



House of Lords  
House of Commons  
Joint Committee on  
Statutory Instruments

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**Seventh Report  
of Session 2008-09**

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**Drawing special attention to:**

*Draft National Assembly for Wales (Legislative Competence) (Housing) Order 2009*

*Social Security (Housing Costs Special Arrangements) (Amendment and Modification) Regulations 2008 (S.I. 2008/3195)*

*Home Information Pack (Amendment) Regulations 2009 (S.I. 2009/34)*

*Ordered by the House of Lords to be printed  
4 March 2009*

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## Joint Committee on Statutory Instruments

### Current membership

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Baroness Jones of Whitchurch (*Labour*)  
Lord Kimball (*Conservative*)  
Countess of Mar (*Crossbench*)  
Earl of Mar and Kellie (*Liberal Democrat*)  
Lord Walpole (*Crossbench*)

#### House of Commons

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### Powers

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](http://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](http://www.parliament.uk/jcsi).

### Committee staff

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

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## Instruments reported

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At its meeting on 4 March 2009 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to three of those considered. The Instruments and the grounds for reporting them are given below. Relevant Departmental memoranda are published as appendices to this report.

### 1 Draft S.I.: reported for doubtful vires

*Draft National Assembly for Wales (Legislative Competence) (Housing) Order 2009*

**1.1 The Committee draws the special attention of both Houses to this draft Order on the ground that there appears to be a doubt in one respect that, if it were approved and made, it would be *intra vires*.**

#### *Legislative background*

1.2 Section 93(1) of the Government of Wales Act 2006 (“the 2006 Act”) enables the National Assembly for Wales (“the Assembly”) to make laws known as Measures. Measures may, subject to other provisions of the 2006 Act, make any provision which could be made by Act of Parliament. A provision of a Measure is within the legislative competence of the Assembly only if, in particular, it relates to a matter specified in Part 1 of Schedule 5 to the 2006 Act. But a provision is outside the Assembly’s legislative competence if it breaches any of the restrictions in Part 2 of Schedule 5 having regard to any exception in Part 3 of Schedule 5.

1.3 Section 95 of the 2006 Act enables an Order in Council to amend Parts 1, 2 and 3 of Schedule 5. As explained in paragraph 344 of the Explanatory Notes to the 2006 Act, “An Order in Council under this section may be made only if the draft of it has been approved by the Assembly, the House of Commons and the House of Lords. Thus Parliament retains control over the ... matters in relation to which the Assembly has power to pass Measures”.

1.4 When the 2006 Act was enacted, the only matters specified in Part 1 of Schedule 5 related to the Assembly itself. The intention was that Orders in Council under section 95 would confer further legislative competence on the Assembly. “The effect of an individual Order in Council will be to insert a description of the “matter” in relation to which the Assembly is to be given enhanced legislative competence, together with any specific exceptions necessary accurately to define its scope”. (Paragraph 316 of the Explanatory Notes to the 2006 Act).

1.5 Schedule 5 has been amended by Acts of Parliament and Orders under section 95. The current Schedule 5 can be seen from Annex A to the Explanatory Memorandum for this draft Order. Some of the matters in Part 1 of Schedule 5 are set out in general terms, and others are set out in more detail, with specific exceptions as envisaged by the Explanatory Notes to the 2006 Act (Matters 5.17, 10.1, 15.1, 18.1 and 18.3 and the Tables of Exceptions at the end of Part 1).

### *The draft Order*

1.6 This draft Order under section 95 would add a new Matter 11.1 in Part 1 of Schedule 5: “Disposal by a social landlord of land held or used for housing purposes.” “Social landlord” is defined in some detail and disposals are described in a way which covers disposals pursuant to particular rights to buy or acquire (“the rights to buy”).

1.7 Article 2(2) of the draft Order adds to Part 2 of Schedule 5 a restriction (in new paragraph 2B) that a Measure cannot abolish the rights to buy. But Article 2(3) of the draft Order adds to Part 3 of Schedule 5 an exception (in new paragraph 7B) that Part 2 does not prevent a provision of a Measure from abolishing any of the rights to buy “if both the Welsh Ministers and the Secretary of State consent to the provision”.

### *The Committee’s initial consideration*

1.8 The draft Order seemed to delegate to the Welsh Ministers and the Secretary of State the decision whether the Assembly should have the legislative competence to abolish the rights to buy, without express authorisation in section 95. As in practice the new restriction in Part 2 could relate only to the new Matter 11.1, the draft Order appeared in effect to provide that Matter 11.1 was subject to the exception that it did not include abolition of the rights to buy unless the Welsh Ministers and the Secretary of State agreed that it should. This seemed a remarkable proposition in the context of an Order setting out part of the constitutional arrangement between Parliament and the Assembly.

### *The Department’s response*

1.9 In response to questions raised by the Committee, the Wales Office submitted a memorandum, printed at Appendix 1.

1.10 The Department explain that new paragraphs 2B and 7B restrict the effect that a Measure may have, rather than narrow the subject-matter that is within the Assembly’s competence. They say further that new paragraphs 2B and 7B do not unlawfully delegate the power to define the Assembly’s legislative competence; rather, they simply place a restriction on how that competence may be exercised. It is suggested that Parliament must have contemplated the type of provision in new paragraph 7B of Part 3 of Schedule 5 because, in particular, Part 3 contained other consent provisions on its enactment which are not significantly different.

### *The Committee’s conclusions*

1.11 New paragraphs 2B and 7B do more than simply place a restriction on how the Assembly’s competence may be exercised. Section 94(6) of the 2006 Act says that “a provision.....is outside the Assembly’s legislative competence if...it breaches any of the restrictions in Part 2 of Schedule 5, having regard to any exception in Part 3.....”. However the matter is presented in the draft Order, the competence is ultimately defined by reference to the consent of the Welsh Ministers and the Secretary of State. If they consent, a provision of a Measure abolishing the rights to buy is within competence. If they do not, the restriction applies and the provision is not within competence.

1.12 The Committee agrees with the Department that the existing entries in Parts 2 and 3 help to define the extent of the power to make further entries. But the Committee does

not agree that the existing provisions in Parts 2 and 3 of Schedule 5 sufficiently support the case for new paragraph 7B proposed in this Order.

1.13 Part 2 of Schedule 5 (headed “General Restrictions”) has always included restrictions on removing, modifying, conferring or imposing functions on a Minister of the Crown or modifying functions of the Comptroller and Auditor General (paragraphs 1 and 5). But Part 3 includes exceptions enabling a Measure to remove, modify, confer or impose functions on a Minister of the Crown or modify functions of the Comptroller and Auditor General with the consent of the Secretary of State (paragraphs 7 and 8).

1.14 These restrictions and exceptions are, as would be expected from the heading to Part 2, of general application across all matters. The consent provisions in Part 3 are limited to consent by the UK executive to Measures altering the UK executive’s own powers or those of the Comptroller and Auditor General. They simply reflect, as near as may be, the position as it will be under paragraphs 1, 4, 6 and 7 of Schedule 7 to the 2006 Act when, following a referendum in accordance with Part 4 of the 2006 Act, the Assembly has full power to pass its own Acts.

1.15 In 2007 an Act inserted a new paragraph 2A in Part 2: “A provision of an Assembly Measure cannot make any alteration in police areas”, and a new paragraph 7A in Part 3 enabling the alteration of a police area’s boundary with the Secretary of State’s consent. Paragraph 7A seems unsurprising in its context, as Parliament had already delegated to the Secretary of State in the Police Act 1996 the power to alter police areas. It seems unlikely that Parliament believed that in including the new paragraph 7A in 2007 it was widening the scope of the powers conferred in 2006 by section 95.

1.16 The delegation in paragraph 7B proposed by this Order differs in degree from the existing consent provisions. First, it delegates power not only to the Secretary of State, but also to the Welsh Ministers, who are not accountable to Parliament. Secondly, unlike paragraphs 7 and 8, it relates to a specific matter in Part 1 and so can be seen as undermining the principle (paragraph 1.3 above) that Parliament retains control over the matters in Part 1. Thirdly, the provision to be authorised by the consent would inevitably impact directly not just on the Secretary of State or administrative arrangements, but on the statutory rights and liabilities of others (the social landlords and their tenants).

1.17 Recognising the restrictions implied by law on sub-delegation, the Committee has said (First Special Report for Session 1977-78; HL51, HC139) that delegated legislation should not depend on the exercise of ministerial or departmental discretion unless provision to that effect is expressly contained in the enabling statute. There are no express words in the 2006 Act authorising the determination of the Assembly’s competence by anything other than an Order in Council; nor, in the Committee’s view, is there a sufficiently strong implication in the 2006 Act. **The Committee considers there is a doubt as to whether new paragraph 7B in Part 3 of Schedule 5 to the 2006 Act, to be inserted by article 2(3) of the draft Order, is *intra vires* and reports accordingly.**

## 2 S.I. 2008/3195: reported for defective drafting

*Social Security (Housing Costs Special Arrangements) (Amendment and Modification) Regulations 2008 ( S.I. 2008/3195)*

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

2.2 These Regulations adopt a gender-neutral drafting style which mentions the masculine and feminine forms of personal pronouns and possessive adjectives (“he or she”, “his or her”). The Committee, while not regarding failure to adopt gender-neutral drafting as alone being a ground for reporting, has no difficulty with gender-neutral drafting as a matter of principle, and is prepared to make allowance for a degree of extra clumsiness in the drafting which may result. However, it does not consider that such allowance should be made for ambiguity or internal inconsistency, and the latter (though not the former) has been recognised by the Department for Work and Pensions, in a memorandum printed at Appendix 2, in respect of provisions of the Regulations highlighted in the following paragraphs. The Committee also makes the general observation that the particular gender-neutral drafting style used in these Regulations is usually better avoided. Its adoption—

- implicitly displaces the default assumption relating to gender which would otherwise operate by virtue of section 6 of the Interpretation Act 1978, as read with section 23 of that Act, only to replicate the effect that section 6 would have had, had it not been displaced, and
- does not even achieve full gender neutrality, as it raises the question: why not “she or he” or “her or his”?

Other techniques of gender-neutral drafting can readily be adopted which do not involve by-passing the 1978 Act and which avoid questions about priority being given to one gender over another. Such techniques are not limited to repeating a noun (which the Department saw as cumbersome). Giving a shorter label to a noun, as in “a person (“P””, is—for example—equally possible.

2.3 Regulation 8(2) provides that a claimant falls within that paragraph “if Part 2 applied to him at any time” (Committee’s underlining). The Department accepts in its memorandum that this approach is inconsistent with the gender-neutral drafting style adopted in regulation 8(3), but considers that no ambiguity arises; the Department does not state in terms whether regulation 8(2) was intended to apply to female claimants as well as male ones. Given the gender-neutral drafting style adopted elsewhere in the Regulations the Committee considers that the intended scope of regulation 8(2) is unclear. **The Committee accordingly reports regulation 8(2) for defective drafting.**

2.4 Regulation 6(a) modifies Schedule 2 to the Jobseeker’s Allowance Regulations 1996 in relation to a person to whom Part 2 of these Regulations applies, and regulation 11(b) modifies that Schedule in relation to a person to whom Part 3 of these Regulations applies. The modifications involve the deemed insertion of text into that Schedule, and the inserted text adopts a gender-neutral drafting style (“his or her”; “he or she”). However, the rest of Schedule 2 to the 1996 Regulations does not adopt such a drafting style; instead it uses only the masculine form “his” or “he” and relies on section 6 of the 1978 Act. The Department



admits in its memorandum that it would have been preferable if the “his or her” formulation had not been adopted in the modifications made to the earlier Regulations, but considers that no ambiguity arises. As to that, the Committee considers that the insertion into the earlier text of references to both masculine and feminine forms is likely to lead to confusion as regards the scope of existing references to the masculine form alone. **The Committee accordingly reports regulations 6(a) and 11(b) for defective drafting.**

2.5 The memorandum does not set out the reasoning for the Department’s expressed belief that no ambiguity arises concerning the meaning and effect of this instrument, and the Committee concludes that it may be based on the premise that gender-neutral drafting is current government policy. However the Committee’s view is that the policy in question cannot be assumed to be a matter of judicial notice, and that therefore it would not necessarily be taken for granted in litigation that the inconsistencies were clearly an error. **The Committee is accordingly pleased to note that the Department, notwithstanding its expressed belief, proposes to amend the Regulations at the first suitable opportunity.**

### **3 S.I. 2009/34: reported for failure to comply with *Statutory Instrument Practice***

***Home Information Pack (Amendment) Regulations 2009 (S.I. 2009/34)***

**3.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they fail to comply with *Statutory Instrument Practice*.**

3.2 The Home Information Pack (No. 2) Regulations 2007 were amended by S.I. 2008/3107 to provide for the inclusion of a property information questionnaire (“PIQ”) within the home information pack, which must be provided by sellers of residential properties to potential buyers. The Explanatory Memorandum to the present Regulations explains at paragraph 7.3 that, as a result of “an oversight”, S.I. 2008/3107 omitted to require the PIQ to be part of the home information pack when marketing begins, and that the present Regulations amend the 2007 Regulations to include such a provision.

3.3 The Committee asked the Department for Communities and Local Government to explain whether, in the light of that explanation and paragraphs 1.1 to 1.6 of the Committee’s First Report of this Session, arrangements had been made for copies of these Regulations to be issued free of charge to all known recipients of S.I. 2008/3107, as appeared to be called for by paragraph 3.4.11 of *Statutory Instrument Practice*; and, if so, to explain why the Regulations did not bear a headnote to that effect in accordance with paragraph 3.4.14 of *Statutory Instrument Practice*.

3.4 In a memorandum printed at Appendix 3 the Department explains that on reviewing S.I. 2008/3107 “it was noticed that a supplementary policy objective was required”; namely, that the PIQ be provided from the first moment the property is marketed, and that the present Regulations ensure that that objective was achieved. The Department accepts that in the light of paragraphs 1.1 to 1.6 of the Committee’s First Report of this Session (and in particular paragraph 1.4 of that Report, which deals with the meaning of “defective” in the context of paragraph 3.4.11 of *Statutory Instrument Practice*), arrangements should have been made as to free issue, and it has now made arrangements to ensure that this occurs.



The Committee accordingly reports these Regulations for failure to comply with *Statutory Instrument Practice*, acknowledged by the Department.

## Instruments not reported

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The Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to the respective Houses.

# Annex

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## Instruments to which the Committee does not draw the special attention of both Houses

- *denotes that the written evidence submitted in connection with the instrument is printed with this Report*
- *denotes written evidence has been submitted but not printed*

## Draft instruments requiring affirmative approval

|                   |  |
|-------------------|--|
| <b>Draft S.I.</b> | Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) Order 2009                              |
| <b>Draft S.I.</b> | Bradford & Bingley plc Compensation Scheme (Amendment) Order 2009  |
| <b>Draft S.I.</b> | Cornwall (Electoral Arrangements and Consequential Amendments) Order 2009  |
| <b>Draft S.I.</b> | Data Retention (EC Directive) Regulations 2009   |
| <b>Draft S.I.</b> | European Parliamentary Elections (Northern Ireland) (Amendment) Regulations 2009                                 |
| <b>Draft S.I.</b> | Financial Assistance Scheme and Incapacity Benefit (Miscellaneous Amendments) Regulations 2009                   |
| <b>Draft S.I.</b> | Guardian's Allowance Up-rating Order 2009  |
| <b>Draft S.I.</b> | Guardian's Allowance Up-rating (Northern Ireland) Order 2009   |
| <b>Draft S.I.</b> | Immigration (Biometric Registration) (Amendment) Regulations 2009  |
| <b>Draft S.I.</b> | Immigration and Nationality (Fees) Regulations 2009  |
| <b>Draft S.I.</b> | Local Government (Structural Changes) (Miscellaneous Amendments and Other Provision) Order 2009                  |
| <b>Draft S.I.</b> | Mental Capacity (Deprivation of Liberty: Monitoring and Reporting; and Assessments - Amendment) Regulations 2009 |
| <b>Draft S.I.</b> | Northern Rock plc Compensation Scheme (Amendment) Order 2009   |
| <b>Draft S.I.</b> | Occupational Pension Schemes (Contracting-out) (Amendment) Regulations 2009                                      |
| <b>Draft S.I.</b> | Occupational Pension Schemes (Levy Ceiling) Order 2009   |
| <b>Draft S.I.</b> | Pension Protection Fund (Pension Compensation Cap) Order 2009  |
| <b>Draft S.I.</b> | Renewable Transport Fuel Obligations (Amendment) Order 2009  |
| <b>Draft S.I.</b> | Renewables Obligation Order 2009   |
| <b>Draft S.I.</b> | Tax Credits Up-rating Regulations 2009   |

## Instruments subject to annulment

|                      |  |
|----------------------|--|
| <b>S.I. 2009/112</b> | National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) (Amendment) Regulations 2009 |
| <b>S.I. 2009/118</b> | Financial Services and Markets Act 2000 (Exemption) (Amendment) Order 2009   |
| <b>S.I. 2009/121</b> | Contracting Out (Administrative Work of Tribunals) Order 2009  |

- S.I. 2009/138** Hill Farm Allowance Regulations 2009
- S.I. 2009/139** Mental Health Act 2007 (Commencement No.10 and Transitional Provisions) Order 2009
- S.I. 2009/141** Public Service Vehicles (Conditions of Fitness, Equipment, Use and Certification) (Amendment) Regulations 2009
- S.I. 2009/142** Road Vehicles (Construction and Use) (Amendment) Regulations 2009
- S.I. 2009/143** Public Service Vehicles Accessibility (Amendment) Regulations 2009
- S.I. 2009/153** Environmental Damage (Prevention and Remediation) Regulations 2009
- S.I. 2009/213** Education (Individual Pupil Information) (Prescribed Persons) (Amendment) (England) Regulations 2009
- S.I. 2009/216** Ozone-Depleting Substances (Qualifications) Regulations 2009
- S.I. 2009/261** Fluorinated Greenhouse Gases Regulations 2009
- S.I. 2009/262** Armed Forces (Pensions) (Prescribed Modification) Order 2009
- S.I. 2009/264** Financial Services and Markets Act 2000 (Exemption) (Amendment) Order 2009
- S.I. 2009/278** NHS Bodies and Local Authorities Partnership Arrangements (Amendment) Regulations 2009
- S.I. 2009/295** Healthy Start Scheme and Welfare Food (Amendment) Regulations 2009

#### **Instruments subject to annulment (Northern Ireland)**

- S.R. 2009/21** Safeguarding Vulnerable Groups (Prescribed Criteria) (Foreign Offences) Order (Northern Ireland) 2009
- S.R. 2009/36** Police Support Staff (Suitability) Regulations (Northern Ireland) 2009

#### **Instruments not subject to Parliamentary proceedings not laid before Parliament**

- S.I. 2008/2889** Education (Recognised Bodies) (England) (Amendment) Order 2008
- S.I. 2008/3121** Air Navigation (Guernsey) (Revocation) Order 2008
- S.I. 2008/3122** Companies Act 2006 (Extension of Takeover Panel Provisions) (Isle of Man) Order 2008
- S.I. 2008/3147** Designation of Schools having a Religious Character (England) (No. 2) Order 2008
- S.I. 2009/140** Criminal Justice and Immigration Act 2008 (Commencement No. 6 and Transitional Provisions) Order 2009
- S.I. 2009/210** School Admissions Code (Appointed Day) (England) Order 2009
- S.I. 2009/211** School Admission Appeals Code (Appointed Day) (England) Order 2009
- S.I. 2009/224** Judicial Committee (Appellate Jurisdiction) Rules Order 2009
- S.I. 2009/260** Control of Salmonella in Broiler Flocks Order 2009
- S.I. 2009/270** Health and Social Care Act 2008 (Commencement No.8) Order 2009

# Appendix 1

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## Draft S.I.: memorandum from the Wales Office

*Draft National Assembly for Wales (Legislative Competence) (Housing) Order 2009*

1. *In its letter of 11 February 2009, the Committee requested a memorandum on the following points:*

The draft Order contains a provision preventing the Assembly from abolishing certain specific rights to buy or acquire. Why is this inserted into Part 2 of Schedule 5 (general restrictions) to the 2006 Act rather than into Part 1, as an exception to Matter 11.1 (contrast, for example, the provision about traffic signs in Matter 10.1)?

*The effect of the draft Order appears to be to delegate to the Secretary of State and Welsh Ministers the power to determine (subject to no Parliamentary or Assembly procedure) whether the Assembly should have legislative competence to abolish those rights to buy or acquire. Why is section 95(1) of the 2006 Act believed to authorise that delegation of legislative power?*

2. These questions relate to article 2(2) of the draft Order, which inserts a new paragraph 2B into Part 2 of Schedule 5 to the Government of Wales Act 2006, and article 2(3) which inserts a new paragraph 7B into Part 3 of that Schedule. The Wales Office's response to the Committee's questions is set out below.

*Inclusion of restriction relating to right to buy/acquire in Part 2 of Schedule 5*

3. The matters in Part 1 of Schedule 5, and the exceptions from those matters included in Part 1, define the subject areas in relation to which the Assembly may pass Measures. The restrictions in Part 2 of Schedule 5 (read with the exceptions in Part 3 of that Schedule) limit the Assembly's ability to legislate in particular ways in relation to those subject areas. New paragraphs 2B and 7B restrict the effects which a Measure may have, rather than narrowing the subject-matter that is within the Assembly's competence. We therefore consider that these provisions belong in Parts 2 and 3 of Schedule 5.

*Delegation to the Secretary of State and Welsh Ministers*

4. We do not consider that paragraphs 2B and 7B, which provide that a Measure may only make certain kinds of provision if the Secretary of State and Welsh Ministers consent, unlawfully delegate the power to define the Assembly's legislative competence. They simply place a restriction on how that competence may be exercised, subject to an exception where consent is given.

5. Under section 95(1)(a) and (c) of the 2006 Act, an Order in Council may amend Part 1 of Schedule 5 to add, vary or remove matters, and may amend Parts 2 and 3 of Schedule 5. The only limitation on these powers specified in the 2006 Act is a requirement that new matters must relate to one or more of the fields listed in Part 1 of Schedule 5. Article 2 of the draft Order simply inserts a new matter into Part 1 of Schedule 5, and amends Parts 2 and 3 of Schedule 5 by inserting a new restriction and exception.
6. We consider that, in passing the 2006 Act, Parliament contemplated that consent provisions of this kind could be inserted into Schedule 5. Parts 2 and 3 of Schedule 5 already include several restrictions and exceptions which enable Assembly Measures to make certain kinds of provision only if the Secretary of State consents. The consent provisions in paragraphs 7 and 8 were included in Part 3 of Schedule 5 as it was originally enacted. The consent provision in paragraph 7A was inserted by a later Act, but its inclusion shows that Parliament has continued to regard provisions subjecting Measures to Secretary of State consent in certain circumstances as appropriate. In none of these cases was the Secretary of State's consent made subject to Parliamentary scrutiny.
7. In our view, paragraphs 2B and 7B do not depart significantly from the type of consent provisions which are already contained in Schedule 5. The existing consent provisions deal with several distinct issues: the functions of Ministers of the Crown, the functions of the Comptroller and Auditor General, and the boundaries of police areas. They therefore serve different purposes, and vary in the extent of their application. We do not believe that the consent provisions relating to the right to buy and right to acquire depart significantly in type from those which already appear in Schedule 5.
8. For these reasons, we consider article 2(2) and (3) of the draft Order to be within the powers conferred by section 95(1) of the 2006 Act. That is also the view of the Welsh Assembly Government.

**Wales Office**  
**18 February 2009**

## Appendix 2

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### S.I. 2008/3195: memorandum from the Department for Work and Pensions

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|---|
| <b><i>Social Security (Housing Costs Special Arrangements) (Amendment and Modification) Regulations 2008 (S.I. 2008/3195)</i></b> |
|---|

1. In its letter to the Department of 4 February, the Joint Committee requested a memorandum on the following points:

*This instrument adopts a gender-neutral drafting style. Explain—*

- (a) *why the particular technique of using both masculine and feminine pronouns has been used (“he or she” and “his or her”), notwithstanding section 6 of the Interpretation Act 1978; and*
  - (b) *given the use of that technique—*
    - (i) *the apparent lack of internal consistency in regulation 8(2); and*
    - (ii) *its application by regulations 6(a) and 11(b) to provisions deemed to be inserted into an instrument that otherwise relies on section 6 of the 1978 Act.*
2. The Department’s response to each of the Committee’s points is outlined below.
  - (1) While the Department acknowledges that using both masculine and feminine pronouns is, in this context in which they appear in this instrument, unnecessary in view of section 6 of the Interpretation Act 1978, the drafting technique of “he or she” and “his or her” were used in some places in the instrument to avoid cumbersome repetition, to make the instrument more accessible to female readers and to stay within the spirit of gender neutral drafting.
  - (2) The Department accepts, however, that an inconsistent approach was adopted in the drafting of regulation 8(2) and (3). It also accepts, on reflection, that it would have been preferable if the “his or her” formulation had not been adopted in the modifications to the Jobseeker’s Allowance Regulations 1996 (S.I. 1996/207) made by regulations 6(a) and 11(b) of S.I. 2008/3195.
  - (3) The Department considers that no ambiguity arises concerning the meaning and effect of this instrument in consequence of these matters, but nonetheless intends to amend this instrument at the first suitable opportunity.

**Department for Work and Pensions**

10 February 2009

## Appendix 3

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### S.I. 2009/34: memorandum from the Department for Communities and Local Government

**Home Information Pack (Amendment) Regulations 2009 (S.I. 2009/34)**

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

*In the light of the final sentence in paragraph 7.3 of the Explanatory Memorandum (and paragraphs 1.1 to 1.6 of the Committee’s First Report of this Session), explain whether the Department has made arrangements for copies of this instrument to be made available free of charge to all known recipients of S.I. 2008/3107, as appears to be called for by paragraph 3.4.11 of Statutory Instrument Practice. If not, explain why not. If so, explain why the instrument does not bear a headnote to that effect (see paragraph 3.4.14 of Statutory Instrument Practice).*

2. S.I. 2008/3107 amends the Home Information Pack (No.2) Regulations 2007 (S.I. 2007/1667) (“the principal Regulations”) to provide for the inclusion of a property information questionnaire (“PIQ”) within the home information pack, which must be provided by sellers of houses to potential buyers. S.I 2008/3107 (“the amending Regulations”) makes provision for the content of the PIQ and where it must appear within the home information pack. On reviewing the amending Regulations, it was noticed that a supplementary policy objective was required; namely, that the PIQ be provided from the first moment the house is marketed. Without this the provision of useful information to potential buyers may have been delayed. S.I. 2009/34 was made to avoid this possibility.
3. The amending Regulations operated so as to provide for the inclusion of a PIQ within the home information pack. S.I. 2009/34 further amended the principal Regulations to ensure that the supplementary policy objective was achieved. For these reasons the Department was of the view that S.I. 2009/34 did not involve the correction of a defective instrument.
4. However, in light of paragraphs 1.1 to 1.6 of the Committee’s First Report of this Session (and in particular paragraph 1.4 of that Report), the Department accepts that S.I. 2009/34 should have been made available free of charge and has accordingly now made arrangements to ensure that this occurs.

10 February 2009

**Department for Communities and Local Government**