House of Lords
House of Commons
Joint Committee on
Statutory Instruments

Fourth Report of Session 2015-16

Drawing special attention to:

National Health Service Pension Scheme Regulations 2015 (S.I. 2015/94)
Public Contracts Regulations 2015 (S.I. 2015/102)
Fluorinated Greenhouse Gases Regulations 2015 (S.I. 2015/310)
Election Judges Rota Rules 2015 (S.I. 2015/329)
Old Oak and Park Royal Development Corporation (Planning Functions) Order 2015 (S.I. 2015/442)
Police (Amendment) Regulations 2015 (S.I. 2015/455)
Control of Major Accident Hazards Regulations 2015 (S.I. 2015/483)
Merchant Shipping (Survey and Certification) Regulations 2015 (S.I. 2015/508)
Immigration and Nationality (Fees) Regulations 2015 (S.I. 2015/768)
Social Security Benefit (Computation of Earnings) (Amendment) Regulations 2015 (S.I. 2015/784)
Hydrocarbon Oil Duties (Reliefs for Electricity Generation) (Amendments for Carbon Price Support) Regulations 2015 (S.I. 2015/943)

Ordered by the House of Lords to be printed
16 September 2015

Ordered by the House of Commons to be printed
16 September 2015

£11.50
Joint Committee on Statutory Instruments

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Lord Lexden (Conservative)
Lord Mackay of Drumadoon (Crossbench)
Baroness Mallalieu (Labour)
Baroness Meacher (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 Amelia Aspden (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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At its meeting on 16 September 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 twelve 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. 2015/94: Reported for defective drafting

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

1.2 The Regulations establish a career average re-valued earnings scheme for the payment of pensions and other benefits to and in respect of health service workers in England and Wales.

1.3 Regulation 154(3) deals with independent provider guarantees and provides: “The scheme manager may at any other time require an independent provider to provide an IP guarantee and may do so in particular—

(a) if an independent provider fails to meet any of its liabilities under these Regulations as an employing authority;
(b) if, before it was granted employing authority status under this Part, failed in any other capacity to meet such liabilities;
(c) if the scheme manager has reasonable grounds to believe that the independent provider is unable, or is likely to become unable, to meet such liabilities.”

1.4 The Committee asked the Department of Health to explain the policy intention of regulation 154(3), and how that intention is achieved, having regard in particular to the use of “an independent provider” in paragraph (a) and the defective syntax in paragraph (b).

1.5 In a memorandum printed at Appendix 1, the Department explains that the “policy intention of regulation 154(3) is to enable the NHS Pension Scheme manager to require an independent provider to provide him with an IP guarantee in the situations set out in regulation 154(3)(a) to (c). Those situations are where—

(a) the independent provider has failed to meet its scheme liabilities, but is to continue as an employing authority for the purposes of the scheme (sub-paragraph (a));
(b) the body which is applying for (and granted) access to the scheme as an independent provider was previously an employing authority on a different basis (e.g. an out-of-hours provider) and in that guise as an employing authority had failed to meet its scheme liabilities (sub-paragraph (b));
(c) the scheme manager has reasonable ground to believe that the independent provider is, or will be, unable to meet its scheme liabilities (sub-paragraph (c)).”

1.6 The Department accepts that the policy intention would have been more clearly implemented if the reference to “an independent provider” in paragraph (3)(a) of regulation 154 had referred to the provider in the chapeau, and if paragraph (3)(b) had included a similar reference. It undertakes to amend the provision at the first suitable opportunity.

1.7 The Committee accordingly reports regulation 154(3) for defective drafting, acknowledged by the Department.

2 S.I. 2015/102: Reported for requiring elucidation, doubtful vires and for making unexpected use of the enabling power

Public Contracts Regulations 2015 (S.I. 2015/102)

2.1 The Committee draws the special attention of both Houses to these Regulations on the grounds that they require elucidation in three respects, are of doubtful vires in six identical respects and make unexpected use of the enabling power in one respect.

2.2 The Regulations implement Directive 2014/24/EU on public procurement and continue to implement Directive 89/665 on the co-ordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and works contracts. They do so in respect of England and Wales and Northern Ireland. Part 1 is general. Part 2 imposes obligations on public bodies called contracting authorities in relation to how they award public contracts for the execution of works, the supply of products or the provision of services. Within Part 2 Chapter 1 sets out general rules and principles, Chapter 2 sets out rules to be followed in relation to procurement procedures (except where Chapter 3 applies), Chapter 3 sets out rules for social and other services and the use of design contests and Chapter 4 imposes requirements on contracting authorities in relation to records and reports. Part 3 contains provisions about remedies. Part 5 deals with consequential and transitional matters. None of those provisions causes concern to the Committee.

2.3 Part 4, in contrast, does not implement any EU obligation. Like the other parts, it covers England and Wales and Northern Ireland, but there are exceptions; it does not cover transactions relating to devolved functions (regulation 1(4)), and parts of it do not cover health care providers or schools (regulations 105 and 109). The obligations it imposes on contracting authorities include requirements: (a) to cause certain information to be published on a web-based portal provided by or on behalf of the Cabinet Office (“Contracts Finder”) when they send contract notices or contract award notices to the EU Publications Office under Part 2; (b) to publish on Contracts Finder information about advertised contract opportunities, and contracts that are awarded, in certain public procurements which have an estimated value less than procurements to which Part 2 applies; (c) to comply, in such procurements, with certain requirements in assessing the suitability of candidates; (d) to have regard to guidance issued by the Minister for the Cabinet Office in complying with certain aspects of Part 4 and in relation to certain aspects of the qualitative selection of economic operators in procurements to which Part 2 applies;
(e) to report to the Cabinet Office certain deviations from such guidance; and (f) to include in public contracts which they award certain provisions relating to the payment of undisputed invoices within 30 days by the awarding contracting authority and its relevant contractors and subcontractors.

2.4 Regulation 114(1) (which is in Part 4) provides that “a material failure to comply with any requirement of this Part does not, of itself, affect the validity of a public contract that has been entered into”. The Committee asked the Cabinet Office, having regard to regulation 114(1), to identify the legal effect, if any, intended by the inclusion of Part 4. In a memorandum printed at Appendix 2, the Department identifies provisions that have a legal effect of placing legal obligations on contracting authorities; the Department accepts that no specific remedy is imposed in respect of many of the obligations in Part 4, but asserts that judicial review will provide an adequate remedy (and refers to illustrative cases on the point). The Department justifies regulation 114(1) as clarifying that “a breach of Part 4 does not, of itself, affect the validity of a public contract that has been entered into”, so as “to avoid any uncertainty that might arise about whether the draconian consequences of invalidity may, in any circumstances, flow automatically from a breach of Part 4”. The Department correctly notes that regulation 114(1) “does not purport to prejudice any other legal effect or remedy, such as any relief that a Court may grant on judicial review, whether in relation to a particular procurement (before or after any contract is entered into) or more generally to compel a particular authority to comply with its obligations under Part 4”. The Committee accordingly reports regulation 114(1) as requiring elucidation, provided by the Department’s memorandum.

2.5 In relation to those provisions of Part 4 that are intended to impose obligations on public authorities, the Committee asked the Department to identify the enabling powers on which that Part relies; the Committee also asked the Department to justify any reliance on section 2(2)(b) of the European Communities Act 1972 (which permits provision “for the purpose of dealing with matters arising out of or related to any [European Union] obligation or rights”) by reference to the tests laid down in the case law on the use of that provision. In its memorandum the Department provides a helpfully detailed analysis of the provisions of the Regulations in the light of the tests laid down in leading case law relating to overall vires for provisions that do not implement European Union obligations but that nonetheless are included in statutory instruments made under section 2(2) of the 1972 Act. The Committee accordingly reports the inclusion of Part 4 in principle as requiring elucidation, provided by the Department’s memorandum.

2.6 Within Part 4 there are three Chapters that impose obligations that go beyond the obligations being implemented – Chapter 7 (which imposes extra publication requirements in relation to procurements covered by the relevant EU legislation), Chapter 8 (which covers contracts for sums below the threshold for that legislation to apply), and Chapter 9 (which deals with payment of invoices, remedies and disclosure). Chapter 7 exempts those who procure health care services for the NHS and maintained schools and academies (regulation 105); Chapter 8 contains partly identical exemptions (regulation 109). The exemptions were queried by the Committee in the light of the possible extension of the EU non-discrimination principle to the Chapter 7 extras in particular. In its memorandum the Department argues in outline first that the principle only extends as far the EU legislation applies and cannot be treated as qualifying section 2(2)(b) of the 1972 Act when used as authority for purely domestic extra provisions. In vires terms the Committee agrees – the combination of section 2(2)(b) with section 2(4) (as read with
Schedule 2), albeit not cited by the Department, has that effect when literally interpreted
and the Committee is aware of no case law authority to vary a literal interpretation in that
respect. However a second argument used by the Department (that, if a breach of EU law
has been perpetrated, section 2(1) of the 1972 Act would provide a remedy) adds nothing
in the Committee’s view – taken to its logical conclusion, it could justify a complete refusal
to implement EU law specifically. There remains the question, apart from *vires*, of whether
including extra provisions that can only be included under the domestic power because an
EU obligation exists and then, in adding the extra provisions, ignoring a basic EU
principle, goes beyond what might be expected. Here the Committee considers that no
conclusion is needed on that question, the reason being that there is a potentially
convincing justification that the Department has not prayed in aid, namely that differences
of treatment in Part 4 are directly aimed at public authorities, which, unlike economic
operators, arguably fall outside non-discrimination protection; if that is the case, it follows
that there is no overall EU principle to apply. On that basis the Committee accepts that its
query might well have been satisfactorily resolved in terms both of *vires* and of what might
be expected, but considers that the justifications differ from those used by the Department.
Accordingly the Committee reports regulation 105 as requiring elucidation, not
completely provided by the Department’s memorandum.

2.7 Regulations 107, 108, 110(16), 111, 112(3) and 113 require regard to be had to guidance
issued by the Minister for the Cabinet Office. Having regard to the restriction on
legislative sub-delegation in paragraph 1(1)(c) of Schedule 2 to the European Communities
Act 1972, the Committee asked the Department to justify the inclusion of requirements to
have regard to guidance. In its memorandum the Department states that it regards “the
issuing of such guidance as essentially administrative, rather than legislative, in nature”.
The Department explains that the intention is not to “enable the guidance to impose any
hard-edged rules or obligations with which contracting authorities must comply”, but that
“the guidance is merely something relevant that contracting authorities are required to
have regard to … in complying with the legislative provision that is made by the
instrument itself”. The Committee believes that the distinction between legislative and
administrative in the context of section 2(2) of the European Communities Act 1972 is a
qualitative distinction relating to the subject matter or nature of the requirements. It is not
a matter of whether the requirements are imposed in a hard-letter or soft-letter form; it
would be troubling if the restriction on sub-delegation could be circumvented by reducing
the clarity and certainty of the sub-delegated legislation. To assert that a duty to “have
regard to” guidance does not make it part of the law is to ignore the realities of modern
administrative law (as relied on by the Department in its justification for the inclusion of
regulation 114(1)). In effect, the guidance will modify, and shape, the legal obligations
imposed on all contracting authorities, and is therefore essentially legislative in nature.
The Committee accordingly reports regulations 107, 108, 110(16), 111, 112(3) and 113
on the ground that there is doubt, in one shared respect, as to whether they are *intra vires*.

2.8 Part 4 of the Regulations is clearly intended to apply to Parliament, having regard to the
definitions of “contracting authorities” and “central government authorities” in regulation
2 and the listing of the House of Commons and the House of Lords in Schedule 1. The
Committee therefore asked the Department to explain whether there was any consultation
with the authorities of either House in advance of including Part 4 and, if not, how that
could be reconciled with the 2002 guidance from the Treasury Solicitor appended to the
Joint Committee on Parliamentary Privilege Report of Session 2013–14 ("Parliamentary Privilege") and the Government commitment, in response to that Report, to work with the House authorities to ensure the correct application of the 2002 guidance. In its memorandum, the Cabinet Office records that it consulted openly on the measures contained in Part 4 in September 2013 and again in September 2014; it accepts that the relevant officials were not aware of the need to consult directly with the House of Commons and House of Lords, apologises for the omission and undertakes to comply with the guidance in future. A particular advantage of the practice of consulting the Houses directly is that it gives both Houses the opportunity to highlight proposed provisions of general application that arguably appear intrinsically to invite variation in the light of Parliament’s constitutional position, in circumstances where such an effect might not be observed in the context of an open consultation. For example, the requirement in regulation 111(8) to send to the Cabinet Office an explanation of deviations from its guidance under Part 4 appears questionable when applied to Parliament in the absence of any EU obligation to include it. The Committee accordingly reports Part 4 of the Regulations for unexpected use of the enabling power in respect of prior consultation.

3 S.I. 2015/310: Reported for defective drafting

Fluorinated Greenhouse Gases Regulations 2015 (S.I. 2015/310)

3.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in one (recurring) respect.

3.2 The Regulations replace the Fluorinated Greenhouse Gases Regulations 2009 and give effect to a number of pieces of European Union legislation about fluorinated greenhouse gases.

3.3 In a number of provisions the following organisations are referred to by title only, without the addition of company registration numbers or any other form of unique identifier: the City and Guilds of London Institute (first mentioned in regulation 8(1)(a)); the Construction Industry Training Board (first mentioned in regulation 8(1)(b)); the Fire Industry Association (mentioned in regulation 10); the Institute of the Motor Industry (mentioned in regulation 16(d)); and the Institute of Road Transport Engineers (mentioned in regulation 16(e)). The Committee asked the Department for Environment, Food and Rural Affairs why no unique identifier was included.

3.4 In a memorandum printed at Appendix 3, the Department confirms that the City and Guilds of London Institute, the Fire Industry Association, the Institute of the Motor Industry and the Institute of Road Transport Engineers are all incorporated. It commits to including, when the Regulations are next amended, a reference to the company number of each of these organisations and adds that this will “ensure consistency with the approach taken to other organisations designated as certification, evaluation or attestation bodies under the Regulations and which are incorporated”. As to the Construction Industry Training Board, the Department refers the Committee to the statutory name by which it is to be known as provided for by article 2 of the Industrial Training (Construction Board) Order 1964 (S.I. 1964/1079); the Committee agrees that this is sufficient to permit legislative reference by title alone in the operative text but suggests that it could be helpful in an equivalent case to footnote the relevant legislation in addition.
3.5 The Committee accordingly reports regulations 8(1)(a), 10 and 16(d) and (e) for defective drafting, acknowledged by the Department.

4 S.I. 2015/329: Reported for defective drafting

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<th>Election Judges Rota Rules 2015 (S.I. 2015/329)</th>
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4.1 The Committee draws the special attention of both Houses to these Rules on the ground that they are defectively drafted in two respects.

4.2 The Rules, which are made under section 142 of the Senior Courts Act 1981, make provision for the manner of selection of judges for the rota under section 123 of the Representation of the People Act 1983, under which a parliamentary election petition is in England and Wales to be tried by two judges on the rota for the trial of parliamentary election petitions. Section 142 of the 1981 Act limits eligibility for the rota to Queen’s Bench judges who are not House of Lords members; meeting requirements of section 142 is specified directly (rule 2(1)) and by reference (rule 2(2)(b)) as a precondition both for initial placing and for renewed placing of judges on that rota.

4.3 Rule 2(4) provides that: “If any election judge ceases to be eligible to be placed on the rota during the year after being placed on the rota, the President of the Queen’s Bench Division shall nominate a judge of the Queen’s Bench Division to be placed on the rota for the remainder of that year in place of the ineligible judge”. As no exclusion for members of the House of Lords is referred to in relation to nomination of a replacement judge, the Committee asked the Ministry of Justice whether it is intended that replacement judges nominated under rule 2(4) must satisfy the requirements for election judges specified in rule 2(1) and, if so, how the intention is achieved. In a memorandum printed at Appendix 4, the Department confirms that “it is the intention that replacement judges nominated under rule 2(4) satisfy the requirements for election judges specified in rule 2(1)”; it adds that they “cannot but do so as only judges who satisfy the statutory criteria specified in section 142 of the Senior Courts Act 1981 can be nominated as election judges: only such judges are eligible for appointment.” The Committee agrees that the Rules would be ultra vires if they did not require satisfaction of the statutory criteria and accordingly agrees with the Department that satisfaction would be likely to be treated as implicitly required as a result of section 142, were the issue to be litigated. However the fact that the rules make express provision requiring satisfaction of the criteria both in rule 2(1) and in the parenthetical words at the end of rule 2(2)(b) has the result that failure to state anything on the point in rule 2(4) carries an avoidable inconsistency. The Committee accordingly reports rule 2(4) for defective drafting.

4.4 Rule 2(6) states that: “Any judge placed on the rota before these Rules come into force shall remain on the rota until 31st December 2015”. The Committee asked the Ministry of Justice whether it is intended that judges in that category must satisfy the requirements for election judges specified in rule 2(1) and, if it is, how that intention is achieved. In its memorandum the Department, which also indicates that it turned out in practice that there were no judges covered by rule 2(6), explains that satisfaction of the requirements is indeed intended, and places the same reliance on the implicit application of section 142. For the reason given in the previous paragraph, the Committee reports rule 2(6) for defective drafting.
5 S.I. 2015/442: Reported for defective drafting

Old Oak and Park Royal Development Corporation (Planning Functions) Order 2015 (S.I. 2015/442) (S.I. 2015/442)

5.1 The Committee draws the special attention of both Houses to this Order on the ground that it is defectively drafted in three related respects.

5.2 The Order gives certain planning functions to the Old Oak and Park Royal Development Corporation, a Mayoral development corporation. In article 6, paragraphs (1) and (3) are as follows—

“(1) For the purpose of exercising functions transferred by this Order, any reference in a statutory instrument to an urban development corporation must, so far as is required for giving effect to the enactment, be construed as including a reference to the Corporation.”

“(3) In particular, for the purpose of exercising functions transferred by this Order, regulation 9AA of the Town and Country Planning General Regulations 1992 must, so far as is required for giving effect to that regulation, be read as if the reference to an urban development corporation includes a reference to the Corporation.”

5.3 The Committee asked the Department for Communities and Local Government to explain, if possible with examples, what is added by the propositions beginning “so far as is required” in paragraphs (1) and (3), and also to explain—

(a) what the words “the enactment” in paragraph (1) are intended to refer to and how effect is given to that intention, and

(b) why, given paragraph (1), paragraph (3) is needed at all.

5.4 In a memorandum printed at Appendix 5 the Department explains that it was considered important to follow the precedent of the order which had conferred planning functions on the only Mayoral development corporation previously established which contained provisions in terms similar to those of article 6. The memorandum explains that the Department considers that the propositions beginning “so far as may be required” are necessary because not all references to an urban development corporation will need to be construed as covering the new development corporation. It also explains that the reference to “the enactment” in paragraph (1) is intended to be a reference to the provisions of the statutory instrument referred to in that paragraph and asserts that the notion of “enactment” is sometimes used to refer to provision contained in a statutory instrument (an assertion that it justifies by reference to the use of an enactment comprised in subordinate legislation in section 23(2) of the Interpretation Act 1978). And finally it explains that paragraph (3) is needed because of the importance of regulation 9AA of the Town and Country Planning General Regulations 1992 and the desirability of emphasising its application.
5.5 The Committee, while appreciating the reference to the precedent, repeats a point that it has made previously, namely that a Department should not assume that following a precedent that had not been the subject of prior comment by the Committee would, notwithstanding flaws in drafting, escape questioning. Nor does the Committee accept that variation from a precedent in a different instrument will result in an unintended interpretation of the earlier one: a drafting improvement is, in the Committee’s view, no more than recognition of an avoidable imperfection that is apparent on the surface of the earlier instrument. Accordingly it is addressing article 6 of this Order on its own merits.

5.6 The Committee accepts that some limitation on the effect of the propositions in paragraphs (1) and (3) might well be desirable if there are indeed references that do not, and indeed should not, be subject to them. But it questions whether “so far as is required for giving effect to ….” is quite the right formulation to indicate that. Something like “except where the context otherwise requires”, as well as being more usual, would probably have been more apt to achieve the intended policy. The Committee also considers that the clash between “a statutory instrument” and “the enactment” in paragraph (1) is jarring and would have been better avoided, particularly in a provision that also refers to “this Order”, to which “the enactment” could equally refer: had the reference to a statutory instrument been phrased as a reference to an enactment comprised in subordinate legislation, there would have been both consistency with usage in the Interpretation Act 1978 and an unambiguously intelligible subsequent reference to “the enactment”. Finally, the Committee wishes to emphasise that, in its opinion, if a general legislative proposition like that in paragraph (1) is to be capable of being relied on to operate generally, its efficacy is best secured by not repeating its effect in relation to particular cases covered by it, even if they are of practical importance.

5.7 The Committee accordingly reports article 6 for defective drafting in three related respects.

6 S.I. 2015/455: Reported for defective drafting

Police (Amendment) Regulations 2015 (S.I. 2015/455)

6.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in one respect.

6.2 The Regulations make various amendments of the Police Regulations 2003 (S.I. 2003/527). Regulation 6 substitutes a number of new paragraphs for paragraph (1) of regulation 46 of those Regulations.

6.3 A new paragraph (1A) begins “Before making a determination …., the Secretary of State … shall—” and there follow three sub-paragraphs. Sub-paragraphs (a) and (b) follow syntactically from the opening words, imposing obligations applying in specified circumstances one of which (mentioned in sub-paragraph (b)) is where sub-paragraph (c) applies. However, sub-paragraph (c) begins as follows—

“(c) this sub-paragraph applies where ….”
6.4 The Committee accordingly asked the Home Office to explain why that sub-paragraph is structured in a way that does not appear to fit syntactically with the opening words.

6.5 In a memorandum printed at Appendix 6 the Department recognises that there is a syntactical problem and expresses its regret for it. It states that, although it considers that the provision is clear and will work satisfactorily, it will make an amendment at the next opportunity which it expects to be later in the year. The Committee is grateful for that undertaking and accepts that sub-paragraph (c) is indeed plainly intended to supply the circumstances referred to in sub-paragraph (b). But, as the Department concedes, as such it is not a proposition of the same nature as the preceding sub-paragraphs and should have been framed not as a proposition following from the opening words but as a separate freestanding provision. The Committee accordingly reports regulation 6 for defective drafting, acknowledged by the Department.

7 S.I. 2015/483: Reported for defective drafting

Control of Major Accident Hazards Regulations 2015 (S.I. 2015/483)

7.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in one respect.

7.2 The Regulations impose requirements with respect to the control of major accident hazards involving dangerous substances, for the purpose of implementing Directive 2012/18/EU of the European Parliament and of the Council on the control of major accident hazards involving dangerous substances.

7.3 Regulation 2(1) defines “storage” as “the presence of a quantity of dangerous substances for the purposes of warehousing, depositing in safe custody or keeping in stock”. The Committee asked the Department for Work and Pensions why “the presence of a quantity of dangerous substances for the purposes of” is included in the definition, and why the definition appears to be structured in a way that would make it either strained or impossible to substitute the meaning for the definition in text where the defined term appears.

7.4 In a memorandum printed at Appendix 7, the Department explains that the “wording of the definition of ‘storage’ is an exact copy-out of the wording in Directive 2012/18/EU, which the Regulations implement”; but the Department “accepts the Committee’s point that it would be strained to substitute the meaning for the definition in text where the defined term appears”, and accepts that the definition of “storage” in the Regulations would still be legally effective if it “deleted the words ‘means the presence of a quantity of dangerous substances for the purposes of’ and inserted ‘includes’”. The Department expresses its intention to make this amendment at the next appropriate opportunity. The Committee has made it clear on a number of occasions that, while the “copy out” principle and the reasons for it are well understood, they do not excuse the inclusion of provisions which do not make grammatical sense, particularly where – as in this case – a simple solution will ensure that the provision makes sense without raising any significant doubt about effective transposition.

7.5 The Committee accordingly reports regulation 2(1) for defective drafting, acknowledged by the Department.
8 S.I. 2015/508: Reported for defective drafting

Merchant Shipping (Survey and Certification) Regulations 2015 (S.I. 2015/508)

8.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in one respect.

8.2 The Regulations make provision about inspections and surveys of United Kingdom ships. The Regulations do not apply to various categories of ships, including pleasure vessels. Regulation 3(1) defines “pleasure vessel” as meaning—

“(a) any vessel which at the time it is being used is:

(i) (aa) in the case of a vessel wholly owned by an individual or individuals, used only for the sport or pleasure of the owner or the immediate family or friends of the owner; or

(bb) in the case of a vessel owned by a body corporate, one on which the persons are employees or officers of the body corporate, or their immediate family or friends; and

(ii) on a voyage or excursion which is one for which the owner does not receive money for or in connection with operating the vessel or carrying any person, other than as a contribution to the direct expenses of the operation of the vessel incurred during the voyage or excursion; or

(b) any vessel wholly owned by or on behalf of a members’ club formed for the purpose of sport or pleasure which, at the time it is being used, is used only for the sport or pleasure of members of the club or their immediate family; and for the use of which any charges levied are paid into club funds and applied for the general use of the club; and

(c) in the case of any vessel referred to in paragraph (a) or (b) no other payments are made by or on behalf of the users of the vessel, other than by the owner;

and in this definition “immediate family” means, in relation to an individual, the spouse or civil partner of the individual, and a relative of the individual or the
relative’s spouse or civil partner, and “relative” means brother, sister, ancestor or lineal descendant;”.

8.3 The Committee was concerned about the structure of the definition and asked the Department for Transport to explain why paragraph (c) is structured in a way that does not appear to follow syntactically from its opening words. In a memorandum printed at Appendix 8 the Department, while pointing out that the wording follows that of the corresponding definition in the Regulations which the Regulations replace, and that almost identical definitions are to be found elsewhere in subordinate legislation, accepts that other differently drafted definitions of the notion of “pleasure vessel” are employed in other, more recent instruments. The Committee considers that those definitions, in which the material appearing here as paragraph (c) appears not as a paragraph but following the material in paragraphs (a) and (b), are indeed to be preferred. In addition, minor adjustments could, in the Committee’s view, also reduce and rationalise the extensive though not incorrect indenting in those more recent precedents.

8.4 The Department states that it is not aware of a definition like this one having caused any difficulty and that it does not consider that it causes any uncertainty; but it nevertheless undertakes to take the Committee’s concerns into account when it next needs to define “pleasure vessel” for the purposes of an instrument. The Committee accordingly reports regulation 3(1) for defective drafting, acknowledged in part by the Department.

9 S.I. 2015/768: Reported for requiring elucidation

Immigration and Nationality (Fees) Regulations 2015 (S.I. 2015/768)

9.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they require elucidation in one respect.

9.2 These Regulations provide new fees for the performance of functions relating to immigration. Some fees are reduced but many are increased. The Regulations were made on 18 March of this year, laid on the next day and came into force on 6 April. They therefore failed to comply with the 21 day rule under which an instrument subject to annulment should be laid at least 21 days before it comes into force.

9.3 The Explanatory Memorandum accompanying the Regulations explains that they rely on the Immigration and Nationality (Fees) Order 2015 (which, in particular, sets new maxima for certain fees) which was subject to draft affirmative procedure and suffered unexpected delay in being approved by Parliament: it was eventually made on 17 March, later than the Home Office had expected when planning for the changes in levels of fees made pursuant to it to take place on 6 April. The Explanatory Memorandum, however, lays particular stress on the assertion that any delay beyond 6 April would “result in a loss of income to the Home Office of £2m for each week of delay”. The Committee asked the Home Office to explain whether the importance of bringing the Regulations into force on 6 April related to legislative coherence (and, if so, how) as well as loss of income to the Home Office.
9.4 In a memorandum printed at Appendix 9 the Department, states that there were three reasons for the commencement date chosen: the preparations that had been made for the fee changes to take effect on 6 April resulting in significant operational difficulties in altering the date; the financial loss inherent in any delay; and the desirability of making changes on a “common commencement date”. The Committee accepts that the Department had undertaken preparations for implementation on 6 April which could not readily be altered without very considerable delay (apparently the preparations for a change in the level of fees take around 3 months). However, the Committee does not accept that the latter two reasons provide justification for non-compliance with the 21 day rule. A desire to raise fees as soon as possible is of benefit to Government rather than those who are obliged to pay them and accordingly should not have been regarded as contributing to the justification, even if adherence to an overall policy of common commencement dates were thereby achieved. The Committee is, however, grateful to the Department for elaborating on the circumstances surrounding the delay in the making of the Order on which the Regulations depended and the considerable practical difficulties that would have been occasioned by changing the commencement date of the Regulations to secure compliance with the 21 day rule. The Committee accordingly reports the Regulations for requiring the elucidation provided in the Department’s memorandum as amplified in this Report.

10 S.I. 2015/784: Reported for failure to comply with proper legislative practice

10.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they fail to comply with proper legislative practice.

10.2 The Regulations amend the Social Security Benefit (Computation of Earnings) Regulations 1996 (S.I.1996/2745) ("the 1996 Regulations") to introduce a reference to a claimant participating as a service user. Regulation 2(3) introduces a new paragraph (3A) into regulation 9 of the 1996 Regulations, which defines that notion. The definition is in similar terms to a provision made by the Social Security (Miscellaneous Amendments) Regulations 2014 (S.I. 2014/591) ("the 2014 Regulations") which was drawn to the attention of Parliament by the Committee in its Third Report of last Session. However, the Explanatory Memorandum published with the Regulations, in the section headed “Matters of special interest to the Joint Committee on Statutory Instruments”, states “None”.

10.3 The Committee accordingly asked the Department for Work and Pensions why, given the Committee’s observations in that Report, the provision inserted by regulation 2(3) appears not to reflect the Committee’s concerns and accordingly why the Explanatory Memorandum states that there are no matters of special interest to the Committee.

10.4 In a memorandum printed at Appendix 10 the Department accepts that the two provisions are in very similar terms and indeed that the Department had, in its memorandum to the Committee on the 2014 Regulations, agreed to reconsider its drafting. The memorandum however goes on to explain that, on further consideration, the
Department has concluded that the provision is correct in its present form. The Committee had been concerned in particular that the way in which the definition was drafted meant that a carer of a carer of a service user seemed to be included. The Department now considers that that indeed is, in some circumstances at least, the desired outcome, citing the case of a service user who is cared for by a spouse who in turn is supported by a child.

10.5 In the memorandum the Department apologises for not having mentioned the Committee’s previous Report in the Explanatory Memorandum and states that it is taking steps for drawing to the attention of responsible officials the need to ensure that all items of interest to the Committee are drawn to its attention in Explanatory Memoranda.

10.6 The Committee is grateful to the Department for having considered more fully its earlier observations and does not wish to take issue with its conclusions. However, it wishes to stress the importance of Departments demonstrating to the Committee how they have engaged with its reports rather than simply replicating provisions that have been commented on by the Committee with no explanation as to why this is considered the right course. The Committee accordingly reports the Regulations for failure to comply with proper legislative practice, acknowledged by the Department.

11 S.I. 2015/815: Reported for defective drafting

11.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in one respect.

11.2 The Regulations, made on 19 March to come into force on 1 July, consolidate the law relating to lead weights for weighting fishing lines. Regulation 5 provides the penalty for the summary offence under regulation 3 of supplying lead in the form of such a lead weight.

11.3 Regulation 5 provides that, if section 85(2) of the Legal Aid, Sentencing and Punishment of Offenders is in force on the day on which the Regulations are made, the maximum penalty for the offence is an unlimited fine (paragraph (2)) but that, if it is not, the maximum fine is set at level 5 on the standard scale (paragraph (4)). Section 85(2) came into force on 12 March by virtue of S.I. 2015/504 which was made on 4 March. Accordingly the drafting of regulation 5 could have been significantly simplified without any change in effect.

11.4 Paragraph 4.5 of the Explanatory Memorandum to the Regulations seeks to justify the retention of the alternative drafting in regulation 5 after the coming into force of section 85(2) on the ground that a draft of the Regulations had been notified to the European Commission under the Technical Standards Directive 98/34/EC and that no amendments could be made, once the commencement date of section 85(2) was known, without standstill and further notification. This justification for the inclusion of unnecessary material, which in the context of these Regulations appeared to be a clearly over-extended interpretation of the scope of the Directive, troubled the Committee. It accordingly asked the Department for Environment, Food and Rural Affairs why, given that the third
paragraph of Article 8.1 of the Directive appears to require member States to re-notify only “if they make changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the later more restrictive”, and that the commencement date for section 85(2) was known 12 days before the Regulations were made, regulation 5 could not have been re-drafted to consist of paragraph (2) alone.

11.5 In a memorandum printed at Appendix 11 the Department justifies the inclusion of the unnecessary material in regulation 5 at the notification stage on the basis that at the time the commencement date for section 85(2) was not known; the Committee does not take issue with that.

11.6 It then explains, in relation to the survival of the unnecessary material in the final text, that the Department’s procedures provided for the draft instrument to be submitted well in advance of signature to allow time for the Minister’s consideration and that accordingly there was insufficient time between when the commencement date of section 85(2) became known and the signature date to enable simplification to achieve the same (intended) effect.

11.7 The Committee accepts that the effect of the instrument as drafted was as intended but is concerned by the explanation of the survival of the unnecessary material in the final text. There was nearly a fortnight between the making of the commencement order bringing section 85(2) into force and the making of the Regulations and the Committee expects that the proposed commencement date was known within Government for considerably longer. Furthermore the implicit proposition that, once a draft is submitted to a Minister for consideration, there is no scope for alteration in the light of events during the consideration period appears unrealistic. Accordingly the Committee agrees with the Department’s acceptance in its Memorandum that “the draft instrument could and should have been amended in advance of its signature once the date of the commencement of section 85(2) was known”.

11.8 The Committee accordingly reports regulation 5 for defective drafting, acknowledged in principle by the Department.

12 S.I. 2015/943: Reported for failure to comply with proper legislative practice and defective drafting

Hydrocarbon Oil Duties (Reliefs for Electricity Generation) (Amendments for Carbon Price Support) Regulations 2015 (S.I. 2015/943)

12.1 The Committee draws the special attention of both Houses to these Regulations on the grounds that they fail to comply with proper legislative practice and are defectively drafted in three related respects.

12.2 The Regulations amend the Hydrocarbon Oil Duties (Reliefs for Electricity Generation) Regulations 2005 (S.I. 2005/3320) so that, in relation to rebated oils and bioblends used to generate the outputs of a combined heat and power station, the reduction in relief from excise duty by reference to carbon price support rates applies only to input fuels that are referable to the production of non-qualifying electricity.
12.3 Regulation 3(c) substitutes a new definition of “CHPQA” as the Combined Heat and Power Quality Assurance Standard Issue 5 (November 2013), prepared by the Department of Energy and Climate Change. The Committee asked the Department to explain why there is no footnote explaining how it is possible to gain access to electronic and hard copies of that document. In a memorandum printed as Appendix 12 the Department expresses regret for the omission and indicates that, while users of this legislation will be very familiar with that document, they propose to issue a correction to the Explanatory Note to explain how copies can be obtained. **The Committee accordingly reports regulation 3(c) for failure to comply with proper legislative practice, acknowledged by the Department.**

12.4 The Committee also asked the Department to explain why, in the Schedule 3 inserted into S.I 2005/3320 by regulation 5, the words “the production of” appear to be missing from the definition of “R” in paragraph 4 and why there appear to be incorrect cross references in that definition and in paragraph 5. In its memorandum the Department accepts that the words “the production of” should have been included, that in paragraph 4 the cross reference in the definition of “R” should have been to paragraph 3, not paragraph 2, and that the cross reference in paragraph 5 should have been to paragraph 4 (not paragraph 3). It undertakes to correct the Regulations at the earliest opportunity. In case it is relevant to the means of correction, the Committee wishes to add that, in its opinion, the errors are too extensive to justify a correction slip rather than a free issue amending instrument. **The Committee accordingly reports regulation 5 for defective drafting in 3 respects, all of which are acknowledged by the Department.**
Instruments not reported

At its meeting on 16 September 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 Instruments requiring affirmative approval

<table>
<thead>
<tr>
<th>Draft S.I.</th>
<th>Instrument Name</th>
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<tbody>
<tr>
<td>Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015</td>
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<td>Maximum Number of Judges Order 2015</td>
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<tr>
<td>Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015</td>
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<td>Small and Medium Sized Business (Credit Information) Regulations 2015</td>
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<td>Small and Medium Sized Business (Finance Platforms) Regulations 2015</td>
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Instruments subject to annulment

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<tr>
<td>S.I. 2015/426</td>
<td>Control of Waste (Dealing with Seized Property) (England and Wales) Regulations 2015</td>
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<td>S.I. 2015/523</td>
<td>Coast Protection (Variation of Excluded Waters) (England) Regulations 2015</td>
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<td>S.I. 2015/527</td>
<td>Young Carers (Needs Assessments) Regulations 2015</td>
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<td>S.I. 2015/748</td>
<td>Ebbsfleet Development Corporation (Planning Functions) Order 2015</td>
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S.I. 2015/769  Public Service Pensions Revaluation Order 2015
S.I. 2015/782  Merchant Shipping (Standards of Training, Certification and Watchkeeping) Regulations 2015
S.I. 2015/814  European Communities (Designation) Order 2015
S.I. 2015/824  Syria (Restrictive Measures) (Overseas Territories) (Amendment) Order 2015
S.I. 2015/825  Iran (Restrictive Measures) (Overseas Territories) (Amendment and Suspension) Order 2015
S.I. 2015/826  Zimbabwe (Sanctions) (Overseas Territories) (Amendment and Revocation) Order 2015
S.I. 2015/839  Health and Social Care (Miscellaneous Revocations) Regulations 2015
S.I. 2015/856  Channel Tunnel (International Arrangements) and Channel Tunnel (Miscellaneous Provisions) (Amendment) Order 2015
S.I. 2015/857  Administrative Forfeiture of Cash (Forfeiture Notices) (England and Wales) Regulations 2015
S.I. 2015/859  Immigration and Police (Passenger, Crew and Service Information) (Amendment) Order 2015
S.I. 2015/860  Firearms Regulations 2015
S.I. 2015/864  Health and Social Care (Miscellaneous Revocations etc.) Order 2015
S.I. 2015/876  Child Trust Funds (Amendment No. 2) Regulations 2015
S.I. 2015/877  Civil Procedure (Amendment No. 3) Rules 2015
S.I. 2015/882  Criminal Legal Aid (Remuneration) (Amendment) Regulations 2015
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<th>S.I. 2015/890</th>
<th>Justices’ Clerks and Assistants (Amendment) Rules 2015</th>
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<td>S.I. 2015/891</td>
<td>Misuse of Drugs (Amendment) (No. 2) (England, Wales and Scotland) Regulations 2015</td>
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<td>Civil Legal Aid (Remuneration) (Amendment) Regulations 2015</td>
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<td>Human Medicines (Amendment) (No. 2) Regulations 2015</td>
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<td>Family Procedure (Amendment) Rules 2015</td>
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<td>Redundancy Payments (Continuity of Employment in Local Government, etc.) (Modification) (Amendment) Order 2015</td>
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<td>S.I. 2015/917</td>
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<td>S.I. 2015/936</td>
<td>Proxy Purchasing of Tobacco, Nicotine Products etc. (Fixed Penalty Notice) (England) Regulations 2015</td>
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<td>Agricultural or Forestry Tractors (Emission of Gaseous and Particulate Pollutants) and Tractor etc (EC Type-Approval) (Amendment) Regulations 2015</td>
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<td>General Medical Council (Licence to Practise and Revalidation) (Amendment) Regulations Order of Council 2015</td>
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<td>Immigration and Nationality (Fees) (Amendment) Regulations 2015</td>
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<tr>
<td>S.I. 2015/1431</td>
<td>Pollution Prevention and Control (Fees) (Miscellaneous Amendments and Other Provisions) Regulations 2015</td>
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S.I. 2015/1439  Health and Social Care Act 2012 (Consistent Identifier) Regulations 2015
S.I. 2015/1451  Health Care and Associated Professions (Knowledge of English) Order 2015 (Commencement No. 1) Order of Council 2015
S.I. 2015/1456  Deposit Guarantee Scheme (Amendment) Regulations 2015
S.I. 2015/1457  National College for High Speed Rail (Incorporation) Order 2015
S.I. 2015/1458  National College for High Speed Rail (Government) Regulations 2015
S.I. 2015/1459  Renewable Heat Incentive Scheme and Domestic Renewable Heat Incentive Scheme (Amendment) (No. 2) Regulations 2015
S.I. 2015/1471  Homes and Communities Agency (Transfer of Property etc.) Regulations 2015
S.I. 2015/1489  Civil Jurisdiction and Judgments (Maintenance) and International Recovery of Maintenance (Hague Convention 2007 etc) (Amendment) Order 2015
S.I. 2015/1491  Coroners and Justice Act 2009 (Alteration of Coroner Areas) (No. 2) Order 2015
S.I. 2015/1493  European Grouping of Territorial Cooperation Regulations 2015
S.I. 2015/1506  Local Justice Areas Order 2015
S.I. 2015/1557  Mortgage Credit Directive (Amendment) Order 2015
S.I. 2015/1563  First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order 2015
Instruments not subject to Parliamentary proceedings laid before Parliament

S.I. 2015/624  National Savings (No. 2) Regulations 2015
S.I. 2015/1527  South Sudan (Sanctions) (Overseas Territories) (Amendment) Order 2015
S.I. 2015/1528  Syria (Restrictive Measures) (Overseas Territories) (Amendment) (No. 2) Order 2015

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2015/827  Territorial Sea Act 1987 (Guernsey) (Amendment) Order 2015
S.I. 2015/924  Anglian Water Parks Byelaws (Extension) (Revocation) Order 2015
S.I. 2015/931  Finance Act 2014, Section 18(2) to (4) (Appointed Day) Order 2015
S.I. 2015/1344  Designation of Schools Having a Religious Character (Independent Schools) (England) (Revocation) (No. 2) Order 2015
S.I. 2015/1377  Inspectors of Education, Children’s Services and Skills (No. 2) Order 2015
S.I. 2015/1427  Spring Traps Approval (Variation) (England) Order 2015
S.I. 2015/1428  Serious Crime Act 2015 (Commencement No. 2) Regulations 2015
S.I. 2015/1475  Pensions Act 2014 (Commencement No. 5) Order 2015
S.I. 2015/1480  Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Alcohol Abstinence and Monitoring Requirements) Piloting (Amendment) Order 2015
S.I. 2015/1544  Electricity and Gas (Standards of Performance) (Suppliers) Regulations 2015
S.I. 2015/1555     Electricity (Competitive Tenders for Offshore Transmission Licences) Regulations 2015

S.I. 2015/1558     Enterprise and Regulatory Reform Act 2013 (Commencement No. 8 and Saving Provisions) (Revocation) Order 2015
Appendix 1

S.I. 2015/94: memorandum from the Department of Health

1. In its letter to the Department of 21st July 2015, the Committee requested a memorandum on the following points:

   Explain the policy intention of regulation 154(3), and how that intention is achieved, having regard in particular to the use of “an independent provider” in paragraph (a) and the defective syntax in paragraph (b).

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

3. The Department would inform the Committee that an “employing authority” for the purposes of the NHS Pension Scheme is liable to pay to the scheme manager (i) employee contributions (essentially those deducted from employee remuneration) and (ii) employer contributions (those it pays in respect of its employees who are members of the scheme).

4. The list of bodies and organisations that qualify for employing authority status are to be found in regulation 33(6) of the Regulations. As access to the scheme has broadened beyond traditional NHS institutions and bodies, so has the list of bodies capable of having employing authority status. That list includes an “independent provider”. Such a provider is not a traditional public sector NHS body and is typically a private sector body or organisation.

5. Regulation 154 deals with “IP guarantees” which are, in effect, monetary guarantees provided by an independent provider covering its liabilities to the scheme as an employing authority.

6. The policy intention of regulation 154(3) is to enable the NHS Pension Scheme manager to require an independent provider to provide him with an IP guarantee in the situations set out in regulation 154(3)(a)-(c). Those situations are where-

   (a) the independent provider has failed to meet its scheme liabilities, but is to continue as an employing authority for the purposes of the scheme (sub-paragraph (a));

   (b) the body which is applying for (and granted) access to the scheme as an independent provider was previously an employing authority on a different basis (e.g. an out-of-hours provider) and in that guise as an
employing authority had failed to meet its scheme liabilities (sub-paragraph (b));

(c) the scheme manager has reasonable ground to believe that the independent provider is, or will be, unable to meet its scheme liabilities (sub-paragraph (c)).

7. The Department accepts that the policy intention would have been more clearly implemented (i) if the reference to “an independent provider” in paragraph (3)(a) of regulation 154 had referred to the provider in the chapeau and (ii) if paragraph (3)(b) had included a similar reference.

8. The Department undertakes to amend the provision at the first suitable opportunity.

Department of Health
27 July 2015

Appendix 2

S.I. 2015/102: memorandum from the Cabinet Office

Public Contracts Regulations 2015 (S.I. 2015/102)

1. In its letter to the Department of 15 July 2015, the Committee requested a memorandum on the following points:

(1) Given regulation 114(1), identify the legal effect, if any, intended by the inclusion of Part 4 and –

(a) if any legal effect is intended, explain how it is achieved, and

(b) if no legal effect is intended, explain in the light of the Committee’s First Special Report of 2013-14 why Part 4 is included.

(2) Assuming that a legal effect of including Part 4 is identified –

(a) identify the enabling powers on which that Part relies,

(b) if and in so far as that Part relies on section 2(2)(b) of the European Communities Act 1972 –
(i) explain how it satisfies the tests laid down in the case law on the use of that provision,

(ii) in the light of the wording at the end of section 2(2) of that Act and the EU non-discrimination principle, explain the justification for the exemptions for health providers and schools from provisions in Part 4 (see regulation 105(2)), and

(iii) in the light of paragraph 1(1)(c) of Schedule 2 to that Act, explain the justification for the inclusion of requirements to have regard to any guidance issued by the Minister for the Cabinet Office (see regulations 107, 108, 110(6)(b), 111, 112(3)(b) and 113).

(3) Given that Part 4 appears clearly intended to apply Parliament (see the definitions of ‘contracting authorities’ and ‘central government authorities’ in regulation 2 and the listing of the House of Commons and the House of Lords in Schedule 1), explain –

(a) whether there was any consultation with the authorities of either House in advance of including Part 4, and

(b) if not, how that is reconciled with the 2002 guidance from the Treasury Solicitor appended to the Joint Committee on Parliamentary Privilege Report of Session 2013–14 (‘Parliamentary Privilege’) and the Government commitment, in response to that Report, to work with the House authorities to ensure the correct application of the guidance in question.

Point (1)

2. Part 4 achieves two kinds of legal effect. First, it places legal obligations on contracting authorities to do things, or to refrain from doing things. This is the purpose of the Part, and the vast majority of its provisions are of that kind. Secondly, regulation 113(6) implies certain terms into contracts in certain circumstances and, accordingly, affects the mutual rights and duties of the parties to such contracts, enforceable by action for breach of contract.

3. As is the case in many other contexts in which statutory obligations are placed on public bodies, these Regulations create no specific remedy in respect of the many legal obligations which Part 4 imposes directly on contracting authorities. In accordance with general principles, various remedies and other consequences may ensue where appropriate having regard to the particular provision concerned and the nature and circumstances of the breach.
4. Judicial review will be available subject to the normal principles that govern it. It is well established that judicial review may, where appropriate, lie for breach of procurement rules laid down by the Public Contracts Regulations 2006 (“the 2006 Regulations”, the predecessor of the present instrument). Normally, any proceedings for breach of the 2006 Regulations (or Part 2 of the present instrument) would be expected to be taken under the specific regime provided for in Part 9 of the 2006 Regulations (Chapter 6 of the present instrument). But where such proceedings are not apt for some reason (for example, where the claimant is not an ‘economic operator’ and therefore not entitled to invoke the cause of action conferred by those provisions), judicial review has been held to be available. See, for example, R (Chandler) v Secretary of State for Children. Schools and Families ([2009] EWHC 219; on appeal [2009] EWCA Civ 101) and R (Law Society) v Legal Services Commission ([2009] EWHC 1848 (Admin); on appeal [2007] EWCA Civ 1264). As proceedings under Chapter 6 of the present instrument are not available in respect of breaches of Part 4 (see regulations 89 and 91), there will be nothing to stop economic operators, as well as others, seeking judicial review, in accordance with general principles, in respect of such breaches.

5. Depending on what kind of public body a contracting authority is, and the circumstances of the breach of Part 4, other specific consequences may follow from a finding by proper persons (for example, a statutory auditor) that the body has acted illegally in spending public money to procure goods, works or services without complying with applicable legal requirements.

6. The Committee refers to regulation 114(1). The effect of that provision is to make it clear that a breach of Part 4 does not, of itself, affect the validity of a public contract that has been entered into. The purpose of this is to avoid any uncertainty that might arise about whether the draconian consequences of invalidity may, in any circumstances, flow automatically from a breach of Part 4. Regulation 114(1) does not purport to prejudice any other legal effect or remedy, such as any relief that a Court may grant on judicial review, whether in relation to a particular procurement (before or after any contract is entered into) or more generally to compel a particular authority to comply with its obligations under Part 4.

Point (2)(a)

7. In relation to element (a) of the point, the powers are section 2(2)(b) of the European Communities Act 1972 (“the 1972 Act”), read with the designations recited in the preamble to the instrument.

Point (2)(b)(i)

8. It is a matter of judgment whether the test of “arising out of or relating to” laid down by section 2(2)(b) is met in any particular case. The caselaw stresses that
the words of the statutory test have their ordinary meaning, should not be glossed and cannot be applied in the abstract: everything depends on the particular context (see, for example, the leading case of *Oakley v Animal* [2005] EWCA Civ 1191, in particular at paragraphs 39, 47 and 80).

9. Subject to that overriding approach, a number of principles relevant to the application of the statutory test have been identified in subsequent cases. These were conveniently summarised as principles (i) to (xiv) in *ITV Broadcasting v TV Catchup* ([2011] EWHC 1874, at paragraph 66). In the following paragraphs of this Memorandum, references to a numbered 'ITV principle' refers to the principle so numbered in that judgment.

10. The basis on which the tests laid down in the case law are satisfied differ in respect of different provisions in Part 4. The biggest distinction is between chapters 7 and 8 on the one hand, and regulation 113 on the other. The Cabinet Office maintains that-

   a. chapters 7 and 8 arise out of, or are related to, Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC ("the 2014 Directive", which is transposed by Part 2 of the present instrument);

   b. regulation 113 arises out of, or is related to, Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions ("the 2011 Directive", which was transposed by the Late Payment of Commercial Debts (Interest) Act 1998).

11. As noted in paragraph 7.4 of the Explanatory Memorandum to the present instrument, Part 4 implements the Government’s domestic procurement policy to make public sector procurement more accessible to smaller businesses, often referred to as ‘small and medium-sized enterprises’ (or ‘SMEs’). It does so by-

   a. Ensuring advertised contract opportunities and award notices are accessible in one place, on the national Contracts Finder portal (this is achieved by regulations 106, 108, 110 and 112). Smaller businesses tend to be less well able than large ones to devote resources to actively monitoring a wide range of places in which contracts might be advertised.

   b. Eliminating pre-qualification stages for low value procurements and ensuring that contracting authorities ask candidates to answer suitability assessment questions in such procurements only where the questions are relevant and proportionate to the particular procurement (this is achieved by regulation 111). This is aimed is the fact that contracting authorities often devised standard 'pre-qualification questionnaires' in
which, for their own convenience, they routinely asked candidates to complete in all procurements, even though many of the 'standard' questions (included to cover all eventualities), while burdensome to answer, might not actually be relevant to particular procurements (particularly the smaller and more simple procurements in which smaller businesses might be particularly interested in bidding).

c. Providing guidance to promote and facilitate a more standardised approach to qualitative selection in relation to higher value procurements, with a view to minimising the placing of undue burdens on small businesses (this is achieved by regulation 107).

d. Requiring that 30 day payment terms are imposed down the public sector supply chain, and that performance on late payment of invoices is reported on (this is achieved by regulation 113).

12. Recital 2 of the 2014 Directive shows that the main purposes of the Directive include “facilitating in particular the participation of small and medium-sized enterprises (SMEs) in public procurement”.

13. Recital 124 of the 2014 Directive refers more extensively to SMEs and states that “it is important to encourage their participation in public procurement, both through appropriate provisions in this Directive as well as through initiatives at the national level” (a reference that is particularly relevant to ITV principle (xi)).

14. Recital 78 of the 2014 Directive begins with the proposition “Public procurement should be adapted to the needs of SMEs”.

15. In relation to the provisions of Part 4 relating to the use of the Contracts’ Finder electronic portal (regulations 106, 108, 110 and 112), it may be noted that recital 52 of the 2014 Directive, after referring to the benefits of various electronic means of information and communication mandated by the Directive, states that “Member States .. should remain free to go further if they so wish” (relevant to ITV principle (xi)).

16. In relation to regulations 107 and 111, it may be noted that recital 83 of the 2014 Directive states that “Overly demanding requirements concerning economic and financial capacity frequently constitute an unjustified obstacle to the involvement of SMEs in procurement”, and that “any such requirements should be related and proportionate to the subject-matter of the contract”.

17. Regulations 106 to 108 have a particularly close connection with Directive 2014/24. Those regulations do not apply to any procurements which are not in any event within the scope of that Directive (and hence Part 2 of the present instrument).
18. Also, in relation to regulations 106 and 108-

a. It is relevant that Article 52 of the 2014 Directive explicitly permits the publication at national level of contract notices and contract award notices, subject to certain restrictions.

b. Regulations 106 and 110 require information from such notices to be published at national level, on Contracts Finder, and the tenor of the requirements respect the restrictions imposed by Article 52 (such as relating to the timing of such national publication).

c. Regulation 106(4) and (5), and regulation 108 (7) and (8), have the effect of disapplying the obligations imposed by regulations 106 and 108 (to cause information to be published on Contracts Finder) if and when arrangements are in place under which the relevant information will, without further action by contracting authorities, be extracted and published on Contracts Finder following the publication of contract notices and contract award notices by the EU Publications Office. This reflects the fact that the information required by regulations 106 and 108 to be published on Contracts Finder go no wider than the information that Directive 2014/24 requires to be published at EU level by means of contract notices and contract award notices.

19. Regulation 107 relates specifically to how contacting authorities perform certain specific functions under Part 2 (being functions which are expressly laid down in the Directive). Any guidance issued under regulation 107 must, of course, be compatible with how those functions are addressed in Part 2 (interpreted in the light of the Directive).

20. In the light of the foregoing, the Cabinet Office consider that section 2(2) enabled Chapter 7 of the present instrument to be made. The ITV principles are either supportive or neutral given the context and the matters referred to above. Nothing in the ITV principles points in the other direction. In particular, there is no basis for considering the relationship between these regulations and the subject-matter of the Directive to be too tenuous (principle (ix)).

21. In relation to Chapter 8, the connection with the 2014 Directive is less direct, because the situations addressed fall outside the scope of that Directive (because they fall below the thresholds above which the Directive, and Part 2 of the present instrument, apply), but the Cabinet Office considers that the connection with the 2014 Directive is still close enough to comply with the ITV principles.

22. In particular-

a. These provisions are not only consistent with the 2014 Directive (ITV principle (iv)) but actually serve some of its express purposes in making
public procurement more accessible to SMEs (as variously expressed in the recitals cited above).

b. The present case is nothing like the examples of a 'tenuous' relationship given in ITV principle (ix), such as a Directive on mistake being used to reform the whole of contract law. On the contrary-

i. Directive 2014/24 reforms public procurement law in a general way;

ii. Chapter 8 by contrast merely makes provision about some aspects of public procurement, namely the advertising of contract opportunities and contracts awarded, and how the suitability of candidates is assessed, which are all matters that are addressed by Directive 2014/24;

iii. regulations 108 to 110 do not apply to any procurement which would not be within the scope of Directive 2010/24 (i.e. Part 2 of the present instrument) if it were above the relevant threshold for the application of that Directive/Part 2 of the present instrument (see regulation 109(1) and (2)).

c. The only respect in which Chapter 8 goes wider than the scope of the 2014 Directive is that it applies to cases below the threshold for the application of that Directive (though subject to its own, lower, thresholds laid down in regulation 109). In that respect-

i. it does not matter that the 'child' is wider, larger or greater than the parent (ITV principle (v));

ii. Chapter 8 can be seen as “a further step on the same path as trodden by the primary provisions of the Directive” (ITV principle (xiii)), by applying, albeit in simplified form more suitable to smaller procurements, requirements for transparent advertising of contract opportunities and awarded contracts that are at the heart of the Directive, and by restricting aspects of qualitative selection that are burdensome to SMEs;

iii. some of the relevant recitals cited above contemplate that member states may go further than required by the Directive (ITV principle (xi))

23. In relation to regulation 113, which does not as such relate to the actual processes of public procurement, the relevant connection is with the 2011 Directive.
24. The 2011 Directive requires Member States to confer an entitlement to interest on contractors where they receive late payment. Article 3 relates to transactions between undertakings, and Article 4 relates to transactions between undertakings and public authorities.

25. Article 1 of the 2011 directive states “The aim of this Directive is to combat late payment in commercial transactions, in order to ensure the proper functioning of the internal market, thereby fostering the competitiveness of undertakings and in particular of SMEs.”

26. Article 12(3) of the 2011 Directive makes it clear that Member States may bring into force provisions which are more favourable to the creditor than the provisions necessary to comply with the Directive.

27. Regulation 113 is not only consistent with, but will promote, the aim stated in Article 1 of the 2011 Directive, as it will further assist in the combatting of late payment in the context of public contracts. Although regulation 113 does not impose requirements to pay interest, it requires the inclusion in public contracts of provisions requiring prompt payment, including provisions requiring contractors to include similar provisions in contracts which they themselves award to relevant subcontractors (so that the obligation will flow right to the bottom of any subcontracting chain, to the particular benefit of SMEs). In relation to the public contracts themselves, terms are implied where the contracting authority fails to include the requisite provisions in them.

28. In some respects regulation 113 will apply where the 2011 Directive does not require interest to be paid, but these are all respects which are more favourable to the creditor. In particular, it may be noted that-

   a. the 30 day payment requirement under regulation 113 leaves no room for the parties to agree a longer period in the contract (unlike under Article 3(a) and (b) and Article 4(6) of the Directive);

   b. the requirement applies regardless of whether the debtor is responsible for the delay (unlike under Article 3(1)(b) and Article 4(1)(b)).

29. In addition to the requirements which it imposes in relation to the inclusion of terms in contracts, regulation 113 also requires contracting authorities to publish annual statistics on how far they have complied with their obligations under the regulation to make payment within 30 days, including information about interest paid or payable in consequence. This is intended to provide a further incentive to contracting authorities to pay their contractors within 30 days.

30. In view of the above, the Cabinet Office would rely on ITV principles (iii) to (v), (xi), (xii) and (xiii). The Cabinet Office does not accept, in relation to principle (viii), that the ability to make provision under section 2(2)(b) arising out of or
related to the 2011 Directive is affected by the fact that the 2011 Directive had already been transposed by the Late Payment of Commercial Debts (Interest) Act 1998. In that regard, it may be noted that the originator of principle (viii), Waller LJ, subsequently partially recanted (see R (Parker) v Bradford Crown Court [2006] EWHC 3213 Admin at paragraphs 25 and 26).

**Point (2)(b)(ii)**

31. The exemptions to which the Committee refers were included as a matter of domestic policy. Although Part 4 arises out of or relates to EU obligations, the obligations imposed by Part 4 are being imposed for domestic policy reasons, there being no EU law obligation to impose them.

32. Despite the relevant connection (for vires purposes) with EU obligations, the Cabinet Office does not consider that the general EU law principle of non-discrimination was engaged when the Minister exercised, for domestic policy reasons, the powers conferred by section 2(2)(b) to make the provision contained in Part 4. In some respects, Part 4 has a wider scope than EU law (in applying, for example to procurements in which there is no cross-border interest and which fall below the thresholds for the application of Directive 2014/24). In other respects, such as those noted by the Committee, they are narrower because certain procurements that fall within the scope of EU procurement rules are excluded (for example, NHS procurements which are already subject to a domestic regime of procurement rules under the National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 mentioned in regulation 105(2)(a) of the present instrument). There is no reason why the scope of the provision made under section 2(2)(b) must mirror the scope of the connected EU obligation (ITV principle (v); also principle (xiv) explicitly contemplates, albeit in relation to a different situation, that section 2(2)(b) may sometimes be exercised only in relation to a sub-species of the cases to which the relevant Directive relates).

33. The Committee refers to “the wording at the end of section 2(2)” of the 1972 Act. The definition of ‘designated minister’ comes at the end of section 2(2), and its last words refer to any restrictions or conditions specified in the Order in Council. The Cabinet Office does not consider any are relevant to the point, and infers that the Committee means the words which precede the definition, namely, the words “In the exercise of any statutory power … the person entrusted with the power …. may have regard to the objects of the EU and to any such rights or obligations as aforesaid” (i.e. EU rights or obligations). These words are permissive, and have the effect of enlarging, rather than restricting, powers. Their purpose seems to be to ensure that any powers other than those conferred by section 2(2) (such as pre-existing statutory powers conferred for domestic policy purposes) may lawfully be exercised having regard to the purposes of the EU and EU obligations and rights. In particular, the words appear designed to remove any objection to the use of such powers to transpose EU obligations.
which might otherwise have been argued to arise from the general principle of administrative law that statutory powers must be exercised only for the purposes for which they were conferred. It does not appear to the Cabinet Office that these words have any restrictive effect on what can be done under section 2(2)(b).

34. In the context of public procurement, the EU law principle of non-discrimination is usually understood to be engaged where a contracting authority discriminates between economic operators who are competing (or might want to compete) for a public contract. The exemption of certain procurements from the scope of Part 4 does not prevent any economic operator from claiming a breach of that EU Treaty principle where it is engaged. For example, it is well established that, even in procurements which fall outside the application of EU procurement directives, fundamental Treaty principles may require contracting authorities to conduct the procurement in a certain way (see for example Case C-231/03 Coname). In such cases, a remedy would be available in accordance with section 2(1) of the 1972 Act for a breach of the Treaty principle, even though such procurements were exempt from the 2006 Regulations. None of this is precluded, or undermined in any way, by the inclusion of Part 4 in the present instrument or by the exclusion of some categories of procurement from the scope of Part 4.

Point (2)(b)(iii)

35. The Cabinet Office considers that the provisions to which the Committee refer do not infringe paragraph 1(1)(c) of Schedule 2 to the Act, which provides that the powers conferred by section 2(2) shall not include power “to confer any power to legislate by means of orders, rules, regulations or other subordinate instrument, other than rules of procedure for any court or tribunal”.

36. The Cabinet Office regards the issuing of such guidance as essentially administrative, rather than legislative, in nature. All these categories of guidance are ancillary to the legislative provision that is made by the instrument itself. As the Committee notes, the relevant provisions of Part 4 impose obligations on contracting authorities to “have regard to” any guidance issued by the Minister. Such words do not enable the guidance to impose any hard-edged rules or obligations with which contracting authorities must comply. The guidance is merely something relevant that contracting authorities are required to have regard to (along with any other relevant considerations, including any which make a departure from the guidance appropriate) in complying with the legislative provision that is made by the instrument itself, and to which the guidance is ancillary.

Point (3)

37. The Cabinet Office consulted openly on the measures contained in Part 4 in September 2013 and again in September 2014 (as detailed in paragraphs 8.4 to 8.6 of the Explanatory Memorandum). Unfortunately, relevant Cabinet Office
officials were not aware of the need to consult directly with the House of Commons and House of Lords, and so this did not happen. The Cabinet Office apologises for this and confirms that the guidance will be complied with in future.

Cabinet Office
21 July 2015

Appendix 3

S.I. 2015/310: memorandum from the Department for Environment, Food and Rural Affairs

Fluorinated Greenhouse Gases Regulations 2015 (S.I. 2015/310)

1. The Committee has asked the Department for Environment, Food and Rural Affairs for a memorandum on the following point:

   Explain why the organisations referred to (or first referred to) in regulations 8(1)(a) and (b), 10 and 16(d) and (e) are not specified by the use of unique identifiers.

2. The organisations referred to in the Committee’s question are as follows:

   - City and Guilds of London Institute;
   - Construction Industry Training Board;
   - Fire Industry Association;
   - Institute of the Motor Industry;
   - Institute of Road Transport Engineers.

3. Four of these organisations (the City and Guilds of London Institute, the Fire Industry Association, the Institute of the Motor Industry and the Institute of Road Transport Engineers) are incorporated.

4. The Department commits to including, when the Regulations are next amended, a reference to the company number of each of these organisations. This will ensure consistency with the approach taken to other organisations designated as certification, evaluation or attestation bodies under the Regulations and which are incorporated.

5. The Regulations will need to be amended to take account of forthcoming Implementing Acts under the EU Fluorinated Greenhouse Gases Regulation
Such Implementing Acts are expected to be adopted by the European Commission by the end of the year.

6. In the case of the Construction Industry Training Board, the Department’s understanding is that this body is not incorporated. It is a non-departmental public body established under article 2 of the Industrial Training (Construction Board) Order 1964 (S.I. 1964/1079).

7. In this case, the Department considers that the citation of the name of the organisation is sufficient for the purpose of identifying it as a certification, evaluation and attestation body for the purposes of regulations 8(1)(b) and 16(b). The Department notes the inclusion of the Construction Industry Training Board in other legislation, including in Part 6 of Schedule 1 to the Freedom of Information Act 2000, without being accompanied by another form of identification.

Department for Environment, Food and Rural Affairs
28 July 2015

Appendix 4

S.I. 2015/329: memorandum from the Ministry of Justice

Election Judges Rota Rules 2015 (S.I. 2015/329)

1. By a letter dated 21st July 2015, the Committee sought a memorandum on the following points:

(1) Explain –

(a) whether it is intended that replacement judges nominated under rule 2(4) must satisfy the requirements for election judges specified in rule 2(1); and

(b) if it is, how that intention is achieved.

(2) Explain –

(a) whether it is intended that a judge to whom rule 2(6) applies should cease to be on the rota if he or she ceases to satisfy the requirements specified in rule 2(1); and

(b) if it is, how that intention is achieved.
In response to point 1, it is the intention that replacement judges nominated under rule 2(4) satisfy the requirements for election judges specified in rule 2(1). They cannot but do so as only judges who satisfy the statutory criteria specified in section 142 of the Senior Courts Act 1981 can be nominated as election judges: only such judges are eligible for appointment. For ease of reference, section 142(1) reads as follows:

*The judges to be placed on the rota for the trial of parliamentary election petitions in England and Wales under Part III of the Representation of the People Act 1983 in each year shall be selected, in such manner as may be provided by rules of court, from the judges of the Queen's Bench Division of the High Court exclusive of any who are members of the House of Lords.*

In response to point 2, rule 2(6) only applied to any election rota judge who had been nominated as such a judge for 2015 prior to these Rules coming into force. It was a transitional provision. In the event there were in fact no nominated election judges for 2015 prior to the entry into force of the rules, and therefore this provision was, in the event, of no practical effect. Generally, a rota judge will cease to be such during their year of office if they cease to satisfy the requirements of s142 of the Senior Courts Act 1981, either through ceasing to be a judge of the Queen's Bench Division or through being elevated to the peerage whilst remaining a judge of the Queen’s Bench Division. A judge ceases to be eligible for appointment under r 2(1) if they cease to meet the criteria for appointment under s142 and must as a consequence be replaced by an eligible judge, under rule 2(4).

**Ministry of Justice**

23 July 2015

**Appendix 5**

**S.I. 2015/442: memorandum from the Department for Communities and Local Government**

| Old Oak and Park Royal Development Corporation (Planning Functions) Order 2015 (S.I. 2015/442) |

1. The Committee has requested a memorandum on the following point in relation to the Old Oak and Park Royal Development Corporation (Planning Functions) Order 2015 (S.I. 2015/442) (“the Order”):

   *In relation to article 6 explain, if possible with examples, what is added by the propositions beginning “so far as is required” in paragraphs (1) and (3), and explain in particular*—
(a) what the words “the enactment” in paragraph (1) are intended to refer to and how effect is given to that intention, and

(b) why, given paragraph (1), paragraph (3) is needed.

2. The Order confers planning functions on the Mayoral Development Corporation (MDC) established by the Old Oak and Park Royal Development Corporation (Establishment) Order 2015 (S.I. 2015/53) under powers in Chapter 2 of Part 8 of the Localism Act 2011.

3. The Order gives effect to a decision of the Mayor of London under section 202 of the Localism Act 2011 that the MDC is to be the local planning authority for certain purposes. By section 198(2)(c) of the Act, the Secretary of State must by order give effect to any such decision.

4. Departmental officials and lawyers worked closely with the Mayor of London’s officials and lawyers to ensure that the Order met their needs. A particular concern on behalf of the Mayor was that the provisions of the Order should generally follow the London Legacy Development Corporation (Planning Functions) Order 2012 (S.I. 2012/2167) (“the 2012 Order”), which conferred planning functions on the first and only other MDC to be established.

5. Article 6 of the Order is drafted in similar terms to article 6 of the 2012 Order. The provision is intended to ensure that references to an urban development corporation (UDC) in existing statutory instruments are, where necessary, construed as including a reference to the MDC.

6. The words “the enactment” in paragraph (1) are intended to refer to the particular provision or legal proposition of the statutory instrument which is being construed in accordance with paragraph (1). This use of the term “enactment” is in the Department’s view consistent with section 23(2) of the Interpretation Act 1978 because the term is being used to refer to an enactment comprised in subordinate legislation. This approach is supported, in the Department’s view, by the analysis of the nature of an ‘enactment’ at section 138 of Bennion on Statutory Interpretation: a Code (5th edition, 2008, pp 396-401).

7. The proposition “so far as is required for giving effect to the enactment” is, in the Department’s view, necessary because it is not in every case that it will be necessary to construe a reference to a UDC as including a reference to the MDC to give effect to the enactment. For example, the words “urban development corporation” in article 3(1) of the Ebbsfleet Development Corporation (Area and Constitution) Order 2015 (S.I. 2015/747) would make little sense if given a construction that included a reference to the MDC. Whereas the reference to an urban development corporation in paragraph A of Class A of Part 12 (Development by local authorities) of the Town and Country Planning (General Permitted Development) (England) Order (S.I. 2015/596) should be construed to
include a reference to the MDC to give effect to that provision in respect of the MDC.

8. Paragraph (3) is important, in the Department’s view, because of the particular significance of regulation 9AA of the Town and Country Planning General Regulations 1992 (S.I. 1992/1492) in the context of MDCs. Regulation 9 of the 1992 Regulations is intended to prevent a local planning authority with an interest in land (acting on their own or with a joint developer) from granting planning permission for development on that land and then selling or otherwise transferring that land with the benefit of that permission to a third party. Regulation 9AA disapplies regulation 9 where the interested planning authority is a UDC. It is central to the regeneration role of development corporations (UDCs and MDCs) that they are able to grant planning permission on land that they own and transfer that land to third parties. Paragraph (3) puts beyond doubt that regulation 9AA applies to the MDC. In the Department’s view it is preferable to avoid any ambiguity and clarify for readers of the Order that the general provision at paragraph (1) includes this particularly important case. In addition, the absence of this provision from the Order after it was included in the 2012 Order would, in the Department’s view, lead to unnecessary uncertainty.

Department for Communities and Local Government
27 July 2015

Appendix 6

S.I. 2015/455: memorandum from the Home Office

Police (Amendment) Regulations 2015 (S.I. 2015/455)

1. At its meeting on 21 July, the Committee requested a memorandum on the following point:

“Explain why sub-paragraph (c) of paragraph (1A) inserted by regulation 6 is structured in a way that does not appear to fit syntactically with the opening words of that paragraph.”

2. The Department recognises that the drafting highlighted by the Committee does not fit from a syntactical point of view, and regrets that it does not. Nevertheless, the Department considers that the intention of the relevant provision is clear and (ahead of the point being addressed in a future amending instrument) will comply with this intention when deciding which is the most appropriate body to consult with under that regulation.
3. The Department is grateful to the Committee for identifying this point and will remedy it at the next opportunity that the Regulations are amended, which is expected to be later this year.

Home Office
28 July 2015

Appendix 7

S.I. 2015/483: memorandum from the Department for Work and Pensions

Control of Major Accident Hazards Regulations 2015 (S.I. 2015/483)

1. By a letter dated 21st July 215, the Joint Committee on Statutory Instruments requested a Memorandum on the following points:

   Explain –

   (a) why ‘the presence of a quantity of dangerous substances for the purposes of’ is included in the definition of ‘storage’ in regulation 2(1), and

   (b) why that definition appears to be structured in a way that would make it either strained or impossible to substitute the meaning for the definition in text where the defined term appears.

2. The Department’s response to the Committee’s points is as follows.

3. The Health and Safety Executive and Treasury Solicitor’s Department (now Government Legal Department) prepared the Regulations.

4. In relation to point (a), the purpose of ‘the presence of a quantity of dangerous substances for the purposes of . . .’ in the definition of ‘storage’ is to explain what amounts to ‘storage’, which has two aspects, firstly, the presence of a quantity of dangerous substances, and secondly, a specified activity, including warehousing, depositing etc.

5. In relation to point (b), the wording of the definition of ‘storage’ is an exact copy-out of the wording in Directive 2012/18/EU, which the Regulations
implement. Nonetheless, the Department accepts the Committee’s point that it would be strained to substitute the meaning for the definition in text where the defined term appears. The definition of ‘storage’ in the Regulations would still be legally effective if we deleted the words ‘means the presence of a quantity of dangerous substances for the purposes of’ and inserted ‘includes’. The Department intends to make this amendment at the next appropriate opportunity.

Department for Work and Pensions
28 July 2015

Appendix 8

S.I. 2015/508: memorandum from the Department for Transport

1. By a letter dated 21st July 2015, the Joint Committee on Statutory Instruments requested a Memorandum on the following point:

   Explain why paragraph (c) of the definition of “pleasure vessel” in regulation 3(1) is structured in a way that does not appear to follow syntactically from the opening words of that definition.

2. Although it is not an answer to the Committee’s concerns, the Department notes that this wording follows the definition used in the Merchant Shipping (Survey and Certification) Regulations 1995 (S.I. 1995/1210), which are the Regulations replaced by S.I. 2015/508.

3. This definition also appears almost verbatim in the Merchant Shipping (Vessels in Commercial Use for Sport or Pleasure) Regulations 1993 (S.I. 1993/1072), and (with immaterial variation) in the Merchant Shipping (Vessels in Commercial Use for Sport or Pleasure) Regulations 1998 (S.I. 1998/2771).

4. The Department is not aware of the marine industry having encountered any difficulty with applying the definition, and does not consider it causes any legal uncertainty in practice.

5. The Department, however, notes that a differently worded definition (which would appear to meet the Committee’s point) appears in the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc.) Regulations 2014 (S.I. 2014/1613) and in the Merchant Shipping (Maritime Labour Convention) (Recruitment and Placement) Regulations 2014 (S.I.
2014/1615), and will take the Committee’s concerns into account when the next Statutory Instrument to require a definition of “pleasure vessel” is drafted.

Department for Transport
29 July 2015

Appendix 9

S.I. 2015/768: memorandum from the Home Office

1. This memorandum is submitted in response to a question from the Joint Committee on Statutory Instruments to the Home Office on 21 July 2015. The Committee asked:

   Following the identification of the breach of the 21-day rule in paragraph 3 of the Explanatory Memorandum, explain whether the importance of bringing the Regulations into effect on 6 April 2015 related to legislative coherence (and, if so, how) as well as loss of income to the Home Office.

2. Whilst shortening the period for the Committee’s consideration is regretted, the circumstances of the delay in laying the instrument were out of the Department’s control and the impact on operational matters and income had we delayed the date on which these Regulations came into effect would have been very significant.

3. As outlined in paragraph 3 of the Explanatory Memorandum, the Regulations could not be made until the Immigration and Nationality (Fees) Order 2015 (SI.2015/746) came into force. The delivery of the Fees Order was carefully managed by the Home Office through a detailed project plan, with sufficient time allocated for each stage of the process, including Parliamentary scrutiny, to allow for the 21-day scrutiny period of the subsequent Regulations before they came into force on 6th April 2015. Unfortunately there was an unexpected delay in achieving a final mention of the Fees Order on the floor of the House of Lords. Instead of taking place on the Wednesday as expected, it was held over until the next sitting date, which was the following Monday. This meant that the date on which we could make the Regulations was delayed.

4. There were two principal reasons for the requirement for the Regulations to come into force on 6th April 2015. The first was operational. There is a standard three month lead time for operational changes of this nature, due to the need for
simultaneous changes to guidance, forms and IT. It is not possible to change operational implementation arrangements at short notice so if the 6th April date had been put back to enable the full 21 day scrutiny period there would have been a substantial delay before the Regulations could have come into effect. The second reason (which would have been exacerbated by the first) was financial, in that a deferral of the coming into force date of the Regulations would have led to a financial loss of approximately £2m per week. An additional reason relates to the common commencement date. Where possible, we seek to introduce the main fees changes on a common commencement date. Where there are strong policy or economic reasons for implementing changes on a different date we ensure that sufficient notice of this is given to stakeholders. That was not done in this case, as we had not planned for commencement other than on a common commencement date.

5. The Department apologises for not following the convention on this occasion, which (as explained above) was due to the imperative to maintain 6th April 2015 as the coming into force date, combined with the unfortunate delay in the Fees Order completing its parliamentary processes.

Home Office
27 July 2015

Appendix 10

S.I. 2015/784: memorandum from the Department for Work and Pensions

Social Security Benefit (Computation of Earnings) (Amendment) Regulations 2015 (S.I. 2015/784)

1. In its letter to the Department of 21st July 2015, the Committee requested a memorandum on the following points:

“Explain why the provision inserted by regulation 2(3) appears to be in similar terms to that made by S.I. 2014/591 which was drawn to the attention of Parliament by the Committee in its Third Report of last Session and why, given that, the Explanatory Memorandum states that there are no matters of special interest to the Committee.”

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

3. The Committee will wish to note that S.I. 2015/784 was made by Treasury Ministers with the concurrence of Department for Work and Pensions (DWP) Ministers, as is required by section 3(2) of the Social Security Contributions and
Benefits Act 1992. However, as policy responsibility sits with DWP, this memorandum has been prepared by DWP.

4. As the Committee has identified, the provision is in the same terms as the drafting which was raised by the Committee in relation to the Social Security (Miscellaneous Amendments) Regulations 2014 (S.I. 2014/591) and reported as defective drafting in the Third Report of Session 2014-15. In a letter dated 11th June 2014, the Committee asked DWP to submit a memorandum to explain the need for the reference to a carer of a user in sub-paragraph (a) of the provisions inserted by regulations 2(2)(b), 4(2)(b), 7(2)(b), 8(2)(b) and 9(2)(b) in addition to sub-paragraph (b) of those inserted provisions. In paragraph 9 of the memorandum submitted (dated 17th June 2014), DWP accepted that the drafting of the definition could be improved and agreed to re-consider the drafting of the provision.

5. As undertaken in the memorandum, DWP subsequently carefully considered the drafting of the provision in question and consulted as to the wording and history of the provision.

6. DWP considers, after reflection and further consultation, that the drafting is not duplicative. Sub-paragraphs (a) and (c) (and (b) and (c)) of the new paragraph (3A) inserted by S.I. 2015/784 are intended to address different practical scenarios. In the case of sub-paragraph (a), only people who are actually being consulted are caught, whereas sub-paragraph (c) refers to carers of people actually being consulted. The intention is to ensure that a user and a carer of a user to be consulted fall under (a) and a separate carer of one or both of them will be included under (c). Therefore, (c) allows for carers to come within the scope of the regulation even if they play no active part in the consultation.

7. A possible scenario would be a couple, where one suffers from dementia and both have physical limitations. The partner with dementia would be cared for in many respects by the other partner, but both would need physical and practical support from another person, say a son or daughter. In this scenario, there are a number of variations: any of the three could be actually consulted under (a) and either or both of the carers could be included under (c) if they chose not to play any active part in the consultation itself. The carer of someone who is not actually consulted would not fall within (c). In practice, therefore, DWP consider that the regulation is as all encompassing as it can reasonably be without opening itself up to include people who fall outside the policy intention, such as those actually undertaking the research, or otherwise involved in an academic or professional capacity.

8. The need to ensure that carers who are not part of the consultation are included within the provision was the subject of debate and interest during the passage of the Welfare Reform Bill in 2012 and subsequent Parliamentary scrutiny of the
Universal Credit Regulations 2013. Baroness Thomas of Winchester said in debate:

“...I have one small point to raise under these regulations, which I expect the House will welcome. Before I do that, whatever we think of the detail of these regulations I pay tribute to the Minister and his staff in the DWP, who have worked absolutely non-stop to get out these regulations and all the guidance. We might complain about having so many piles of paper, but somebody has had to prepare them. It has been a tremendous effort, so I thank him very much. Noble Lords will be pleased to hear that the one matter I address in these regulations is a success story. It is possibly the end of a long road leading to the better treatment of all those service users and carers [emphasis added] who are involved in helping to improve health and social care services. This is about having their expenses disregarded for benefits.”

9. DWP apologises for not having explained the position in the memorandum of 17th June 2014. However, for the reasons above, it believes that the provisions are needed in their current form to ensure that the regulation includes all those who are intended to be covered.

10. DWP apologises for not having brought the fact of the previous Report to the attention of the Committee in the Explanatory Memorandum for these Regulations. We are taking steps to remind lawyers and policy officials drafting Explanatory Memorandums to ensure that they draw all necessary items of interest to the attention of the Committee.

Department for Work and Pensions
4 August 2015

Appendix 11

S.I. 2015/815: memorandum from the Environment, Food and Rural Affairs


1. The Committee has asked the Department for Environment, Food and Rural Affairs for a memorandum on the following points:

Given that—
(a) the reason offered in paragraph 4.5 of the Explanatory Memorandum for not varying the text from the draft notified under Directive 98/34/EC appears to be that further notification and standstill would be needed if any amendments were made;

(b) the third paragraph of Article 8.1. of the Directive appears to require member states to re-notify only “if they make changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive”; and

(c) it was apparent 15 days before the Regulations were made that, without altering its effect at all, regulation 5 could have been re-drafted to consist of paragraph (2) alone,

explain why that re-drafting was not done.

2. The Department understands the Committee’s question to relate to why the instrument was not amended from the draft notified to the European Commission under Directive 98/34/EC, when the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 11) Order 2015 was made on 4 March, which brought section 85(2) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“the 2012 Act”) into force on 12 March 2015.

3. The Department accepts that the draft instrument could and should have been amended in advance of its signature once the date of the commencement of section 85(2) of the 2012 Act was known, so as to remove all but sub-paragraph (2) of regulation 5.

4. The reason why regulation 5 was drafted by reference to alternative eventualities, notwithstanding that at the date of signature of the instrument it would be likely to be known which of the two eventualities obtained, was that it was not known on what date section 85(2) of the 2012 Act would be commenced until very shortly before its commencement; and the date of signature of the instrument was similarly not known in advance with certainty. The estimated timing of the commencement of section 85(2) was, however, so close to the date on which it was anticipated that the Regulations would be made that it was thought prudent to draft in such a way as to ensure the correct result whichever eventuality obtained, in case the draft instrument proved in the event to have been drafted on the basis of an incorrect assumption as to the relative timing of the commencement of section 85(2) and the signature of the instrument, and then was signed by the Minister without having first been amended to ensure the correct result (or, if the instrument had been drafted on an incorrect assumption that section 85(2) would already be in force, to ensure that it was intra vires).
The Department’s procedures provided for the draft instrument to be submitted well in advance of signature to allow time for the Minister’s consideration.

5. In the event of the instrument’s being drafted and signed on the basis of an incorrect assumption that section 85(2) had not come into force at the date of signature (in other words, providing for a fine of a specified maximum amount), section 85(1) would not have applied to correct the position, since the definition of “relevant offence” in section 85(3) limits that term to existing offences contained in an Act or an instrument before the commencement date, and so the conversion of the maximum fine (into a fine of any amount) effected by section 85(1) only operates in relation to those offences.

6. In addition, as the Explanatory Memorandum indicated, if (in order to be certain that the instrument as made would be *intra vires*) the instrument had been drafted on the assumption that section 85(2) had not come into force by the date on which the instrument was made, it would be highly arguable that it could not then have been amended so as to change the penalty to a fine of an unlimited amount without its being re-notified to the Commission, since the increase in penalty might have been regarded as having the effect of making the relevant requirements “more restrictive” (within the meaning of Article 8.1 of the Directive, which of course must be interpreted purposively).

7. The risks to which drafting the instrument on the basis of the wrong assumption might give rise therefore appeared to be more serious in their consequences than any risk of failure to amend the draft instrument in time for the purpose of removing whichever of the two alternatives it transpired was not applicable.

8. In the event, the instrument was in fact signed without the second alternative having been removed, as it might have been (but the provision of alternatives at least meant that the failure to amend the draft instrument in time did not have the effect that it was signed on an incorrect basis).

Department for Environment, Food and Rural Affairs
27 July 2015
Appendix 12

S.I. 2015/943: memorandum from the Her Majesty’s Revenue and Customs

Hydrocarbon Oil Duties (Reliefs for Electricity Generation) (Amendments for Carbon Price Support) Regulations 2015 (S.I. 2015/943)

1. The Committee considered the above instrument at its meeting on 21st July and has requested a memorandum on the following points:

(1) Following the identification of the breach of the 21-day rule in paragraph 3 of the Explanatory Memorandum (which should have been directed at the Joint rather than the Select Committee on Statutory Instruments), explain whether the importance of bringing the Regulations into effect on 6 April 2015 related to legislative coherence (and, if so, how).

(2) Explain why there is no footnote explaining how it is possible to gain access to electronic and hard copies of the document referred to in the new definition of CHPQA substituted by regulation 3(c).

(3) Explain why, in Schedule 3 inserted by regulation 5, the words “the production of” appear to be missing from the definition of “R” in paragraph 4 and why there appear to be incorrect cross references in that definition and in paragraph 5.

Question (1)

(i) The tax treatment of energy products, such as gas oil and fuel oil (which are subject to excise duty), when used in electricity generation, mirrors that of other energy products, such as gas and coal, which are subject to climate change levy.

(ii) Section 63 of the Finance Act 2015 (c. 11) amended paragraph 24B of Schedule 6 to the Finance Act 2000 (c. 17) so that, with effect from 1st April 2015, carbon price support rates of climate change levy are not charged on taxable commodities (such as gas and coal) used to generate certain good quality electricity in a combined heat and power (CHP) station (“qualifying electricity”).

(iii) The commencement date of 1st April 2015 for these Regulations (not 6th April, as mentioned in the request for a memorandum) was necessary so that relief from excise duty for oils used to generate qualifying electricity in a CHP station commenced at the same time as the relief from climate change levy for taxable commodities used to generate such electricity and was for the purpose of legislative coherence.
Question (2)

It is regretted that it was an oversight not to include a footnote explaining how it is possible to gain access to electronic and hard copies of the Combined Heat and Power Quality Assurance Standard (Issue 5) referred to in the amendment made by regulation 3(c). Users of this legislation (such as CHP station operators) will be very familiar with this document but the Commissioners propose to issue a correction to the Explanatory Note to explain how copies can be obtained.

Question (3)

The Commissioners accept that the words "the production of" should have been included in the definition of "R" in paragraph 4 of Schedule 3. The Commissioners also accept that the cross reference in the definition of "R" should have been to paragraph 3 and the cross reference in paragraph 5 should have been to paragraph 4. The Commissioners apologise for these errors and are grateful to the Committee for pointing them out. The Regulations will be corrected at the earliest opportunity.

The Commissioners for Her Majesty’s Revenue and Customs
27 July 2015