House of Lords
House of Commons

Joint Committee on Statutory Instruments

Eleventh Report of Session 2009-10

Drawing special attention to:

Exeter and Devon (Structural Changes) Order 2010 ***(Draft SI)***
Norwich and Norfolk (Structural Changes) Order 2010 ***(Draft SI)***
Criminal Procedure Rules 2010 ***(S.I. 2010/60)***
Infrastructure Planning (Compulsory Acquisition) Regulations 2010 ***(S.I. 2010/104)***
Employee Study and Training (Procedural Requirements) Regulations 2010 ***(S.I. 2010/155)***
Employee Study and Training (Eligibility, Complaints and Remedies) Regulations 2010 ***(S.I. 2010/156)***
Coroners and Justice Act 2009 (Commencement No. 3 and Transitional Provision) (Amendment) Order 2010 ***(S.I. 2010/186)***

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Joint Committee on Statutory Instruments

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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.

Remit

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

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

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

The Committee usually meets weekly when Parliament is sitting.

Publications

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

Committee staff

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

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Instruments reported

At its meeting on 17 March 2010 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to seven 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 Draft S.Is: Reported for doubt whether orders could lawfully be made, an unexpected use of power, requiring elucidation and failing to accord with proper legislative practice

Exeter and Devon (Structural Changes) Order 2010 (Draft SI)
Norwich and Norfolk (Structural Changes) Order 2010 (Draft SI)

1.1 **The Committee draws the special attention of both Houses to each of these draft orders on the grounds that, if they are approved and made, there will be a doubt as to whether they would be lawfully made; that in one respect in particular they would represent an unexpected use of the power conferred by the enabling Act; that in one respect their purport requires elucidation; and that in one respect they fail to accord with proper legislative practice.**

1.2 These orders form part of a series of orders under Part 1 of the Local Government and Public Involvement in Health Act 2007. Other orders in the series have also been noteworthy (see this Committee's 8th Report (Cornwall and Shropshire) and 14th Report (Bedfordshire) for 2007-08).

The draft orders

1.3 The orders are to implement proposals for a single tier of local government for the cities of Exeter and Norwich. The proposals were made by Exeter City Council and Norwich City Council respectively. The orders' legislative context and policy background are set out in the Explanatory Memorandum laid with the drafts (sections 4 and 7 in particular). Each order is expressed to come into force on the day after that on which it is made. But under article 3(1), (4) and (5) it is not until 1 April 2011 that Exeter and Norwich cease to be part of the counties of Devon and Norfolk respectively; that Exeter and Norwich City Councils become the sole principal councils for Exeter and Norwich respectively; and that the Exeter and Norwich county electoral divisions cease to exist.

1.4 Article 11 of each order cancels the relevant city council elections due to take place in May 2010. The last date under electoral law for giving notice of those elections is 29 March 2010 and the government's intention is that these orders will, if approved in draft, be made and come into force before that date.

Judicial review proceedings

1.5 As appears from the memorandum from the Department of Communities and Local Government, printed at Appendix 1, the relevant county councils have begun judicial

review proceedings to challenge the decisions of the Secretary of State to which those orders are to give effect. There is to be a hearing on 28 and 29 April 2010 of both the application for permission to apply for a judicial review and, if permission is given, of the substantive application itself. The main points at issue are set out in the Department's memorandum. They relate more to the rationality and procedural propriety of the decisions than to the scope of the powers conferred by the 2007 Act.

1.6 No doubt the bringing of these proceedings came as little surprise to the Department. Correspondence between the Secretary of State and the Permanent Secretary to his Department, printed at Appendix 1 to the 12th Report for the current session of the House of Lords Merits of Statutory Instruments Committee, reveals that the clear legal advice to the Department was that the risk of decisions for a unitary Exeter and Norwich being successfully challenged in judicial review proceedings was very high; and that there was every likelihood of such proceedings being commenced.

1.7 It is for the court, not this committee, to decide whether or not the decisions to implement the proposals for a unitary Exeter and Norwich were lawful. But if the court finds those decisions unlawful (and that must at least be a possibility) the legal basis for these orders will be undermined, even if the orders are ones which might validly have been made had the proposals been handled differently. **Accordingly, there is a doubt as to whether the orders, if approved and made, would be lawfully made, and the Committee reports accordingly. It is for each House to decide whether or not to approve these draft orders. But the Houses should be in no doubt as to the proposition which the Secretary of State puts to them. It is that they should approve legislation implementing decisions which the Secretary of State himself is advised may well be successfully challenged in the courts.**

Cancellation of elections

1.8 There is a particular difficulty with the cancellation of the city council elections due to be held in May 2010. If the court decides that the decisions to implement the unitary proposals were flawed, it will be too late to restore the elections which will have been cancelled. The terms of office of many of the existing members will come to an end in the normal way, leaving some wards considerably under-represented until the vacancies can be filled by by-elections. **The making of an order which contains article 11(1) is, in these circumstances, an unexpected use of the power, whatever the eventual outcome of the judicial review proceedings.**

Article 5 – transitional functions of the Implementation Executive

1.9 Article 5 provides for certain transitional functions. It reads:

> "5.-(1) The other transitional functions which are to be exercisable.....are—
>
> a) the existing executive and non-executive functions of [the city and county councils]; and
>
> b) such other functions.....,
>
> as..... the Secretary of State specifies."

1.10 It seemed to the Committee that either "such of" was missing at the beginning of sub-paragraph (a), or that the words from "as" to the end should have been part of sub-paragraph (b). In other words, either the wording or the layout had gone astray, and it was not clear which. It appears from the memorandum at Appendix 1 that it is the former. **Article 5(1) is reported as requiring the elucidation provided by the Department in its memorandum.**

Preamble

1.11 The preamble to draft affirmative instruments, when laid before Parliament, recites the conditions which must be fulfilled before the instrument can be made, in accordance with paragraph 2.4.7 of the Statutory Instrument Practice. This includes the approval of both Houses, where that approval is required, even though the approval has not been given at the time of laying the draft. This recital is additional to the italicised heading at the top of the first page which shows the provision under which the draft is laid for approval. The recital is missing from this draft, though the Department does not indicate whether this is due to oversight or to premonition. **The Committee reports the preamble for failure to comply with proper legislative practice.**

2 S.I. 2010/60: Reported for not according with proper legislative practice

Criminal Procedure Rules 2010 (S.I. 2010/60)

2.1 **The Committee draws the special attention of both Houses to these Rules on the ground that in one repeated respect they do not conform with proper legislative practice.**

2.2 These Rules consolidate and amend earlier ones. The constituent Parts in these Rules are numbered consecutively and reflect the ordering of Parts in the earlier Rules, but Parts 9, 23 to 26, 38, 46 and 51 in these Rules are redundant and have no content. The Committee asked the Ministry of Justice for an explanation as to why the opportunity was not taken to number each Part consecutively with an indication in each renumbered part of the predecessor Part (for example by means of a footnote or the type of brackets used in these Rules for non-operative text).

2.3 In a memorandum printed at Appendix 2 the Department provides a detailed and well argued explanation as to why such action was not taken in these Rules. In principle the aim is to assist publishers and users of the Rules by keeping with familiar numbering until more radical revision and simplification is consolidated in rules hoped to be made no later than 2015. At that point the Criminal Procedure Rule Committee (which made these Rules) intends to renumber the constituent Parts of the Rules, incorporating notes to indicate the provenance of each Part, precisely as the Committee suggested.

2.4 The general principle that legislation should not include empty provisions appears to be axiomatic in relation to primary legislation ("Every section of an Act takes effect as a substantive enactment without introductory words" - Interpretation Act 1978, section 1)

and is recognised by the Committee in relation to secondary legislation (see for example part of the reasoning in paragraph 1.4 of the Committee's 23rd Report of Session 2007-08). The Committee considers that deviation therefore calls for convincing argument either that it should not be a general principle or that the particular instrument falls within a clearly identifiable and exceptional class to which the general principle should not apply.

2.5 The Committee recognises that the identified purpose of including the redundant numbering was well intentioned and considered at length, and also that there is no lack of clarity in the way that the Rules are set out. It notes also that the Department does not appear to dissent from the general principle, for it records the intention to adhere to it in a planned later consolidation.

2.6 It follows that the question for the Committee to address is whether this instrument can be considered as falling within an exceptional class to which the general principle should not apply. In that respect there are, in the Committee's view implications from the Department's argument that render it impossible as things stand for the Committee to conclude that there should be such a class at all, let alone whether these Rules should fall within it.

2.7 The first is that an indication that the inclusion of empty provisions is to be temporary is (as the Department recognises) no more than a hope. Those responsible for relevant legislation, at the time renumbering is now expected, may have other priorities. The Committee has to examine the Rules as they are now, not on the basis of how they may come to be changed.

2.8 The second is that, while the Committee has no reason to dispute the proposition that familiarity of numbering helps users initially, there is also no reason to assume that they will not become equally familiar with new numbering, particularly if there is an indication of the derivation of the Parts newly numbered. That point is reinforced rather than lessened by the statement, in paragraph 6 of the memorandum, that the principal users of the rules are legal practitioners.

2.9 The third is that considerateness to publishers could have been equally met by amendments to previous Rules backed if desired by an unofficial consolidated version.

2.10 It follows that the Committee is not persuaded that a case for exceptional treatment has been convincingly made. **The Committee accordingly reports these Rules on the ground that the inclusion of empty Parts in them does not conform with proper legislative practice.**

3 S.I. 2010/104: Reported for defective drafting

Infrastructure Planning (Compulsory Acquisition) Regulations 2010 (S.I. 2010/104)

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

3.2 Regulation 3 and Form A in Schedule 1 prescribe the form for a notice under section 127(7) of the Planning Act 2008. In a memorandum printed at Appendix 3 the Department for Communities and Local Government acknowledges that—

- the second paragraph of the notice wrongly assumes it is necessarily the Secretary of State who is to be satisfied as to the matters referred to in that paragraph, whereas by virtue of section 127(1)(c) of the Act the "decision-maker" needs to be so satisfied – that term is defined in section 103(2) of the Act and in certain circumstances means the relevant Panel or the Council of the Infrastructure Planning Commission;

- while the third, fourth and fifth paragraphs of the notice, which refers to the Secretary of State certifying under section 127(2) or (5) of the Act that the Secretary of State is satisfied as to certain matters, correctly identify the matters relevant to section 127(2) (which are set out in section 127(3)), they erroneously omit to identify the matters relevant to section 127(5) (which are set out in section 127(6)).

3.3 The Department plans to rectify the position in regulations anticipated within 12 months. **The Committee accordingly reports Form A in Schedule 1 for defective drafting in the above two respects, acknowledged by the Department.**

4 S.I. 2010/155 and 156: Reported for defective drafting

Employee Study and Training (Procedural Requirements) Regulations 2010 (S.I. 2010/155)
Employee Study and Training (Eligibility, Complaints and Remedies) Regulations 2010 (S.I. 2010/156)

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

4.2 Both sets of Regulations are made under enabling powers inserted into the Employment Rights Act 1996 by section 40 of the Apprenticeships, Skills, Children and Learning Act 2009. S.I. 2010/303 provides for the commencement of section 40 on 6 April 2010 except in relation to employers employing fewer than 250 employees ("small employers") and their employees, and for section 40 to come into force on 6 April 2011 to the extent that it is not already in force.

4.3 These Regulations come into force on 6 April 2010 and apply in respect of employers and employees: there is nothing on the face of the Regulations which excludes small employers and their employees before the enabling power in respect of them comes into

force on 6 April 2011. The Committee therefore asked the Department for Business, Innovation and Skills for an explanation as to how the Regulations were *intra vires* as respects such employers and their employees.

4.4 In a memorandum printed at Appendix 4 the Department for Business, Innovation and Skills states that it considers (and intends) that the Regulations have no application to small employers or their employees (as at 6 April 2010). The Department does not seek to argue that the Regulations are *intra vires* as respects such employers and employees as at 6 April 2010, but that the Regulations will apply (and be *intra vires*) to them as at 6 April 2011. The Department refers to the Explanatory Memorandum and its guidance on this topic. However, the Department does not address the point that *the Regulations themselves* are drafted in such a way as purportedly to apply in respect of all employers and employees with effect from the commencement date of 6 April 2010, including small employers and their employees. The Regulations should have included suitable provision excluding the latter category from the scope of the Regulations before 6 April 2011. The absence of any such provision in the Regulations results in the Regulations purporting to extend beyond their enabling powers and it appears clear that any such extension is in strict legal terms a nullity. Accordingly, so far as effect is concerned, the Committee —

- agrees with the Department that, as a matter of law, the material in the Regulations, notwithstanding the lack of express exclusion, cannot at present apply to small employers and their employees, and
- accepts on balance that it would be in line with existing case law for the material to apply to them from 6 April 2011 onwards (though it would encourage the Department to re-examine the Regulations with a view to a free issue amendment aimed at achieving the correct effect expressly).

4.5 **The Committee accordingly reports these Regulations for defective drafting resulting from the failure to provide for a temporary exclusion of small employers and their employees.**

5 S.I. 2010/186: Reported for failure to comply with *Statutory Instrument Practice*

Coroners and Justice Act 2009 (Commencement No. 3 and Transitional Provision) (Amendment) Order 2010 (S.I. 2010/186)

5.1 **The Committee draws the special attention of both Houses to this Order on the ground that it fails to comply with *Statutory Instrument Practice*.**

5.2 This Order corrects an error in the Schedule to an earlier instrument. In a memorandum printed at Appendix 5 the Northern Ireland Office acknowledges that this Order should have been made available free of charge to all known recipients of the earlier instrument, and should have borne an italic headnote to that effect, in accordance with paragraphs 3.4.11 and 3.4.14 of *Statutory Instrument Practice*. The Department has now taken steps to rectify the position, one of which is to arrange for any reprints to carry the appropriate headnote. It would also be desirable for reprints (plus the web version and the

Annual Edition) to omit the obviously superfluous term "(Amendment)" in the title of the earlier instrument as identified in article 2. **The Committee accordingly reports this Order for a failure to comply with *Statutory Instrument Practice*, acknowledged by the Department.**

Instruments not reported

At its meeting on 17 March 2010 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported.

A memorandum from the Department for Children, Schools and Families in connection with the Children Act 2004 Information Database (England) (Amendment) Regulations 2010 (Draft S.I) is printed at Appendix 6.

Annex

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*

Draft Instruments requiring affirmative approval

•	**Draft S.I.**	Children Act 2004 Information Database (England) (Amendment) Regulations 2010
	Draft S.I.	Conditional Fee Agreements (Amendment) Order 2010
	Draft S.I.	Damages-Based Agreements Regulations 2010
	Draft S.I.	Financial Services and Markets Act 2000 (Liability of Issuers) Regulations 2010
		Legal Services Commission Funding Code: Criteria and Procedures
	Draft S.I.	National Assembly for Wales (Legislative Competence) (Housing and Local Government) Order 2010
	Draft S.I.	Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010
	Draft S.I.	Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010
	Draft S.I.	Northern Ireland Court Service (Abolition and Transfer of Functions) Order (Northern Ireland) 2010
	Draft S.I.	State Pension Credit Pilot Scheme Regulations 2010
	Draft S.I.	Youth Rehabilitation Order (Review by Specified Courts) Order 2010

Instruments subject to annulment

S.I. 2010/403	Business Rate Supplements (Accounting) (England) Regulations 2010
S.I. 2010/404	Building (Local Authority Charges) Regulations 2010
S.I. 2010/405	National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administration Arrangements) (England) (Amendment) Regulations 2010

S.I. 2010/408	Non-Domestic Rating (Unoccupied Property) (England) (Amendment) Regulations 2010
S.I. 2010/412	National Health Service (Performers Lists) Amendment Regulations 2010
S.I. 2010/420	Fish Labelling (England) Regulations 2010
S.I. 2010/423	National Health Service (Strategic Health Authorities: Further Duty to Involve Users) Regulations 2010
S.I. 2010/424	Welfare Reform Act 2009 (Section 26) (Consequential Amendments) Regulations 2010
S.I. 2010/426	Social Security (Maximum Additional Pension) Regulations 2010
S.I. 2010/427	Rail Vehicle Accessibility (Applications for Exemption Orders) Regulations 2010
S.I. 2010/428	Welsh Ministers (Transfer of Fire and Rescue Service Equipment) Order 2010
S.I. 2010/430	Severn Bridges (Amendment) Regulations 2010
S.I. 2010/431	Police Pensions (Amendment) Regulations 2010
S.I. 2010/432	Rail Vehicle Accessibility (Non-Interoperable Rail System) Regulations 2010
S.I. 2010/433	Natural Mineral Water, Spring Water and Bottled Drinking Water (England) (Amendment) Regulations 2010
S.I. 2010/434	Healthy Start Scheme and Welfare Food (Amendment) Regulations 2010
S.I. 2010/436	Trade Union Ballots and Elections (Independent Scrutineer Qualifications) (Amendment) Order 2010
S.I. 2010/437	Recognition and Derecognition Ballots (Qualified Persons) (Amendment) Order 2010
S.I. 2010/440	Registration of Civil Partnerships (Fees) (Amendment) Order 2010
S.I. 2010/441	Registration of Births, Deaths and Marriages (Fees) Order 2010
S.I. 2010/442	Social Security (Persons Serving a Sentence of Imprisonment Detained in Hospital) Regulations 2010
S.I. 2010/444	Social Security (Notification of Changes of Circumstances) Regulations 2010
S.I. 2010/445	Tobacco Advertising and Promotion (Display) (England) Regulations 2010
S.I. 2010/446	Tobacco Advertising and Promotion (Specialist Tobacconists) (England) Regulations 2010
S.I. 2010/447	Education (Student Support) (European University Institute) Regulations 2010

S.I. 2010/449	Motor Vehicles (Tests) (Amendment) Regulations 2010
S.I. 2010/451	Road Vehicles (Registration and Licensing) (Amendment) Regulations 2010
S.I. 2010/452	Public Service Vehicles (Operators' Licences) (Amendment) Regulations 2010
S.I. 2010/454	Local Authorities (Capital Finance and Accounting) (Amendment) (England) Regulations 2010
S.I. 2010/455	Goods Vehicles (Licensing of Operators) (Amendment) Regulations 2010
S.I. 2010/456	Central Rating List (England) (Amendment) Regulations 2010
S.I. 2010/457	Public Service Vehicles (Operators' Licences) (Fees) (Amendment) Regulations 2010
S.I. 2010/459	Travel Concessions (Eligibility) (England) Order 2010
S.I. 2010/464	Goods Vehicles (Licensing of Operators) (Fees) (Amendment) Regulations 2010
S.I. 2010/468	Social Security Pensions (Low Earnings Threshold) Order 2010
S.I. 2010/473	Postgraduate Medical Education and Training Order of Council 2010
S.I. 2010/474	General Medical Council (Constitution of Panels and Investigation Committee) (Amendment) Rules Order of Council 2010
S.I. 2010/475	General Medical Council (Applications for General Practice and Specialist Registration) Regulations Order of Council 2010
S.I. 2010/476	General Medical Council (Registration Appeals Panels Procedure) Rules Order of Council 2010
S.I. 2010/479	Health Professions Council (Registration and Fees) (Amendment) Rules Order of Council 2010
S.I. 2010/504	Lowestoft Sixth Form College (Incorporation) Order 2010
S.I. 2010/505	Lowestoft Sixth Form College (Government) Regulations 2010
S.I. 2010/527	Qualifications and Curriculum Development Agency's Remit Order 2010

Instruments subject to annulment (Northern Ireland)

S.R. 2010/46	Police and Criminal Evidence (Application to the Police Ombudsman) (Amendment) Order (Northern Ireland) 2010
S.R. 2010/47	Police (Unsatisfactory Performance and Attendance) Regulations (Northern Ireland) 2010
S.R. 2010/49	Rules of the Court of Judicature (Northern Ireland) (Amendment) 2010

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2010/443	Pensions Act 2004 (Commencement No. 14) Order 2010
S.I. 2010/466	Finance Act 2009, Schedule 56 (Appointed Day and Consequential Provisions) Order 2010
S.I. 2010/467	Pensions Act 2008 (Commencement No. 6) Order 2010
S.I. 2010/469	Violent Crime Reduction Act 2006 (Commencement No. 8) Order 2010
S.I. 2010/477	General Medical Council (Marking of the General Practitioner Register) Regulations Order of Council 2010
S.I. 2010/478	General and Specialist Medical Practice (Education, Training and Qualifications) Order 2010 (Commencement No.1) Order of Council 2010
S.I. 2010/507	Policing and Crime Act 2009 (Commencement No. 4) Order 2010

Appendix 1

1 Draft S.Is: memorandum from the Department for Communities and Local Government

Exeter and Devon (Structural Changes) Order 2010 (Draft SI)
Norwich and Norfolk (Structural Changes) Order 2010 (Draft SI)

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

"1. Why does the preamble not contain a recital of the approval of a draft of the order by resolution of each House of Parliament?"

2. Reference to the need for approval of the drafts by resolution of each House is included in italics at the top of the draft instruments. If each House does approve the instruments, the italicised reference will be removed and replaced with the appropriate recital in the preamble to the signature copies of the instruments.

"2. In view of the absence of the words "such of" or similar words at the beginning of sub-paragraph (a) of article 5(1), is sub-paragraph (a) intended to be qualified by the words "as, by any of the means…" to "Implementation Executive"?"

3. Yes. In the view of the Department this is the natural interpretation of article 5(1). If the words in the full-out after sub-paragraph (b) of article 5(1) had been intended to qualify only that sub-paragraph, the structure of the article would have been different – for instance, rather than being in the full-out, they would have been within sub-paragraph (b) itself. The Department accepts that it would have been clearer if sub-paragraph (a) included the words "such of" or similar.

"3. It appears from correspondence made available by Ministers (Hansard, Col 228WH, 2 March 2010) that the Department's clear legal advice is that the risk of the decisions to which these orders give effect being successfully challenged in judicial review proceedings is very high. Is the position now that the first steps have been taken in such proceedings, with a hearing due on 26th April? If not, what is the current position?"

4. On the 22nd February 2010 judicial review proceedings were issued by Norfolk and Devon County Councils challenging the decision of the Secretary of State to implement a proposal for unitary local government in Exeter and in Norwich. The request for permission together with the hearing, if permission is granted, is listed for hearing on the 28th and 29th April 2010.

"4. Which decisions or other actions are being challenged in those proceedings and on what grounds?"

5. The decision that has been challenged is as set out above. The grounds for the challenge are:

   i that the Secretary of State failed to comply with his statutory duty to consult in relation to the proposals being implemented;

   ii that the Secretary of State failed to give effect to the Claimants' legitimate expectation that he would follow a particular approach when reaching decisions;

   iii that the decisions of the Secretary of State are irrational;

   iv that the Secretary of State appears, absent any reasonable explanation, to have predetermined the matter;

   v that the Secretary of State failed to give adequate reasons for his decisions;

   vi that the Secretary of State acted in a manner that was procedurally unfair; and

   vii that the Secretary of State acted in a manner contrary to the ministerial code.

   "5. When is the last date by which notice of the elections referred to in article 11 must be given?"

6. The last date for the notice to be given is the 29th March 2010.

   "6. If these orders are approved in draft, is it intended to make them before that date?"

7. Yes, it is the intention to make the orders before 29th March 2010.

   "7. If these orders are intended to be made before the outcome of the judicial review proceedings is known, what is to happen to the timetable for the elections referred to in Article 11 if the court finds the decisions to which the orders give effect to be unlawful?"

8. If the Court finds the decisions to which the orders give effect unlawful, and as a consequence quashes the orders prospectively with effect from the date of quashing, the terms of office of those councillors who would, but for the orders, have retired, will come to an end on that date. The effect of this will be to create vacancies in the wards of those councillors, and the local authorities will arrange for elections to be held so that these vacancies can be filled. It is intended that arrangements for such elections would be put in place immediately following the judgment, if the orders are quashed.

9. The Court was informed of these issues at a directions hearing on the 25th February 2010, and accepted as a possible scenario when it set the date for the hearing referred to above.

5th March 2010
Department for Communities and Local Government

Appendix 2

2 S.I. 2010/60: memorandum from the Ministry of Justice

Criminal Procedure Rules 2010 (S.I. 2010/60)

1. The Committee has requested a memorandum on the following point:

> *As indicated in paragraphs 7.1 and 8.1 of the Explanatory Memorandum, there is no content to Parts 9, 23 to 26, 38, 46 and 51, a factor being matching the Parts that these Rules replace. Explain why the opportunity was not taken to number each Part consecutively with an indication in each renumbered Part of the predecessor Part (for example by way of a footnote or the type of brackets used in these Rules for non-operative text).*

2. The paragraphs of the Explanatory Memorandum to which the Committee's request refers read as follows:

> "When it made the Criminal Procedure Rules 2005, the Committee declared its intention to effect after 5 years a legislative consolidation of those Rules with such amendments as had been made by then. This is that consolidation. The Committee intends to effect further such consolidations at regular intervals in future. In response to representations that it received (see paragraph 8.1 below), the Committee decided for the time being not to renumber the constituent Parts of the Rules, leaving some empty. … On the desirability of making consolidated rules, and in particular on the possibility of doing so again at intervals in future, the Rule Committee consulted with members of the judiciary, with bodies representing the legal professions, with commercial publishers of the text of the Criminal Procedure Rules, with the Parliamentary Committees charged with their scrutiny, and with relevant government departments and agencies. No opposition was expressed to consolidation in principle. Several of those consulted endorsed the Rule Committee's view that it would be important to identify in what respect, if any, consolidated rules amended the rules that they replaced; and that it would be appropriate to use for that purpose the Explanatory Note and the Explanatory Memorandum published with the consolidated Rules. Some publishers cautioned against any significant re-arrangement of the Rules, for example by renumbering the constituent Parts to accommodate the omission of those that had become redundant."

3. The Rule Committee intends in due course to renumber the constituent Parts of the Criminal Procedure Rules, incorporating notes to indicate the provenance of each Part thus removed, precisely as the Committee's question suggests. However, as the Explanatory Memorandum indicates, the Rule Committee intends also to continue to pursue a progressive revision and simplification of the Rules, and to effect further consolidations at regular intervals in future. In the course of consulting on such further

consolidation, the Rule Committee observed, reflecting comments that had already by then been made:

> "If each year, or frequently, among other changes to the Criminal Procedure Rules the Rule Committee were to alter the numbering of the constituent Parts, or of rules within those Parts, to accommodate the introduction of new rules or the removal of rules that had become superfluous, then another potential disadvantage would be the confusion that that might cause. Users expecting to find the rules on a particular subject in a familiar place would find themselves distracted by the need to search elsewhere for those rules, if only within the confines of the same instrument. External references to those Parts or rules, in other publications for example, would become out of date. Thus the ready accessibility of the Rules might be compromised rather than advanced. It is suggested that where the Rule Committee could not avoid renumbering or moving rules or Parts then the explanation of the amendments should include a destination table showing at a glance their former and new numbers or positions. Better still, no doubt, would be as soon as possible to achieve a settled 'geography' for the Criminal Procedure Rules within which it would be possible for the Rule Committee to make such amendments as were required while still maintaining the familiar arrangement of the constituent Parts, at least, and, as far as possible, that of individual rules."

4. The Rule Committee hopes that such a settled 'geography' will be accomplished by no later than the anticipated making of the Criminal Procedure Rules 2015 (on the tenth anniversary of the making of the first Rules). It hopes that, by then, a reduction in the number of operative Parts, from the present 68 to about 50, will have been achieved, by revision, simplification and consolidation; and thereafter will endure. It intends to maintain intact the existing framework of the Rules, by which the constituent Parts are arranged in eleven divisions (General matters; Preliminary proceedings; Custody and bail; Disclosure; Evidence; Trial; Sentencing; Confiscation and related proceedings; Contempt of court; Appeal; and Costs).

5. It is not a function of the Rule Committee to facilitate accurate commercial reproduction of the Criminal Procedure Rules as an end in itself. However, the Rule Committee perceives it as implicit in the duty to promote the accessibility of the criminal justice system that is imposed upon it by Parliament, under section 69(4) of the Courts Act 2003, that it should promote ready access to the Rules, having due regard to the means by which they are in practice distributed. Their commercial publication, in particular in the principal practitioners' textbooks and on the principal practitioners' websites, is one of the more important means by which the Rules are disseminated. In response to its consultation, the Rule Committee received representations from practitioner editors and publishers urging it not to renumber incrementally the Parts of the Rules, giving examples of practical difficulties for their publication that doing so might entail, and of the risks that it would present to maintaining the accuracy of cross-references and the citation of relevant case law. Rather, it was suggested, any general renumbering should await the conclusion of the Rule Committee's intended further revisions.

6. The Rule Committee acceded to those representations. It was impressed also by the argument that legal practitioners, who are in practice the principal users of the Rules, would not be well served by incremental renumbering, no matter by what device derivations might be explained. It is hoped that its decision to postpone renumbering to a later date, when it expects to do so once and comprehensively, strikes the right balance between, on the one hand, coherence within the Criminal Procedure Rules, read in isolation, and, on the other, their practical use and accessibility within the context in which they are in fact used.

Ministry of Justice
9th March, 2010

Appendix 3

3 S.I. 2010/104: memorandum from the Department for Communities and Local Government

Infrastructure Planning (Compulsory Acquisition) Regulations 2010 (S.I. 2010/104)

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

"With reference to Form A in Schedule 1, explain—
(a) why paragraph 2 refers only to the Secretary of State, given section 127(1)(c) of the Planning Act 2008 which refers to "the decision-maker"; and
(b) why, given section 127(5) of that Act, the Form does not include wording in square brackets apt to cover that the Secretary of State is satisfied of the matters set out in section 127(6)".

2. With reference to point (a) above, it is accepted that paragraph 2 of Form A in Schedule 1 should refer not only to the Secretary of State but also to the other potential decision-makers, namely the Panel that has the function of deciding the application and the Council of the Commission.

3. With reference to point (b) above, it is accepted that Form A in Schedule 1 should include wording in square brackets apt to cover that the Secretary of State is satisfied of the matters set out in section 127(6).

4. As these points do not affect the substantive operation of section 127 and the authorisation of the compulsory acquisition of statutory undertakers' land or new rights over it, it is considered that these errors will have minimal impact. Appropriate amendments will be brought forward in future regulations made in respect of the Infrastructure Planning Commission. It is anticipated that the next such regulations will be made within 12 months.

9th March 2010
Department for Communities and Local Government

Appendix 4

4 S.Is 2010/155 and 156: memorandum from the Department for Business, Skills and Innovation

Employee Study and Training (Procedural Requirements) Regulations 2010 (S.I. 2010/155)
Employee Study and Training (Eligibility, Complaints and Remedies) Regulations 2010 (2010/156)

1. This Memorandum has been prepared by the Department for Business, Innovation and Skills and contains information for the Joint Committee on Statutory Instruments.

2. By letter dated 3rd March 2010, the Committee requested the Department to submit a memorandum on the following point in relation to the above regulations—

   Given that S.I. 2010/303 provides for section 40 of the Apprenticeships, Skills, Children and Learning Act 2009 to come into force in two stages, explain how these Regulations which come into force on 6 April 2010 are intra vires as respects employers employing fewer than 250 employees and their employees.

3. The Employee Study and Training (Procedural Requirements) Regulations 2010 (S.I. 2010/155) and the Employee Study and Training (Eligibility, Complaints and Remedies) Regulations 2010 (S.I. 2010/156) (together "the Regulations") set out certain procedural matters relating to an employee's right to make an application under section 63D of the Employment Rights Act 1996 ("the 1996 Act") to enable the employee to spend time undertaking study or training. The Regulations are made under sections 63E(4)(c), 63E(5)(a), 63F(3) and (4), 63H(3), 63I(3)(b) and 63J(3) of the 1996 Act.

4. These sections were inserted into the 1996 Act by section 40 of the Apprenticeships, Skills, Learning and Children Act 2009 ("the 2009 Act"). Under the provisions of the Apprenticeships, Skills, Children and Learning Act 2009 (Commencement No. 2 and Transitional and Saving Provisions) Order 2010 (S.I. 2010/303), section 40 comes into force on 6 April 2010 for all purposes except in relation to small employers (employers employing fewer than 250 employees) and their employees. Section 40 comes into force in relation to small employers and their employees on 6 April 2011.

5. The Department considers (and intends) that the Regulations have no application to small employers or their employees as at 6 April 2010. The substantive provisions in

section 40, and the ancillary procedural provisions contained in the Regulations, apply in the first instance (from 6 April 2010) only to large employers and their employees. Section 40, and so the Regulations, will not apply in relation to small employers and their employees, until 6 April 2011.

6. In the circumstances, the Department does not seek to argue that the Regulations are *intra vires* as respects small employers and their employees as at 6 April 2010. The Regulations will, however, apply (and be *intra vires*) to such employers and employees as at 6 April 2011, when the parent primary legislation comes into force in its entirety.

7. The Department's guidance on the new statutory right for both employers[1] and employees[2] makes clear that the right applies from 6 April 2010 only for employees who work in an organisation with 250 or more employees. In addition, paragraph 4.1 of the Explanatory Memorandum relating to the Regulations stated that section 40 of the 2009 Act would be commenced only for large employers in 2010.

Department for Business, Innovation and Skills
8th March 2010

[1] http://online.businesslink.gov.uk/bdotg/action/ruDetail?r.l1=1073858787&topicType=1&r.lc=en&r.l3=1084207995&r.l2=1073858926&type=REGUPDATE&itemId=1084526665

[2] http://www.direct.gov.uk/timetotrain

Appendix 5

5 S.I. 2010/186: memorandum from the Northern Ireland Office

Coroners and Justice Act 2009 (Commencement No. 3 and Transitional Provision) (Amendment) Order 2010 (S.I. 2010/186)

1. The Committee has asked the Department to submit a memorandum on the following point:

> *Has the Department made arrangements (in accordance with paragraph 3.4.11 of Statutory Instrument Practice) for copies of this instrument to be made available free of charge to all known recipients of S.I. 2010/145? If not, explain why not. If so, explain why this instrument does not bear a headnote to that effect (see paragraph 3.4.14 of Statutory Instrument Practice).*

2. The Department has now made arrangements for copies of this instrument to be made available free of charge to all known recipients of S.I. 2010/145. The Department regrets the oversight and arrangements have also been made to refund persons who have paid for this S.I. and any future reprints will carry the header.

Northern Ireland Office
8 March 2010

Appendix 6

6 Draft S.I.: memorandum from the Department for Children, Schools and Families

Children Act 2004 Information Database (England) (Amendment) Regulations 2010 (Draft SI)

The Committee has requested a memorandum on the following point:

Explain –

(a) in the light of the new definition inserted by regulation 3(c), which provision of section 12 of the Children Act 2004 is relied on as authorising regulation 7(3); and

(b) in the light of the remarks made by Baroness Ashton of Upholland at Report Stage in the House of Lords on the Children Bill on 5th July 2004 (Official Report Vol.663, col.586-7), why regulation 7(3) does not make an unexpected use of the power conferred by that provision.

1. It is submitted that the regulation is authorised by powers in section 12(4)(h) of the Children Act 2004 ("the 2004 Act"). Section 12(3) provides that :

   "A database under this section may only include information falling within subsection (4) in relation to a person to whom arrangements specified in subsection (1) relate."

   Section 12(4) provides that-

   "The information referred to in subsection (3) is information of the following descriptions in relation to a person- …
   (h) information of such other description, not including medical records or other personal records, as the Secretary of State may by regulations specify."

2. The effect of the new definition inserted by regulation 3(c) and the amendment effected by regulation 7(3) is to amend the *Children Act 2004 Information Database (England) Regulations 2007* ("the 2007 Regulations") to enable the name and contact details of a child's natural parent who does not have parental responsibility ("PR") for, or care of, the child to be included in ContactPoint. This is in addition to the contact details of any other person who has PR for, or care of, the child (a matter already dealt with in the 2007 Regulations, in reliance on specific vires given by section 12(3)(c)). In practice, such a natural parent is most likely to be an unmarried father who does not live in the same family as the child. It is submitted that the name and contact details for a parent who does not have PR or care is clearly information "of such other description", within the scope of paragraph (h) of section 12(4).

3. When the provision in the Children Bill which became section 12 was debated in the House of Lords Baroness Ashton, speaking on behalf of the Government, said that express mention, within the specific vires in section 12(4)(c), of natural fathers who did not have PR for or care of their child would be unnecessary. This reflected the Government's policy at the time, which was not to include contact details for such parents in ContactPoint.

4. The residual vires in paragraph (h) was included in section 12(4) in the usual way, to ensure that changes of circumstance and developments in policy thinking might be addressed without the need for amendment to primary legislation. As was said in the explanatory note to the section, "the flexibility exists to require the inclusion of further basic data, for example to provide for future organisational change" (paragraph 73 of the *Children Act 2004 Explanatory Notes*). The only restriction on this residual vires relates to medical or personal records. This was added following the debate on Amendment 107 to address concerns that the directory should not include subjective information except as expressly provided for in paragraph (g). There is no breach of that restriction in the amending regulations which rely on this vires. It is submitted that reliance on section 12(4)(h) to make the current amendment is entirely within the clear meaning and anticipated use of this residual power.

5. Since the passage of the Children Bill, the Government's understanding of the important role that natural fathers can play in the upbringing of their children has developed. This is reflected in the *Children's Plan* (DCSF, 2007)[1] "Families are the bedrock of society and the place for nurturing happy, capable and resilient children. In our consultation, parents made it clear that they would like better and more flexible information and support that reflects the lives they lead. Our Expert Groups emphasised how important it is that parents are involved with policy affecting children and that **we need particularly to improve how government and services involve fathers**." [Emphasis added].

6. A research report commissioned by the Department for Children, Schools and Families - 'How Fathers can be better recognised and supported through DCSF Policy' by James Page, Dr. Gill Whitting and Carl Mclean (published November 2008)[2] - noted that the "difficulty identifying young and non-resident fathers was … a critical barrier to engagement with them across virtually all family services" (page 7). In 2008-9 the Department ran a "Think Fathers" campaign with the aim of encouraging local authorities and practitioners to address this issue and issues around engagement with fathers generally.

7. As ContactPoint was implemented with the Early Adopter Local Authorities and National Partners, it became apparent that it had potential to be a useful tool to

[1] http://www.dcsf.gov.uk/childrensplan/

[2] http://www.dcsf.gov.uk/research/programmeofresearch/projectinformation.cfm?projectid=15293&resultspage=1

support professionals' efforts to involve non-resident fathers with their children, if those fathers' contact details were included. Amendment of the 2007 Regulations to include information about the wider group of "parents" of a child will enable ContactPoint to operate more effectively as a central directory of basic information about the child that is capable of sign posting relevant agencies to those whom they may need to contact, in the child's interests.

8. This will contribute to fulfilling the wider policy objective of the ContactPoint directory, which is to ensure that services are provided in a joined- up way and involve all those who have a legitimate interest in a child's well-being. It is submitted that in the circumstances it is appropriate to rely on paragraph (h) of section 12(4) of the Act to enable ContactPoint to be adapted to reflect the Government's evolving policy on families.

9. The Department consulted on this issue as part of its consultation about other proposed changes to the regulations flowing from the experience of the Early Adopter Local Authorities and National Partners. The consultation responses were evenly split between those in favour of and those against the proposed amendment. Of the organisations that responded, and that will be using ContactPoint (mainly local authorities), the majority were in favour. Of those who were against (mostly parents), one appeared to have misunderstood that the proposal was to include case files for parents, rather than just contact details for all parents, another thought that the proposal was to include contact details for parents but not other carers and some others expressed concern that this amendment was solely for the administrative convenience of schools and not in the wider interests of children.

10. Since the passage of the Children Bill and the introduction of children's services authorities, understanding of the inter-action between the Children Act 1989 and the Education Acts has also developed. This is reflected in the efforts the department has made to support integration of services by using terminology in secondary legislation that is well-understood by all the department's external partners, wherever this is possible and consistent with the powers under which the instrument is made.

11. Although the policy objective could have been achieved by simply adding the natural father to paragraph (6) of Schedule 1, it was decided to adopt the inclusive definition of "parent" used in the Education Acts (see section 576 of the Education Act 1996) instead. Schools are one of the main providers of data to ContactPoint, so this drafting approach has the advantage of easing the administrative burden on schools as they can be certain that contact details they have for their own purposes about "parents" is exactly the same as the information they need to transfer to ContactPoint. They will no longer be required to strip out information about fathers who do not have PR for, or care of, their child.

Department for Children, Schools and Families
17 March 2010