



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Fourth Report
of Session 2010-11**

Drawing special attention to:

*Secretary of State for Culture, Olympics, Media and Sport Order 2010
(S.I. 2010/1551)*

*General Pharmaceutical Council (Statutory Committees and their Advisers
Rules) Order of Council 2010 (S.I. 2010/1616)*

*General Pharmaceutical Council (Registration Rules) Order of Council 2010
(S.I. 2010/1617)*

*General Pharmaceutical Council (Transfer of Property, Rights and Liabilities,
Fees and Grants) Order of Council 2010 (S.I. 2010/1618)*

Marine Strategy Regulations 2010 (S.I. 2010/1627)

*National Health Service Pension Scheme (Amendment) Regulations 2010
(S.I. 2010/1634)*

*Non-Domestic Rating (Collection and Enforcement) (Local Lists) (England)
(Amendment) (No. 2) Regulations 2010 (S.I. 2010/1656)*

*Armed Forces and Reserve Forces (Compensation Scheme) (Amendment)
Order 2010 (S.I. 2010/1723)*

Equality Act 2010 (Commencement No. 1) Order 2010 (S.I. 2010/1736)

*Ordered by the House of Lords to be printed
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Joint Committee on Statutory Instruments

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The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 74, available on the Internet via www.parliament.uk/jcsi.

Remit

The Joint Committee on Statutory Instruments (JCSI) is appointed to consider statutory instruments made in exercise of powers granted by Act of Parliament. Instruments not laid before Parliament are included within the Committee's remit; but local instruments and instruments made by devolved administrations are not considered by JCSI unless they are required to be laid before Parliament.

The role of the JCSI, whose membership is drawn from both Houses of Parliament, is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of each House to any instrument on one or more of the following grounds:

- i. that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;
- ii. that its parent legislation says that it cannot be challenged in the courts;
- iii. that it appears to have retrospective effect without the express authority of the parent legislation;
- iv. that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;
- v. that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where the instrument has come into force before it has been laid;
- vi. that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;
- vii. that its form or meaning needs to be explained;
- viii. that its drafting appears to be defective;
- ix. any other ground which does not go to its merits or the policy behind it.

The Committee usually meets weekly when Parliament is sitting.

Publications

The reports of the Committee are published by The Stationery Office by Order of both Houses. All publications of the Committee are on the Internet at www.parliament.uk/jcsi.

Committee staff

The current staff of the Committee are John Whatley (*Commons Clerk*), Kath Kavanagh (*Lords Clerk*) and Jennifer Steele (*Committee Assistant*). Advisory Counsel: Peter Davis, Peter Brooksbank and Christine Cogger (*Commons*); Allan Roberts, Nicholas Beach and Peter Milledge (*Lords*).

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Instruments reported

At its meeting on 27 October 2010 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to nine of those considered. The Instruments and the grounds for reporting them are given below. The relevant Departmental memoranda are published as appendices to this report.

1 S.I. 2010/1551: Reported for defective drafting

Secretary of State for Culture, Olympics, Media and Sport Order 2010 (S.I. 2010/1551)

1.1 **The Committee draws the special attention of both Houses to this Order on the grounds that it is defectively drafted in one respect.**

1.2 Article 3(3) and (4) refers to instruments “made or issued”, while articles 6(4) and 9(3) refer to enactments and instruments “passed or made”. Taking “passed” to refer to enactments, the Committee asked the Department for Culture, Media and Sport why articles 6(4) and 9(3) referred to instruments only as being “made” and did not include the alternative “or issued”, as does article 3(3).

1.3 The Committee recognises that, if the intention were to apply article 6(4) only to the sub-class of instruments (as defined in article 2) that are aptly described as being “made”, the omission would be justified.

1.4 The Department’s memorandum printed at Appendix 1, however, does not suggest that the omission is required in order to restrict the application of the paragraph in that way. The memorandum simply argues that the different contexts of articles 3 and 6 justify the different expressions. The Committee does not agree: if both articles are to apply to the entire range of instruments as defined in article 2, then either “made” is apt for all, or “made” is apt only for some while “issued” is apt for others. **The Committee therefore is not persuaded that justification for the inconsistency of usage has been made out, and accordingly reports articles 3, 6 and 9 for defective drafting in that respect.**

2 S.I. 2010/1616: Reported for defective drafting

General Pharmaceutical Council (Statutory Committees and their Advisers Rules) Order of Council 2010 (S.I. 2010/1616)

2.1 **The Committee draws the special attention of both Houses to this Order on the ground that the rules which the Order approves are defectively drafted in one respect.**

2.2 Rule 8(3)(f) of the rules made by the General Pharmaceutical Council and approved by this Order and set out in its Schedule refers to whether a person has received a “formal caution” for a criminal offence. In response to the Committee’s question as to what was intended to be added by the word “formal”, the Department of Health, in its memorandum

printed at Appendix 2, acknowledges that the term “formal caution” has been replaced in police usage by the term “simple caution” and that the use of “formal” is an error. The memorandum also records the intention of the General Pharmaceutical Council to amend the rules at the earliest opportunity to rectify the error. **So the Committee reports rule 8(3)(f) for defective drafting, acknowledged by the Department.**

3 S.I. 2010/1617: Reported for defective drafting of the preamble

General Pharmaceutical Council (Registration Rules) Order of Council 2010 (S.I. 2010/1617)

3.1 The Committee draws the special attention of both Houses to this Order on the ground that the preamble to the Order is defectively drafted in one respect.

3.2 Rule 23(7)(b) of the rules approved by this Order and set out in its Schedule confers a power to charge fees. Article 36 of the Pharmacy Order 2010, under which this rule is made, requires prior consultation. The Committee asked the Department of Health whether the consultation had been carried out and, if so, why it was not mentioned in the preamble. In a memorandum printed at Appendix 3 the Department confirms that the consultation was carried out and states that it was omitted from the preamble in error. **So the Committee reports the preamble for defective drafting, acknowledged by the Department.**

4 S.I. 2010/1618: Reported for requiring elucidation

General Pharmaceutical Council (Transfer of Property, Rights and Liabilities, Fees and Grants) Order of Council 2010 (S.I. 2010/1618)

4.1 The Committee draws the special attention of both Houses to this Order on the ground that it requires elucidation in one respect.

4.2 Paragraph 3(1) and (2)(f) of Schedule 1 to this Order, as read with article 2(1), transfers intellectual property, rights and liabilities in relation to “all employment records relating to relevant staff”—a term covered by a definition embracing all individuals employed or engaged at a given time in a particular activity; but article 2(2) specifies the relevant staff being transferred by reference to names on an existing list, which suggests that only some relevant staff are to be transferred. The Committee asked the Department of Health about the apparent inconsistency and, in a memorandum printed at Appendix 4, the Department explains that in fact the definition and the list are co-extensive. **The Committee therefore reports the Order for requiring the elucidation provided in the Department’s memorandum.**

5 S.I. 2010/1627: Reported for defective drafting

Marine Strategy Regulations 2010 (S.I. 2010/1627)

5.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in two identical respects.

5.2 Part 2 of Schedule 1 includes definitions of “criteria” and “regional cooperation” but those expressions appear nowhere else in the Regulations apart from the definitions themselves. In a memorandum printed at Appendix 5 the Department for Environment, Food and Rural Affairs acknowledges that the definitions are unnecessary, and **the Committee accordingly reports Part 2 of Schedule 1 for defective drafting, acknowledged by the Department.**

6 S.I. 2010/1634: Reported for defective drafting

National Health Service Pension Scheme (Amendment) Regulations 2010 (S.I. 2010/1634)

6.1 The Committee draws the special attention of both Houses to these Regulations on the grounds that they are defectively drafted in a number of respects.

6.2 Regulation 3(3) inserts a provision into the National Health Service Pension Scheme Regulations 1995 (SI 1995/300) which appears to require the Secretary of State to determine bands and rates that are “specified in the relevant table”; since the bands and rates are specified in the table, it is unclear what is left for the Secretary of State to determine, or what there is for the Secretary of State to consult on in advance (as required by a provision amended by regulation 3(4)). The Committee asked the Department of Health to explain this, and in a memorandum printed at Appendix 6 the Department suggests that the requirement imposed by the provision inserted by regulation 3(3) is “declaratory in that it provides that, in respect of each Scheme year, the Secretary of State will determine contribution rates and pay bands as required to be specified in the relevant tables”. The Committee does not consider this a genuine form of declaratory legislation, such as might properly be used to dispel a doubt, but rather a form of avoidable duplication, whereby the regulations purport to require the Secretary of State to do that which (in the light of the Committee's comments on SI 2009/381 in its 12th Report for the 2008-09 Session) has already been correctly done by the regulations. **The Committee therefore reports regulation 3 for defective drafting in respect of the inclusion of superfluous material in the provision inserted by regulation 3(3) and in respect of the retention of superfluous material in the provision amended by regulation 3(4).**

6.3 The points to which the Committee draws attention above arise also in relation to other provisions of the Regulations drafted similarly to the provisions reported.

6.4 Regulation 4 imposes a requirement to “take the advice” of the Scheme Actuary (in inserted paragraph (1B)), in contrast to a requirement to “consider” advice used elsewhere in the Regulations. The Committee asked the Department whether the expression “take the advice” was intended to imply a duty to follow any advice given, or if not why the

expression had been used. In its memorandum the Department explains that no difference of meaning between “take” and “consider” was intended, and undertakes to amend the Regulations in due course. **The Committee therefore reports regulation 4 for defective drafting, acknowledged by the Department, while recognising that, as regulation 4 is one of those covered by the previous paragraph, a revision of the Regulations in the light of this Report might cause the requirement to be omitted rather than revised.**

7 S.I. 2010/1656: Reported for doubtful *vires*

Non-Domestic Rating (Collection and Enforcement) (Local Lists) (England) (Amendment) (No. 2) Regulations 2010 (S.I. 2010/1656)

7.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that, in one respect, there is a doubt as to whether they are *intra vires*.**

7.2 Paragraph 1 of Schedule 1E to the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989 (S.I. 1989/1058), inserted by the Schedule to these Regulations, allows billing authorities to determine the number of instalments to be paid in respect of small business rate in certain circumstances. The Committee asked the Department for Communities and Local Government to identify the enabling provision for this delegation of power. In a memorandum printed at Appendix 7 the Department refers to the general powers under which the collection and recovery regulations are made, and appears to excuse the conferring of power on the grounds that the discretion conferred is limited to choosing between a nine or ten month duration of instalment schemes in a small class of cases. The Committee accepts that the delegation of power is small and relatively unimportant, but does not accept that an unlawful sub-delegation becomes lawful just because it is substantively trivial. **Accordingly the Committee reports the Schedule on the ground that, in one respect, there is a doubt as to whether it is *intra vires*.**

8 S.I. 2010/1723: Reported for defective drafting and doubtful *vires*

Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2010 (S.I. 2010/1723)

8.1 **The Committee draws the special attention of both Houses to this Order on the ground that it is defectively drafted in one respect and that there is a doubt as to whether it is *intra vires*.**

8.2 Article 4 of the Order amends article 27 of the Armed Forces and Reserve Forces (Compensation) Scheme Order 2005 (S.I. 2005/439). It seemed to the Committee that the amendment left the relationship between the paragraphs of article 27 unclear and that, in particular, the opening phrase of paragraph (1) (“Subject to the following provisions of this article”) was no longer apt, and should be confined to a reference to paragraph (2). The

Committee asked the Ministry of Defence for an explanation and, in a memorandum printed at Appendix 8, the Department agrees that the effect of article 27 after amendment by the Order is unclear, and proposes to arrange for a correction slip. The Committee does not accept that a correction slip is apt for a case of this kind, for (even if the error and correction can properly be regarded as obvious) the amendment of article 27(1) along the lines indicated would require the insertion of a new provision and accordingly would not be sufficiently small in scale. **The Committee therefore recommends that the correction should be effected by a further order and reports article 4 for defective drafting, acknowledged by the Department.**

8.3 New article 48A of the 2005 Order inserted by article 9 of this Order empowers the Secretary of State among other things to revise a decision made by a tribunal or court, on the grounds that the decision fails to take account of an award of benefit made by the Secretary of State and therefore amounts to double-recovery. The Committee asked the Department to identify the enabling provision that allows the Order to confer power on the Secretary of State to interfere with a judicial decision. In its memorandum the Department, which indicates that it is proposing to re-examine the revision power among others in preparation for new legislation intended to be made in February 2011, explains that the intention is not to interfere with the judicial decision, but rather “to abate the amount of benefit payable following that decision”. The Committee appreciates that intention and accepts that the principle of abatement would be lawful, but does not accept that the Order as drafted gives effect to it, since the power expressly enables the Secretary of State to revise a decision of a tribunal or court. The Committee believes that under the broad powers under which this Order is made there would have been a number of ways of avoiding double-recovery—such as a scheme for recovery of over-payment or payments in error—that would have avoided allowing the Executive to interfere in judicial decisions. Interference of that kind is generally sufficiently unexpected to give rise to the assumption that it is not within the contemplation of the legislature when conferring broad powers to make subordinate legislation, although the assumption would give way to express provision or clear implication to the contrary. **The Committee does not consider that there is express or clearly implied power in this case, and accordingly it reports article 9 for doubt as to whether it is *intra vires*.**

9 S.I. 2010/1736: Reported for not complying with proper drafting practice

Equality Act 2010 (Commencement No. 1) Order 2010 (S.I. 2010/1736)

9.1 **The Committee draws the special attention of both Houses to this Order on the ground that it does not comply with proper drafting practice in two related respects.**

9.2 Article 3(1) of this Order (whose citation in article 1(1) does not fully match its printed title) brings into force certain provisions of paragraph 10 of Schedule 26 to the Equality Act 2010, together with section 211(1) (the introductory provision for that Schedule) so far as it relates to those provisions. However, the Order omits to bring into force paragraph 6 of that Schedule, on which paragraph 10 depends. In a memorandum printed at Appendix 9

the Government Equalities Office accepts that the effect of the Order would have been clearer if paragraph 6 of that Schedule had also been commenced. **The Committee reports the Order for failure to comply with proper drafting practice in this respect, acknowledged by the Department.**

9.3 Article 2 brings into force provisions of the Act which are listed in the Schedule for the purpose of enabling subordinate legislation or guidance to be made. Amongst the provisions listed are certain paragraphs of Schedules 1, 4, 7, 9, 12, 17 and 21 to the Act, but there is no mention of the provisions in the Act which introduce those Schedules.

9.4 In its memorandum the Department draws a distinction between article 2 (bringing into force powers to make subordinate legislation) and article 3 (bringing into force a substantive amendment to another enactment), and argues that in the former case it is unnecessary to commence the appropriate introductory section, though it acknowledges that it may have been preferable to have drafted the Order in a more consistent way. The Committee is not convinced that the difference in subject matter between articles 2 and 3 warrants different treatment with regard to the provisions introducing Schedules. The Committee considers that provisions which introduce the relevant Schedules referred to in the Schedule to the Order should also be expressly brought into force to the extent needed. Otherwise there may be unnecessary argument as to the efficacy of the commencement of those Schedule provisions. **The Committee reports the Order for failure to comply with proper drafting practice in this respect.**

9.5 The Committee welcomes the fact that a second commencement Order (S.I. 2010/1966) was made on 3 August 2010 to supplement this Order by bringing into force paragraph 6 of Schedule 26 to the Act and the provisions of the Act which introduce the Schedules listed in the Schedule to this Order to the extent necessary, so putting the position beyond doubt.

Instruments not reported

At its meeting on 27 October 2010 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

Annex

Draft Instruments requiring affirmative approval

Draft S.I.	Apportionment of Money in the National Lottery Distribution Fund Order 2010
Draft S.I.	Justification Decision (Generation of Electricity by the AP1000 Nuclear Reactor) Regulations 2010
Draft S.I.	Justification Decision (Generation of Electricity by the EPR Nuclear Reactor) Regulations 2010
Draft S.I.	Nuclear Decommissioning and Waste Handling (Designated Technical Matters) Order 2010
Draft S.I.	Official Statistics Order 2010
Draft S.I.	Offshore Chemicals (Amendment) Regulations 2010
Draft S.I.	Offshore Petroleum Activities (Oil Pollution Prevention and Control) (Amendment) Regulations 2010
Draft S.I.	Protection of Vulnerable Groups (Scotland) Act 2007 (Consequential Modifications) Order 2010

Instruments subject to annulment

S.I. 2010/1835	Equality Act 2010 (Offshore Work) Order 2010
S.I. 2010/1836	Secretary of State for Education Order 2010
S.I. 2010/1839	Transfer of Functions (Equality) Order 2010
S.I. 2010/1874	School Information (England) (Amendment) (Revocation) Regulations 2010
S.I. 2010/1882	Medicines for Human Use (Advanced Therapy Medicinal Products and Miscellaneous Amendments) Regulations 2010
S.I. 2010/1902	Organic Products (Amendment) Regulations 2010
S.I. 2010/1911	Henley College Sixth Form College Corporation Designation (England) Order 2010
S.I. 2010/1915	Equality Act 2010 (Designation of Institutions with a Religious Ethos) (England and Wales) Order 2010
S.I. 2010/1918	School Governance (Transition from an Interim Executive Board) (England) Regulations 2010

- S.I. 2010/1919** Education (Pupil Referral Units) (Application of Enactments) (England) (Amendment) (No. 2) Regulations 2010
- S.I. 2010/1920** Education (Short Stay Schools) (Closure) (England) (Amendment) Regulations 2010
- S.I. 2010/1939** Education and Inspections Act 2006 and Education and Skills Act 2008 (Consequential Amendments to Subordinate Legislation) (England) Regulations 2010
- S.I. 2010/1953** Civil Procedure (Amendment No. 2) Rules 2010
- S.I. 2010/1976** Coastal Access Reports (Consideration and Modification Procedure) (England) Regulations 2010
- S.I. 2010/1979** School Teachers' Pay and Conditions Order 2010
- S.I. 2010/1988** Vaccine Damage Payments (Specified Disease) (Revocation and Savings) Order 2010
- S.I. 2010/1996** Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010
- S.I. 2010/1997** Education (Independent School Standards) (England) Regulations 2010
- S.I. 2010/2001** Plant Health (Fees) (Forestry) (Amendment) Regulations 2010
- S.I. 2010/2007** Export Control (Amendment) (No. 2) Order 2010
- S.I. 2010/2019** Sites of Special Scientific Interest (Appeals) (Amendment) Regulations 2010
- S.I. 2010/2056** Veterinary Surgery (Rectal Ultrasound Scanning of Bovines) Order 2010
- S.I. 2010/2058** Veterinary Surgery (Epidural Anaesthesia of Bovines) Order 2010
- S.I. 2010/2059** Veterinary Surgery (Artificial Insemination) Order 2010
- S.I. 2010/2060** Road Vehicles (Construction and Use) (Amendment) (No. 3) Regulations 2010
- S.I. 2010/2078** Rural Development (Enforcement) (England) (Amendment) Regulations 2010
- S.I. 2010/2079** Marketing of Fruit Plant Material Regulations 2010
- S.I. 2010/2089** Legal Services Act 2007 (Commencement No. 8, Transitory and Transitional Provisions) Order 2010
- S.I. 2010/2091** Legal Services Act 2007 (Legal Complaints) (Parties) Order 2010
- S.I. 2010/2134** Town and Country Planning (General Permitted Development) (Amendment) (No. 2) (England) Order 2010
- S.I. 2010/2135** Town and Country Planning (Compensation) (No. 3) (England) Regulations 2010
- S.I. 2010/2150** Pharmacy Order 2010 (Appeals - Transitional Provisions) Order of Council 2010
- S.I. 2010/2156** Companies (Disclosure of Address) (Amendment) Regulations 2010
- S.I. 2010/2172** Environmental Permitting (England and Wales) (Amendment) (No. 2) Regulations 2010

- S.I. 2010/2173** Smoke Control Areas (Exempted Fireplaces) (England) (No. 2) Order 2010
- S.I. 2010/2189** Eastern Inshore Fisheries and Conservation Order 2010
- S.I. 2010/2190** Kent and Essex Inshore Fisheries and Conservation Order 2010
- S.I. 2010/2192** Equality Act 2010 (Qualifying Compromise Contract Specified Person) Order 2010
- S.I. 2010/2193** North Eastern Inshore Fisheries and Conservation Order 2010
- S.I. 2010/2194** Equality Act 2010 (Obtaining Information) Order 2010
- S.I. 2010/2197** Northumberland Inshore Fisheries and Conservation Order 2010
- S.I. 2010/2198** Southern Inshore Fisheries and Conservation Order 2010
- S.I. 2010/2199** Sussex Inshore Fisheries and Conservation Order 2010
- S.I. 2010/2200** North Western Inshore Fisheries and Conservation Order 2010
- S.I. 2010/2205** Furniture and Furnishings (Fire) (Safety) (Amendment) Regulations 2010
- S.I. 2010/2212** Devon and Severn Inshore Fisheries and Conservation Order 2010
- S.I. 2010/2246** Community Care, Services for Carers and Children's Services (Direct Payments) (England) (Amendment) Regulations 2010
- S.I. 2010/2262** Solicitors' (Non-Contentious Business) Remuneration (Amendment) Order 2010
- S.I. 2010/2269** Further Education (Principals' Qualifications) (England) (Revocation) Regulations 2010
- S.I. 2010/2342** Safeguarding Vulnerable Groups Act 2006 (Specified Lists: Scotland) Order 2010
- S.I. 2010/2357** Commons Registration (Amendment and Miscellaneous Revocations) Regulations 2010
- S.I. 2010/2363** Bee Diseases and Pests Control (England) (Amendment) Order 2010
- S.I. 2010/2389** National Health Service (General Medical Services Contracts) (Prescription of Drugs etc.) (Amendment) Regulations 2010
- S.I. 2010/2401** Highway Litter Clearance and Cleaning (Transfer of Responsibility) (England) (Amendment) Order 2010
- S.I. 2010/2412** Police Authority (Amendment) Regulations 2010
- S.I. 2010/2417** Housing Renewal Grants (Prescribed Form and Particulars) (Revocation) (England) Regulations 2010
- S.I. 2010/2429** Social Security (Miscellaneous Amendments) (No. 5) Regulations 2010
- S.I. 2010/2442** Social Fund Cold Weather Payments (General) Amendment Regulations 2010
- S.I. 2010/2446** Social Security (Contribution Conditions for Jobseeker's Allowance and Employment and Support Allowance) Regulations 2010

- S.I. 2010/2449** Housing Benefit and Council Tax Benefit (Miscellaneous Amendments) Regulations 2010
- S.I. 2010/2459** Child Benefit and Guardians Allowance (Administration) (Amendment) Regulations 2010
- S.I. 2010/2478** Community Legal Service (Funding) (Amendment No. 2) Order 2010 (Revocation) Order 2010

Instruments subject annulment (Northern Ireland)

- S.R. 2010/336** Safeguarding Vulnerable Groups (Barred Lists: Scotland) Order (Northern Ireland) 2010

Draft instruments subject to annulment

- Draft S.I.** Cheshire East (Electoral Changes) Order 2011
- Draft S.I.** Cheshire West and Chester (Electoral Changes) Order 2011
- Draft S.I.** Cornwall (Electoral Changes) Order 2011
- Draft S.I.** Northumberland (Electoral Changes) Order 2011

Instruments not subject to Parliamentary proceedings not laid before Parliament

- S.I. 2010/1832** Inspectors of Education, Children's Services and Skills (No. 4) Order 2010
- S.I. 2010/1891** Apprenticeships, Skills, Children and Learning Act 2009 (Commencement No. 2 (Amendment) and Transitional Provision) Order 2010
- S.I. 2010/1931** Constitutional Reform and Governance Act 2010 (Commencement No. 2 and Transitional Provisions) Order 2010
- S.I. 2010/1942** Charities Act 2006 (Commencement No. 5, Transitional and Transitory Provisions and Savings) (Amendment) Order 2010
- S.I. 2010/1966** Equality Act 2010 (Commencement No. 2) Order 2010
- S.I. 2010/1986** Policing and Crime Act 2009 (Commencement No. 6 and Commencement No. 5 (Amendment)) Order 2010
- S.I. 2010/2157** Designation of Schools Having a Religious Character (Independent Schools) (England) (No. 3) Order 2010
- S.I. 2010/2169** Flood and Water Management Act 2010 (Commencement No. 1 and Transitional Provisions) Order 2010
- S.I. 2010/2195** Marine and Coastal Access Act 2009 (Commencement No.4 and Transitional Provisions) Order 2010
- S.I. 2010/2356** Commons Act 2006 (Commencement No. 1 and Savings (England and Wales) and Commencement No. 5 (England) (Amendment)) Order 2010
- S.I. 2010/2374** Apprenticeships, Skills, Children and Learning Act 2009 (Commencement No. 4) Order 2010

Appendix 1

S.I. 2010/1551: memorandum from the Department for Culture, Media and Sport

Secretary of State for Culture, Olympics, Media and Sport Order 2010 (S.I. 2010/1551)

1. By letter dated 21 July 2010, the Committee requested a memorandum on the following points:
 - (1) *Explain why article 3(2)(a) is thought necessary, and lawful, having regard to section 3(3) of the Ministers of the Crown Act 1975.*
 - (2) *Explain why the phrase “made or issued” qualifies “instrument” in article 3(3) but “or issued” is omitted in relation to instruments in articles 6(4) and 9(3).*
2. Like all other instruments under the Ministers of the Crown Act 1975, S.I. 2010/1551 was drafted by Parliamentary Counsel. Accordingly, the Department consulted Counsel about the Committee’s questions before preparing this memorandum.

Question 1

3. The question asked by the Joint Committee implies that article 3(2)(a) of S.I. 2010/1551 may be neither necessary nor lawful because it overlaps with section 3(3) of the Ministers of the Crown Act 1975.
4. We agree that there may be overlap, but consider that the extent of any overlap is unclear. It is clear that there is not a total overlap because section 3(3) does not include authentication by the corporate Secretary of State in question.
5. For example, section 3(3) may only be applicable in a case where reliance is being placed on section 3(2) to ensure that a contract etc is being entered into validly (e.g. where the office of the corporate Secretary of State is vacant), but section 3(3) may not apply in a case where a contract is being entered into by a person authorised by the corporate Secretary of State in question in reliance on the normal rules of agency (in which event section 3(2) is not applicable).
6. Therefore article 3(2)(a) is both necessary and lawful for the purpose of dealing with any cases not covered by section 3(3). The fact that it may also create some overlap with section 3(3) does not affect this conclusion. (Article 3(2)(a), unlike section 3(3), does not refer to the “Secretary to any Department of a Secretary of State”, as references to Secretaries are now considered to be unnecessary in the light of changes made to the structuring of civil service grades, and have not been used since S.I. 1997/2971.)
7. In this context, it is worth considering the history of section 3(3).
8. The predecessor of section 3 of the 1975 Act was paragraph 2 of Schedule 2 to the Ministers of the Crown Act 1974.
9. Prior to the 1974 Act, several orders made under the Ministers of the Crown (Transfer of Functions) Act 1946 contained provision establishing Secretaries of State as corporations sole and essentially authorising other Secretaries of State to act on behalf of the corporation—see e.g. article 3(1) of S.I. 1974/692. They also

contained provision requiring the corporate seal to be authenticated by a Secretary of State etc—see e.g. article 3(2) of that S.I.

10. In consequence of paragraph 2 of Schedule 2 to the 1974 Act, Schedule 3 to that Act repealed article 3(1) of S.I. 1974/692 (and equivalent provision in other orders) so far as it overlapped with paragraph 2 of Schedule 2. Significantly, however, it did not repeal article 3(2) of that S.I. or equivalent provision in the other orders. (It is perhaps also worth noting that article 3(2) of that S.I. referred to the "Secretary to the new Department", as opposed to the "Secretary to any Department of a Secretary of State".)
11. The approach taken in article 3(2)(a) of S.I. 2010/1551 reflects the approach taken in the 1974 Act, which is considered to be an appropriate precedent in this context. Similar wording has been used in more than 15 other orders made under the 1975 Act between 1976 and 2009.

Question 2

12. Articles 6(4) and 9(3) of S.I. 2010/1551 are about the interpretation of words contained in instruments. In that context, it is not thought necessary to include the words "or issued".
13. Article 3(3) of S.I. 2010/1551, like article 3(4) (which is not mentioned in the Committee's letter), has a different context. Its purpose is evidentiary. And, depending on what the precise evidentiary question is, it may be necessary for the deeming provision to cover the "making" or the "issuing" of an instrument.

Department for Culture, Media and Sport

27 July 2010

Appendix 2

S.I. 2010/1616: memorandum from the Department of Health

General Pharmaceutical Council (Statutory Committees and their Advisers Rules) Order of Council 2010 (S.I. 2010/1616)

The Committee has asked the Department to submit an Explanatory Memorandum on the above mentioned instrument dealing with the following points:

What is intended to be added by the word "formal" in rule 8(3)(f) of the Schedule?

The General Pharmaceutical Council (Statutory Committees and their Advisers) Rules 2010 ("the Rules") are contained in the Schedule to the General Pharmaceutical Council (Statutory Committees and their Advisers Rules) Order of Council 2010 (S.I.2010/1616).

Rule 8 of the Rules sets out a number of categories of person who will not be eligible for appointment as a member of a statutory committee. Specifically, rule 8(3)(f) provides that a person will not be eligible for appointment as a member of a statutory committee

where the person has received a formal caution for a criminal offence in the United Kingdom and the Appointments Committee of the General Pharmaceutical Council is satisfied that the person's membership of a statutory committee would be liable to undermine public confidence in the regulation of pharmacists or pharmacy technicians. The word "formal" in rule 8(3)(f) of the Rules was intended to distinguish non-statutory police cautions which meet the threshold and conditions for a "formal caution" (re-named as a simple caution) in Home Office Circular 30/2005 "The Cautioning of Adult Offenders" and the CPS: The Director's Guidance on Charging from any kind of admonishment or "ticking off" from a police officer (which is often referred to in common parlance as an informal caution) which does not meet such conditions or such a threshold. It was considered that "formal caution" was a term which was widely used (including on various police websites) and understood and could be given its ordinary meaning. It has also been used in recent legislation, for example in paragraph 1(2)(a) of Schedule 24 to the Environmental Permitting (England and Wales) Regulations 2010 (S.I. 2010/675).

However, Home Office circular 30/2005 re-named the "formal caution" and it is now known in Home Office circulars as a "simple caution". The Department, therefore, considers that the use of the term "formal caution" is outdated as far as the language of Home Office circulars is concerned and could lead to confusion. The Department accepts that it would have been better not to have used the word "formal" in rule 8(3)(f) of the Rules.

In the circumstances, the General Pharmaceutical Council (subject to the approval of the Privy Council) resolves to make an amendment to rule 8(3)(f) of the Rules at the earliest opportunity so as to remove the word "formal" from that provision.

Department of Health
18th August 2010

Appendix 3

S.I. 2010/1617: memorandum from the Department of Health

<i>General Pharmaceutical Council (Registration Rules) Order of Council 2010 (S.I. 2010/1617)</i>

The Committee has asked the Department to submit an Explanatory Memorandum on the above mentioned instrument dealing with the following points:

Explain, in relation to rule 23(7)(b) of the Schedule-

- (a) whether the General Pharmaceutical Council carried out the consultation required by article 36(6) of the Pharmacy Order 2010;
- (b) if it did so, why that is not indicated in the preamble;

- (c) the authority for bestowing on the registrar a general power to decide whether fees are payable; and
- (d) the authority for empowering the registrar to determine (within the range of reasonableness) the cost of the function charged for.

The General Pharmaceutical Council (Registration) Rules (“the Registration Rules”) are contained in the Schedule to the General Pharmaceutical Council (Registration Rules) Order of Council 2010 (S.I.2010/1617). The Registration Rules set out various matters relating to the register established and maintained by the registrar appointed by the General Pharmaceutical Council (“the Register”) under article 19 of the Pharmacy Order 2010 (S.I.2010/231) (“the Order”)

Rule 23 of the Registration Rules makes provision in respect of applications for the variation or revocation of any conditions imposed on the entry in the Register of premises at which a retail pharmacy business is carried on. Rule 23(7) of the Registration Rules makes provision in respect of cases where the registrar appointed by the General Pharmaceutical Council under article 18 of the Order grants an application under rule 23. It requires the registrar to ensure that an appropriate alteration is made to the entry of the premises entered in Part 3 of the Register to which the application relates and also enables the registrar to charge a fee of such amount as may reasonably be determined by the registrar in connection with the cost of making an appropriate alteration to the Register.

Article 36(1) of the Order gives the General Pharmaceutical Council the power to make rules about the charging of fees in connection with the entry of a person or premises in the Register. Paragraph (6) of that article requires the General Pharmaceutical Council to consult such persons as it considers appropriate before making such rules including the persons referred to in sub-paragraphs (a) to (d) of that paragraph. Before making the Registration Rules, the General Pharmaceutical Council carried out the consultation required under article 36(3) of the Order in conjunction with the consultation required under article 66(3) of the Order. Article 36(3) of the Order was, therefore, omitted from the preamble to S.I. 2010/1616 in error. The Department apologises for this.

The authority for giving the Registrar a general power to decide whether a fee is payable in the circumstances provided for by rule 23(7)(b) of the Registration rules is article 36(1)(c) of the Order which enables a fee to be charged in connection with amendments to the Register.

Under article 18(3) of the Order, the Council may delegate any of its functions to the Registrar except any power to make rules. It is a function of the General Pharmaceutical Council to determine the amount of any fee that may be charged by virtue of rules made by it under article 36(1) of the Order. This function is derived from the wide power in article 36(1) of the Order which enables the Council to make provision in rules in respect of the charging of fees. The Department considers that the extent of this power is not limited to the determination of the amount of any fee that may be charged in particular circumstances. It also enables the Council to confer discretion on another person to decide whether or not a fee may be charged in any particular case and as to the amount of any fee that may be charged in particular circumstances.

The Department therefore considers that it is within the powers conferred by article 18(3) and 36(1) of the Order to prescribe, in rule 23(7)(b) of the Registration Rules, that the Registrar is able to determine (within the range of reasonableness) the amount of any fee to be charged in a particular case in connection with the cost of making amendments to an entry in the Register. This is a matter which will fall to be determined by reference to the particular circumstances of an individual case.

Department of Health
18th August 2010

Appendix 4

S.I. 2010/1618: memorandum from the Department of Health

General Pharmaceutical Council (Transfer of Property, Rights and Liabilities, Fees and Grants) Order of Council 2010 (S.I. 2010/1618)

The Committee has asked the Department to submit an Explanatory Memorandum on the above mentioned instrument dealing with the following point:

Why does paragraph 3(1) and (2)(f) of Schedule 1 transfer intellectual property, rights and liabilities in relation to “all employment records relating to relevant staff”, when it appears from article 2 that only some relevant staff are to be transferred?

Article 2 of the General Pharmaceutical Council (Transfer of Property, Rights and Liabilities, Fees and Grants) Order 2010 (S.I.2010/1618) (“the Transfer Order”) makes provision in respect of the transfer of the property, rights and liabilities specified in Schedule 1 to that Order from the Royal Pharmaceutical Society of Great Britain (“the Society”) to the General Pharmaceutical Council (“the Council”) on the day on which the regulatory activities of the Society are transferred to the Council (“the transfer date”) by virtue of provisions in the Pharmacy Order 2010 (S.I.2010/231).

Paragraph 3(1) of Schedule 1 to the Transfer Order provides that the intellectual property, rights and liabilities that the Society has in relation to the items specified in paragraph 3(2) of that Schedule, in so far as these relate to the regulatory activity of the Society, are to pass to the Council on the transfer date which is, for this purpose, 27th September 2010. Paragraph 3(2)(f) of Schedule 1 to the Transfer Order refers to “all employment records relating to “relevant staff” which is defined in article 1(2) of the Transfer Order as “individuals who are employed or engaged by the Society in connection with its regulatory activity immediately before the transfer date”.

Although article 2(2) of the Transfer Order refers to “any relevant staff whose names are contained in the list, compiled by the Society and certified by the Privy Council, of staff

whose employment with the Society is to transfer to the Council on the transfer date”, it is not the intention that the employment of only some relevant staff is to transfer from the Society to the Council on that date.

The Department agrees that the reference to “any relevant staff” in article 2(2) of the Transfer Order could be construed as implying that the employment of only some relevant staff is to transfer from the Society to the Council on the transfer date. However, given that the list referred to in that provision actually contains the names of all relevant staff who were employed by the Society immediately before the Order was made, the Department is satisfied that the correct result has been achieved in so far as the Transfer Order transfers from the Society to the Council all rights and liabilities in relation to all relevant staff.

Department of Health
18th August 2010

Appendix 5

S.I. 2010/1627: memorandum from the Department for Environment, Food and Rural Affairs

Marine Strategy Regulations 2010 (S.I. 2010/1627)

1. In its letter to the Department dated 21 July 2010, the Joint Committee requested a memorandum on the following points:

Explain why—

- (a) regulation 2(1), in including a definition of “marine strategy”, contains material that, in the light of regulation 2(2), appears superfluous, and*
- (b) Part 2 of Schedule 1 includes definitions of “criteria” and “regional cooperation”, given the absence of other reference to those expressions in the Regulations.*

2. In relation to the first point, a definition of “marine strategy” was expressly provided in regulation 2(1), as it is a central concept to the Marine Strategy Regulations. The Department considered it more logical to keep the definitions deriving from the Directive together in a Schedule, rather than to intersperse them with the other definitions in regulation 2(1).

3. As a result of this decision, in response to requests from stakeholders, we included a specific definition of “marine strategy” to provide a signpost for a casual reader of the Regulations.

4. In relation to the second point, the Department accepts that it is not necessary to include such definitions for the reason set out by the Joint Committee. The Department apologises for this error.

5. The errors do not affect the rights or obligations of citizens or business and therefore the Department does not consider that the Regulations need urgent amendment. The Department will take into account the Joint Committee's comments when we have an opportunity to review the Regulations.

Department for Environment, Food and Rural Affairs
30 July 2010

Appendix 6

S.I. 2010/1634: memorandum from the Department of Health

National Health Service Pension Scheme (Amendment) Regulations 2010 (S.I. 2010/1634)

1. In its letter to the Department of 21 July 2010, the Joint Committee requested a memorandum on the following points:

(1) Is “take the advice” in regulation 4 (inserted paragraph (1B)) intended to require the advice to be followed? If so, why is a potentially ambiguous rather than a clear term used? If not, why does the provision not use “consider the advice”, as in regulation 7(3) (inserted sub-paragraph (2B))?

(2) Explain, in relation to the new provision for SI 1995/300 inserted by regulation 3(3)—

(a) what it falls to the Secretary of State to determine that is not already fixed by regulation D1 of SI 1995/300 as amended by these Regulations, and how that is achieved;

(b) in so far as all is already fixed, the purpose of consulting those identified in regulation D1(2A) of the 1995 Regulations, as amended by these Regulations; and
(c) in so far as some is not fixed, how the duty to determine meets the point made in the 12th JCSI Report for the 2008-09 Session in relation to SI 2009/381.

(3) Explain, in relation to the new provision for SI 1995/300 inserted by regulation 3(5), what is to happen after the 2011-2012 scheme year and how that is achieved or assured.

(4) Explanations are also sought in respect of—

(a) queries equivalent to those in point (2) in relation to parallel provisions inserted by regulations 4, 14 and 17, and

(b) queries equivalent to those in points (2) and (3) in relation to parallel provisions inserted by regulations 7, 11, 13, and 16.

2. The Department's response to each of the Committee's points is outlined below.
3. Point (1).
Is "take the advice" in regulation 4 intended to require the advice to be followed or to be considered?

In paragraph (IB) of regulation D2 of the National Health Service Pension Scheme Regulations 1995 (contributions by employing authorities) as inserted by regulation 4, "take the advice" of the Scheme Actuary is not intended to require the Secretary of State to follow that advice. The intention is that the Secretary of State should consider that advice.

The Department accepts that that intention would have been clearer had the phrase "consider the advice of" or "take account of" been used. The Department will amend the regulation to that end when a suitable opportunity arises.

4. Point (2):
In relation the insertion made by regulation 3(3), what it falls to the Secretary of State to determine that is not already fixed by regulation D1; what is the purpose of consulting those identified in regulation D1(2A) and how the duty to determine meets the point made in the 12th JCSI Report for the 2008-09 Session in relation to SI 2009/381.

Regulation D1 of the National Health Service Pension Scheme Regulations 1995 (contributions by members) as amended by S.I.2010/1634 sets out the regime relating to member contributions to the scheme, covering – (i) the liability on members of the Scheme to pay contributions (D1(1) and (1A) (ii) the rate of such contributions and the earnings bands in respect of which that rate applies (D1(2B) as set out in the relevant tables and S.I.2010/1634 provided the relevant tables for the scheme years 2010-2011 and 2011-2012) (iii) the duty on the Secretary of State to "set" contribution rates and pay bands for each scheme year and set them out in a table in the regulation (D1(2)) (iv) what must be considered by the Secretary of State in setting those contribution rates and pay bands (D1(2A)) and (v) by reference to the relevant tables, what contribution rate is payable in different scenarios (e.g. when a person joins part way through the year or has dual employments D1(2C) et seq)). The Department considers paragraph (2) of regulation D1 (as inserted by regulation 3(3)) to be part and parcel of that regime.

Paragraph (2) of regulation D1 is declaratory in that it provides that, in respect of each Scheme year, the Secretary of State will determine contribution rates and pay bands as required to be specified in the relevant tables. As S.I.2010/1634 has specified the relevant tables for the scheme years 2010-2011 and 2011-2012, in accordance with the process set out in regulation D1 (as amended) it falls to the

Secretary of State to determine the contribution rates and pay bands for subsequent scheme years and, by amending statutory instrument, to set them out in a relevant table. Nothing in paragraph (2) (or anything else in the regulation) enables, or is intended to enable, the Secretary of State to provide for the imposition or payment of contributions “off the face of the Regulations”. In short, nothing in the amended regulation D1 confers on the Secretary of State power to amend the tables specifying the contribution rates and pay bands without making a further statutory instrument.

In context paragraph (2) requires any rates and bands to be specified in the relevant tables in regulation D1. The Department considers that it is not possible, within the framework of the regulation, for the Secretary of State to change either the contribution rates or pay bands applying for any year (which have to be specified in the relevant tables in respect of each year) without amending the relevant tables in question (see the duty in paragraph (2) to determine and the definition of relevant table in paragraph (2A) of regulation D1). Whilst the Department considers that this could possibly have been made clearer by adding something like “(and amend paragraph (2B) accordingly)”^a at the end of paragraph (2), it does not think that would have added anything to what is already there.

Paragraph (2A) sets out what must be considered by the Secretary of State in determining the pay bands and contribution rates which, pursuant to paragraph (2), are then set out for each year scheme in the relevant table in paragraph (2B) of regulation D1.

The Department takes the view that the declaratory provision of D1(2) operates to require any change to the relevant tables for the scheme years 2010-2011 and 2011-2012 and the establishment of new contribution rates and pay bands for a subsequent scheme year to be made by statutory instrument so that (as per D1(2)) both pay bands and contribution rates are specified in a table in respect of the appropriate scheme year.

5. Point (3):

Explain, in relation to the new provision for SI 1995/300 inserted by regulation 3(5), what is to happen after the 2011-2012 scheme year and how that is achieved or assured.

Paragraph (2B)(2)(c) of regulation D1 of the National Health Service Pension Scheme Regulations 1995, as inserted by regulation 3(5), inserts the definition of “relevant table” and sets out table 1 which specifies the contribution rates and pay bands for the scheme year 2010-2011 and table 2 which specifies the contribution rates and pay bands for the scheme year 2011-2012.

^a So that it reads “(2) The Secretary of State shall, with the consent of the Treasury, determine the pensionable pay bands and the contribution percentage rates specified in the relevant table in respect of each scheme year (and amend paragraph (2B) accordingly”.

For scheme year 2012-2013, an amendment by way of statutory instrument will be made to paragraph (2B)(2)(c) amending the relevant dates and/or tables. Failure to make a statutory instrument amending those tables will mean that a member's liability to make contributions to the scheme will cease at the end of the 2011-2012 scheme year.

6. Point (4);
 (4) Explanations of—
 (a) queries equivalent to those in point (2) in relation to parallel provisions inserted by regulations 4, 14 and 17, and
 (b) queries equivalent to those in points (2) and (3) in relation to parallel provisions inserted by regulations 7, 11, 13, and 16.

In relation to (a) the Department wonders whether the reference should have been to regulation 16.

In relation to regulation 4, the Committee is referred to paragraph 3 of this memorandum. In relation to regulation 14 and 16, the Department's intention was that the advice in question had to be considered but did not have to be followed. The Department considers that the phrases "take account of" and "must consider" give effect to that intention.

In relation to (b), the Committee is referred to paragraph 4 of this memorandum which the Department considers applies in a similar manner to regulations 7, 11, 13 and 16.

Department for Health
 26th July 2010

Appendix 7

S.I. 2010/1656: memorandum from the Department for Communities and Local Government

Non-Domestic Rating (Collection and Enforcement) (Local Lists) (England) (Amendment) (No. 2) Regulations 2010 (S.I. 2010/1656)

1. The Committee has requested a memorandum on the following points –

"In relation to inserted Schedule 1E explain—

- (a) on what power the words "as the billing authority determines" in paragraph 1(3) rely; and*
(b) how "the amounts" as described in the opening words of paragraph 1(5) are established; there appears to be a stage of estimating them in paragraph

1(5)(a) to (c), and (in paragraph 1(6)), a requirement to specify them in a notice, but nothing express either to link estimate and specification or to indicate how the specification might differ from the estimate”.

2. In relation to the first point raised, the words “as the billing authority determines” in paragraph 1(3) of Schedule 1E rely on the powers in paragraphs 1 and 2(2)(b) of Schedule 9 to the Local Government Finance Act 1988. Paragraph 1 provides that “*the Secretary of State may make regulations containing such provision as he sees fit in relation to the collection and recovery of amounts persons are liable to pay under sections 43, 45 and 54 above*”. Paragraph 2(2)(b) provides further that “*Regulations under this Schedule may include provision...(c) that payments on account must be made in accordance with an agreement between the ratepayer and payee or in accordance with a prescribed scheme for payment for instalments*”. Paragraph 1 of Schedule 1E to these Regulations prescribes a scheme for payment by instalments for ratepayers to whom Schedule 1E applies and paragraph 1(3) relates to the monthly structure of this instalment scheme. This mirrors the provisions in relation to the usual statutory instalment scheme, provided for in paragraphs 1(2) and 1(2A) of Schedule 1 of the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989 (S.I. 1989/1058). It does not allow the billing authority any discretion other than to choose between a nine or ten month duration for the instalment scheme for demand notices issued in May 2011 only.

3. In relation to the second point raised, the amounts are established by reading regulation 7(1A) of the Non-Domestic Rating (Collection and Enforcement) (Local Lists) Regulations 1989 (as inserted by regulation 2(4) of these Regulations) together with sub-paragraphs (5) and (6) of paragraph 1 of Schedule 1E. Regulation 7(1A) provides that the estimate of the amount payable must be paid in instalments in accordance with Schedule 1E. So the amounts of each monthly instalment must, by their nature, be estimates and will not differ from the amounts specified in the notice as the entire amount payable is an estimate (because a ratepayer’s liability may change during the financial year if, for example, there is a change in rateable value of the property) and cannot be finally determined at this stage of the billing cycle. In addition, sub-paragraph (5) also states that “the amounts of the monthly instalments shall be as follows”, which, in the Department’s view, is sufficient to indicate that the amounts to be estimated by the billing authority in sub-paragraph (5) are the amounts to be specified as the instalments in the notice in sub-paragraph (6). In the Department’s view and that of local authority consultees, who have had an opportunity to comment on this instrument in draft, there cannot be any real uncertainty as to the amounts to be specified in the notice.

26 July 2010

Department for Communities and Local Government

Appendix 8

S.I. 2010/1723: memorandum from the Ministry of Defence

Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2010 (S.I. 2010/1723)

1. The Joint Committee has requested a memorandum on two points.

2. The first point is-

Explain the relationship between paragraphs (1) and (3) of article 27 of S.I. 2005/439 after amendment by article 4 of this Order.

3. The Department assumes that your question arises from having identified that paragraph (1) is only subject to paragraph (2). We agree that this could be clarified and intend to submit a correction slip to the effect that paragraph (1) is amended to read “subject to paragraph (2)”.

4. Paragraph (1) of article 27 of S.I. 2005/439 provides that where a member of the armed forces dies in service the bereavement grant payable is £25,000. This is subject to the provision in paragraph (2) which makes a different provision for persons who were members of the Armed Forces Pension Scheme 2005 at the date of death. Paragraph (3) applies where the member dies after service has ended. In those cases a bereavement grant of £37,500 is payable in all circumstances.

5. The second point is-

Explain in what circumstances it is envisaged that the Secretary of State might seek to revise a decision relating to benefit made by any of the bodies specified in new article 48A(2)(a)(iii) of S.I. 2005/439 inserted by article 9 of this Order; and explain what in the enabling power allows the Secretary of State to revise awards of those bodies (as distinct from revising awards of the Secretary of State to reflect the decisions of those bodies in awarding damages).

6. Article 32 of S.I. 2005/439, as amended by article 6 of this Order, contains a power for the Secretary of State to abate an award of benefit where the claimant has also received an award of damages in a personal injury or dependency claim for the same injury or death. In most cases an award is made under the Armed Forces Compensation Scheme (“AFCS”) before the award of damages is settled. Where the Department is paying damages, the usual practice is to take account of the AFCS award in settlement of the damages claim. This is not possible in some dependency claims, and where damages are awarded by a third party (e.g. the defendant’s insurance company following a road traffic accident). The purpose of the new article 48A is to provide a power to review the amount of benefit already awarded under the AFCS in cases where no account has been taken of the AFCS in the settlement of damages. This is in line with the long standing common law principle that compensation is not awarded twice for the same injury or death.

7. In order to effect the legislative intent of this provision, which reflects the recommendations made by Admiral The Lord Boyce in the Review of the Armed Forces Compensation Scheme (Cm 7798), it is necessary to include a power to review a decision relating to the award of benefit

following a decision of a court or tribunal. The decision to be reviewed will be in relation to the award of benefit under the AFCS, not the award of damages made in the personal injury or dependency claim. The purpose of the review is not to dispute or purport to change the decision of the court or tribunal in relation to the appropriate level of award (i.e. which tariff applies) but to abate the amount of benefit payable following that decision, in accordance with the powers in article 32. There is a right of appeal to the First-tier Tribunal on the exercise of the review powers in article 48A and subsequent abatement of an award. The Department considers that by necessary implication the enabling powers allow the Secretary of State to exercise a review power which affects the implementation of a decision of a court or tribunal.

8. A similar formulation providing a power to review a decision made, given or upheld by a court or tribunal is used in article 44(3) of the Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions Order 2006 S.I.2006/606. This provision has been in legislation in its current form since 2001, and it has not given rise to any legal difficulty.

9. The Department will be examining all the review powers in the AFCS as part of the implementation of Lord Boyce's Review, as the recommendations recognised the need to extend the powers of the Secretary of State to revise awards. We will give careful consideration to how best to frame these review powers in the new legislation which we intend to make in February 2011.

The Ministry of Defence
27 July 2010

Appendix 9

S.I. 2010/1736: memorandum from the Government Equalities Office

<i>Equality Act 2010 (Commencement No. 1) Order 2010 (S.I. 2010/1736)</i>
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1. This memorandum is submitted in response to a two part question from the Committee to the Government Equalities Office on 21 July 2010. The Committee asked:

Explain why:

- a) article 3(1) does not include mention of paragraph 6 of Schedule 26 so far as it relates to paragraphs 10(1), (2), (3) and (5) of that Schedule, and*
- b) in contrast with the mention in article 3(1) of the introducing provision (section 211(1)) for those Schedule 26 provisions, the provisions listed in Table 2 in the Schedule are brought into force by article 2 in the absence of any mention in the Order of the provisions that introduce the Schedules referred to in that Table.*

2. Article 3(1) brings into force paragraph 10(1), (2), (3) and (5) of Schedule 26 to the Equality Act 2010 which amends section 14 of the Equality Act 2006. It also brings into force section 211(1) which introduces paragraph Schedule 26, so far as is necessary to

bring the relevant parts of paragraph 10 into force. While we consider that this is sufficient to bring these provisions into force for the purpose of making this amendment to the 2006 Act, we accept that the effect of the Order would have been clearer if paragraph 6 of Schedule 26 had also been commenced.

3. In response to the second part of the Committee's question; Article 2 of the Order brings powers to make subordinate legislation into force which differs from Article 3 which is bringing into force a substantive amendment to another enactment. Our view is that where we are merely commencing powers to make subordinate legislation (which will not, itself, come into force until those sections are fully commenced) it is not necessary to bring the Schedules themselves into force by commencing the appropriate introductory section. We also consider that, notwithstanding the difference between the approaches taken in Articles 2 and 3 the effect of the Order is quite clear on its face. However, we acknowledge it may have been preferable to have drafted the Order in a more consistent way.

4. In the light of our re-examination of the Order, the Government Equalities Office has decided to put the position beyond doubt in relation to paragraph 6 of Schedule 26 and will make a further commencement order to bring this provision into force. Since we are making a further Order, GEO will also commence the sections of the Act that introduce Schedules that contain powers to make subordinate legislation and guidance that have been commenced in Commencement Order No 1, again to put the position beyond question. The Commencement Order will be made at the earliest available opportunity.

Government Equalities Office
3 August 2010