House of Lords
House of Commons
Joint Committee on
Statutory Instruments

Twenty-sixth Report of Session 2014-15

Drawing special attention to:

National Health Service Pension Scheme (Transitional and Consequential Provisions) Regulations 2015 (S.I. 2015/95)
Civil Procedure (Amendment) Rules 2015 (S.I. 2015/406)
Selective Licensing of Houses (Additional Conditions) (England) Order 2015 (Draft S.I.)

Ordered by the House of Lords to be printed
17 March 2015
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Joint Committee on Statutory Instruments

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Lord Kennedy (Labour)
Lord Lyell (Conservative)
Baroness Mallalieu (Labour)
Lord Selkirk (Conservative)
Baroness Stern (Crossbench)
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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 Joanna Welham (Commons Clerk), Jane White (Lords Clerk) and Liz Booth (Committee Assistant). Advisory Counsel: Peter Davis, Peter Brooksbank, Philip Davies and Daniel Greenberg (Commons); Nicholas Beach, Peter Milledge and John Crane (Lords).

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Instruments reported

At its meeting on 17 March 2015 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 three 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. 2015/95: Reported for defective drafting

National Health Service Pension Scheme (Transitional and Consequential Provisions) Regulations 2015 (S.I. 2015/95)

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

1.2 These Regulations make transitional and consequential provision in connection with a new NHS pension scheme established by the National Health Service Pension Scheme Regulations 2015. Regulation 2, which makes provision as to general interpretation, defines “2015 Regulations” as meaning those Regulations, and “new scheme” as meaning the scheme set out in the 2015 Regulations. The Regulations contain numerous references to the new scheme. However, regulations 5, 13 and 40 contain the expression “2015 Scheme” three, two and eight times respectively, although that expression is not defined for the purposes of these Regulations. Other provisions of these Regulations insert the same term into two other instruments.

1.3 In a memorandum printed at Appendix 1, the Department of Health, which correctly points out recent separate amendments to the two other instruments defining the term within them, nonetheless acknowledges that these Regulations are defectively drafted in otherwise using two different terms, only one of which is defined, for the same item. The Department indicates that it will take remedial action at the first available opportunity. The Committee accordingly reports regulations 5, 13 and 40 for defective drafting, acknowledged by the Department.

2 S.I. 2015/406: Reported for defective drafting, failure to give effect to a statutory requirement, and unreasonable delay in complying with proviso to section 4(1) of the Statutory Instruments Act 1946

Civil Procedure (Amendment) Rules 2015 (S.I. 2015/406)

2.1 The Committee draws these Rules to the special attention of both Houses on the grounds that they are defectively drafted in six respects (three of them identical); that they fail to include provision that they are required, by the Act that confers the power to make them, to include; and that there appears to have been an unjustifiable delay in
sending a notification, under the proviso to section 4(1) of the Statutory Instruments Act 1946, where an instrument has come into operation before it has been laid before Parliament.

2.2 The Rules amend the Civil Procedure Rules 1998 (“the 1998 Rules”), made under section 1 of the Civil Procedure Act 1997 (“the 1997 Act”). They insert a new Part 88 into the 1998 Rules in exercise of powers conferred by paragraphs 2 to 4 and 6 of Schedule 3 to the Counter-Terrorism and Security Act 2015 (“the 2015 Act”). The new Part 88 introduces special rules of court to govern the conduct of proceedings concerned with the imposition of, and challenges to, temporary exclusion orders under Chapter 2 of Part 1 of the 2015 Act, and to ensure that sensitive material is not disclosed contrary to the public interest.

2.3 Being the first to be made under Schedule 3 to the 2105 Act, these Rules are made by the Lord Chancellor and require an affirmative procedure if they are to remain in force. (If the Rules are approved, any subsequent rules under those powers will fall to be made by the Civil Procedure Rule Committee, subject to being allowed by the Lord Chancellor, under section 2 of the 1997 Act in the usual way.) The Committee sought explanations from the Ministry of Justice about a number of apparent inconsistencies in, and an omission from, the Rules.

2.4 Rule 1.2 of the 1998 Rules obliges the court to seek to give effect to “the overriding objective” in rule 1.1, to deal with cases justly and at proportionate cost. Rule 3 of these Rules qualifies that obligation by amending rule 1.2 so that the court must interpret any of the 1998 Rules subject to new rule 88.2, paragraph (2) of which requires it to “ensure that information is not disclosed in a way which would be damaging to the interests of national security”. The Committee asked the Ministry what distinction is intended between a disclosure that is “damaging to the interests of national security” in new rule 88.2(2) and one that is “contrary to the interests of national security”, which is the expression used for the purposes of the interpretation provision in new rule 88.1(3). In paragraph 3 of their joint memorandum, printed at Appendix 2, the Ministry of Justice and the Home Office admit that the reference to “damaging” is an error, and that the formulation “contrary to” should have been used in new rule 88.2(2), as in new rule 88.1(3). The Committee accordingly reports new rule 88.2 for defective drafting, acknowledged by the Departments.

2.5 New Rule 88.9(1) provides that “When the court issues a claim form it will fix a date for a directions hearing”. The Committee recalled that it had reported a number of previous sets of Civil Procedure Rules for using “will” ambiguously in provisions where it was intended that a duty should be imposed. It noted in particular the revised approach signified last year in Practice Direction 2D, supplementing the 1998 Rules, that “will” would in future not be used in such a context. The Committee therefore asked whether new rule 88.9(1) was intended to impose an obligation on the court; and, if so, why appropriate language had not been used for the purpose. In paragraph 4 of their memorandum, the Departments accept that “will” was used in error and should have been “must”. The Committee reports new rule 88.9 for defective drafting, acknowledged by the Departments.
2.6 New rules 88.24(2) and 88.28(3)(a) and (6)(a) each refer to things that have been, or must in certain circumstances be, done by or in relation to “the relevant person”. The Committee asked what that expression was intended to mean and where it was defined for the purposes of new Part 88. In paragraph 5 of their memorandum, the Departments explain that the reference to “the relevant person” had been erroneously imported into all three provisions of new Part 88 from provisions of Part 82 of the 1998 Rules, on which new Part 88 is (according to paragraph 2 of the memorandum) modelled; and they should each have been a reference to the Secretary of State. The Committee observes in passing that this error indicates the dangers of simply copying the contents of earlier provisions into new provisions, without giving sufficiently careful consideration to which parts of the earlier material are appropriate in the new context. It accordingly reports new rules 88.24(2) and 88.28(3)(a) and (6)(a) for defective drafting, in each case acknowledged by the Departments.

2.7 As well as conferring powers to make rules of court, Schedule 3 to the 2015 Act imposes obligations on a person making rules under the Schedule to include certain kinds of provision in them. Paragraph 4(1)(d) requires that if, in accordance with the rules, a court (in the present context, the High Court or the Court of Appeal) gives permission to the Secretary of State not to disclose material other than to the court or to any person appointed as a special advocate, the rules must secure that the court is obliged to consider requiring the Secretary of State to provide a summary of the material to every party to the proceedings and their legal representative.

2.8 The Committee asked where such provision is to be found in new Part 88. In paragraph 6 of their memorandum, the Departments explain that it was intended that such provision should have appeared in new rule 88.28(6)(a) but that, because of the last of the errors described above, there is no reference there to the Secretary of State. They intend that the error should be corrected in an amending instrument “as soon as practicable”. In the Committee’s view, until such time as the Rules can be amended for this purpose, they fail to comply with the requirements of paragraph 4(1) and the Lord Chancellor remains in breach of his statutory duty to that extent. In the light of that, it reports the Rules for failure to give effect to the statutory obligation imposed by paragraph 4(1)(d) of Schedule 3 to the 2015 Act.

2.9 New rule 88.24(5)(b) provides that, where the special advocate has sought the authority of the court to communicate with any person about the proceedings, the Secretary of State must serve on the special advocate notice of any objection which she has “to the proposed communication” or “to the form in which it is proposed to be made”. Rule 88.28(1) provides that rule 88.28 applies where the Secretary of State has objected under rule 88.24(5)(b) to a proposed communication by the special advocate, or has made an application under rule 88.27. The Committee asked whether rule 88.28 is also intended to apply to a case where the Secretary of State objects to the form in which a proposed communication is to be made.

2.10 In paragraph 7 of their memorandum, the Departments indicate that this is indeed the intention, and that the words “[objected] … to a proposed communication by the special advocate” were “intended to be explanatory rather than to limit rule 88.28’s application”. They go on to point out that an equivalent formulation appears in the corresponding rules.
in Parts 76, 79, 80 and 82 of the 1998 Rules “which have as we understand it not caused any difficulty or suggestion in practice that the rule does not apply equally to an objection to the substance and the form of the communication”. The Departments do not say whether there have in fact yet been any instances where an objection has been made only to the form, but not the substance, of a proposed communication, and so the Committee is unsure what weight can be given to their apparent confidence that rule 88.28(1)(a) will necessarily be construed in the way they hope.

2.11 The Departments do, however, say that they “will consider whether in the interests of clarity new rule 88.28(1) should be amended. The Committee agrees that early consideration of an amendment is highly desirable because, applying the usual canons of construction, it considers that, by referring expressly to only one of the two possible grounds for objection under new rule 88.24(5)(b), new rule 88.28(1) raises a strong inference that rule 88.28 is intended to apply only to the specified ground. That, according to paragraph 7 of the memorandum, is not the outcome that the Departments were intending to achieve. It follows that new rule 88.28(1)(a) is defectively drafted, as is to some extent acknowledged by the Departments; and the Committee reports it accordingly.

2.12 Subsection (1) of section 4 of the Statutory Instruments Act 1946 (“the 1946 Act”) provides that a statutory instrument that is required to be laid before Parliament after being made must be so laid before it comes into operation. But the subsection goes on to provide that, where it is essential that an instrument comes into operation before it can be laid, a notification must be sent “forthwith” to the Speaker of each House drawing attention to the fact that the instrument has come into operation before being laid, and explaining why this has happened. The Committee noted that these Rules were made on 26th February 2015, that the effect of rule 1 was to bring them into force at the very beginning of the following day, 27th February, and that (according to the second italic heading) they were not laid before Parliament until 27th February.

2.13 The Committee therefore asked why no notification and explanation were sent to the Speaker of each House, as required by section 4(1) of the 1946 Act. In paragraph 8 of their memorandum, the Departments explain that the Rules were made too late on 26th February to be laid before each House on the same day, and that the need to send a notification under section 4(1) was overlooked. Attached to the memorandum is a copy of a letter dated 12th March from the Minister of State for Justice to the Speaker of each House, giving the requisite notification and an explanation, and apologising for the omission. The Committee welcomes the early steps taken by the Ministry to remedy the deficiency promptly once it had been pointed out. It nevertheless reports that there appears to have been an unjustifiable delay in sending the notification, given that the Rules were made on 26th February 2015 with the intention that they would come into force only a few hours later.

2.14 The Committee notes the statement in paragraph 2 of the memorandum that the errors identified by the Committee and acknowledged by the Departments require prompt correction. While it may be the case that the errors might not themselves “render the Rules invalid”, any court seeking to apply new Part 88 before the errors can be corrected will be left with the task of making such sense as it can of the provisions concerned, with the risk
that the conclusions it reaches may not necessarily coincide with the Departments’ policy intentions. Because of the significance of the Rules, in terms of the restrictions they impose on parties to proceedings to participate in hearings or to see copies of evidence produced to the court by the Secretary of State, the Committee regards it of great importance that known errors in them should be corrected without delay. It therefore welcomes the statement at the end of paragraph 2 of the memorandum that preparations by the Rule Committee for a correcting instrument are already under way.

\section{Draft S.I.: Reported for failure to comply with proper drafting practice and unexpected use of the enabling power}

\subsection*{Selective Licensing of Houses (Additional Conditions) (England) Order 2015 (Draft S.I.)}

3.1 The Committee draws the special attention of both Houses to this draft instrument on the grounds that it fails in two respects to comply with proper drafting practice, and that it appears to make an unexpected use of the power conferred by the enabling Act.

3.2 The draft Order, to be made under section 80(7) of the Housing Act 2004 (“the 2004 Act”), would extend the circumstances in which a local housing authority in England may make a designation under section 80(1) in respect of the whole or part of the area of their district so as to require landlords of private sector rented properties in the area concerned to obtain a licence.

3.3 The draft Order specifies four sets of conditions, any one of which the authority must consider to be satisfied in respect of an area before they can make a designation. These will be alternative conditions to those already set out in section 80(3) and (6) of the 2004 Act which allow for the designation of an area with low housing demand, or of an area experiencing a significant and persistent problem caused by anti-social behaviour.

3.4 Several issues have been identified in relation to the draft instrument since it was laid before Parliament on 4 March 2015. These are addressed in a memorandum to the Committee provided by the Department for Communities and Local Government on 12 March, which is printed at Appendix 3.

3.5 The first two issues concern the preamble to the draft instrument. This recites as enabling powers section 250(1) and (6) of the 2004 Act even though these subsections are concerned with the form of, or procedure for, secondary legislation to be made under the Act and do not confer power to make the proposed Order. Moreover the preamble contains no reference to a draft of the Order having been laid in draft before and approved by resolution of each House of Parliament in accordance with section 250(6). Paragraph 2.4.7 of Statutory Instrument Practice specifies that a preamble should recite the fulfilment of any condition which the enabling Act requires to be fulfilled before the instrument can validly be made. In paragraphs 2 and 3 of its memorandum, the Department acknowledges these defects in the preamble and undertakes to correct them at the earliest opportunity. The Committee accordingly reports the preamble to the draft Order on the ground that it fails in two respects to comply with proper drafting practice, acknowledged in both cases by the Department.
3.6 The remainder of the Department’s memorandum concerns the proposed new circumstances in which a local authority will be empowered to make a licensing designation. Article 3 of the draft Order provides that, before it can do so, the authority must consider that: (a) the area contains a high proportion of properties in the private rented sector, in relation to the total number of properties in the area; (b) those private sector properties are occupied either under assured tenancies or licences to occupy; and (c) one or more of the sets of conditions in articles 4 to 7 are satisfied.

3.7 In general terms, article 4 would apply if the authority intends to inspect a significant number of private sector rented properties in the area with a view to determining whether a “category 1” or “category 2” hazard exists, and to carrying out any necessary enforcement action. Article 5 would apply if the area has recently experienced or is experiencing “an influx of migration”, and the migrants who have arrived as part of that influx are occupying private sector rented accommodation. Article 6 would apply if the area is suffering from “a high level of deprivation”. Article 7 would apply if the area suffers from a high level of crime.

3.8 The Department’s memorandum explains: in paragraphs 5 to 7, the circumstances in which it is intended that the proportion of properties in the private rented sector should be considered “high” for the purposes of article 3(1)(a); in paragraphs 8 and 9, the intended meaning of “influx of migration” for the purposes of article 5(a) and (b); and in paragraph 10, how it is to be determined whether the levels of crime in a particular area are “high” for the purposes of article 7(a). In each case, the memorandum says that it is for the local authority to determine, having regard to local circumstances, whether these criteria will be met; and that the Department has deliberately avoided setting specific thresholds.

3.9 Paragraph 11 of the memorandum explains that the conditions in the instrument are drafted in broad terms so as to provide local authorities with discretion when considering whether to make selective licensing designations. The Department considers that this is appropriate because local authorities will be best placed to decide whether the area they propose to designate meets the criteria set out in the instrument.

3.10 The Committee has examined some of the Parliamentary materials relating to the Bill which became the 2004 Act. It has noted in particular the following statement by the Minister (Lord Rooker) at House of Lords Committee stage on 9 September 2004, Official Report column 774, in response to a probing amendment about the intended use of the power now conferred by section 80(7):

“I am aware that many local authorities believe that they should be allowed total freedom to impose selective licensing wherever they feel that it is necessary. However, we are extremely keen that selective licensing is a tool to be properly targeted and used only where the worst problems exist. As may be known, our original plan for selective licensing was to confine it to areas of low demand—effectively parts of the Midlands and the north-east and north-west. It has now been allowed nationwide, but not at the behest of local authorities. We do not wish to license the entire private sector, because that would be unjustified — I want to make that absolutely clear.”
3.11 The Order as drafted would appear to allow for significant areas of England with an above average proportion of private sector rented housing to be designated by a local authority. For example, many areas of the country are experiencing movements of population, whether from other parts of England or from elsewhere, and persons moving to new areas often find accommodation in the private rented sector. All such areas could potentially be designated on the basis of articles 3 and 5 of the draft Order. Similarly, many areas of the country suffer from high levels of crime, for example burglary, which affects persons in private rented accommodation (as well as other those in other types of housing), therefore potentially allowing for designation on the basis of articles 3 and 7.

3.12 The Committee accepts that a decision by a local authority to designate an area without a proper foundation for doing so would be subject to judicial review. It also notes paragraph 12 of the Department’s memorandum, which signifies the Secretary of State’s intention to amend the General Approval issued under section 82 of the 2004 Act so as to allow him to exercise scrutiny over selective licensing designations of a significant size; and paragraph 13 which highlights that the average licence fee charged by local authorities is £100, and points out that, even where this cost is passed on to tenants, they are likely to experience benefits from local authority licensing.

3.13 Nonetheless, the Committee is not persuaded that, when it enacted section 80(7), Parliament envisaged that the power would be used to confer broad discretion on a local authority to determine whether open-ended, subjective criteria of the type specified in the draft Order were satisfied in relation to the whole or part of the authority’s area. Designation could have significant consequences for both landlords and tenants in the private rented sector. It therefore appears to the Committee, in light of the assurances given by the Minister, that it was not the intention that local authorities should be empowered to designate unless clearly defined and objective conditions set out in legislation, and designed to address localities where the worst problems exist, are met in relation to the area concerned.

3.14 The Committee therefore reports the draft Order on the ground that it appears to make an unexpected use of the power conferred by section 80(7) of the Housing Act 2004.
Instruments not reported

At its meeting on 17 March 2015 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 Instrument requiring affirmative approval

Draft S.I. Counter-Terrorism and Security Act 2015 (Risk of Being Drawn into Terrorism) (Amendment and Guidance) Regulations 2015

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Appendix 1

S.I. 2015/95: memorandum from the Department of Health

National Health Service Pension Scheme (Transitional and Consequential Provisions) Regulations 2015 (S.I. 2015/95)

1. In its letter to the Department of 4th March 2015, the Committee requested a memorandum on the following points:

   (1) Regulations 5, 13 and 40 each contain references to the “2015 Scheme”. If these are intended to refer to the “new scheme” as defined in regulation 2, why is that expression not used? If that is not the intention, why is the term not defined?

   (2) Several amendments made to the National Health Service Pension Scheme Regulations 1995 and the National Health Service Pension Scheme Regulations 2008 by Schedule 2 insert references to the “2015 Scheme”. Why is a definition of this expression not also added to those instruments?

2. The Department’s response to the Committee’s points is outlined below.

3. In relation to “new scheme/2015 scheme”, the Department accepts that the instrument is defectively drafted. The Department will take remedial action at the first available opportunity.

4. In relation to the insertion of a definition of the “2015 Scheme” into the National Health Service Pension Scheme Regulations 1995 and the National Health Service Pension Scheme Regulations 2008, the Department draws the Committee’s attention to the National Health Service Pension Scheme, Injury Benefits and Additional Voluntary Contributions (Amendment) Regulations 2015 (S.I. 2015/96). Regulations 3 and 19 of S.I. 2015/96 insert a definition of the “2015 Scheme” into the 1995 and 2008 Regulations respectively.

Department of Health

10 March 2015
1. By a letter dated 11th March 2015, the Committee sought a memorandum on the following points:

1. What distinction is intended between a disclosure “made contrary to the interests of national security” (new rule 88.1(3)) and a disclosure made “in a way which would be damaging to the interests of national security” (new rule 88.2(2)), and explain how that distinction is made clear in the new Part 88 inserted by these Rules.

2. Explain, in the light of the joint committee’s 12th Report of Session 2013-14 as it relates to S.I. 2013 Nos. 1695 and 1974 and of Practice Direction 2D supplementing the Civil Procedure Rules 1998, whether paragraph (1) of new rule 88.9 is intended to impose an obligation on the court; and, if so, why that is not made clear by the use of appropriate language in that paragraph.

3. Explain the reference to “the relevant person” in new rule 88.24(2) (and in new rule 88.28(3)(a) and (6)(a)), and identify the provision which defines that expression.

4. New rule 88.28(7) purports to provide for the case where “the court … has directed the Secretary of State to serve a summary” of sensitive material. In view of the duty imposed on the Lord Chancellor by paragraph 4(1)(d) of Schedule 3 to the Counter-Terrorism and Security Act 2015, identify the provision in new Part 88 which requires the court to direct, or consider directing, the Secretary of State to serve such a summary.

5. Explain whether it is intended that new rule 88.28 should apply in a case where the Secretary of State has objected under new rule 88.24(5)(b) to the form in which a proposed communication is to be made, as distinct from the proposed communication itself. If so, explain how that intention is given
effect in new rule 88.28(1); and, if not, explain whether, and (if so) how, effect is to be given to that objection under new Part 88.

6. Given that these Rules appear to have come into force before they were laid before Parliament, explain why no notification and explanation were sent to the Speaker of each House in accordance with the proviso to section 4(1) of the Statutory Instruments Act 1946.

2. We regret that there are drafting errors which the Committee has identified. These errors derive from the process in which the draft rules were modelled on existing rules in relation to terrorism prevention and investigation measures (in Part 80 of the Civil Procedure Rules (“CPR”)), proceedings under the Counter-Terrorism Act 2008 and Terrorist Asset-Freezing etc. Act 2010 (Part 79 of the CPR) and closed material procedure (Part 82 of the CPR), and unfortunately they were not identified and corrected in the checking process. While we do not consider that the errors acknowledged below render the rules invalid or inoperable, we do accept that they require prompt correction, and will ensure that they are corrected by an amending instrument as soon as practicable. The process of making that instrument (which will be made by the Civil Procedure Rule Committee) is already under way.

3. The Committee’s first question concerns the disparity between the reference in new rule 88.1(3) to a disclosure “contrary to” the interests of national security and that in new rule 88.2(2) to one made “in a way which would be damaging” to those interests. There is an error in rule 88.2(2), which should use the formulation “contrary to”.

4. The Committee’s second question queries the use of “will” in new rule 88.9(1). That provision follows the model of rule 79.7 of the CPR, which predates the change in approach outlined in Practice Direction 2B supplementing the CPR. The word “will” was used here in error and the word used should, as the Committee’s question anticipates, have been “must”, following the change in approach.

5. The Committee’s third question queries the reference to the “relevant person” in new 88.24(2) (and 88.28(3)(a) and (6)(a)). This term appears in error. It means, in the context of Part 82 of the CPR, the person who would be required to disclose the sensitive material which is in issue, but in the context of proceedings to which the new Part 88 applies, as with those to which Parts 76 and 80 apply this can only be the Secretary of State, and references here should be, as elsewhere in the new Part 88, to the Secretary of State.
6. The Committee’s fourth question queries where provision is to be found in the new Part 88 requiring the court to consider directing the Secretary of State to serve a summary of sensitive material. The provision drafted for this requirement is new rule 88.28(6)(a); and as explained above, in that provision the reference to “the relevant person” should be to the Secretary of State, who is the only person who could be directed to serve such a summary. And this error, as with the other errors acknowledged above, will be corrected in an amending instrument as soon as practicable.

7. The Committee’s fifth question queries whether new rule 88.28 should apply not only where the Secretary of State has objected under new rule 88.24(5)(b) to a proposed communication, but also where the Secretary of State has objected under that rule to the form of the proposed communication. That is indeed the intention, with the additional words beyond the reference to the Secretary of State having “objected under rule 88.24(5)(b)” intended to be explanatory rather than to limit rule 88.28’s application. The formulation in new rule 88.28(1) mirrors that in the corresponding rules in Parts 76 (rule 76.29(1)), 79 (rule 79.21(1)), 80 (rule 80.25(1)) and 82 (rule 82.28(1)), which have as we understand it not caused any difficulty or suggestion in practice that the rule does not apply equally to an objection to the substance and the form of the communication; but we will consider whether in the interests of clarity new rule 88.28(1) should be amended so that it unarguably refers to any objection under rule 88.24(5)(b) (and to consider similar amendments to the corresponding rules in Part 76, 79, 80 and 82).

8. The Committee’s final question asks why no notification and explanation were sent to the Speaker of each House in accordance with the proviso to section 4(1) of the Statutory Instruments Act 1946. It had been intended that, as with earlier instruments needing to be brought into force urgently, this instrument would be laid on the day of making, so that it would be laid before coming into force; but we regret that the instrument was made too late on the day of making for it to be laid that day; and that by oversight the consequent need for notification and explanation to be sent to the Speaker of each House was missed. A letter has now been sent to the Speaker of each House giving notification and explanation and apologising for the earlier omission and a copy is attached.

Ministry of Justice/Home Office
13 March 2015
Appendix 3

Draft S.I.: voluntary memorandum from the Department for Communities and Local Government

Selective Licensing of Houses (Additional Conditions) (England) Order 2015 (Draft S.I.)

1. The Department submits this memorandum in order to assist the Committee in its consideration of this draft Statutory Instrument, in relation to the following issues which have been identified since it was laid before Parliament:

   (1) The preamble recites section 250(1) and (6) of the 2004 Act as enabling powers, but those subsections are concerned with form and procedure and do not confer power to make orders.

2. Section 250(1) and (6) of the 2004 Act are concerned with form and procedure, rather than conferring the power to make orders. We apologise that these provisions have been incorrectly cited and will correct this error at the earliest opportunity.

   (2) The preamble should include an additional paragraph reciting that, in accordance with section 250(6) of the 2004 Act, a draft of the Order has been laid before and approved by resolution of each House of Parliament: see S.I. Practice, paragraph 2.4.7.

3. We apologise for this oversight and again will take the earliest opportunity to correct this error.

Issues (3) to (6)

4. The Department’s observations in relation to issues (3) to (6) should be read in the light of the general comments in paragraphs 11 to 13 below, which explain that it is for local authorities to apply the provisions of this Order in the light of circumstances in their areas, and set out the circumstances in which the designation process is subject to confirmation by the Secretary of State under a separate legislative power.

   (3) The circumstances in which the proportion of properties in the private rented sector should be considered “high” for the purposes of article 3(1)(a), and how will this be determined.
5. Article 3(1)(a) refers to an area with a high proportion of properties in the private rented sector, in relation to the total number of properties in the area. Nationally the private rented sector makes up around 19% of the total housing stock, so where an area contains a private rented sector of higher than 19% this may be taken as an indication of a high proportion of properties in the private rented sector. However, the Department has sought to avoid specifying a particular figure which would be considered to constitute a high proportion of properties in the private rented sector because we recognise that there may be regional differences which may influence what is considered to be a high proportion of properties in this sector, and local authorities may wish to take into account where the size of private rented sector has significantly increased in an area over a fairly short period of time, even if the size of this sector remains relatively low in comparison to some other parts of England.

6. It is therefore for local authorities to determine what they consider to be high, with reference to local circumstances, and having regard to the impact of these private rented sector properties on the area, in accordance with the conditions as set out in articles 4 to 7 of the statutory instrument.

7. We would expect local authorities to determine the size of the private rented sector in their area by reference to data sources such as the census, data from any landlord accreditation schemes that may be run by the local authority and data on the numbers of housing benefit claimants.

(4) The meaning of “an influx of migration” for the purposes of article 5(1)(a): whether it is intended that a particular number of people should have moved into the area within a given period; and whether the condition will be met if the persons concerned have migrated from a different area of England or the UK, or only where they come from overseas?

8. We have deliberately avoided setting a particular threshold for the number of people who should have moved into an area within a given period. The number of people moving into an area that will be sufficient to have an impact upon that area will depend upon local circumstances, and will depend upon the level of migration that an area has experienced previously. The term “influx” is intended to refer to a sudden arrival of people to an area, perhaps triggered by a particular event, such as agricultural workers coming to an area take up seasonal work, rather than a steady churn of population. Such migration would be likely to have an impact on supply and demand of accommodation in the private rented sector in the area. The term “migration” is deliberately left undefined, so it would take on its ordinary meaning, of referring to people moving into an area, whether that is from a different part of England or the United Kingdom or from overseas.
(5) Why article 5(b) refers to an influx of migration rather than an influx of migrants.

9. This is a reference to a significant number of the properties referred to in article 3(1)(a) being occupied by persons who have recently moved into the area, whether from elsewhere in the United Kingdom or from overseas. The reference to “those migrants referred to in paragraph (a)” makes it sufficiently clear who is referred to here.

(6) How it is to be determined whether the levels of crime in a particular area are “high” for the purposes of article 7(a).

10. It is for local authorities to determine, with regard to local circumstances, whether the levels of crime are high in a particular area. This may be in comparison to the levels of crime in the area previously, levels of crime in other parts of the local authority area, and/or also in relation to national crime levels. We would expect local authorities to make use of police crime statistics and to liaise with local police when making their assessment of the crime levels in the area. However, we do not consider it appropriate to prescribe a particular threshold which an area has to meet in order to be considered to have a high crime rate. Instead it will be for local authorities to make this judgment, with regard to the volume and types of crime experienced in a particular area and the effect that this has on the community.

11. More generally on the question as to why the conditions set out in the statutory instrument are drafted in broad terms, these conditions provide local authorities with discretion when considering whether to make selective licensing designations. This is appropriate because local authorities will be best placed to make the decision about whether the area they propose to designate meets the criteria as set out in the statutory instrument.

12. The Secretary of State for Communities and Local Government intends to amend the General Approval, which was issued in March 2010 in exercise of powers under sections 58(6) and 82(6) of the Housing Act 2004. Currently, provided a local authority consults persons likely to be affected by a selective licensing designation, for a period of not less than ten weeks, the local authority’s designation will fall within the terms of the general approval and the local authority is not required to seek confirmation for the designation from the Secretary of State. The Secretary of State proposes to amend the terms of the General Approval from 1st April 2015, to restrict the circumstances in which selective licensing designations made by local authorities fall within the General Approval. It is proposed that any designation that would cover more than 20%
of the local authority’s geographical area or would affect more than 20% of privately rented homes in the local authority area, will no longer fall within the terms of the General Approval but will be required to apply to the Secretary of State for confirmation of the designation, in accordance with section 82(1) of the Housing Act 2004. This will enable the Secretary of State to exercise scrutiny over selective licensing designations of a significant size, to ensure that local authorities have made a proper assessment of the appropriateness of making a designation, in accordance with the criteria as set out in the statutory instrument. The Department will publish guidance on the new selective licensing criteria, in advance of the statutory instrument coming into force.

13. Whilst the designation of an area as subject to selective licensing would have an impact on landlords by subjecting them to a licence fee, the average licence fee charged by local authorities is around £100 per year. Although some landlords may choose to pass this cost on to their tenants, through increased rents, tenants would also be likely to experience benefits from local authority licensing, including improvements in property conditions and in the local area.

Department for Communities and Local Government
12 March 2015