are time-limited and must be completed by 6 July 2018.

Draft Representation of the People (Scotland) (Amendment) Regulations 2017

33. These Regulations facilitate the registration of 16 and 17 year old electors on the local government register in Scotland, with the agreement of Scottish Ministers and in advance of the commencement of the relevant elections provisions in the Scotland Act 2016 which will include the devolution of these arrangements.

Draft West Midlands Combined Authority (Functions and Amendment) Order 2017

34. In our 35th report of the 2015–16 Session,[16] we drew the draft West Midlands Combined Authority Order 2016 to the special attention of the House on the grounds of public policy interest and apparent inadequacies in the consultation process. We noted that the West Midlands Combined Authority (WMCA) would consist of constituent councils, namely, Birmingham, Coventry, Dudley, Sandwell, Solihull, Walsall and Wolverhampton; and that the WMCA would also involve non-constituent councils outside its area, namely, Cannock Chase, Nuneaton and Bedworth, Redditch, Tamworth and Telford and Wrekin.[17] We commented that the apparent "combination creep" of the West Midlands arrangements to involve non-constituent councils was likely to add to complexity, and that it highlighted the far-reaching impact of the changes to local government structures which were being taken forward through secondary legislation.

35. The latest draft Order makes further provision about functions of the WMCA and also about its governance arrangements, including the addition of more non-constituent councils. In the Explanatory Memorandum (EM),

16 35th Report, Session 2015–16 (HL Paper 147).
17 Each of these councils will appoint one of its elected members to be a member of the WMCA.

the Department for Communities and Local Government (DCLG) says that the Order proposes the addition of five new non-constituent councils, namely, North Warwickshire, Rugby, Shropshire, Stratford-on-Avon and Warwickshire. The outcome will be that the WMCA will have seven constituent councils and ten non-constituent councils.

36. In the EM, DCLG says that the WMCA carried out consultation on proposals for its future functions, from 4 July to 21 August 2016. 1,328 responses were received: of these 63% were from local residents, 23% from local authority employees, 7% from businesses, 3% from councillors and 4% from others. DCLG says that the outcome was generally positive, with 777 respondents (60%) agreeing that the mayoral Combined Authority (CA) would promote more efficient and effective governance in the West Midlands. DCLG notes, however, that the least positive response was to the question as to what impact the mayoral CA would have on the identity or interests of local communities: 654 (51%) thought a positive impact, 247 (19%) a negative impact and 200 (16%) no impact at all.

37. Further detail is provided in the WMCA's summary of responses, published in September 2016.[18] This says that the group with the greatest proportion of respondents expecting a positive impact was businesses (67%), followed by employees (59%); while the group with the lowest proportion of respondents considering the mayoral CA to be positive was residents (46%). A common comment made by those concerned about the impact was that the WMCA would be "too big". **We consider it highly unlikely that such concern will be assuaged by the expansion of the Combined Authority to cover so large an area of the West Midlands and to encompass so many councils with widely divergent characteristics.**

Criminal Procedure (Amendment No. 2) Rules 2017 (SI 2017/282)

38. Part 4 of the Policing and Crime Act 2017 ("the Act") inserts new provisions about pre-charge police bail into the Police and Criminal Evidence Act 1984 to limit the period during which a defendant, who has been arrested for an offence, may be on police bail after being released without being charged. In specified circumstances that period may be extended by a senior police officer and, after that, on application by an investigator to a magistrates' court. These rules specify the process for the exercise of those powers where not already set out in the Act. New rule 14.21 requires an investigator's application to a magistrates' court to contain the information that the court will need in order to decide whether the new statutory criteria for authorising an extension of police bail are met. New rule 14.22 supplies the procedure to be followed where an applicant investigator wants the court to exercise the power conferred by the new statutory provisions to allow the withholding of information from the defendant.

18 https://westmidlandscombinedauthority.org.uk/media/1354/mayoral-wmca-consultation-report-for-upload.pdf

Employers' Duties (Implementation) (Amendment) Regulations 2017 (SI 2017/347)

39. The Pensions Act 2008 requires employers automatically to enrol and re-enrol workers who satisfy age and earnings criteria into a qualifying workplace pension scheme. Since October 2012, employers have been brought into the workplace pensions scheme progressively according to the staging profile set out in the Employers' Duties (Implementation) Regulations 2010.[19] The staging profile ends for non-PAYE employers on 1 April 2017, and for PAYE employers on 30 September 2017. Now that the conversion process is almost complete, this instrument requires new employers to set up a pension scheme from the date on which their first worker starts work. The Regulations also maintain the deregulatory provision which allows an employer to defer enrolment for up to three months after a new employee has joined the firm in order to avoid unnecessary expense and administration for short-term employees.

Transfer for Determination of an Application for International Protection (Detention) (Significant Risk of Absconding Criteria) Regulations 2017 (SI 2017/405)

40. The Regulations place on the face of legislation objective criteria for determining when an individual, who has made an application for international protection under the Dublin III Regulation, poses a risk of absconding. The urgency arises from the handing down on 15 March 2017 of a ruling by the Court of Justice of the European Union in the case of *Al Chodor* C-528/15 on how the Dublin III Regulation, which deals with asylum matters, should be interpreted. Without urgent legislation the ability of the Secretary of State to detain third-country nationals or stateless persons, including those already in detention, in order to transfer them to the State responsible for examining their applications for international protection, would have been compromised. The Home Office has therefore acted promptly to comply with the court's requirements.

41. The new justiciable criteria for detaining an immigration applicant are set out in regulation 4 of the instrument. The Committee notes that that two of the 11 grounds for doing so rely on "whether there are reasonable grounds to believe …". We continue to have concerns about how an immigration decision made on the basis of any individual official's belief can be objective and particularly how such decisions can be delivered consistently across the UK.

19 SI 2010/4

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

Draft instruments subject to affirmative approval

Electoral Registration Pilot Scheme (England) (Amendment) Order 2017

Electoral Registration Pilot Scheme (England and Wales) Order 2017

Electoral Registration Pilot Scheme (Scotland) Order 2017

Representation of the People (Scotland) (Amendment) Regulations 2017

Public Sector Apprenticeship Targets Regulations 2017

Specified Agreement on Driving Disqualifications Regulations 2017

West Midlands Combined Authority (Functions and Amendment) Order 2017

Draft instruments subject to annulment

Green Deal Code of Practice (Version 5)

Instruments subject to annulment

Cm 9434	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Arab Emirates Concerning Air Services
Cm 9435	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia Concerning Air Services
SI 2017/232	Social Security (Industrial Injuries) (Prescribed Diseases) Amendment Regulations 2017
SI 2017/247	Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2017
SI 2017/270	Social Security (Fees Payable by Qualifying Lenders) (Amendment) Regulations 2017
SI 2017/271	Social Fund (Amendment) Regulations 2017
SI 2017/272	Civil Enforcement of Parking Contraventions Designation and Consequential Amendment Order 2017
SI 2017/275	National Health Service Pension Scheme and Additional Voluntary Contributions (Amendment) Regulations 2017
SI 2017/282	Criminal Procedure (Amendment No. 2) Rules 2017
SI 2017/288	Seeds (Miscellaneous Amendments) (England) Regulations 2017
SI 2017/291	Social Security (Social Care Wales) (Amendment) Regulations 2017

SI 2017/296	National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) (Amendment) Regulations 2017
SI 2017/300	Scotland Act 2016 (Commencement No. 4, Transitional and Savings) Regulations 2017
SI 2017/302	Gambling (Personal Licence Fees) (Amendment) Regulations 2017
SI 2017/303	Gambling (Operating Licence and Single-Machine Permit Fees) Regulations 2017
SI 2017/306	Policing and Crime Act 2017 (Possession of Pyrotechnic Articles at Musical Events) Regulations 2017
SI 2017/307	Social Security (Miscellaneous Amendments) Regulations 2017
SI 2017/310	Government Resources and Accounts Act 2000 (Estimates and Accounts) Order 2017
SI 2017/311	Criminal Legal Aid (Standard Crime Contract) (Amendment) Regulations 2017
SI 2017/314	Infrastructure Planning Fees (Amendment) Regulations 2017
SI 2017/318	Non-Domestic Rating (Designated Areas etc.) Regulations 2017
SI 2017/322	National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) (Amendment) (No. 2) Regulations 2017
SI 2017/323	Oil and Gas Authority (Levy) Regulations 2017
SI 2017/333	Childcare Act 2006 (Provision of Information to Parents) (England) (Amendment) (No. 2) Regulations 2017
SI 2017/336	Further Education Loans (Amendment) Regulations 2017
SI 2017/347	Employers' Duties (Implementation) (Amendment) Regulations 2017
SI 2017/405	Transfer for Determination of an Application for International Protection (Detention) (Significant Risk of Absconding Criteria) Regulations 2017

APPENDIX 1: DRAFT TRADE UNION (DEDUCTION OF UNION SUBSCRIPTIONS FROM WAGES IN THE PUBLIC SECTOR) REGULATIONS 2017
TRADE UNION (FACILITY TIME PUBLICATION REQUIREMENTS) REGULATIONS 2017 (SI 2017/328)

Additional information from the Cabinet Office

Q1: In the Explanatory Memorandum you say:

> *"7.3 The cost of administering check-off varies across the public sector. A TaxPayers' Alliance report published in 2014 found that most public sector organisations deducted union subscription fees from employees' salaries, of these only 22% charged trade unions for the service. It is estimated that the administration of check-off costs the public sector upwards of £6.6 million per year. This instrument seeks to reduce this cost burden to the public sector."*

Do the Government accept the findings of the TaxPayers' Alliance report? Is the estimate quoted taken from that report, or have the Government done any independent work to establish the scale and cost of administering check-off?

A1: The Government has produced a detailed impact assessment on the costs and benefits of the regulatory provision on Check-off. For a full explanation of the estimated costs and benefits of this legislation please refer to the accompanying impact assessment–see attached.

In the absence of other research in this area, the TaxPayers' Alliance report provides some indication of the extent and cost of taxpayer funded check-off services in the wider public sector.

The Taxpayers' Alliance research was based on Freedom of Information Act requests to public bodies. It provides evidence from which estimated monetised costs and benefits have been extrapolated from in the accompanying impact assessment.

The impact assessment estimates that current costs to the public sector for the provision of check-off services is in the region of £12.46m per year, at present trade unions only provide an estimated £2.74m for this service so there is an additional uncollected cost to the tax payer of £9.7m per year. As a result of this legislation, which requires trade unions to reimburse public sector organisations for the provision of check-off services, it is estimated that trade unions will face ongoing annual cost of £6.6m - £8.68m per year (where they are in receipt of a check-off service) this consists of both payments for the provision of check-off services to public sector organisations, and banking fees as a result of members moving to direct debit.

Q2: You also say: "8.1 The Government consulted on which public sector employers should be included in the regulations by working with all relevant Government departments."

Why did the Government not consult other interested parties, such as local authorities and trades unions?

A2: The Trade Union Bill explicitly laid out the Government's intention to legislate to restrict the deduction of union subscriptions from wages in the public sector.

The policy principles underlying the scope of which bodies should be caught by the regulations, were debated extensively during the passage of the Trade Union Bill through Parliament. There was also significant engagement from the opposition in the House of Lords, which led to further consideration of the scope of these regulations.

In direct response to concerns raised by Opposition Peers, the Government changed the drafting of the Bill to ensure that the extension power could only capture bodies if they are 'funded wholly or mainly from public funds.' The Government also clarified its policy intent to exclude certain public bodies from scope (i.e. bodies with a predominantly commercial focus or bodies levy funded by a discrete group in society).

Bodies such as local authorities were not formally consulted directly, as it is widely established that local authorities are public authorities. Consultation with government departments involved consideration of those employers within the wider public sector that government departments are responsible for, (e.g. the Department for Communities and Local Government has responsibility for local authorities). This consultation sought to ensure arms' length bodies potentially within scope of the regulations met the Government policy principles for inclusion within scope.

Trade unions were not consulted on which public sector bodies should be in scope of the regulations as the legislation only directly regulates public sector employers. Again, the principle of the legislation was established during the Bill.

Policy officials will continue to engage with employers as to how these provisions can be implemented most effectively and efficiently. This will include continued engagement with the relevant officials in the devolved administrations.

20 March 2017

APPENDIX 2: DAMAGES (PERSONAL INJURY) ORDER 2017 (SI 2017/206)

Letter from the Rt Hon. the Lord Trefgarne to, the Rt Hon. Elizabeth Truss MP, Lord Chancellor and Secretary of State for Justice

I am writing to you as Chairman of the Secondary Legislation Scrutiny Committee.

The Committee deferred consideration of this instrument at its meeting yesterday because, having read the Explanatory Memorandum and the Written Statement of 27 February 2017, questions remain outstanding to which we would welcome your response before making a final decision.

Absence of an Impact Assessment

In a statement of government policy provided to us by the Cabinet Office last session, we were told that Impact Assessments are mandatory for measures that have a significant regulatory impact on business and civil society organisations. We would be grateful if you could explain why, in this instance, there is no Impact Assessment when the press coverage indicates that this change will cost the insurance industry millions of pounds which will be passed on to the consumer through increased insurance premiums.

Timetabling

The Written Statement announced that the Government would be consulting on how the discount rate is to be set and that the consultation would take place "before Easter". We would be grateful if you could tell us the precise dates for the consultation.

The Committee would also welcome clarification of why, if the discount rate has remained unaltered since 2001, a new rate is being set now *before* the further consultation. Would it not cause less disruption to the insurance industry and to the public to conclude the proposed discussions before setting a new rate?

Please could you respond **by 11 am on Monday 20 March** so that we may consider it at the Committee's next meeting.

15 March 2017

Letter from Elizabeth Truss MP to Lord Trefgarne

Thank you for your letter of 15 March about the Order I laid before Parliament on 27 February setting a new personal injury discount rate for England and Wales.

I am of course aware of the implications of the rate change for organisations in both the private and public sector. However, it is clear from the case law that the object of an award of damages for future loss is to place the injured party as nearly as possible in the same financial position he or she would have been in but for the accident. The aim is to award such a sum of money as will amount to no more, and no less, than the net loss. Where damages are awarded for future loss in the form of a lump sum, that award is adjusted to take account of the effect of the injured person being able to invest the money before the loss or expense for which it is awarded has actually occurred. The factor by which the award is adjusted is the discount rate, which represents the appropriate rate of return on investing the award.

It is not part of these established legal principles that I, as Lord Chancellor, may take account of the impact of a change in the discount rate on others, such as defendants. For me to take into account any such impacts in setting the rate would be to act inconsistently with the principle of full compensation of a claimant for his or her loss. This is because a rate that is set higher only to protect the interests of defendants (as awards would be smaller) may not reflect the proper rate of return on investing an award and so claimants would be undercompensated.

As Lord Hutton observed at the conclusion of his judgment in *Wells v Wells* (which is the leading case on the principles for setting the discount rate):

> *"The consequence of the present judgments of this House will be a very substantial rise in the level of awards to plaintiffs who by reason of the negligence of others sustain very grave injuries requiring nursing care in future years and causing a loss of future earning capacity, and there will be resultant increases in insurance premiums. But under the present principles of law governing the assessment of damages which provide that injured persons should receive full compensation plaintiffs are entitled to such increased awards. If the law is to be changed it can only be done by Parliament which, unlike the judges, is in a position to balance the many social, financial and economic factors which would have to be considered if such a change were contemplated."*

In terms of an impact assessment, then, under the current legal framework when setting the rate I cannot take into account the costs to defendants. Moreover, the change to the discount rate is not itself regulatory in nature. I am, as Lord Chancellor, providing (non-binding) guidance to the Courts on how they calculate awards of damages in personal injury claims, not providing guidance to businesses on carrying out their activities. The discount rate helps the Courts to determine the right level of damages for individuals when a wrongful injury has occurred; it is not about helping the Courts to secure future compliance with any regulations. For those reasons, an impact assessment is not required.

You also ask why I have taken action now to set the rate, rather than wait for a review of the law. I do want to make sure that the framework remains fit for purpose in the future, and so I will be consulting on the framework under which the rate is set. But that review is entirely separate from the application of the present law, and it is important that the rate is set at the right level under that law. There has already been a long and thorough review in this area, conducted by me and my predecessors, including a public consultation on how the rate should be set in 2012, and the appointment of an expert panel in 2015. I made my decision now because my consideration of the issues was complete. I must apply the law as it stands and if a change in the rate is appropriate a delay cannot be justified because of my plans for a review of whether to change the law for the future. The forthcoming review will not be concerned with whether past decisions have been made correctly. It will involve an open minded consultation process in which no firm decisions have been taken on whether the current legal framework should be amended or not.

As I set out when I set the discount rate, I intend to launch that consultation before the Easter. That will include a consultation-stage impact assessment, given I will be consulting on a potential change of policy. Subject to collective agreement, my intention would be to launch that before the House of Commons breaks for Recess on 30 March.

20 March 2017

APPENDIX 3: CORRESPONDENCE: DRAFT NON-CONTENTIOUS PROBATE FEES ORDER 2017

Letter from the Rt Hon. the Lord Trefgarne to the Rt Hon. Sir Oliver Heald QC MP, Minister of State for Courts and Justice at the Ministry of Justice

Following its consideration of this instrument the Committee has asked me to write to you and draw your attention to the concerns raised in our 28th Report.

We noted in particular that the current fixed fee structure continues to cover the full cost of the grant of probate and these changes are, therefore, made purely in search of funds to cross-subsidise the courts and tribunal system. We would welcome clarification of whether this is a new policy that the Ministry of Justice intends to pursue in all its fee-based activities, or whether this will be applied selectively and, if so, on what basis.

We also note that you anticipate that the new fee structure will generate around £300 million per annum in additional fee income: that represents a more than 600% increase on the £45 million actually required to run the grant of probate service. While section 180 of the Anti-social Behaviour, Crime and Policing Act 2014 permits the levying of "enhanced" fees we felt that imposing such a high multiple of the cost on individuals with estates at the upper end of the range appeared to be a tax rather than a fee for a service offered. What is your justification for using the power to raise fees in this way?

We would be grateful for your response to these concerns and would welcome **a response by 11 am on Monday 20 March** so that we may consider it at the Committee's next meeting.

14 March 2017

Letter from Sir Oliver Heald QC MP to Lord Trefgarne

Thank you for your letter regarding this draft Order, which queried the justification for imposing these fees, and the Ministry of Justice's general approach to fee changes. The draft Order sets out a new banded structure for probate fees, as enabled by the primary powers in s.92 of the Courts Act 2003, and s.180 of the Anti-social Behaviour, Crime and Policing Act 2014. We have considered these provisions carefully in developing these new fees, and our view is that taken together, these primary powers give us clear statutory authority to prescribe the fees set out at Schedule 1 to the draft Order.

Section 180(1) of the 2014 Act provides that the Lord Chancellor may with the consent of Treasury 'prescribe a fee of an amount which is intended to exceed the cost of anything in respect of which the fee is charged'. In doing so, the Lord Chancellor must have regard (amongst other matters) to 'the financial position of the courts and tribunals for which the Lord Chancellor is responsible, including in particular any costs incurred by those courts and tribunals that are not being met by current fee income' (s.180(3)(a)). Such fees must be used 'to finance an efficient and effective system of courts and tribunals' (s.180(6), 2014 Act).

Taken together, the Government considers that these provisions demonstrate Parliament's intention that the Lord Chancellor may set certain fees above cost recovery levels in one part of the court and tribunal system in order to help maintain the efficient and effective operation of the rest of the system. Indeed the fact that

the Lord Chancellor is required to consider those courts and tribunals where costs are not being met when exercising the power at section 180(1) anticipates cross subsidisation.

The Office of National Statistics has not yet given a view on whether to classify these fees as a tax for accounting purposes. Regardless of the accounting treatment, this does not change the Government's view that these proposals are fees charged in return for a specific service–a grant of probate–under a wide power explicitly designed to allow for cross-subsidisation in the court and tribunal system. We do not consider that the classification for accounting purposes has any bearing on the interpretation of this legislative provision and we do not see any reason in principle for reading down the power in such a way as to preclude its exercise in this manner.

During the Parliamentary passage of the 2014 Act, the then Minister explained the purpose of the section 180 power to the House of Commons[20]:

> "*We will shortly be consulting on proposals to achieve full cost recovery, less remissions, in the civil and family courts. However, even on this basis the running of the court system in England and Wales costs more than £1 billion a year, so we need to go further in reducing the burden on taxpayers. We believe it is fair and proportionate that those who use the courts and can afford to do so should make a greater contribution to their overall funding. That is why we are bringing forward this provision to allow fees to be set above cost in some circumstances.*"

The Minister emphasised that the Lord Chancellor, in prescribing fees under this power, 'must have regard to the principle that access to the courts must not be denied', and that fees would not therefore be set at excessively high levels which deny persons access to the courts.

The specific proposals in this Order were not set out at that point. That was because, as the Minister went on to say, "we want to take some time to ensure that we get the measures right. As I said, we will consult widely on the proposals and look carefully at how any proposed court fees might compare with the overall cost of litigation, the value of the issues at stake and the fees charged by our international competitors. Following the consultation there will, as I have indicated, be full parliamentary scrutiny of any enhanced fees that we decide to introduce" (emphasis added).

We consider that the proposals in this Order are consistent with the section 180 power, as well as the assurances given to Parliament at the time. The Lord Chancellor has, in particular, had careful regard to the need to ensure that this scheme of fees would not deny access to the court (as per s.92(3), Courts Act 2003). Fees are recoverable from the estate, and setting fees by reference to the value of the estate–with the lifting of the lower threshold for paying fees from £5k to £50k–ensures the affordability of fees for those who ultimately bear their cost. As a safety net, in exceptional circumstances, the Lord Chancellor will retain the power to grant exceptional fee remissions.

I should stress that using these powers to prescribe enhanced fees is not a new policy. These powers have previously been used (and approved by Parliament) in this manner. The Civil Proceedings Fees Order 2008, for example, sets enhanced fees for the issuing of a money claim by reference to the value of the claim; from

20 Hansard, 15 October 2013, Volume 568, column 602

£35 for a claim not exceeding £300, to £10,000 for a claim exceeding £200,000 (see Fee 1.1 of Schedule 1 to the Civil Proceedings Fees Order 2008). Similarly, the Upper Tribunal (Lands Chamber) Fees Order 2009/1114 sets the fee for certain proceedings by reference to a percentage of the amount awarded by the Tribunal (see fees 9 and 10 of Schedule 1 to that Order).

Your letter also asked about MoJ's future fee policy. Specific fees proposals are developed on a case by case basis, and any decision to implement further enhanced fees will be taken after the Lord Chancellor has considered the three statutory factors set out in primary legislation: the principle that access to the courts must not be denied; the financial position of the courts and tribunals; and the competitiveness of the legal services market as well as other statutory obligations, for example those under the Equality Act 2010.

In 2015/16, Her Majesty's Courts and Tribunals Service cost around £1.9 billion to run, of which we recovered only around £700m in fees, a position the Government believes is unsustainable. The best way to protect access to justice in the long term is with a properly funded courts and tribunals system, we believe it is reasonable to ask users to pay more where they can afford to do so. Any decisions on future changes to fee levels across the courts and tribunals will be made by Ministers based on the specific evidence available. Enhanced fees are only legally permissible in the circumstances outlined in the 2014 Act, and subject to the affirmative procedure, so, as with the current draft Order, Parliament will always have the opportunity to scrutinise any such changes before they are made.

We keep courts and tribunals fees under regular review. You may also be interested to know that I announced in November 2016 that we were undertaking a review of Tribunal fees and funding to better balance the needs of those who use the tribunals and the taxpayer.

16 March 2017

APPENDIX 4: CORRESPONDENCE: UNIVERSAL CREDIT (HOUSING COSTS ELEMENT FOR CLAIMANTS AGED 18 TO 21) (AMENDMENT) REGULATIONS 2017 (SI 2017/252)

Letter from the Rt Hon. the Lord Trefgarne to Richard Harrington MP, Parliamentary Under Secretary of State for Pensions

I am writing as Chairman of the Secondary Legislation Scrutiny Committee. The Committee will be publishing a report on this instrument tomorrow. I have, however, been asked by the Committee to raise two important issues with you. This correspondence will be published in a later report.

The response of landlords

We received a submission from Shelter which quotes the National Landlords' Association reaction to the new Regulations: "Never mind the nuances, all landlords will hear is that 18-21 year olds are no longer entitled to housing benefit. Faced with a young person who may not be able to pay the rent, a landlord won't worry about the details of their life, they just won't consider them as a tenant".

The Department for Work and Pensions (DWP) made the following response to this point: "There is no hard evidence that landlords will not let to claimants in this age group as a result of this policy–this is speculation." We find this response unconvincing and we would be grateful if you could explain DWP's reasons for making it, given that the National Landlords' Association claims over 65,000 members and might be assumed to have some knowledge of their likely actions.

The provision of guidance

The Committee considered the range of exemptions set out in the Regulations and noted the comment in the Explanatory Memorandum (EM) that while DWP "can readily determine that a claimant is in receipt of one of the specified disability benefits establishing whether it would be inappropriate for a young person to live in the parental home will be less straightforward" (paragraph 9.1 of the EM). We welcome DWP's intention to consult expert groups on this but are concerned about the timetable: these Regulations were laid on 3 March and are due to come into effect on 1 April and yet draft guidance was not available to us. What assurance can you give that there will be sufficient time for the staff and, more importantly, the applicants to familiarise themselves with these new rules before the legislation takes effect?

The Committee's concern was heightened by the following statement by DWP:

"The guidance that will be used to determine exemptions is not yet public–this is normal for a digital project where information is deployed as and when it is needed."

This approach ignores the needs of the applicants, those charities which advise them and the needs of Parliament. This Committee's reports have previously made clear to DWP, among other departments, our view that if guidance is intended to direct users on how specific terms should be interpreted or how decisions should be made, it should be laid with the relevant instrument and be available to Parliament throughout the scrutiny process. We would be grateful if you could ensure that this is done in the future.

15 March 2017

Letter from Caroline Nokes MP, Minister for Welfare Delivery at the Department for Work and Pensions, to Lord Trefgarne

Thank you for your letter to Richard Harrington of 15th March. I am replying as the Minister with responsibility for this policy area.

I very much welcome scrutiny of this policy, from the Committee and from stakeholders, and recognise the important role it plays in getting its implementation right. We are working closely with the sector and I am pleased that the Committee welcomes the consultative approach the Department is taking to developing the guidance for DWP staff around the policy. It continues the extensive consultation we undertook while developing the policy and which the Social Security Advisory Committee commended for its thoroughness.

For the Committee's information I attach to this letter a copy of the draft departmental guidance which is currently being commented on by a broad range of stakeholders, including the charities who advise claimants who you refer to in your letter. It is therefore still subject to change and has not been cleared by Departmental lawyers. A finalised version will be in place ahead of the Regulations coming into force on 1st April.

We will be taking a test and learn approach to the policy, in line with our broader approach to Universal Credit, and will continue to review and refine the guidance as it is being used. To support that we have asked stakeholders for their continued input into and feedback on the operation of the policy as it is rolled out. As this change will apply only in Universal Credit full service areas, it is expected to affect 1,000 people in the first year which provides an opportunity to build on the guidance so it reflects live experience and addresses scenarios and issues as they arise.

In response to the Committee's question around landlords, we recognise the need to provide clarity and reassurance to that group, and to that end my officials are working closely with the Department for Communities and Local Government and stakeholder organisations to develop key messages which will be communicated to landlords. We are also involving the National Landlords Association, as well as Shelter and others, in the development of the guidance for DWP staff.

I have noted the Committee's comments around the availability of supporting guidance in order to scrutinise legislation and will ensure that Departmental colleagues are made aware.

I hope you find this response helpful.

20 March 2017

APPENDIX 5: 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 21 March 2017, a Member declared the following interest:

Draft Trade Union (Deduction of Union Subscriptions from Wages in the Public Sector) Regulations 2017

Trade Union (Facility Time Publication Requirements) Regulations 2017 (SI 2017/328)

Baroness O'Loan

Baroness O'Loan's brother is a Trade Union Representative.

Attendance:

The meeting was attended by Lord Bowness, Lord Haskel, Lord Hodgson of Astley Abbotts, Baroness Humphreys, Lord Janvrin, Baroness O'Loan, Lord Rowlands, Baroness Stern and Lord Trefgarne.