House of Lords
House of Commons

Joint Committee on Statutory Instruments

Thirty-first Report of Session 2010-12

Drawing special attention to:

Airports Slot Allocation (Amendment) Regulations 2011 ***(S.I. 2011/1610)***
Education (Non-Maintained Special Schools) (England) Regulations 2011 **(S.I. 2011/1627)**
Turks and Caicos Islands Constitution Order 2011 **(S.I. 2011/1681)**
*Consular Fees (Amendment) Order 2011***(S.I. 2011/1691)**
Criminal Procedure Rules 2011 **(S.I. 2011/1709)**
*Court Funds Rules 2011***(S.I. 2011/1734)**
*Defence and Security Public Contracts Regulations 2011***(S.I. 2011/1848)**
*Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011***(S.I. 2011/2055)**
Plant Protection Products (Fees and Charges) Regulations 2011 **(S.I. 2011/2132)**
*Excise Goods (Holding, Movement and Duty Point) (Amendment) Regulations 2011***(S.I. 2011/2225)**

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Joint Committee on Statutory Instruments

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

Remit

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

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

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

The Committee usually meets weekly when Parliament is sitting.

Publications

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

Committee staff

The current staff of the Committee are John Whatley (*Commons Clerk*), Jane White (*Lords Clerk*) and Jennifer Steele (*Committee Assistant*). Advisory Counsel: Peter Davis, Peter Brooksbank, Philip Davies and Daniel Greenberg (*Commons)*; Allan Roberts, Nicholas Beach and Peter Milledge *(Lords)*.

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Statutory Instruments, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2026; the Committee's email address is: jcsi@parliament.uk.

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Instruments reported

At its meeting on 2 November 2011 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 ten 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. 2011/1610: Reported for defective drafting

Airports Slot Allocation (Amendment) Regulations 2011 (S.I. 2011/1610)

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 make temporary amendments of the Airports Slot Allocation Regulations 2006 (S.I. 2006/2665) ("the 2006 Regulations"). The amendments are aimed at enabling additional coordination of the allocation of airport slots to cope with the increase in demand on airports in the south-east of England which it is anticipated will be caused by the 2012 Olympic Games.

1.3 Regulation 4 makes provision for the Secretary of State to appoint a coordinator for an airport designated as a coordinated airport by reason of the Games. Paragraph (e) of regulation 4 inserts paragraph (9A) into regulation 4 of the 2006 Regulations. The inserted paragraph (9A) makes provision for the withdrawal of a coordinator's appointment if the Secretary of State is satisfied that a breach of paragraph (4) or (5) of regulation 4 has occurred. Paragraph (4) of regulation 4 of the 2006 Regulations provides that a person shall not be appointed as a coordinator unless the Secretary of State is satisfied that conditions as to impartiality and independence are met.

1.4 The Committee asked the Department for Transport to explain the intended meaning of the words "a breach of paragraph (4) .... has occurred" and how effect is given to that intention. In a memorandum printed at Appendix 1, the Department explains that the intention is that a coordinator's appointment may be terminated if the requirements of impartiality and independence are no longer satisfied. It also points out that a parallel mechanism was used to similar effect in paragraph (6) of regulation 4 of the 2006 Regulations without comment from the Committee.

1.5 The Committee considers that paragraph (4) of regulation 4 of the 2006 Regulations, read literally, does not impose continuing requirements of impartiality and independence. Its view of that paragraph (4) is that it is a prohibition on the making of an appointment if the Secretary of State is not satisfied that those requirements are satisfied. As such there can be no question of a "breach" of paragraph (4) occurring after an appointment is made. The test which paragraph (9A) provides is to be applied in deciding whether to withdraw an appointment is therefore inaccurately constructed: the test should be whether the Secretary of State remains satisfied that the requirements of impartiality and independence are met. If, in consequence of this Report, the Department were to amend paragraph (9A), it would be consistent to amend paragraph (6) similarly.

1.6 **The Committee accordingly reports regulation 4(e) for defective drafting.**

2 S.I. 2011/1627: Reported for defective drafting

Education (Non-Maintained Special Schools) (England) Regulations 2011 (S.I. 2011/1627)

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

2.2 The Regulations make provision for the approval of non-maintained special schools by the Secretary of State, and set out the requirements which must be met for a school to continue to be approved as a non-maintained special school.

2.3 Paragraph 26(6) of the Schedule to the Regulations begins by setting out alternative conditions, but fails to say what is to happen where either condition is met. The Committee therefore asked the Department for Education to explain the paragraph. In a memorandum printed at Appendix 2, the Department explains that the following words were omitted from the end of the paragraph in error: "a school lunch must be provided for the pupil free of charge and, where milk is provided for the pupil, it must be provided free of charge.". The Department also indicates that it will make regulations to correct the omission at the earliest possible opportunity.

2.4 **The Committee accordingly reports paragraph 26(6) of the Schedule for defective drafting, acknowledged by the Department.**

3 S.I. 2011/1681: Reported for defective drafting

Turks and Caicos Islands Constitution Order 2011 (S.I. 2011/1681)

3.1 **The Committee draws the special attention of both Houses to this Order on the ground it is defectively drafted in two related respects.**

3.2 The Order establishes a new constitution for the Turks and Caicos Islands which is set out in Schedule 2 to the Order. Section 4 of the Order provides that Schedule 2 is to have effect from a day appointed by the Governor (defined by the Order as "the appointed day") but goes on to provide that the Governor may provide for the commencement of any provisions of the new constitution to be delayed until a later day appointed by him. Section 3 provides that the instruments providing for the existing constitution are to be revoked on the appointed day. Section 5 makes provision for existing laws to have effect on and after the appointed day as if made under the new constitution and to be construed so as to conform with it.

3.3 The Committee asked the Foreign and Commonwealth Office to explain how sections 3 and 5 are intended to operate if the coming into force of the new constitution is deferred under section 4 and how effect is given to that intention. In a memorandum printed at Appendix 3, the Department explains that there is no intention that the commencement of the entire constitution be delayed and that sections 3 and 5 therefore correctly refer to the appointed day.

3.4 The Committee considers that, because it is possible that the commencement of a provision of the new constitution might be delayed under section 4, the revocation of a provision of the old constitution superseded by it should be similarly delayed. And, as drafted, section 3 does not allow for that. Similarly, if the commencement of a provision of the new constitution under which laws are to have effect is delayed until after the appointed day it will not be appropriate to provide for existing laws to be treated as having effect as if made under that provision from the appointed day. Nor will it be appropriate for existing laws to be construed so as to conform with that provision of the new constitution from the appointed day. But that is what section 5 provides.

3.5 **The Committee accordingly reports sections 3 and 5 for defective drafting.**

4 S.I. 2011/1691: Reported for requiring elucidation

Consular Fees (Amendment) Order 2011 (S.I. 2011/1691)

4.1 **The Committee draws the special attention of both Houses to this Order on the ground that its form calls for elucidation in one respect.**

4.2 The Order amends the Consular Fees Order 2011, so that delivery costs, which were previously included within "direct costs", are now charged separately.

4.3 Article 2 charges a fee for "Arranging delivery of a passport for an application made abroad for a 32 or 48 page passport and if the application is successful, delivering the passport". The Committee asked the Home Office what costs are incurred for "arranging delivery of a passport" in a case where the application for a passport is unsuccessful. In a memorandum printed at Appendix 4, the Department explains that in those relatively rare cases the fee is justifiable by reference to contributing to the overall costs of the infrastructure required for delivery of passports (and adds that the cost of refunding money in an unsuccessful case would probably exceed the amount of the refund). The Committee accepts that explanation of the intention and effect, but considers that it would have been preferable if the description of the fee in the heading had made it clearer that it included a share of general costs for arrangements *in connection with* delivery services, thus making it evident that delivery will not be required where an application is unsuccessful.

4.4 **The Committee accordingly reports article 2 as requiring elucidation, provided in the Department's memorandum as amplified in this Report.**

5 S.I. 2011/1709: Reported for requiring elucidation, failure to comply with proper drafting practice and defective drafting

Criminal Procedure Rules 2011 (S.I. 2011/1709)

5.1 **The Committee draws the special attention of both Houses to these Rules on the grounds that they require elucidation in one respect, that they fail to comply with**

proper drafting practice in two respects and that they are defectively drafted in two respects.

5.2 The Rules were made by the Criminal Procedure Rule Committee and allowed by the Lord Chancellor. They are a general and wide-ranging code for the procedure of the criminal courts. They consolidate the Criminal Procedure Rules 2010 (S.I. 2010/60) as amended, and make some additional amendments. A number of questions relating to the Rules were sent to the Ministry of Justice, and a memorandum from the Department in response is printed, together with an accompanying letter from the deputy chairman of that Committee, at Appendix 5.

5.3 Before the Committee comments on the issues raised in its specific questions (other than those satisfactorily answered in the Department's memorandum), it is necessary to focus on two elements of general significance in the memorandum.

5.4 Firstly, a helpful context section introduces the memorandum. It sets out the enabling power and implicitly underlies a number of explanations as to why, in the Department's view, rules of court made under that power should be assessed by the Committee according to criteria different from those used in assessing instruments where rights can be conferred and obligations imposed that are not purely procedural. The Committee's approach is that the context section clearly justifies the presentation of extensive explanatory material with the Rules but not the presentational merging of material that has a legal effect with material that does not do so.

5.5 Secondly, a number of responses include references to precedents on which the Committee did not comment in the past. The Committee is always grateful for references to other legislative provisions that give context to the instrument under consideration or suggest necessary or desirable elements of consistency between instruments. As a general rule, however, the Committee is clear that the fact that a drafting formula is used in one instrument on which the Committee does not comment, for whatever reason, neither automatically justifies the use of that formula in another instrument nor constrains the Committee in considering a later instrument (even one which effectively replicates the first). Accordingly the Department's references to precedents are not addressed when the specific responses are considered below.

5.6 It is now necessary to turn to the issues specifically raised in the Committee's questions.

5.7 The first such issue is a general one. The Rules contain a number of "empty Parts", in the sense that the numbering of the Parts is not consecutive but leaves gaps that could be filled by later insertion of additional material. The 2010 Rules had taken the same approach, which was criticised by the Committee in its 11th Report of Session 2009-10. The Committee therefore asked the Department whether new issues arose in relation to the 2011 Rules that affected the question of the inclusion of empty Parts. In its memorandum the Department restates the Rule Committee's reasoning in adopting empty Parts, and reinforces its arguments by attaching and summarising the accompanying letter. There is one issue that is not directly addressed—the suggestion of the Committee in relation to the 2010 Rules that preservation of familiar numeration could have been maintained by amending rather than consolidating instruments, with consolidation (maintaining the existing numbering) being published unofficially. The accompanying letter (last paragraph but four) appears to assume that the Committee had suggested re-numeration in unofficial

consolidations, which was not the case. Nonetheless the Committee accepts that, had the formal amendment and unofficial consolidation approach been taken in 2010, blank provisions would not have disappeared, for previous rules of court also contained them. It follows that the Committee accepts that—pending consolidation with numeration in order and no blank provisions—the approach taken now does not create difficulties anew. **The Committee accordingly reports the empty provisions in these Rules as requiring the elucidation set out in the Department's memorandum and the accompanying letter, as amplified in this paragraph.**

5.8 The next issue relates to rule 2.4, which introduces a glossary of terms as follows: "The glossary at the end of the Rules is a guide to the meaning of certain legal expressions used in them." The Committee asked whether the glossary is intended to have legal effect, why the expression "guide" is used if the glossary is intended to have legal effect, and why it and its introducing provision are not in the italic form used elsewhere in the Rules for notes if it is not intended to have legal effect. In its memorandum, the Department states that the glossary is not intended to have legal effect, that legal definitions are confined to rule 2.2 and other express defining provisions, and that while interpolated notes appear in italic type to differentiate them clearly and immediately from the surrounding operative text, the glossary follows, and "is clearly and visually distinct from, the operative text of the Rules" and consequently requires no italicisation. This explanation clarifies the Rule Committee's intention, but not why the glossary is introduced by what is presented in the form of an operative provision. **The Committee accordingly reports rule 2.4 as failing to comply with proper drafting practice.**

5.9 The next issue relates to rule 4.2, which provides: "Where a document may be served by electronic means, the general rule is that the person serving it will use that method." The Committee asked for an explanation of the intention of the proposition of a “general rule” in rule 4.2, in the absence of specified criteria by reference to which the generality is to be departed from. The Committee also questioned the use of "will" in rules 5.8(5), 5.8(7), 62.8(3), 62.10(3), 73(7)(3) and 75(4)(a). In its memorandum, the Department states that "As a matter of ordinary English usage (a) ‘will’ expresses the future tense and incorporates ‘a strong intention or assertion about the future’ or ‘a probability or expectation’ (Concise Oxford Dictionary), but does not itself import obligation; and (b) ‘as a general rule’ connotes ‘usually, but not always’. In the Committee's opinion, legislative language requires greater precision than is necessary or appropriate for many kinds of communication that follow "ordinary English usage". Citizens to whom rules are relevant are entitled to know whether a legislative proposition imposes an obligation or not, and to be given criteria by reference to judge when a general obligation does not apply. While the criteria and explanations provided by the Department's memorandum helpfully explain the intention, the reader of the Rules themselves is entitled to have that intention given clear effect by the legislative language and presentation. Given the extensive use of italicised explanatory material that is not presented as operative, the Committee is not persuaded that material not intended to be obligatory could not be presented similarly. **Accordingly, the Committee reports rules 4.2, 5.8(5), 5.8(7), 62.8(3), 62.10(3), 73(7)(3) and 75(4)(a) for failing to comply with proper drafting practice.**

5.10 The next issue relates to rule 4.10(2)(c), which permits service "at a correspondent DX". The Committee asked for an explanation of the reference to a “correspondent DX”. In its memorandum, the Department states that "‘Correspondent’, as a matter of ordinary

English, means one who regularly corresponds with another. Thus a 'correspondent DX' is a document exchange which regularly sends documents to, and receives documents from, the document exchange at which the addressee, in accordance with rule 4.5, has indicated that he or she has a DX box." The Committee does not accept that "correspondent" necessarily carries a connotation of regularity, nor, more importantly, that in the legislative context it gives sufficient indication of what degree of regularity is sufficient. If the key criterion is whether the addressee has indicated possession of a DX box, that could have been provided for expressly and simply. **The Committee accordingly reports rule 4.10(2)(c) for defective drafting.**

5.11 The final issue relates to the Glossary, which defines "advance information", a term which does not appear in the Rules. The Committee asked the Department to explain its presence. In its memorandum, the Department acknowledges that the definition was included in error, along with two others ('in camera' and 'evidence in chief'), and states that it will undertake to invite the Rule Committee to amend the Glossary at the first available opportunity. The Committee assumes that the Department's reference to amendment is intended to be read as a reference to the issue of a correction slip, given the Department's statement that the Glossary is without legal effect. The Committee is also grateful to the Department for having identified the two additional defects. **The Committee accordingly reports the Glossary for defective drafting, acknowledged by the Department.**

6 S.I. 2011/1734: Reported for requiring elucidation and defective drafting

Court Funds Rules 2011 (S.I. 2011/1734)

6.1 **The Committee draws the special attention of both Houses to these Rules on the grounds that they require elucidation in two respects and that they are defectively drafted in one respect.**

6.2 The Rules govern the way in which funds are paid into, dealt with in and paid out of court.

6.3 Rule 10 requires the Accountant General to refuse to accept deposits on grounds of non-compliance with the rules or where "there is any other good reason to do so". The Committee asked the Ministry of Justice to explain the additional ground. In a memorandum printed at Appendix 6, the Department gives examples that fall outside "obvious non-compliance with the Rules" in which a deposit might be expected to be refused, but not why refusal in such cases is phrased in terms of a duty rather than a discretion. **The Committee accordingly reports rule 10 as requiring elucidation, partly but not fully provided by the Department's memorandum.**

6.4 Rule 34 prohibits the Accountant General from making payments in certain specified cases and if "there is any other good reason". The Committee asked the Department to explain the additional ground. In its memorandum, the Department gives examples that fall outside the specified cases but not why non-payment in such cases is phrased in terms

of a prohibition rather than a discretion. **The Committee accordingly reports rule 34 as requiring elucidation, partly but not fully provided by the Department's memorandum.**

6.5 The Committee also questioned whether there is a missing word "not" in rule 34(d). In its memorandum, the Department accepts that there is and undertakes to consider how to correct the provision. **The Committee accordingly reports rule 34(d) for defective drafting, acknowledged by the Department.**

7 S.I. 2011/1848: Reported for defective drafting

Defence and Security Public Contracts Regulations 2011 (S.I. 2011/1848)

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

7.2 The Regulations implement Directive 2009/81/EC of the European Parliament and Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts in the field of defence and security (OJ No L 216, 20.8.2009, p.76-136). In particular, they specify the procedures to be followed in relation to the award of such contracts by public bodies called contracting authorities and by utilities.

7.3 In regulation 2, which requires periodic reviews of the operation of the Regulations, the Committee observed a contrast between the use of "must" in regulation 2(1) and (3) and the use of "will" in regulation 2(2). The Committee asked the Ministry of Defence to explain the contrast. In a memorandum printed at Appendix 7, the Department says "The wording of regulation 2 precisely follows that of the Government's template review provision to be inserted, adapted as necessary, in secondary legislation implementing EU obligations as part of the Government's policy on the 'sunsetting' and review of regulation. We understand that there is no intended contrast by the use of the words "must" and "will" in these paragraphs and that both words were intended by the Government to have the same mandatory effect." The Committee take this opportunity to observe that the use of a template or standard-form provision is not a valid explanation for a defect in the drafting of an instrument, whether because it produces internal inconsistency by reference to other provisions of the instrument or whether there is an inconsistency or other defect in the template or standard form itself. In this case, since the Department acknowledges that the same meaning was intended in each place, the same expression should have been used: this is a standard expectation for legislative drafting, designed to allow the courts to operate the presumption that a change of legislative language signals a change of intended meaning. **The Committee accordingly reports regulation 2 for defective drafting.**

7.4 Regulation 3 defines "disabled person" in the following terms: ""disabled person" means any person recognised as disabled within the meaning of the Equality Act 2010 and "disabled persons" is to be interpreted accordingly". The Committee asked the Department to explain the intention of the words and "disabled persons" is to be interpreted accordingly;". In its memorandum, the Department explains that the Regulations follow

the approach, and where possible language, of the Public Contracts Regulations 2006 (SI 2006/5) and the Public Contracts (Scotland) Regulations 2006 (SSI 2006/1), because of close similarities in the EU legislation which each implements. The Department amplifies its aim as follows: "Therefore, to avoid confusion and maintain a consistent approach to implementation, the general approach was for these Regulations, wherever possible, to mirror the provisions of the 2006 Regulations. The definition of "disabled person" in regulation 3(1) of these Regulations is identical to that in regulation 3(1) of the Public Contracts Regulations 2006. However, the Department accepts that, but for the interests of maintaining consistency with the 2006 Regulations described above, the phrase referred to would not have been necessary." The Committee acknowledges the utility of consistency between instruments on cognate matters which require to be construed in a consistent way. In the Committee's view, however, there is a difference between ensuring substantive consistency and perpetuating a technical error; if the definition had been drafted in the manner that the Department acknowledges is appropriate, the Committee does not believe that anyone would be misled as a result of a minor technical difference of language between three sets of regulations. If the Department disagreed, it would have been open to it, of course, to take steps within Government to have the other two sets of Regulations corrected to remove what they acknowledge to have been an error. **The Committee accordingly reports regulation 3(1) for defective drafting, in effect acknowledged by the Department.**

7.5 Regulation 7(1)(g) defines "land" in terms which appear to add nothing to the definition in the Interpretation Act 1978. The Committee therefore asked the Department to explain the purpose of the provision. In its memorandum, the Department states: "Again, regulation 7(1)(g) of these Regulations is identical to regulation 6(2)(e) of the Public Contracts Regulations 2006. However, having regard to the Interpretation Act 1978, the Department accepts that, but for the interests of maintaining consistency with the 2006 Regulations described above, the phrase referred to would not have been necessary." As the memorandum implies, the issue of principle here is the same as in relation to regulation 3(1), and the Committee's reasoning is the same. **The Committee accordingly reports regulation 7(1)(g) for defective drafting, in effect acknowledged by the Department.**

7.6 Regulation 12(1) defines "recognised bodies" in the following terms: ""recognised bodies" means test and calibration laboratories and certification and inspection bodies which comply with applicable European standards and "recognised body" shall be interpreted accordingly;". The Committee asked the Department to explain why it was thought necessary to include the phrase "and "recognised body" shall be interpreted accordingly". In its memorandum, the Department states: "The definition of "recognised bodies" in regulation 12(1) of these Regulations is identical to that in regulation 9(1) of the Public Contracts Regulations 2006. However, the Department accepts that but for the interests of maintaining consistency with the 2006 Regulations described above, the phrase referred to would not have been necessary." As the memorandum implies, the issue of principle here is the same as in relation to regulation 3(1), and the Committee's reasoning is the same. **The Committee accordingly reports regulation 12(1) for defective drafting, in effect acknowledged by the Department.**

7.7 Regulation 21(19) defines "values" in paragraphs (5)(b), (8)(b), (10)(d), (13)(b) and (15)(b) as including price. Since prices as well as values are expressly mentioned in the

paragraphs referred to in regulation 21(19), the Committee asked the Department to explain the purpose of that provision. In its memorandum, the Department says "The same formulation is used in regulation 21(19) of the Public Contracts Regulations 2006."; it goes on to explain why both values and prices require to be mentioned expressly. The Committee does not dispute that, but does dispute the need to duplicate effect by having an inclusive definition in regulation 21(19) as well as express mention of price and value in each relevant place. **The Committee accordingly reports regulation 21(19) for defective drafting.**

8 S.I. 2011/2055: Reported for requiring elucidation

Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011 (S.I. 2011/2055)

8.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they require elucidation in two identical respects.**

8.2 The Planning Act 2008 (c.29) ("the Act") established the Infrastructure Planning Commission and gave it the function of making orders consenting to development which is or forms part of a nationally significant infrastructure project (within the meaning given by section 14 of the Act). The Act made provision concerning changes to, and revocations of, development consent orders and the Regulations contain provisions about applications for such changes or revocations. Regulations 14 and 36 require applicants for a change or revocation to publish a notice and both contain (in paragraph (4) of regulation 14 and paragraph (6)(d) of regulation 36) special requirements about the display and publication of notices in the case of an application involving a development consisting of or including a "linear scheme". Neither the Regulations nor the Act define "linear scheme".

8.3 The Committee asked the Department for Communities and Local Government to explain the meaning of the term "linear scheme" and why it is not defined. In a memorandum printed at Appendix 8, the Department asserts that it is clear which of the descriptions of projects listed in section 14 of the Act are "linear schemes", that the meaning is clear from the context ("exceeding five kilometres"), that the term has been used without definition in other identified regulations concerning nationally significant infrastructure projects and that the phrase is generally understood by those involved in such projects.

8.4 The Committee considers that, because an applicant is subject to special requirements if the application involves a development consisting of or including a "linear scheme", it is important for applicants to be able readily to establish if their applications do so relate. The Committee therefore considers that it would have been desirable for the Regulations to have included a definition of the term "linear scheme". The Committee considers that the phrase "exceeding five kilometres" is not needed to clarify the meaning of the word "linear" and appears to be of no assistance in clarifying what "scheme" means. The Committee does not consider that previous use of the term without definition militates against its conclusion: it notes that in one of the two uses identified in a previous instrument the context is somewhat clearer than here. The Committee is content to take it on trust that the

term is in fact widely understood but, even if it is, it is not inevitable that every person responsible for dealing with the procedural requirements relating to an application will be aware of its meaning. If (as the Department claims) it is clear which of the varieties of development listed in section 14 of the Act constitute "linear schemes" it would have been be easy for the Department to have included a definition cross-referring to the relevant portions of that section.

8.5 **The Committee accordingly reports regulations 14 and 36 as requiring elucidation largely but not completely provided in the Department's memorandum.**

9 S.I. 2011/2132: Reported for defective drafting

Plant Protection Products (Fees and Charges) Regulations 2011 (S.I. 2011/2132)

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

9.2 The Regulations include a charging regime in relation to persons who hold an authorisation for placing plant protection products on the market ("authorisation holders"). Regulation 8 provides the method of calculating amounts that authorisation holders are liable to pay under regulations 5 and 6 in respect of the costs incurred by the competent authorities in administering the regulatory regime relating to such products. The charge that an authorisation holder is liable to pay is a specified percentage of the authorisation holder's annual turnover. The percentage is arrived at by multiplying by 100 a fraction of which the numerator is the total costs incurred by the competent authority in the liability period and the denominator is the aggregate of the annual turnover of all authorisation holders.

9.3 The liability period is defined (by regulation 2(1)) as "the period between 1 April in any year and 31 March in the following year"; and "annual turnover" is defined (in regulation 8(6)) as the amount derived from sales "in the financial year ending between the 1st October and 30th September the following year, the latter date being in the calendar year in which the liability period starts".

9.4 The Committee asked the Department for Environment, Food and Rural Affairs to explain how the amounts which authorisation holders are liable to pay in accordance with regulation 8 are intended to be calculated and to demonstrate how effect is given to that intention, commenting (in particular) on how a "financial year" is identified and on which financial year is relevant to any particular liability period.

9.5 In a memorandum printed at Appendix 9, the Department explains that the competent authority must work out its costs in a liability period (to arrive at the nominator in the fraction) and the aggregate of the turnover of each authorisation holder by reference to its annual sales in the relevant financial year (to arrive at the denominator). The memorandum does not explain what is meant by "financial year" but does give an example showing how one ascertains the financial year that is relevant in relation to any particular liability period. It explains that it is the financial year that ends in 12 month period ending with 30th September (though the memorandum erroneously refers to 31st September) in the

calendar year in which the liability period starts. It appears implicit that a financial year for any authorisation holder is a matter of choice for that authorisation holder.

9.6 The Committee remains concerned about the drafting of the definition of "annual turnover" in regulation 8(6) and the associated definition of "liability period" in regulation 2(1). Firstly, regulation 8(6) does not contain a definition of the notion of "financial year" which is used in the definition of "annual turnover". There is no indication of how to establish what is an authorisation holder's financial year, whether it is a company or a natural person. Secondly, the Committee also finds the words in the definition of "annual turnover" which tie the financial year to the liability period difficult to follow and, although it finds helpful the example included in paragraph 5 of the memorandum, it considers that that definition could be made to work unambiguously by relating it to an authorisation holder and then clarifying the link with the liability period. Thirdly, the Committee considers that, by referring to the period "between" 1 April and 31 March, the definition of liability period in regulation 2(1), read literally, raises a question as to whether or not the liability period includes either or both of those dates.

9.7 **The Committee accordingly reports regulation 8(6) (and the connected definition of "liability period" in regulation 2(1)) for defective drafting.**

10 S.I. 2011/2225: Reported for defective drafting

Excise Goods (Holding, Movement and Duty Point) (Amendment) Regulations 2011 (S.I. 2011/2225)

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

10.2 The Regulations amend the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (S.I. 2010/593) ("the 2010 Regulations"). Regulation 10 amends regulation 62 of the 2010 Regulations by substituting paragraphs (2) to (2E) for the existing paragraph (2). The new paragraph (2) permits the movement of alcoholic liquors, without payment of duty or the cover of an electronic administrative document, from and to "the premises referred to in paragraphs (2A) to (2E)". Paragraphs (2A) to (2D) do nothing but specify premises but, while sub-paragraph (a) of paragraph (2E) specifies premises, sub-paragraph (b) of that paragraph contains the proposition that the person who is registered or licensed in relation to the premises or the authorised warehousekeeper (on the one hand) ("A") and the producer or manufacturer of the alcoholic liquor (on the other) ("B") are persons who, for the purposes of value added tax, are members of the same group.

10.3 The Committee asked Her Majesty's Revenue and Customs for an explanation of how paragraph (2E) is intended to work and how that intention is achieved. In a memorandum printed at Appendix 10, the Department states that the intention is that movement is to be allowed to or from the premises mentioned in paragraph (a) of paragraph (2E) only if A and B are members of the same group.

10.4 The Committee considers that the construction of paragraph (2E) does not clearly yield that construction. The inserted provisions should have stated clearly that the premises

specified in paragraph (a) of paragraph (2E) are premises that count for the purposes of paragraph (2) only if a condition is satisfied and then gone on separately to state that condition. As paragraph (2E) is drafted, the indenting appears manifestly awry and the significance of the proposition in sub-paragraph (b) is not made clear.

10.5 **The Committee accordingly reports regulation 10 for defective drafting.**

Instruments not reported

At its meeting on 2 November 2011 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

Annex

Draft Instruments requiring affirmative approval

Draft S.I.	Parliamentary Constituencies and Assembly Electoral Regions (Wales) (Amendment) Order 2011
Draft S.I.	Renewable Heat Incentive Scheme Regulations 2011

Instruments subject to annulment

S.I. 2011/1885	Carriage of Dangerous Goods and Use of Transportable Pressure Equipment (Amendment) Regulations 2011
S.I. 2011/2038	Legal Services Act 2007 (Designation as a Licensing Authority) Order 2011
S.I. 2011/2323	Health Research Authority (Establishment and Constitution) Order 2011
S.I. 2011/2341	Health Research Authority Regulations 2011
S.I. 2011/2342	First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order 2011
S.I. 2011/2364	Feed-in Tariffs (Specified Maximum Capacity and Functions) (Amendment No. 3) Order 2011
S.I. 2011/2390	Libya (Asset-Freezing) (Amendment) Regulations 2011
S.I. 2011/2419	Nuffield Orthopaedic Centre National Health Service Trust (Transfer of Trust Property) Order 2011
S.I. 2011/2423	Social Fund Cold Weather Payments (General) Amendment Regulations 2011
S.I. 2011/2425	Social Security (Miscellaneous Amendments) (No. 3) Regulations 2011
S.I. 2011/2426	Social Security (Disability Living Allowance, Attendance Allowance and Carer's Allowance) (Miscellaneous Amendments) Regulations 2011
S.I. 2011/2428	Social Security (Work-focused Interviews for Lone Parents and Partners) (Amendment) Regulations 2011
S.I. 2011/2430	Education (Student Support) (European University Institute) Regulations 2010 (Amendment) (No. 2) Regulations 2011
S.I. 2011/2448	Bus Service Operators Grant (England) (Amendment) Regulations 2011
S.I. 2011/2479	Syria (Asset-Freezing) (Amendment) Regulations 2011

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2011/1702	Parliamentary Voting System and Constituencies Act 2011 (Repeal of Alternative Vote Provisions) Order 2011
S.I. 2011/2280	Finance Act 2011, Section 43 (Appointed Day) Order 2011
S.I. 2011/2391	Finance (No. 3) Act 2010, Schedule 10 and the Finance Act 2009, Schedule 55 and Sections 101 to 103 (Appointed Day, etc.) (Construction Industry Scheme) Order 2011
S.I. 2011/2392	Education (National Curriculum) (Key Stage 1, 2 and 3 Assessment Arrangements) (England) (Amendment) Order 2011
S.I. 2011/2401	Finance Act 2009, Section 103 (Appointed Day) Order 2011
S.I. 2011/2420	Nuffield Orthopaedic Centre National Health Service Trust (Dissolution) Order 2011
S.I. 2011/2427	Welfare Reform Act 2009 (Commencement No. 5) Order 2011

Appendix 1

S.I. 2011/1610: memorandum from the Department for Transport

Airports Slot Allocation (Amendment) Regulations 2011 (S.I. 2011/1610)

By a letter dated 19th October 2011 the Committee has asked for a memorandum on the following point:

> *Explain the intended meaning of the words "a breach of paragraph (4) .... has occurred" in the paragraph (9A) inserted by regulation 4(e) into regulation 4 of S.I. 2006/2665 and how effect is given to that intention.*

Before it was amended by S.I 2011/1610, regulation 4(4) of S.I. 2006/2665 provided that the managing body of an airport could not appoint a coordinator unless it was satisfied that-

> "a) that person's functions in his capacity as a coordinator are separate or will be separated from the functions of any interested party; and
>
> (b) that person's activities in his capacity as a coordinator are financed by means of a system that guarantees the coordinator's independence."

The intention was to prevent the appointment of a coordinator who did not satisfy the stated requirements of impartiality and independence. Regulation 4(5) imposed a continuing obligation on each coordinator to act in an independent, neutral, non-discriminatory and transparent manner.

The appointment of a coordinator was also conditional upon the Secretary of State's approval under regulation 4(3). Regulation 4(6), which has been in force since 2006, enabled the Secretary of State to withdraw that approval on being satisfied of a breach of paragraph (4) or (5) in relation to that person.

The intention was not only to ensure the continuing obligations under regulation 4(5) but to establish the requirements of impartiality and independence under regulation 4(4) as continuing obligations; a breach of which would enable the Secretary of State to withdraw his approval of a coordinator's appointment.

S.I. 2011/1610 inserted regulation 4(2A) into S.I. 2006/2665; thereby enabling the Secretary of State, as distinct from the managing body, to appoint a coordinator for an Olympic coordinated airport. Such an appointment is subject to the Secretary of State being satisfied as to the requirements of impartiality and independence in regulation 4(4) and a coordinator so appointed is subject to the continuing obligations in regulation 4(5).

The Department considered that a parallel provision to regulation 4(6) was required and accordingly regulation 4(9A) was inserted in almost identical terms; the difference being that as the Secretary of State makes the appointment, rather than approves it, the Secretary of State can withdraw that appointment.

The words "a breach of paragraph (4) … has occurred" in paragraph (9A) are intended to mean, as they do in paragraph (6), a breach of the requirements of impartiality and independence in paragraph (4) as continuing requirements. Effect is given to this intention through the structure of paragraph (9A) as read with paragraph (4) and the Department considers that within the overall context of regulation 4, it is strongly arguable that the words could not be interpreted as having any other meaning.

Department for Transport
25th October 2011

Appendix 2

S.I. 2011/1627: memorandum from the Department for Education

Education (Non-Maintained Special Schools) (England) Regulations 2011 (S.I. 2011/1627)

The Committee has requested a memorandum on the following point:

> *Explain the intended effect of paragraph 26(6) and (7) of the Schedule and how that effect is achieved.*

The intended effect of paragraph 26(6) of the Schedule is to ensure that where a pupil or parent is entitled to specified tax credits the pupil is provided with a school lunch, and any milk provided, free of charge. Unfortunately the wording in bold below was omitted from the final version of paragraph 26(6) of the Schedule. The paragraph should read:

"(6) Where—

(a) any registered day pupil is entitled to any tax credit under the Tax Credits Act 2002 or element of such a tax credit that is prescribed under section 512ZB(4)(c)(ii) of the 1996 Act, and meets such conditions as may be prescribed under section 512ZB(4)(c), or

(b) the parent of any registered day pupil is entitled to any tax credit under the Tax Credits Act 2002 or element of such a tax credit that is prescribed under section 512ZB(4)(aa)(ii) of the 1996 Act, in such circumstances as may be prescribed under section 512ZB(4)(aa), and the pupil meets any conditions prescribed under that provision;

> **a school lunch must be provided for the pupil free of charge and, where milk is provided for the pupil, it must be provided free of charge**."

The Department accepts that this is an error, and will make regulations to correct this omission at the earliest suitable opportunity.

Paragraph 26(7) of the Schedule is a free-standing provision to ensure that no charge is made for the provision of facilities to enable day pupils to eat food brought in from home.

The Department apologises for the error.

Department for Education
24th October 2011

Appendix 3

S.I. 2011/1681: memorandum from the Foreign and Commonwealth Office

Turks and Caicos Islands Constitution Order 2011 (S.I. 2011/1681)

The Committee has requested a memorandum on the following point:

> Explain how sections 3 to 5 are intended to operate if the coming into force of the new Constitution is delayed by proclamation under section 4 and how effect is given to that intention.

Section 2(1) defines "the appointed day" as the day appointed by the Governor under section 1(2).

Section 1(2) provides: "This Order shall come into force on such day as the Governor, acting in his or her discretion, may appoint by proclamation published in the *Gazette*."

It is therefore necessary for a single day to be appointed by the Governor for the commencement of the Order.

Section 4 provides that Schedule 2 shall have effect as the Constitution of the Turks and Caicos Islands from the appointed day, that is to say the date of commencement of the Order. But section 4 goes on to provide that "the Governor, acting in his or her discretion and with the prior approval of a Secretary of State, may by proclamation published in the *Gazette* provide that any provisions of the Constitution shall not come into force until such later day or days as he or she in like manner may appoint, and in that case such provisions shall come into force on the day or days so appointed".

The intention is that the Constitution should come into force on the date of commencement of the Order ("the appointed day") but that, if a Secretary of State so approves, certain provisions should come into force at a later date or dates. There is no intention that the coming into force of the entire Constitution should be delayed beyond the appointed day. Indeed there would be no purpose in doing so, because the commencement of the Order can be timed to coincide with the date that it is intended the Constitution should commence.

The intention described above can be assured by the requirement in section 4 that the approval of a Secretary of State must be obtained before the Governor delays the coming into force of any provisions of the Constitution.

Sections 3 to 5 of the Order will operate by reference to the appointed day, that is to say the date of commencement of the Order (notwithstanding that certain provisions of the Constitution might come into force at a later date). That is the intention, and effect will be given to it as explained above.

Foreign and Commonwealth Office
24 October 2011

Appendix 4

S.I. 2011/1691: memorandum from the Home Office

Consular Fees (Amendment) Order 2011 (S.I. 2011/1691)

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

   In connection with new paragraph BA of part 2 of Schedule 1 to the Consular Fees Order 2011, explain what costs are incurred for "arranging delivery of a passport" in a case where the application for a passport is unsuccessful.

2. The fee for delivering a passport overseas must cover two types of costs. It not only covers the costs incurred when a package is despatched but also the cost incurred to put in place and run the infrastructure to support the initial collection of delivery fees and the delivery of packages.

3. For example, delivering a passport requires systems and business processes to be in place to enable the collection of delivery fees, including offices where customers may submit their applications and fees in person in a number of countries where it is not possible to send an application to one of the seven Regional Passport Processing Centres directly. We need to have in place staff resources and suitable IT systems which record the receipt of an application and its progress and which can then either arrange or

prevent delivery of a passport. In addition, there are overheads incurred in managing our relationship with our delivery supplier in order to ensure the entire service is co-ordinated as well as ensuring that correct delivery processes are maintained (e.g. ensuring we meet different customs regulations for overseas deliveries to multiple territories).

4. In the proportionately small number of cases where a passport is refused, the cost of setting up exceptional processes for refunding the costs relating to actual despatch of the passport would have created further administrative burdens at a relatively high cost on each occasion – likely to be in excess of the actual refund to be provided in many cases.

Home Office
25 October 2011

Appendix 5

S.I. 2011/1709: memorandum from the Ministry of Justice

Criminal Procedure Rules 2011 (S.I. 2011/1709)

1. The Committee has requested a memorandum on the following 10 points:

(1) In the light of the Committee's 11th Report of Session 2009-10 on the Criminal Procedure Rules 2010, explain whether new issues arise in relation to the 2011 rules that affect the question of the inclusion of empty Parts.

(2) In relation to rule 2(4)—

(a) are the expressions in the Glossary intended to have legal effect as part of the Rules;

(b) if so, why is the expression "is a guide to" used (as opposed to wording such as "sets out" or similarly clear wording); and

(c) if not, why is neither the rule nor the glossary in the layout used for the Notes in the Rules?

(3) What is intended by the proposition of a "general rule" in rule 4.2, in the absence of specified criteria by reference to which the generality is to be departed from?

(4) What is meant by the reference to a "correspondent DX" in rule 4.10(2)(c) and how is the meaning made clear?

(5) By what method are fees to be prescribed for the purposes of, for example, rule 5.5? If they are to be prescribed under some other statutory power, where is that power identified? And if they are to be prescribed under the Rules, what is the source of the power to prescribe?

(6) Explain why the expression "will" is used in rules 5.8(5), 5.8(7), 62.8(3), 62.10(3), 73(7)(3) and 75(4)(a).

(7) What does "when" in rule 6.19(a)(iii) add to (a)(ii)?

(8) Explain—

(a) why rule 16.10 applies only to devices of the kind described in rule 16.9(1)(a)(i) and not to devices of the kind described in rule 16.9(1)(a)(ii), and

(b) what sanctions are available in relation to the latter device.

(9) In relation to each note at the foot of each rule in Part 17 -

(a) what, apart from the note itself, ensures that the rule has effect only for proceedings where the request for expedition was received by the relevant authority in the United Kingdom on or before 31 December 2003;

(b) if it is ensured by legislation still in force, why does the note not indicate it; and

(c) if nothing but the note ensures it, why is the note presented as purely referential material?

(10) In the apparent absence of use of the expression "advance information" elsewhere, what is the purpose of including a definition of that expression in the Glossary?

Context

2. By section 69 of the Courts Act 2003:

> (1) There are to be rules of court (to be called 'Criminal Procedure Rules') governing the practice and procedure to be followed in the criminal courts.
>
> (2) Criminal Procedure Rules are to be made by a committee known as the Criminal Procedure Rule Committee.
>
> …
>
> (4) Any power to make Criminal Procedure Rules is to be exercised with a view to securing that—
>
> (a) the criminal justice system is accessible, fair and efficient; and
>
> (b) the rules are both simple and simply expressed.

3. Section 1 of the Civil Procedure Act 1997, enacted in substantially the same terms, confers on the Civil Procedure Rule Committee a corresponding power to make Civil Procedure Rules.

4. 'Govern' means 'control or influence' (Concise Oxford Dictionary). 'Practice and procedure' are to be distinguished from (i) that which confers jurisdiction on the courts, (ii) that which determines the admissibility of evidence in proceedings before the courts and (iii) rights and obligations that are not of a procedural character: see, for example, *R (Kelly) v Warley Magistrates' Court* [2007] EWHC 1836 (Admin). Criminal Procedure Rules cannot lawfully confer rights, or impose obligations and sanctions, that are not

procedural, and therefore should not purport to do so. But, to meet the statutory requirements of accessibility and simplicity, the effects of such other rights, obligations and sanctions must be accommodated by the Rules.

5. References appear beneath to the inclusion of rules in the Civil Procedure Rules, in the Criminal Procedure Rules 2005 and in the Criminal Procedure Rules 2010. Those Rules were contained in, respectively, S.I. 1998/3132, S.I. 2005/384 and S.I. 2010/60.

Question 1

6. The reasons for, and the matters arising in connection with, the retention of empty Parts of the Criminal Procedure Rules were set out in a letter addressed to the chairman of the Committee by the deputy chairman of the Rule Committee, writing on behalf of the Lord Chief Justice and fellow members, dated 7th April, 2011. A copy of that letter accompanies this memorandum.

7. In summary, the observations made in that letter are:

(a) The legal argument about the significance of numbering, at paragraph 2.4 of the Committee's Report in question, is misconceived. As it is put in the Rule Committee letter, "the number is not an operative part of its corresponding rule. The number merely provides a convenient device by which to refer to that rule, and serves as an aid to the interpretation of that rule by establishing its intended sequence within a series of rules. Adopting this logic, a rule still would be a valid rule even if it had no corresponding number. And the inclusion in a statutory instrument of a number with no corresponding rule plainly does not convert that number into a rule itself."

(b) Research conducted by the Rule Committee among those who use and publish the Rules indicated that the repeated renumbering of the Rules apparently required by the Committee would produce expense and confusion disproportionate to any (unidentified) advantage in adopting what is said to be 'proper legislative practice'.

(c) The Rule Committee adopted this technique at the outset, but it provoked no comment before the Report in question. As it is put in the Rule Committee letter, "when the Criminal Procedure Rules 2005 were made, Parts 9, 22, 23, 33, 51, 76 and 77 all were left empty at the outset, anticipating that rules in all those Parts might be required in due course as the Rule Committee's programme of reform progressed. On that occasion, the JCSI made no comment. On several occasions since, as the Rule Committee has revised and consolidated rules, Parts and rules have been omitted without altering the numbering of subsequent rules and Parts. On those occasions, too, the JCSI has made no comment. It is established practice for Acts of Parliament to repeal sections of earlier Acts without renumbering subsequent sections of those earlier Acts. I see no obvious difference in principle."

8. The Department respectfully concurs. A statutory instrument containing Criminal Procedure Rules differs from statutory instruments made by Ministers of the Crown in that it is made by the Rule Committee, a subordinate legislature of appointed members established by Parliament. Subject to its abolition by Parliament, the Rule Committee's

programme of reform of the secondary legislation for which it is responsible is less susceptible to the vagaries to which paragraph 2.7 of the Committee's Report referred than the Committee may have assumed.

Question 2

9. Adopting the Committee's comminution:

(a) No. The definition of expressions used in the Rules is dealt with by rule 2.2, headed 'Definitions'.

(b) Not applicable, therefore.

(c) Interpolated notes to individual rules, and notes appended to Parts of the Rules, appear in italic type to differentiate them clearly and immediately from the surrounding operative text. Rule 2.4 describes the function of the glossary, just as rule 2.3 describes the convention adopted by the Rules for references to legislation. The Glossary follows, and is clearly and visually distinct from, the operative text of the Rules. Its function is again described in the sentence by which it is introduced. Consequently it requires no italicisation.

10. Rule 2.4 and the Glossary appeared in the same terms, and in the same presentation, in the Criminal Procedure Rules 2005 and in the Criminal Procedure Rules 2010, without provoking comment. They are modelled on the corresponding, and correspondingly presented, rule 2.2 of the Civil Procedure Rules and Glossary to those Rules.

Questions 3 and 6

11. The English language recognises, and the Criminal Procedure Rules adopt, use of the following auxiliaries to express a gradation of compulsion, from (in the following sequence) obligation, through expectation, to discretion:

(i) 'must';
(ii) 'will';
(iii) 'as a general rule, will';
(iv) 'may'.

Each may, but need not, be subjected to qualification or exception.

12. As a matter of ordinary English usage:

(a) 'will' expresses the future tense and incorporates 'a strong intention or assertion about the future' or 'a probability or expectation' (Concise Oxford Dictionary), but does not itself import obligation; and

(b) 'as a general rule' connotes 'usually, but not always' (*ibid*).

13. Thus:

(a) in rule 4.2, if the opportunity to use electronic service is available to the person serving a document, then that person is expected usually to use that method but is not required to do so;

(b) in rules 5.8(5) and 5.8(7), the court officer can be expected to act as there indicated under the compulsion of (i) rule 5.8(4), in the first instance, and (ii) judicial direction ('if the court so directs') in the second;

(c) in rules 62.8(3) and 62.10(3), the court can be expected to admit in evidence the information there listed, if it is offered, under the compulsion of the common law;

(d) in rule 73.7(3) the Court of Appeal can be expected to allow the appeal that is the subject of that rule, in the circumstances there identified, under the compulsion of the common law defining the jurisdiction of that court; and

(e) in rule 75.4(a), the court can be expected usually to act as there indicated but it is not required to do so.

14. Rules 62.8 and 62.10 appeared first in the Criminal Procedure (Amendment No. 2) Rules 2010 (S.I. 2010/3026). Rule 73.7 remains in the same terms as in the antecedent Criminal Appeal (Confiscation, Restraint and Receivership) Rules 2003 (S.I. 2003/428) and appeared in the Criminal Procedure Rules 2005 and 2010. Rule 75.4 appeared in the Criminal Procedure Rules 2010 and corresponding expressions appear elsewhere in the Criminal Procedure Rules, for example in rule 76.2(6). None of these rules hitherto has provoked comment by the Committee; by any court applying the rules; or by any other user of the Criminal Procedure Rules. The expressions 'will' and 'as a general rule, will' appear often in the Civil Procedure Rules, for example in rules 3.7, 3.9, 6.3, 6.14, 7.6, 8.8, 12.5, 12.8, etc.: sometimes subject to qualifications or exceptions, but not always.

Question 4

15. The meaning of the abbreviation 'DX' is indicated by parentheses in rule 4.5. 'Correspondent', as a matter of ordinary English, means one who regularly corresponds with another. Thus a 'correspondent DX' is a document exchange which regularly sends documents to, and receives documents from, the document exchange at which the addressee, in accordance with rule 4.5, has indicated that he or she has a DX box.

16. This expression first appeared in the Criminal Procedure (Amendment) Rules 2007 (S.I. 2007/699) and subsequently in the Criminal Procedure Rules 2010, without provoking comment.

Question 5

17. Under any power for the time being supplied by Parliament and exercised by the authority on which such power is conferred. Hence the indefinite passive, 'any … prescribed'. Such a power is that conferred on the Lord Chancellor by section 92 of the Courts Act 2003. But it has not yet been exercised in relation to matters governed by the Rules.

18. The antecedent to rule 5.5 appeared in substantially corresponding terms in the Criminal Appeal Rules 1968 (S.I. 1968/1262); it was adopted in the Criminal Procedure Rules 2005; it appeared in amendments made by the Criminal Procedure (Amendment

No. 2) Rules 2007 (S.I. 2007/2317); and it subsequently appeared in Part 65 of the Criminal Procedure Rules 2010: without provoking comment.

Question 7

19. Rule 6.19 governs an application for an account monitoring order under section 370 of the Proceeds of Crime Act 2002. The same construction appears in rule 6.10, which rule governs an application for an account monitoring order under paragraph 2 of Schedule 6A to the Terrorism Act 2000.

20. Section 370 of the 2002 Act provides, at subsections (6) and (7):

> (6) An account monitoring order is an order that the financial institution specified in the application for the order must, for the period stated in the order, provide account information of the description specified in the order to an appropriate officer in the manner, and at or by the time or times, stated in the order.
>
> (7) The period stated in an account monitoring order must not exceed the period of 90 days beginning with the day on which the order is made.

21. Paragraph 2 of Schedule 6A to the 2000 Act provides, at subparagraphs (4) and (5):

> (4) An account monitoring order is an order that the financial institution specified in the application for the order must—
>
> (a) for the period specified in the order;
>
> (b) in the manner so specified;
>
> (c) at or by the time or times so specified; and
>
> (d) at the place or places so specified,
>
> provide information of the description specified in the application to an appropriate officer.
>
> (5) The period stated in an account monitoring order must not exceed the period of 90 days beginning with the day on which the order is made.

22. The rule draws the same distinction as is drawn in subsection (6) and in subparagraph (4) between, on the one hand, the duration of the account monitoring period and, on the other, the occasion or occasions on which the information gleaned is to be supplied to the applicant.

23. The rules in Part 6 first appeared in the Criminal Procedure (Amendment) Rules 2009 (S.I. 2009/2087) and subsequently in the Criminal Procedure Rules 2010, without provoking comment. However, if the Committee now concludes that the word 'for' is to be preferred to the word 'during' in the two rules concerned, the Department will invite the Rule Committee to substitute the former for the latter at the first available opportunity.

Question 8

24. The only relevant power of forfeiture is that conferred by section 9 of the Contempt of Court Act 1981, and it extends only to devices in the category to which rule 16.9(1)(a)(i) refers.

25. For the use without permission of a device in the category to which rule 16.9(1)(a)(ii) refers, the potential sanction is punishment of the user for contempt of court. See the penultimate note to rule 16.1.

Question 9

26. The rules in Part 17 refer to and supplement the provisions which they identify of the Backing of Warrants (Republic of Ireland) Act 1965 and of the Extradition Act 1989. By section 218 of the Extradition Act 2003, the 1965 and 1989 Acts ceased to have effect on the coming into force of the 2003 Act. By article 2 of the Extradition Act 2003 (Commencement and Savings) Order 2003, S.I. 2003/3103, the 2003 Act came into force on 1st January, 2004, subject to the savings contained in that Order. By article 3 of that Order, as substituted by article 2 of the Extradition Act 2003 (Commencement and Savings) (Amendment No. 2) Order 2003, S.I. 2003/3312:

> The coming into force of the Act shall not apply for the purposes of any request for extradition, whether made under any of the provisions of the Extradition Act 1989 or of the Backing of Warrants (Republic of Ireland) Act 1965 or otherwise, which is received by the relevant authority in the United Kingdom on or before 31st December 2003.

27. The application of the rules in Part 17 thus is correspondingly confined; and the notes to those rules so indicate, in the manner of other such notes. Legislative history is indicated by the legislative footnotes. No useful purpose would be served by duplicating that information. None of the notes has an operative effect.

28. The same rules and notes appeared in the Criminal Procedure Rules 2005 and 2010, without provoking comment.

Question 10

29. The Committee correctly identifies the expression 'advance information' as one no longer appearing in the Rules: it having been superseded by the expression 'initial details of the prosecution case' (see Part 21). The Department will invite the Rule Committee to remove it from the Glossary at the first available opportunity; and likewise the expressions 'in camera' and 'evidence in chief', now similarly superfluous.

Ministry of Justice
24th October, 2011

JUDICIARY OF
ENGLAND AND WALES

THE RT HON. LORD JUSTICE HOOPER

George Mudie MP
Chair, Joint Committee on Statutory Instruments
House of Commons
London SW1A 0AA

7th April 2011

Dear Mr Mudie,

Proposals for the Criminal Procedure Rules 2011

I am the deputy chairman of the Criminal Procedure Rule Committee. I write on behalf of its members and chairman, the Lord Chief Justice. I hope to persuade the Joint Committee not to object to a feature of a proposed statutory instrument which the Rule Committee intends to ask the Lord Chancellor to endorse in June.

Sections 68 to 72 of the Courts Act 2003 provide for a Criminal Procedure Rule Committee of 18 members to make rules that govern the practice and procedure of the criminal courts, that is, magistrates' courts, the Crown Court and the Court of Appeal, Criminal Division. Section 69 requires the Rule Committee to make rules that are simple and simply expressed, and that help make the criminal justice system accessible, fair and efficient. Members of the Rule Committee are drawn from among all the groups involved in the criminal justice system: the judiciary, including the magistracy; the legal professions; prosecutors; the police; voluntary organisations; and government departments.

On 11th January, 2010, the Lord Chancellor allowed the Criminal Procedure Rules 2010, S.I. 2010/60. The Explanatory Memorandum published with those Rules contained the following two paragraphs:

> "7.1 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.

Room C115 Royal Courts of Justice Strand London WC2A 2LL
Telephone 020 7947 7689 **Fax** 020 7947 7928 **Email** stephen.h.smith@judiciary.gsi.gov.uk
Website www.judiciary.gov.uk

8.1 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." (Emphasis added)

In its 10th Report of session 2009 – 10, published on 11th February, 2010, the House of Lords Select Committee on the Merits of Statutory Instruments commented as follows on those Rules:

"In accordance with the programme adopted by the Criminal Procedure Rule Committee when it was first appointed, these Rules consolidate the Criminal Procedure Rules 2005 and all the subsequent amendments. In addition this instrument makes the regular half yearly sweep of consequential amendments arising from recent legislation and a number of changes as a result of case law or ongoing review. We commend the efforts made to render the Criminal Procedure Rules as clear and as user-friendly as possible."

However, at paragraph 2 of its 11th Report of session 2009 – 10, published on 18th March, 2010, the then Joint Committee reported as follows:

"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."

I do not think the general principle proposed by paragraph 2.4 of that report follows from its premise. I am willing to accept the suggestion that each Criminal Procedure Rule takes effect as if it were a substantive enactment in its own right, by analogy with what section 1 of the Interpretation Act 1978 says about the sections of an Act (even though that provision does not apply to subordinate legislation: see section 23(1)). It follows that each rule should be treated as a distinct enactment. But the number is not an operative part of its corresponding rule. The number merely provides a convenient device by which to refer to that rule, and serves as an aid to the interpretation of that rule by establishing its intended sequence within a series of rules. Adopting this logic, a rule still would be a valid rule even if it had no corresponding number. And the inclusion in a statutory instrument of a number with no corresponding rule plainly does not convert that number into a rule itself.

No doubt what is said in paragraph 2.8 is true, and users of the Rules in time would become familiar with a renumbered publication. They would have no choice. But that is no answer to the question that the Rule Committee set for itself, in accordance with the objective set for the Rule Committee by Parliament, which question was, what best serves those users and, hence, criminal justice? The Rule Committee itself comprises practitioners who use the Rules daily, and we consulted others as described above. Our conclusion thus is based on research, not on an assumption, or on a prescriptive view of what users of the Rules ought to tolerate.

I cannot over-emphasise the importance that we attach to avoiding any compromise of the Rules' accessibility. The Committee has with the help of what is now known as Her Majesty's Courts and Tribunals Service and the Ministry of Justice made huge strides in persuading practioners and judges to use the Rules. Whereas for historical reasons the Civil Procedure Rules are very well known and heavily relied upon, the rules of criminal procedure until 2005 were very difficulty to find and impenetrable. You can imagine how frustrating it would be if practitioners, judges, court staff and those responsible for law enforcement used to using particular rules now had to spend time finding out the new number of a rule with which they were familiar. It would mean that the publishers which have been persuaded by the Committee to publish complete sets of the Rules would have to spend the money and time on editing not only the complete sets but the thousands of references to the Rules throughout the main bodies of the textbooks. Furthermore the HMCTS and the Lord Chief Justice would have to withdraw a large number of forms and reprint them with the new numbering. The costs would be considerable and would further drain budgets already under fierce attack.

The argument in paragraph 2.9 is, with respect, difficult to follow. Presumably it is not being suggested that the numbering of the informal consolidation of the Criminal Procedure Rules, which has been maintained throughout their existence by the Ministry of Justice and to which the Explanatory Memorandum also referred, should differ from that of the legislative text. The confusion that that would cause can be readily imagined. If the suggestion is that renumbering could, and should, have occurred earlier, then I would point out that when the Criminal Procedure Rules 2005 were made, Parts 9, 22, 23, 33, 51, 76 and 77 all were left empty at the outset, anticipating that rules in all those Parts might be required in due course as the Rule Committee's programme of reform progressed. On that occasion, the JCSI made no comment. On several occasions since, as the Rule Committee has revised and consolidated rules, Parts and rules have been omitted without altering the numbering of subsequent rules and Parts. On those occasions, too, the JCSI has made no comment. It is established practice for Acts of Parliament to repeal sections of earlier Acts without renumbering subsequent sections of those earlier Acts. I see no obvious difference in principle. It is also established practice when amending legislation by insertion to avoid renumbering by having new sections with letters after them, e.g. AA, AB etc. Those responsible for drafting do that presumably so that those who use the statutes and have become familiar with particular sections do not have to spend time researching the new number which has been given to a section.

Given that the Committee is still involved in the process of consolidating the Rules into one accessible and easily understood Code, renumbering so as to avoid having a blank part would have the following consequences. If it was desired to use what would have been one of the now blank Parts, it would be necessary either to insert a new Part and change all subsequent Part numbers or resort to "Part 57A" in circumstances where Part 57 and Part 57A have nothing to do with each other. I ask whether we should be required to do that.

At the meeting of the Rule Committee on 18th February, we resolved to make in June a further consolidation of the Rules, as we announced last year. We expect the statutory instrument containing that consolidation to be entitled the Criminal Procedure Rules 2011. We expect that consolidation, too, to contain empty Parts, like the 2010 Rules, pending the single, comprehensive, renumbering that we plan to undertake no later than 2015, as we have announced.

It is encouraging that the JCSI, like the Merits Committee, found in the 2010 Rules 'no lack of clarity'. For the reasons I have outlined, I invite the Joint Committee to revert to the view that it took in 2005, when it raised no objection to temporarily empty Parts in the steadily evolving Criminal Procedure Rules.

As you can see from this letter I feel very strongly that we should be able to retain temporarily empty Parts and I know that, in this, I have the full support of the Committee and the Lord Chief Justice. If I can be of any help in this matter, please let me know.

Yours sincerely

The Rt Hon. Lord Justice Hooper

Appendix 6

S.I. 2011/1734: memorandum from the Ministry of Justice

Court Funds Rules 2011 (S.I. 2011/1734)

In its letter of 19 October 2011, the Committee sought a memorandum on the following points:

(1) Explain -

(a) in what circumstances it is expected that the provision in rule 10(b) is required to be relied upon, and

(b) why the provision is not specific in relation to them, given that the rule imposes a duty.

(2) Explain -

(a) in what circumstances it is expected that the provision in rule 34(d) is required to be relied upon,

(b) why the provision is not specific in relation to them, given that the rule imposes a prohibition, and

(c) whether there is a missing "not" before "to do so" in that provision.

(3) Explain to what extent, if any, rule 36(2) is intended to be disapplied in cases to which rule 39(1) applies, and how that intention is achieved.

Rule 10 Refusal to accept a deposit

Rule 10 provides that the Accountant General shall refuse to accept a deposit if:

(a) the person requesting the deposit has not complied with the Rules; or

(b) there is any other good reason to do so.

Paragraph (b) was included as a catch-all provision to enable deposits to be refused where it is considered appropriate to do so, for example, where there are questions as to the authenticity of the deposit schedule or written request or doubts that the money being deposited actually belongs to the person for whom it would be held.

It would not be practical to draft a provision which sets out every possible circumstance which might fall outside obvious non-compliance with the Rules.

Rule 34 Refusal to make a payment

Rule 34 provides that the Accountant General may not make a payment if:

(a) the identity or entitlement of a person claiming to be entitled to a payment is in doubt;

(b) the request for payment is outside the scope of a deputy's power;

(c) the person requesting the payment has not complied with the Rules; or

(d) there is any other good reason to do so.

Like rule 10(b), paragraph (d) of rule 34 was included as a catch-all provision to enable the Accountant General to refuse to make a payment where he considered appropriate to do so, and was drafted broadly for the same reason. Examples of where it might be needed include where there are questions as to the authenticity of the payment schedule or written request, doubt about whether the bank account belongs to the payee (e.g. the payee is "Joanne Smith" but the bank account is in the name of "J Smith" or "J and K Smith"); or where there are insufficient funds to make the payment or there is reason to believe that a legal aid charge is outstanding,

Rule 34 was loosely based on rule 40(9) of the Court Funds Rules 1987 (SI 1987/821 as amended) which allowed the Accountant General to refuse to make a payment until he is satisfied as to the identity and entitlement of any person claiming to be the payee and, in relation to payments by BACS or international money transfer, if the payment schedule is not completed with sufficient information or for any other good reason.

We agree that there is a missing "not" in subparagraph (d). The Ministry will consider how best to correct that.

Rules 36 and 39 Unclaimed funds in court and unclaimed county court money
Rule 36(2) provides that a fund in court shall be treated as unclaimed if it has not been dealt with for a period of ten years or the Accountant General is, at any time, satisfied that all reasonable steps have been taken to trace the person entitled to the fund in court and that person cannot be traced. Rule 3 defines a fund in court as money, securities or effects deposited in accordance with Part 2 of the Rules.

Rule 39(1) provides that money paid into a county court **other than under rule 8** may be treated as unclaimed if it has not been dealt with for a period of one year immediately before 1 March in any year. (Rule 8 deals with circumstances where money may be paid into a county court and hence becomes treated as a fund in court.) The money referred to rule 39 does not fall within the definition of a fund in court (as defined by rule 3) because the money is deposited with the Accountant General under rule 39, not under Part 2 ,and so is therefore not covered by rule 36 at all. There is therefore be no need expressly to disapply rule 36(2) where rule 39(1) applies.

It may help the Committee to explain that rule 39 relates to payments that a county court collects on behalf of judgment creditors, for example under an attachment of earnings order, and then distributes to the creditors by cheque. The money tends to become unclaimed where the cheque is returned to the court because the creditor has moved and failed to provide the court with updated contact details. The amounts are usually very low (£10 or less). Except where they become unclaimed under rule 39, the Court Funds Rules don't deal with these payments.

Ministry of Justice
24 October 2011

Appendix 7

S.I. 2011/1848: memorandum from the Ministry of Defence

Defence and Security Public Contracts Regulations 2011 (S.I. 2011/1848)

1. The Committee asks the Department to explain the contrast between the use of "must" in regulation 2(1) and (3) and the use of "will" in regulation 2(2). The wording of regulation 2 precisely follows that of the Government's template review provision to be inserted, adapted as necessary, in secondary legislation implementing EU obligations as part of the Government's policy on the 'sunsetting' and review of regulation. We understand that there is no intended contrast by the use of the words "must" and "will" in these paragraphs and that both words were intended by the Government to have the same mandatory effect.

2. The Committee asks the Department to explain why it is thought necessary to include the phrase "and 'disabled persons' is to be interpreted accordingly" in the definition of "disabled person" in regulation 3(1). It may be helpful to explain, by way of introduction, the general approach taken to these Regulations. These Regulations deal with a particular sub-set of public procurements and will need to exist alongside the well-established Public Contracts Regulations 2006 (SI 2006/5) and the Public Contracts (Scotland) Regulations 2006 (SSI 2006/1) ("the 2006 Regulations")[a]. Directive 2009/81/EC, which these Regulations implement, is drafted in very similar terms to Directive 2004/18/EC, which the 2006 Regulations implement. Many of the provisions of the Directives are, in fact, identical. These Regulations are likely to be used by the same 'users' as the 2006 Regulations. Therefore, to avoid confusion and maintain a consistent approach to implementation, the general approach was for these Regulations, wherever possible, to mirror the provisions of the 2006 Regulations. The definition of "disabled person" in regulation 3(1) of these Regulations is identical to that in regulation 3(1) of the Public Contracts Regulations 2006. However, the Department accepts that, but for the interests of maintaining consistency with the 2006 Regulations described above, the phrase referred to would not have been necessary.

3. Having regard to the definition of "land" in the Interpretation Act 1978, the Committee asks the Department to explain the purpose of the words from "including" to the end in regulation 7(1)(g). Again, regulation 7(1)(g) of these Regulations is identical to regulation 6(2)(e) of the Public Contracts Regulations 2006. However, having regard to the Interpretation Act 1978, the Department accepts that, but for the interests of maintaining consistency with the 2006 Regulations described above, the phrase referred to would not have been necessary.

[a] The particular defence and security public procurements to which these Regulations apply are, in effect, 'carved out' of the application of the Public Contracts Regulations 2006 and the Public Contracts (Scotland) Regulations 2006.

4. The Committee asks the Department to explain why it is thought necessary to include the phrase "and "recognised body" shall be interpreted accordingly" in the definition of "recognised bodies" in regulation 12(1). The definition of "recognised bodies" in regulation 12(1) of these Regulations is identical to that in regulation 9(1) of the Public Contracts Regulations 2006. However, the Department accepts that but for the interests of maintaining consistency with the 2006 Regulations described above, the phrase referred to would not have been necessary.

5. As prices as well as values are expressly mentioned in the paragraphs referred to in regulation 21(19), the Committee asks the Department what the purpose of that provision is. The same formulation is used in regulation 21(19) of the Public Contracts Regulations 2006. Regulation 21(19) of these Regulations provides that the references to values in specified paragraphs of regulation 21 shall be interpreted as including price. Therefore, for example, regulation 21(5)(b)[b] of these Regulations provides that where a contract is to be awarded on the basis of an offer which is the most economically advantageous (as opposed to awarded on the basis of lowest price) the contracting authority shall base an electronic auction on price or the values (including price) of quantifiable elements of the tenders. This is necessary because, whilst values can include price, the term "values" is wider and a value can also be attributed to other elements, for example, such as delivery time and quality. In the context of regulation 21(5)(b), regulation 21(19) is necessary to make clear that an electronic auction is to be based on price or a combination of values which shall include price.

6. The Committee asks the Department to explain the intended legal effect (if any) of regulation 23(3) on the competent authority receiving a request under it and how any such effect is achieved. This paragraph transposes Article 39(1) of Directive 2009/81/EC which provides that contracting authorities/entities "may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned". Regulation 23(3) of these Regulations is identical to regulation 23(3) of the Public Contracts Regulations 2006. The Department does not consider that regulation 23(3) of these Regulations imposes an obligation on a relevant competent authority to provide any such information but is intended to make it clear that a contracting authority can apply to a relevant competent to ask for such information as it might otherwise be wrong for it to seek.

7. The Committee asks the Department to explain what is intended to be covered by the "security clearance provisions of the United Kingdom" in regulation 38(3) and how that intention is given effect. This paragraph transposes Article 22 of Directive 2009/81/EC which provides that: "In the absence of harmonisation at Community level of national security clearance systems, Member States may provide that the measures and requirements referred to in the second subparagraph have to comply with their

[b] Regulation 21(5)(b) transposes Article 48(2) of Directive 2009/81/EC which provides that: "the electronic auction shall be based on… price and/or the new values of the features of the tenders indicated in the contract documents, where the contract is awarded to the most economically advantageous tender".

national provisions on security clearance". The intended effect of regulation 38(3) is that the measures and requirements specified by the contracting authority in the contract documents must comply with the Government's security clearance practices and procedures. For example, in a contract involving access to significant quantities of highly classified material the contracting authority could, in compliance with the security clearance provisions of the United Kingdom, require that economic operator's staff with access to that material be cleared to a high level. However, the contracting authority would be unlikely, in compliance with those provisions, to be able to specify the same requirement for a contract involving only material with a lower classification. In this way regulation 38(3) operates to ensure that, in specifying measures and requirements to ensure the security of information, the contracting authority cannot go beyond the security clearance provisions of the United Kingdom. The security clearance provisions of the United Kingdom are administrative in nature, rather than fixed requirements, and cannot be defined in law but at any one time, will be clear to contracting authorities, economic operators and sub-contractors.

Ministry of Defence
25th October 2011

Appendix 8

S.I. 2011/2055: memorandum from the Department for Communities and Local Government

Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011 (S.I. 2011/2055)

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

   Explain the meaning of the term "linear scheme" as used in regulations 14(4) and 36(6)(d) and why it appears not to be defined.

2. The Planning Act 2008 ("the Act") established the Infrastructure Planning Commission and provides for the granting of development consent for certain types of nationally significant infrastructure projects ("NSIPs").

3. The meaning of NSIP is defined in section 14 of the Act where it lists the projects which are NSIPs. These include among other things the construction of facilities such as a generating station, rail freight interchange, hazardous waste facility, and others such as the installation of electric lines, the construction of gas transporter pipeline, highway, railway, which are linear schemes. It is clear from the context in which the term is used which NSIPs are "linear schemes" because it is followed by the words "exceeding 5 kilometres".

4. Section 153 of and Schedule 6 to the Act contain provisions concerning changes to, and the revocation of orders granting development consent for nationally significant infrastructure after they have been granted. These Regulations set out procedural provisions in respect of applications under Schedule 6 to the Act, their consideration and determination.

5. The term 'linear scheme' has been used in other regulations concerning NSIPs. For example, in the Infrastructure Planning (Applications: Prescribed Forms and procedure) Regulations 2009 S.I. No. 2264:-

   - regulation 5(2)(j)(i) states "the proposed location or (for a linear scheme) the proposed route and alignment of the development and works"; and
   - regulation 9(3) states "Where the proposed development consists of, or includes, a linear scheme exceeding five kilometres in length,…".

6. The latter wording is the same as that used in these Regulations.

7. The term 'linear scheme' is a standard term used and understood by those involved in the development and provision of NSIPs, including businesses, contractors, statutory undertakers and local authorities.

8. We consider that when considered in the context of the Act and the development consent regime which it established, it is clear which NSIPs are linear schemes and, therefore subject to regulations 14(4) and 36(6)(d). It is for this reason that it was not considered necessary to define the term "linear scheme".

Department for Communities and Local Government
25th October 2011

Appendix 9

S.I. 2011/2132: memorandum from the Department for Environment, Food and Rural Affairs

Plant Protection Products (Fees and Charges) Regulations 2011 (S.I. 2011/2132)

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

Explain (with an example) how the amounts which authorisation holders are liable to pay in accordance with regulation 8 are intended to be calculated and demonstrate how effect is given to that intention, commenting (in particular) on

how a "financial year" is identified and on which financial year is relevant to any particular liability period.

2. The intention is that the annual charge in any particular year will relate to costs incurred within a liability period starting with 1st April in one year and ending with 31st March the following year ("liability period" is defined in regulation 2).

3. In order for a UK competent authority to calculate the annual charge for an authorisation holder in relation to, for example, the 2012/2013 liability period it must work out its own total costs incurred within that liability period ("total costs incurred" are defined in regulation 8(6)) and the "total annual turnover" (regulation 8(3)).

4. Each authorisation holder's annual turnover (needed in order to calculate the "total annual turnover") is calculated by reference to sales in its financial year. In this example, the financial year for each authorisation holder is calculated by reference to the 2012/2013 liability period (regulation 8(6)).

5. If, for example, a particular authorisation holder (AH) has a financial year that runs from 1st January to 31st December, the first step is to identify the calendar year in which the relevant liability period starts, namely 2012. AH's annual turnover is then calculated by reference to its sales in its financial year ending between 1st October 2011 and 31st September 2012 (the latter date being calculated by reference to the year in which the liability period starts). In this example, therefore, AH's financial year is 1st January 2010 to 31st December 2011 (regulation 8(6)).

6. Once a United Kingdom competent authority has the figures for its total costs incurred for the 2012/2013 liability period and the total annual turnover (calculated by reference to the 2012/2013 liability period) it divides the former by the latter and multiplies that figure by 100 in order to obtain a percentage which is then applied to each authorisation holder's annual turnover.

7. Each authorisation holder is obliged to provide an authority with evidence of its annual turnover for a given liability period on request (regulation 8(4)).

8. Using the following assumptions:-

i) AH's annual turnover for 1st January 2010 to 31st December 2011 is £2,350,000,

ii) the total annual turnover for all authorisation holders (calculated by reference to the 2012/2013 liability period) is £610,000,000, and

iii) the total costs incurred in the 2012/2013 liability period are £3,419,000.

Stage one in the calculation of AH's annual charge in relation to the 2012/2013 liability period is: A ÷ B x 100.

A = £3,419,000 (total costs incurred in the liability period), and B = £610,000,000 (total annual turnover).

£3,419,000 ÷ £610,000,000 x 100 = 0.56%.

Stage two is applying that percentage to AH's annual turnover. 0.56% of £2,350,000 is £13,160. This is the amount AH would be charged in relation to the 2012/2013 liability period.

Department for Environment, Food and Rural Affairs
21st October 2011

Appendix 10

S.I. 2011/2225: memorandum from HM Revenue and Customs

Excise Goods (Holding, Movement and Duty Point) (Amendment) Regulations 2011 (S.I. 2011/2225)

1. The Joint Committee has requested a memorandum to be submitted on the following point-

"Explain (in steps) precisely how paragraph (2E) of the paragraphs (2) to (2E) substituted by regulation 10 for regulation 62(2) of S.I. 2010/593 is intended to work, and how that intention is achieved, given that (unlike the rest of the substituted paragraphs (2A) to (2E)) sub-paragraph (b) of paragraph (2E) does not appear to refer to premises (even though the substituted paragraph (2) indicates that it does)"

2. Regulation 62 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (S.I. 2010/593) (as amended by regulation 10 of the Excise Goods (Holding Movement and Duty Point) (Amendment) Regulations 2011 (S.I. 2011/2225) allows alcoholic liquors to be removed without payment of duty from the premises referred to in regulation 10 of these Regulations to any other such premises without being under the cover of an electronic administrative document.

3. Paragraphs (2A) to (2E) list the premises from and to which the product can be moved. Paragraph (2E) does refer to premises, as indicated by substituted paragraph (2).The premises are those referred to in sub-paragraph (a). However, the description of those premises is qualified by sub-paragraph (b), which provides that the person registered or holding a licence in respect of the premises, or the authorised warehousekeeper (where the premises are an excise warehouse) must be a person who, for VAT purposes, is treated as a member of the same group as the producer or manufacturer of the alcoholic liquors.

4. Paragraph (2E) is intended to allow the movement of alcoholic liquors to occur between the premises referred to in sub-paragraph (a) without being under the cover of an electronic administrative document, but only where the "occupier" of those premises (as referred to sub-paragraph (a)) and the producer and manufacturer of the alcoholic liquors are within the same VAT group. It operates in the same way as paragraphs (2A) to (2D) in that it refers to the premises in relation to which such movements are permitted.

HM Revenue and Customs
25 October 2011.