House of Lords
House of Commons

Joint Committee on Statutory Instruments

Second Report of Session 2013-14

Drawing special attention to:

National Treatment Agency (Abolition) and the Health and Social Care Act 2012 (Consequential, Transitional and Saving Provisions) Order 2013 **(S.I. 2013/235)**
Motor Vehicles (Driving Licences) (Amendment) Regulations 2013 **(S.I. 2013/258)**
Controlled Drugs (Supervision of Management and Use) Regulations 2013 **(S.I. 2013/373)**
Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 **(S.I. 2013/380)**
Social Security (Overpayments and Recovery) Regulations 2013 **(S.I. 2013/384)**
Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2013 **(S.I. 2013/436)**
Trade Marks and Registered Designs (Amendment) Rules 2013 **(S.I. 2013/444)**
Local Authorities (Capital Finance and Accounting) (England) (Amendment) Regulations 2013 **(S.I. 2013/476)**
Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 **(S.I. 2013/480)**
Residential Family Centres (Amendment) Regulations 2013 **(S.I. 2013/499)**
National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 **(S.I. 2013/500)**
Crime and Disorder Act 1998 (Youth Conditional Cautions: Code of Practice) Order 2013 **(S.I. 2013/613)**

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Joint Committee on Statutory Instruments

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Powers

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

Remit

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

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

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

The Committee usually meets weekly when Parliament is sitting.

Publications

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

Committee staff

The current staff of the Committee are Sarah Petit (*Commons Clerk*), Jane White (*Lords Clerk*) and Liz Booth (*Committee Assistant*). Advisory Counsel: Peter Davis, Peter Brooksbank, Philip Davies and Daniel Greenberg (*Commons)*; Nicholas Beach and Peter Milledge *(Lords)*.

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Instruments reported

At its meeting on 5 June 2013 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to twelve of those considered. The Instruments and the grounds for reporting them are given below. The relevant Departmental memoranda are published as appendices to this report.

1 S.I. 2013/235: Reported for requiring elucidation

National Treatment Agency (Abolition) and the Health and Social Care Act 2012 (Consequential, Transitional and Saving Provisions) Order 2013 (S.I. 2013/235)

1.1 **The Committee draws the special attention of both Houses to this Order on the ground that it requires elucidation in one respect.**

1.2 This Order provides for the abolition of the National Treatment Agency. Article 3 abolishes the Agency on 1st April 2013; and articles 4 and 5 make provision for the transfer of the staff, property and liabilities of the Agency. Article 5(2) says: "Any criminal liabilities of the Agency are on the transfer date transferred to the National Health Service Litigation Authority".

1.3 The Committee asked the Department of Health to explain the practical implications of article 5(2) including, in particular, what the prosecution would be required to prove, who would be expected to answer the charge and how issues relating to states of mind would be proved and disproved.

1.4 In a memorandum printed at Appendix 1, the Department explain that "Transfers of criminal liabilities are now commonly made on the dissolution of NHS bodies. The Department believes that it is not usual practice to address the practical implications of transfers of criminal liabilities in primary or secondary legislation." The Department acknowledges "that a criminal prosecution following the dissolution of a Special Health Authority could be more difficult to pursue than a prosecution of a body which is still in existence".

1.5 The memorandum goes on to discuss how transferred criminal prosecutions might be made to work in practice. It gives the example of an offence of strict liability, as to which the Committee agrees that the practical difficulties might not be insurmountable. In relation to other offences the Department acknowledges that it might be necessary to prove the state of mind of particular individuals. It was in relation to those cases that the Committee was particularly concerned about how practicable it is to transfer criminal liability from a defunct entity. For example, how would the individuals whose states of mind were relevant obtain access to the records necessary to refresh their memory of relevant events? What obligations would those individuals have to cooperate with investigations in relation to their previous employment? To these questions and others there may be answers, but they are not supplied by the memorandum.

1.6 The memorandum correctly highlights the clear statutory authority for transfer of criminal liability as well as precedents for it but, even so, the Committee is not satisfied that

it is either generally necessary to transfer it or (where transfer appears to be the best course) sound to provide for it without dealing with the consequences expressly, as would clearly be possible under the enabling powers cited. Thus if there is simply a need to ensure that assets are available to pay a fine for a strict liability offence committed by the defunct body, that could be achieved simply by saving the existence of the body in relation to future criminal consequences of its past actions, and making the assets of the transferee body available for the purpose of satisfying those criminal liabilities, in the same way as is routinely done in transfer of functions provisions for civil liabilities.

1.7 The discussion in the memorandum, while helpful so far as it goes, does not address a number of obvious practical issues. **Accordingly the Committee reports article 5(2) as requiring elucidation, only partly provided by the Department's memorandum.**

2 S.I. 2013/258: Reported for defective drafting

Motor Vehicles (Driving Licences) (Amendment) Regulations 2013 (S.I. 2013/258)

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 amend the Motor Vehicles (Driving Licences) Regulations 1999 (S.I. 1999/2864) ("the principal Regulations") to implement changes to driving licence medical standards in respect of eyesight and epilepsy.

2.3 Regulation 3(2) amends regulation 72 of the principal Regulations. The new paragraph (1) substituted in regulation 72 by regulation 3(2) prescribes impairment of vision as a relevant disability in relation to applicants for, or holders of, certain driving licences who are unable to meet certain standards which include, in the case of someone with diplopia or sight in only one eye, the adaptation standard in paragraph (1D) (which is inserted into regulation 72 by regulation 3(2)). Paragraph (1D) defines the adaptation standard for a person having diplopia or sight in only one eye as being that "since developing that condition" there has been an appropriate period of adaptation and clinical confirmation of full adaptation.

2.4 The Committee wondered how (if at all) paragraph (1D) was intended to work if a person was born with diplopia or sight in only one eye since, in such a case, the words "since developing that condition" did not appear entirely apposite. The Committee accordingly asked the Department for Transport to explain its intentions in relation to such a case and how effect is given to them.

2.5 In a memorandum printed at Appendix 2, the Department states that a person having diplopia or sight in one eye from birth or an early age is likely to have adapted to that condition long before being licensed to drive and, though such a person would be required to produce a medical report confirming adaptation, it would almost invariably be automatic. The Committee accepts that that may well be so but nevertheless remains concerned that the inclusion of the words "since developing that condition" might be taken to suggest that the condition does not apply at all in the case of such a person, which appears not to be the Department's intention. It considers that those words are unnecessary since adaptation to a condition cannot possibly occur before the condition

arises. And, as is often the case when unnecessary words are included in legislative provisions, their inclusion here has ended up casting doubt about exactly what is achieved. If (as seems to be the case) the Department intends people born with diplopia or sight in one eye to be subject to the adaptation condition, it would have been better not to refer to "developing" such a condition. **The Committee accordingly reports regulation 3(2) for defective drafting.**

3 S.I. 2013/373: Reported for requiring elucidation

Controlled Drugs (Supervision of Management and Use) Regulations 2013 (S.I. 2013/373)

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

3.2 The Regulations make new provision underpinning the arrangements in England and Scotland for securing the safe management and use of controlled drugs in hospitals and the wider community.

3.3 Regulation 19 provides that various bodies may make a request for a periodic declaration and self assessment from providers of health care, those carrying on care homes and registered pharmacists stating whether (and, if so, how) controlled drugs are managed and used at their premises. The Committee asked the Department of Health whether regulation 19 is intended to impose a duty to comply with such a request and (if so) how effect is given to that intention and (if not) why regulation 19 has been included in the Regulations.

3.4 In a memorandum printed at Appendix 3, the Department states that regulation 19 is not intended to impose a duty to comply but was included to make it clear that the bodies concerned (which are all created by statute) have the power to make the sorts of requests mentioned in that regulation. It goes on to say that a failure to comply, though not subject to an express sanction, could trigger further investigation and that the provision replicates earlier provision to similar effect.

3.5 The Committee is not clear that express provision is required to authorise a statutory body to do something that has no direct legal consequences but accepts that it is not beyond doubt that the bodies referred to in regulation 19 may make requests of the sort mentioned in the absence of express power.

3.6 **The Committee accordingly reports regulation 19 for requiring the elucidation provided in the Department's memorandum.**

4 S.I. 2013/380: Reported for defective drafting

Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (S.I. 2013/380)

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

4.2 The Regulations make provision about claims for and payments of universal credit, personal independence payment, and jobseeker's allowance and employment and support allowance as provided for by Part 1 of the Welfare Reform Act 2012.

4.3 Regulation 29(4) extends time for claiming jobseeker's allowance in circumstances specified in paragraph (5). Paragraph (5)(h) specifies one set of circumstances in the following words: "the claimant was unable to make contact by means of an electronic communication used in accordance with Schedule 2 where the claimant would be expected to notify an intention of making a claim because the official computer system was inoperative."

4.4 The Committee asked the Department for Work and Pensions what effect is intended by the inclusion in regulation 29(5)(h) of the phrase "where the claimant would be expected to notify an intention of making a claim".

4.5 In a memorandum printed at Appendix 4, the Department accepts that "this phrase does not add anything and that these words have no effect", and the Department undertakes to remove the words at the earliest available opportunity.

4.6 **The Committee accordingly reports regulation 29(5)(h) for defective drafting, acknowledged by the Department.**

5 S.I. 2013/384: Reported for defective drafting

Social Security (Overpayments and Recovery) Regulations 2013 (S.I. 2013/384)

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

5.2 The Regulations make provision about the recovery of amounts which are recoverable under social security legislation.

5.3 Regulation 15 applies where an amount of housing costs has been, or falls to be, recovered by deduction from benefit paid to a person ("the landlord") to discharge (in whole or in part) an obligation owed to the landlord by the person on whose behalf the recoverable amount was paid ("the tenant"). If the landlord has been found guilty of an offence or agreed to pay a specified penalty, regulation 15(2) provides for the obligation to be taken to be discharged by the amount of the deduction. Regulation 15(3) then requires the Secretary of State to notify both the landlord and the tenant "that the overpayment that it has recovered or that the Secretary of State has determined to recover is, or will be, one to which paragraph (2) applies", and certain other matters. The Committee asked the Department for Work and Pensions what the word "it" in regulation 15(3)(a) is intended to refer to.

5.4 In a memorandum printed at Appendix 5, the Department accepts that the use of the word "it" in regulation 15(3)(a) is incorrect, and should have been a reference to the Secretary of State. The Department argues that in the context it is clear that "the word "it" can only be taken as a reference to the Secretary of State because it is only the Secretary of State who has power to recover overpayments of benefit under section 71ZB of the Social Security Administration Act 1992 and who consequently is empowered to recover them by

deduction from benefit under section 71ZC of that Act". The Department asks the Committee to consider whether this may be corrected by issuing a correction slip, and otherwise undertakes to make an amendment at the earliest opportunity.

5.5 Determination of when it is appropriate to rectify the text of a statutory instrument by the issue of a correction slip is a direct responsibility of the Registrar of Statutory Instruments rather than the Committee. In case the Committee's preliminary view is of assistance to the Registrar, the Committee notes that, building on the judgment in *Inco Europe v First Choice Distribution* ([2000] 1 WLR 586 (HL)), it expects the error to be small scale and obvious and the correction to be equally obvious, if a correction slip is to be found as justified. In this case it does not have sufficient information from the memorandum to conclude that the correction is obvious. The reason is that the memorandum argues the point on the basis of unavoidable consistency with just one of the numerous enabling powers cited; it does not address whether the others are necessarily irrelevant.

5.6 **The Committee accordingly reports regulation 15(3)(a) for defective drafting, acknowledged by the Department.**

6 S.I. 2013/436: Reported for defective drafting

Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2013 (S.I. 2013/436)

6.1 **The Committee draws the special attention of both Houses to this Order on the ground that it is defectively drafted in one respect.**

6.2 The Order amends the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011 (S.I. 2011/517) ("the principal Order") to provide for a new benefit known as armed forces independence payment.

6.3 Article 2(4) inserts new articles 24A to 24F into the principal Order. Article 24C provides that where there is payable to a person in respect of a period both armed forces independence payment and an extra-costs disability benefit the amount of the latter is to be deducted from the former and only the balance paid.

6.4 The Committee was puzzled by that proposition because article 24A, as inserted into the principal Order, specifies as one of the conditions for an award of armed forces independence payment that an extra-costs disability benefit is not being received or claimed. And article 24B provides that if that condition ceases to be satisfied so does entitlement to armed forces independence payment. The Committee accordingly asked the Ministry of Defence to explain why article 24C assumes that armed forces independence payment and an extra-costs disability benefit may be payable to a person in respect of the same period, given that articles 24A and 24B seem to suggest that that cannot happen.

6.5 In a memorandum printed at Appendix 6, the Department states that article 24C was inserted "out of an abundance of caution" so that, if by accident a double payment is processed, a deduction can be made from armed forces independence payment.

6.6 The Committee considers that such a provision is probably unnecessary, its assumption being that (under the general law) a payment made in error to which the recipient is not entitled can be recovered. But, even if it is advisable to eliminate all scope for argument on the point by spelling out that recovery could be made by way of a deduction from armed forces independence payment, the terms of article 24C are unfortunate in that they refer to both armed forces independence payment and an extra-costs disability benefit being "payable" (when only one can be). Had the provision referred explicitly to a situation where, erroneously, both are in fact paid, the Committee might well have not felt the need to query new article 24C.

6.7 **The Committee accordingly reports article 2(4) for defective drafting.**

7 S.I. 2013/444: Reported for defective drafting

Trade Marks and Registered Designs (Amendment) Rules 2013 (S.I. 2013/444)

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

7.2 The Rules amend the Registered Designs Rules 2006 (S.I. 2006/1975) and the Trade Marks Rules 2008 (S.I. 2008/1797). Most of the amendments alter time periods prescribed in the two sets of Rules so that, when computing a period of time by reference to an event, the date on which the event occurred is not taken into account.

7.3 Rule 3(6) amends the closing words of rule 18(6) of the Trade Marks Rules 2008. Those words provide for a period to begin on the notification date and end "one month after the date on which Form TM9t was filed or two months after the notification date, whichever is the later." The amendment inserts "beginning immediately" after "two months".

7.4 The Committee asked the Department of Business, Innovation and Skills to explain the need for the amendment made by rule 3(6) given that the provision amended already refers to a period ending two months after a date and why, if there are good reasons for the amendment, they do not require the making of a similar amendment in the alternative one month period specified in that provision.

7.5 In a memorandum printed at Appendix 7, the Department states that the existing reference to a period beginning on the notification date and ending two months after the notification date required amendment "to avoid the computation of the period including the notification date". But the Committee considers that it was already clear that, whatever the length of the period, it ended two months after that date. Adding the extra words did not clarify that and, indeed, had the effect of rendering the provision syntactically unfortunate as it now reads "and end .... two months beginning immediately after the notification date". Furthermore, despite the Department's statement, nothing in the text appears to have any effect on the start of the period in question.

7.6 As to the alternative one month period, the memorandum asserts that the formulation "one month after the date on which Form TM9t was filed" would be interpreted as "commencing from the date after the filing [of the Form]" The Committee does not understand why the Department considers that the one month period is differently constructed from the two month period. Both are expressed to end one, or two, months

after a date. If the words relating to the first (one month) period needed no amendment (as to which the Committee agrees) then neither did those relating to the second (two month) period.

7.7 **The Committee accordingly reports rule 3(6) for defective drafting.**

8 S.I. 2013/476: Reported for defective drafting

Local Authorities (Capital Finance and Accounting) (England) (Amendment) Regulations 2013 (S.I. 2013/476)

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

8.2 The Regulations amend the Local Authorities (Capital Finance and Accounting) (England) Regulations 2003 ("the 2003 Regulations"). The Schedule to the Regulations contains a new version of the Schedule to the 2003 Regulations which is substituted for the existing version. Regulation 1(5) of the 2003 Regulations contains, in the definition of "sub-liability", a reference to paragraph 9 of the Schedule to those Regulations. The Committee noticed that that reference no longer appears to be correct now that a new version of the Schedule is substituted for the existing one. It accordingly asked the Department for Communities and Local Government to explain why the reference to paragraph 9 had not been amended by the Regulations in consequence of that substitution.

8.3 In a memorandum printed at Appendix 8, the Department accepts that that reference should have been amended to refer to paragraph 13 of the substituted version of the Schedule and undertakes to correct the omission by a further instrument.

8.4 **The Committee accordingly reports the Regulations for defective drafting, acknowledged by the Department.**

9 S.I. 2013/480: Reported for defective drafting

Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (S.I. 2013/480)

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

9.2 The Regulations make provision about the rules the Director of Legal Aid Casework must apply to determine whether an individual's financial resources are such that the individual is eligible for civil legal services under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

9.3 Regulation 41 specifies that, where an individual is aged 60 or over and the individual's monthly disposable income is less than £315 "the amount of capital shown in Table 1 shall be disregarded", Table 1 contains ten capital figures on the right under the heading "Amount of Capital Disregard" each against a tranche on the left under the heading "Monthly disposable income (excluding net income derived from capital)". The first tranche ends at £25, the second starts at £26 and ends in £50, the third starts at £51 and

ends at £75, and so on until the final tranche, which runs from £226 to £315. The Committee queried both the absence of dovetailing of text and table and the absence of a rule for those whose relevant income fell between tranches (e.g. £25.50). In a memorandum printed at Appendix 9 the Ministry of Justice points (correctly) to a precedent from 2000, indicates that it does not understand the point about dovetailing and states in relation to the £25.50 example that the Director will round up the relevant sums to the nearest whole number in the usual way, which the Ministry indicates is a well-established practice in the legal aid context.

9.4 On the question of dovetailing, the Committee's starting assumption is that text and tables should preferably relate to each other as exactly as text and other text should, and therefore proper dovetailing would call for the text not just to specify that "the amount of capital shown in Table 1 shall be disregarded" but also contain some indication that the amount of capital in the right hand column would match the corresponding income tranche in the left hand one. Although the matching is nonetheless sufficiently implicit that the lack of express dovetailing, had Table 1 otherwise appeared satisfactory, would not alone have caused initial concern, the Committee does not find the answer to the query on the £25.50 case convincing. There is no indication as to what gives the Director authority to round up and, while the Committee has no reason to cast doubt on the Department's statement that the practice is well-established, it notes that similar imprecision in the 2000 precedent may have been a factor in establishing the need for the practice. **The Committee accordingly reports regulation 41 for defective drafting.**

10 S.I. 2013/499: Reported for defective drafting

Residential Family Centres (Amendment) Regulations 2013 (S.I. 2013/499)

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

10.2 The Regulations are made under the Care Standards Act 2000 and amend the Residential Family Centres Regulations 2002. Regulation 13 inserts new regulation 21A, dealing with the use of surveillance; new regulation 21A provides that monitoring devices must only be used in a residential centre for the purpose of safeguarding the residents' welfare or for the assessment or monitoring of parenting capacity. Regulation 21A(6) disapplies the restrictions of the regulation to "monitoring devices commonly used by parents to monitor their children's safety".

10.3 The Committee asked the Department for Education why the exception in new regulation 21A(6), read literally, applies to devices irrespective of how they are actually being used.

10.4 In a memorandum printed at Appendix 10, the Department explains that new regulation 21A(6) was inserted following consultation "in order to ensure that parents are able to use baby monitors during their time at the residential centres". The Department accepts that the provision "has the unintended effect of allowing staff (and others) at residential family centres to use baby monitors without the safeguards provided in regulation 21A in relation to other surveillance devices"; the Department thanks the

Committee for highlighting this issue, and undertakes to review and amend the regulations.

10.5 **The Committee accordingly reports regulation 13 for defective drafting, acknowledged by the Department.**

11 S.I. 2013/500: Reported for requiring elucidation

National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 (S.I. 2013/500)

11.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they require elucidation in several related respects.**

11.2 The Regulations deal with, among other things, the procurement of health care services for the purposes of the National Health Service.

11.3 Regulation 3(2)(b) provides that a clinical commissioning group or the National Health Service Commissioning Board must "treat providers equally and in a non-discriminatory way, including by not treating a provider, or type of provider, more favourably than any other provider, in particular on the basis of ownership." Regulation 3(3) provides that a clinical commissioning group or the National Health Service Commissioning Board "must procure the services from one or more providers that—

> (a) are most capable of delivering the objective referred to in regulation 2 in relation to the services, and
>
> (b) provide best value for money in doing so."

11.4 The Committee asked the Department of Health—

> (1) In relation to regulation 3(2), to explain (by reference to hypothetical examples if possible)—
>
> > (a) what the duty to treat providers "equally", the duty to treat them "in a non-discriminatory way" and the duty not to treat any of them "more favourably than any other provider" are intended to add to each other, and
> >
> > (b) what is intended to be achieved by the inclusion of the words "on the basis of ownership",
>
> and how effect is given to those intentions; and
>
> (2) Given that discrimination can presumably be made on the grounds of capability and value for money, to explain why there is no express indication of the relationship of regulation 3(2)(b) and (3).

11.5 In a memorandum printed at Appendix 11, the Department explains that it was keen in regulation 3(2)(b) to follow the terms of the general law on public procurement as set out in regulation 4(3) of the Public Contracts Regulations 2006 (S.I. 2006/5) ("the 2006 Regulations") which is in turn modelled on Article 2 of Directive 2004/18/EC which it implements.

11.6 Whether or not that approach is justified, regulation 4(3) of the 2006 Regulations does not include anything to explain the inclusion in regulation 3(2)(b) of provision that a provider, or type of provider, is not be treated "more favourably than any other provider". In the memorandum the Department states that these words are "intended to be read with the words that follow, "in particular on the basis of ownership"" and that the drafting is intended to indicate that being in the public sector, the private sector or the voluntary sector is not meant of itself to buy a provider any advantage.

11.7 On the issue of the relationship between regulation 3(2)(b) and (3), the Department's memorandum asserts that there is no overlap between them. It states that "capability and value for money are objective factors .... against which providers can be distinguished from each other without discriminating against them."

11.8 The Committee accepts the Department's explanation on the question of sectors but otherwise concludes that the Department, without any indication as to whether European Union law is to govern the interpretation of these Regulations, is relying significantly on concepts used in other Regulations, interpretation of which manifestly relies on European Union law concepts, to justify lack of express prioritisation among provisions that might otherwise conflict.

11.9 The Committee is grateful to the Department for its help in seeking to elaborate on the significance of the inclusion of these open-textured, and inevitably potentially ambiguous and self-contradictory, concepts. But it continues to be concerned that their intended meaning depends on assumptions as to interpretation the application of which has not been justified. **The Committee accordingly reports regulations 3(2)(b) and (3) as requiring elucidation, partly provided by the Department's memorandum.**

12 S.I. 2013/613: Reported for failure to comply with proper legislative practice

Crime and Disorder Act 1998 (Youth Conditional Cautions: Code of Practice) Order 2013 (S.I. 2013/613)

12.1 **The Committee draws the special attention of both Houses to this Order on the ground that it fails to comply with proper legislative practice in one respect.**

12.2 The Order provides for the coming into force of a new code of practice entitled "Code of Practice for Youth Conditional Cautions" under section 66G of the Crime and Disorder Act 1998. The Explanatory Memorandum relating to the Order indicates that the Code "can be downloaded from the Official Documents website".

12.3 The Committee has previously stated its view that proper legislative practice requires documents that are referred to in legislation to be available to those who do not have access to the internet. The Committee recently stated its reason for this view in paragraph 2.4 of its fifth Report of last Session, published on 4 July 2012, when reporting on S.I. 2012/937. It accordingly asked the Ministry of Justice to explain why, in the light of that, nothing in the Order, its footnotes, its Explanatory Note or its Explanatory Memorandum includes an address at which the Code can be inspected or from which a hard copy of the code can be obtained.

12.4 In a memorandum printed at Appendix 12, the Department accepts that it would have been helpful to have included more information as to how to obtain a copy of the Code. It states that it proposes to issue a correction slip to add to the Explanatory Note a short comment setting out how a copy of the Code can be obtained, including both an internet address and a postal address. The Committee is grateful for that response.

12.5 **The Committee accordingly reports the Order on the ground for failure to comply with proper legislative practice, acknowledged by the Department.**

Instruments not reported

At its meeting on 5 June 2013 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

○ *denotes written evidence has been submitted but not printed*

Draft Instruments requiring affirmative approval

S.I. 2013/1128 Justice and Security (Northern Ireland) Act 2007 (Code of Practice) Order 2013

Draft S.I. Coroners and Justice Act 2009 (Consequential Provisions) Order 2013

Draft S.I. Public Bodies (Abolition of the Registrar of Public Lending Right) Order 2013

Draft S.I. Public Bodies (Abolition of BRB (Residuary) Limited) Order 2013

Draft S.I. Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013

Draft S.I. Education (Amendment of the Curriculum Requirements for Second Key Stage) (England) Order 2013

Draft S.I. Highway and Railway (Nationally Significant Infrastructure Project) Order 2013

Draft S.I. Child Support and Claims and Payments (Miscellaneous Amendments and Change to the Minimum Amount of Liability) Regulations 2013

Draft S.I. Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visits) (England) (Amendment) Regulations 2013

Draft S.I. Legal Aid (Information about Financial Resources) (Amendment) Regulations 2013

Draft S.I. Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Referral Fees) Regulations 2013

Instruments subject to annulment

○ **S.I. 2013/362** Civil Enforcement of Road Traffic Contraventions (General Provisions) (Wales) Regulations 2013

S.I. 2013/363 National Health Service (Primary Medical Services) (Miscellaneous Amendments and Transitional Provisions) Regulations 2013

S.I. 2013/387 Personal Independence Payment (Transitional Provisions) Regulations 2013

S.I. 2013/389 Social Security (Disability Living Allowance, Attendance Allowance and Carer's Allowance) (Amendment) Regulations 2013

S.I. 2013/443 Social Security (Miscellaneous Amendments) Regulations 2013

○ **S.I. 2013/471** Criminal Legal Aid (Financial Resources) Regulations 2013

S.I. 2013/536 Copyright and Performances (Application to Other Countries) Order 2013

S.I. 2013/603 Energy Performance of Buildings (England and Wales) (Amendment) (Fees) Regulations 2013

S.I. 2013/612 Fines, Council Tax and Community Charges (Deductions from Universal Credit and Other Benefits) Regulations 2013

S.I. 2013/622 Social Security (Contributions) (Amendment and Application of Schedule 38 to the Finance Act 2012) Regulations 2013

S.I. 2013/624 Misuse of Drugs (Designation) (Amendment No. 2) (England, Wales and Scotland) Order 2013

S.I. 2013/625 Misuse of Drugs (Amendment No. 2) (England, Wales and Scotland) Regulations 2013

S.I. 2013/640 Wireless Telegraphy (Register) (Amendment) Regulations 2013

S.I. 2013/642 Financial Services Act 2012 (Consequential Amendments and Transitional Provisions) (No. 2) Order 2013

S.I. 2013/711 National Health Service (Primary Dental Services) (Miscellaneous Amendments to Charges) Regulations 2013

S.I. 2013/786 Iran (Restrictive Measures) (Overseas Territories) (Amendment) Order 2013

S.I. 2013/815 General Medical Council (Fitness to Practise and Constitution of Panels and Investigation Committee) (Amendment) Rules Order of Council 2013

S.I. 2013/822 Mobile Roaming (European Communities) (Amendment) Regulations 2013

S.I. 2013/829 Promotion of the Use of Energy from Renewable Sources (Amendment) Regulations 2013

S.I. 2013/830 Town and Country Planning (Temporary Stop Notice) (England) (Revocation) Regulations 2013

S.I. 2013/862 Protection of Freedoms Act 2012 (Consequential Amendments) Order 2013

S.I. 2013/877 Syria (European Union Financial Sanctions) (Amendment) Regulations 2013

S.I. 2013/903 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Consequential Amendments) Regulations 2013

S.I. 2013/908 Late Payment of Commercial Debts (No. 2) Regulations 2013

S.I. 2013/933 Regional Strategy for the West Midlands (Revocation) Order 2013

S.I. 2013/934 Regional Strategy for the North West (Revocation) Order 2013

S.I. 2013/935 Regional Strategy for the South West (Revocation) Order 2013

S.I. 2013/968 Electricity (Extension of Transitional Period for Property Schemes) Order 2013

S.I. 2013/971 Offshore Combustion Installations (Pollution Prevention and Control) Regulations 2013

S.I. 2013/973 Greater London Authority (Specified Activities) Order 2013

S.I. 2013/981 Mobile Homes (Selling and Gifting) (England) Regulations 2013

S.I. 2013/984 Care Planning, Placement and Case Review and Fostering Services (Miscellaneous Amendments) Regulations 2013

S.I. 2013/985 Adoption Agencies (Miscellaneous Amendments) Regulations 2013

S.I. 2013/992 Bus Lane Contraventions (Approved Local Authorities) (England) (Amendment) and Civil Enforcement of Parking Contraventions Designation Order 2013

S.I. 2013/1001 Nitrate Pollution Prevention (Amendment) and Water Resources (Control of Pollution) (Silage, Slurry and Agricultural Fuel Oil) (England) (Amendment) Regulations 2013

S.I. 2013/1011 Electricity (Exemption from the Requirement for a Generation Licence) (Baillie) Order 2013

S.I. 2013/1013 Motor Vehicles (Driving Licences) (Amendment) (No. 2) Regulations 2013

S.I. 2013/1031 Electricity (Exemption from the Requirement for a Generation Licence) (Markinch) Order 2013

S.I. 2013/1037 Greenhouse Gas Emissions Trading Scheme (Amendment) Regulations 2013

S.I. 2013/1047 Energy Supply Company Administration (Scotland) Rules 2013

S.I. 2013/1096 Burma/Myanmar (Financial Restrictions) (Revocation) Regulations 2013

S.I. 2013/1125 Prospectus Regulations 2013

Instruments not subject to Parliamentary proceedings laid before Parliament

S.I. 2013/838 Mid Staffordshire National Health Service Foundation Trust (Appointment of Trust Special Administrators) Order 2013

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2013/646 Wireless Telegraphy (Mobile Spectrum Trading) (Amendment) Regulations 2013

S.I. 2013/651 Financial Services Act 2012 (Commencement No. 3) Order 2013

S.I. 2013/762 Consular Fees (Amendment) Regulations 2013

S.I. 2013/787 Inspectors of Education, Children's Services and Skills (No. 3) Order 2013

S.I. 2013/917 Wireless Telegraphy (Licence Charges) (Amendment) Regulations 2013

S.I. 2013/969 Electoral Registration and Administration Act 2013 (Commencement No. 3) Order 2013

S.I. 2013/975 Apprenticeships, Skills, Children and Learning Act 2009 (Commencement No. 6) Order 2013

S.I. 2013/983 Welfare Reform Act 2012 (Commencement No. 9 and Transitional and Transitory Provisions and Commencement No. 8 and Savings and Transitional Provisions (Amendment)) Order 2013

S.I. 2013/986 Crown Office Fees Order 2013

S.I. 2013/1026 General Osteopathic Council (Application for Registration and Fees) (Amendment) Rules Order of Council 2013

S.I. 2013/1042 Crime and Courts Act 2013 (Commencement No. 1 and Transitional and Saving Provision) Order 2013

S.I. 2013/1103 Criminal Justice Act 2003 (Commencement No. 31 and Saving Provisions) Order 2013

S.I. 2013/1104 Coroners and Justice Act 2009 (Commencement No. 13) Order 2013

S.I. 2013/1127 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 8) Order 2013

Appendix 1

S.I. 2013/235: memorandum from the Department of Health

National Treatment Agency (Abolition) and the Health and Social Care Act 2012 (Consequential, Transitional and Saving Provisions) Order 2013 (S.I. 2013/235)

1. In its letter to the Department of 24th April 2013, the Committee requested a memorandum on the following point:

   "Explain the practical implications of article 5(2) including, in particular, what the prosecution would be required to prove, who would be expected to answer the charge and how issues relating to states of mind would be proved and disproved."

2. The Department's response to the Committee's point is outlined below.

3. The general policy of the Department is that the criminal liabilities of NHS bodies should be transferred on their dissolution or abolition to other NHS bodies, so that accountability for criminal offences committed by any such bodies can be retained within the NHS and will not wither away. This policy was reflected in section 74 of the Health Act 2006, which was designed to address a lacuna which arose from the case of R v Pennine Acute Hospitals NHS Trust (formerly Rochdale Health Care NHS Trust) [2003] EWCA Crim 3436, [2004] 1 All ER 1324. In that case, the Court of Appeal held that the general power in paragraph 30 of Schedule 2 to the NHS and Community Care Act 1990 to transfer property, rights and liabilities on the dissolution of an NHS trust did not include the power to transfer criminal liabilities. Section 74 therefore amended the provisions on transfer on dissolution of all NHS bodies so as to provide specifically for the transfer of criminal liabilities. This included inserting what is now section 28(5) of the National Health Service Act 2006, which deals with Special Health Authorities and under which article 5(2) is made.

4. Transfers of criminal liabilities are now commonly made on the dissolution of NHS bodies. The Department believes that it is not usual practice to address the practical implications of transfers of criminal liabilities in primary or secondary legislation. See, for example, article 5(2) of the NHS Professionals Special Health Authority (Abolition) Order 2010/425. This approach is also taken in primary legislation, for example, paragraph 3 of Schedule 7 to the Health Act 2006.

5. As for the practical implications, it is acknowledged that a criminal prosecution following the dissolution of a Special Health Authority could be more difficult to pursue than a prosecution of a body which is still in existence. However, the Department takes steps to ensure that liabilities of abolished bodies can be dealt with, whether civil or criminal. In the case of the National Treatment Agency ("Agency"), all of its property and records are transferred to the Secretary of State, who is able to ensure that the appropriate resources are available to the NHS Litigation Authority to deal with any criminal investigation or prosecution.

6. As for what the prosecution would have to prove, this would depend on the offence in question. An offence of strict liability (for example in relation to health and safety) would require proof that the constituent elements of the offence were met. If an employee of the Agency had committed an offence during the course of his or her employment, there may also be vicarious liability of the Agency. In such a case, the prosecution would need to establish an offence by the employee and consider whether the Agency was also liable vicariously. Proving or disproving issues relating to the state of mind of particular individuals could arise in relation to offences which require *mens rea*. Corporate bodies can be criminally responsible for such offences by application of the identification principle. This is where the acts and state of mind of those who represent the directing mind and will of the corporate body will be imputed to it. The prosecution would therefore need to prove what the state of mind of those individuals was, in order to establish criminal liability of the Agency.

7. As to who would be expected to answer the charge, appropriately senior officers of the NHS Litigation Authority would represent the Agency in any legal proceedings.

Department of Health
30 April 2013

Appendix 2

S.I. 2013/258: memorandum from the Department for Transport

Motor Vehicles (Driving Licences) (Amendment) Regulations 2013 (S.I. 2013/258)

1. By a letter dated 24th April 2013 the Committee has asked for a memorandum on two points:

Point (1)

"Explain how (if at all) paragraph (1D) inserted by regulation 3(2) is intended to work in the case of a person born with diplopia or sight in only one eye and how effect is given to that intention."

2. The expert advice from the EU Eyesight Working Group[a], advice which has been accepted by the Secretary of State's Honorary Vision Panel, is that a person having diplopia or sight in only one eye from a young age, or from birth, is highly likely to have adapted to that condition long before being licensed to drive. Therefore, in practice, it is unlikely that a licence will be refused or

[a] "New Standards for the Visual Functions of Drivers", Report of the Eyesight Working Group, was published Brussels May 2005 and provided the expert evidence and recommendations which led to Commission Directive 2009/113/EC of 25 August 2009 amending Directive 2006/126/EC of the European Parliament and of the Council on driving licences.

revoked, pending "an appropriate adaptation period" except after a newly developed eye disease or recent injury.

3. The drafting of paragraph (1D) is intended to reflect the fact that different individuals may require different periods of adaptation. There may also be rare cases where full adaptation has not been achieved notwithstanding the fact the condition has been long term. The requirement in sub paragraph (b) of "clinical confirmation of full adaptation" is therefore complementary to the requirement for "an appropriate period of adaptation" in sub-paragraph (a). A person who had been born with diplopia or sight in only one eye would still be required to produce a medical report confirming this fact and confirming full adaptation, but almost inevitably the latter confirmation will follow automatically.

4. DVLA produces detailed administrative guidance for doctors in its publication "At a Glance" and will elaborate on this issue within that guidance.

Point 2

"Explain the need for paragraph (ii) of the definition of "isolated seizure" substituted by regulation 3(4) given the terms of paragraph (i) of that definition."

5. For both paragraphs, a number of seizures occurring within a 24 hour period are counted as if they were one seizure. This is based on expert medical advice that a solitary 24 hour episode involving several seizures, poses no more risk than one seizure on its own.

6. Paragraph (i) of the definition refers to a situation where a person has only had one seizure, or one 24 hour episode of seizures, in the whole of their life to date. This reflects the wording of the relevant Commission Directive 2009/113/EC of 25 August 2009, amending Directive 2006/126/EC of the European Parliament and of the Council on driving licences – (paragraphs 12.3 and 12.12 of Annex), which refers to a "first or single unprovoked seizure". The word "single" means "not one of several" and so a person who has had multiple episodes of seizure, no matter how far apart in time these are, would not be covered by this paragraph.

7. Paragraph (ii) covers the situation where there has been more than one of these occurrences, but there has been a gap between them of at least five years. That interval is amended for Group 2, in regulation (3)(8)(b), to be ten years. Where the interval between a seizure, or 24 hour episode of seizures, is less than five years (Group 1), or less than ten years (Group 2) – the person would become subject to the restrictions applying to the prescribed disability of epilepsy.

8. Although in the case of epilepsy or an isolated seizure of the sub paragraph (ii) type, the person will have had multiple seizures, in the latter case, the interval of time between the episodes of seizure is sufficient to mean the risk of a future occurrence is less. This justifies subjecting this class of "isolated seizure" to slightly less stringent conditions for driving than epilepsy. The assessment of

risk and the appropriate kind of conditions to mitigate risk are based on the advice of the relevant EU Working Group, as affirmed by the Secretary of State's Honorary Panel.[b]

Department for Transport
30 April 2013

Appendix 3

S.I. 2013/373: memorandum from the Department of Health

Controlled Drugs (Supervision of Management and Use) Regulations 2013 (S.I. 2013/373)

1. In its letter to the Department of 24th April 2013, the Committee requested a memorandum on the following point:

> "Explain whether there is intended to be a duty to comply with a request under regulation 19 and a sanction for failure to comply with it and—
>
> (a) if so, how effect is given to that intention, and
> (b) if not, why the regulation has been included."

2. The Department's response to the Committee's point is outlined below.

3. It is not intended that there be a duty to comply with a request under regulation 19. Accordingly the issue of a specific sanction for failure to comply with such a request falls away.

4. The regulation was included because the four bodies making requests under the regulation – the Care Quality Commission, the Care Inspectorate, the General Pharmaceutical Council and Healthcare Improvement Scotland – are all public bodies that are creatures of statute and, in the Department's view, are only entitled to do those things that they are authorised to do by "positive law"[c]. In this instance, whilst it may have been arguable that the incidental powers of these bodies were sufficient to provide the necessary positive law to make the requests in issue, regulation 19 puts it beyond doubt that they do have the powers to do so. In practice, this will give the requests additional weight in circumstances where the person receiving a request under regulation 19 is reluctant to comply and questions the authority of the body to make the request.

[b] "Epilepsy and Driving in Europe A report of the Second European Working Group on Epilepsy and Driving, an advisory board to the Driving Licence Committee of the European Union", final report 3 April 2005.
[c] From the judgment of Lord Justice Buxton in the case of R v Richmond Upon Thames LBC, ex parte Watson, and linked applications [2001] QB 370, 385.

5. Although there are no sanctions for failure to comply with a request under regulation 19, there may be consequences of such a failure.

6. All four public bodies in question are "responsible bodies" within the meaning of regulation 6. They are therefore potential members of the local intelligence networks established under regulation 14 and are subject to the co-operation arrangements in regulation 15. So, for example, a failure to comply with a request could be drawn to the attention of the local lead controlled drugs accountable officer (CDAO) for the area in which the person failing to provide the declaration and self-assessment is located – as a possible case for concern for the relevant local intelligence network. The network may wish to consider further action, for example, an approach being made by the local lead CDAO under regulation 16(4) to an employer of a person refusing to comply. Such a failure may also inform other decisions by the four bodies – for example, an inspection under other powers could be brought forward.

7. The Committee may wish to be aware that regulation 19 is a revision and expansion of provisions previously included in regulation 12(3) and (4) of the Controlled Drugs (Supervision of Management and Use) Regulations 2006 (2006/3148, as amended). Prior to their revocation by S.I. 2013/373, those provisions only related to the Care Quality Commission and the General Pharmaceutical Council, and not to the Care Inspectorate and Healthcare Improvement Scotland.

Department of Health
30 April 2013

Appendix 4

S.I. 2013/380: memorandum from the Department for Work and Pensions

Universal Credit, Personal Independence Payment, Jobseeker's Allowance and Employment and Support Allowance (Claims and Payments) Regulations 2013 (S.I. 2013/380)

1. In its letter to the Department of 24th April 2013, the Committee requested a memorandum on the following point:

   "What effect is intended by the inclusion in regulation 29(5)(h) of the phrase "where the claimant would be expected to notify an intention of making a claim" and how is the intention achieved?"

2. The Department's response to the Committee's point is outlined below.

3. The Department accepts that, in this context, this phrase does not add anything and that these words have no effect. The Department undertakes to remove them at the earliest available opportunity.

Department for Work and Pensions
30 April 2013

Appendix 5

S.I. 2013/384: memorandum from the Department for Work and Pensions

Social Security (Overpayments and Recovery) Regulations 2013 (S.I. 2013/384)

1. In its letter to the Department of 24th April 2013, the Committee requested a memorandum on the following point:

   "In regulation 15(3)(a) what is the word "it" intended to refer to and how is the intention made clear?"

2. The Department's response to the Committee's point is outlined below.

3. The Department accepts that the use of the word "it" in regulation 15(3)(a) is incorrect. The word "it" is used correctly in regulation 107(3)(a) of the Housing Benefit Regulations 2006 (S.I.2006/213) where it refers to "the authority that has determined that there is an overpayment" but in the present context the reference should have been to the Secretary of State.

4. However the Committee may consider that, in context, the word "it" can only be taken as a reference to the Secretary of State because it is only the Secretary of State who has power to recover overpayments of benefit under section 71ZB of the Social Security Administration Act 1992 (c.5) and who consequently is empowered to recover them by deduction from benefit under section 71ZC of that Act. The Department therefore asks the Committee to consider whether this may be corrected by issuing a Correction Slip. The error is small in scale (a single word), it is obviously an error and it is equally obvious what the correct text should be since the parent Act allows no other possible meaning. If, despite that, the Committee considers that a Correction Slip is not appropriate in this case, the Department will make an amendment at the earliest opportunity.

Department for Work and Pensions
30 April 2013

Appendix 6

S.I. 2013/436: memorandum from the Ministry of Defence

Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2013 (S.I. 2013/436)

1. The Joint Committee on Statutory Instruments requested a memorandum in response to the following point made in relation to the above mentioned instrument:

   Explain why article 24C, inserted into S.I. 2011/517 by article 2(4), assumes that armed forces independence payment and an extra-costs disability benefit may be payable to a person in respect of the same period, given that articles 24A and 24B as so inserted, seem to suggest that that cannot happen.

2. Article 24C was inserted out of an abundance of caution so that if by accident a double payment is processed tax payers' money can be deducted as an overpayment from armed forces independence payment.

Ministry of Defence
30 April 2013

Appendix 7

S.I. 2013/444: memorandum from the Department for Business, Innovation and Skills

Trade Marks and Registered Designs (Amendment) Rules 2013 (S.I. 2013/444)

1. By a letter dated 24 April 2013, The Committee considered the above instrument at its meeting today and has instructed me to request you to submit a memorandum on the following points:

   Explain the need for the amendment made by rule 3(6) given that the provision amended already refers to a period ending two months after a date and why, if there are good reasons for the amendment, they do not require the making of a similar amendment in the alternative one month period specified in that provision.

2. The Department's response to question (1) is as follows:

"No amendment is required to the alternative one month period specified in the tail piece to Rule 18 as the period is expressed as "one month **after** the date on which Form TM9t was filed". This formulation does not not utilise drafting which ties the computation of the period to the period "beginning on" the date on which Form TM9t was filed. Accordingly, the period of one month would be interpreted as commencing from the date after the filing of Form TM9t (which accords with the policy intent) and therefore does not require amendment.

The drafting of the alternative two month period, on the other hand, was originally expressed to "begin on" the notification date and to end two months after that date and so required amendment in order to avoid the computation of the period including the notification date."

Department for Business, Innovation and Skills
1 May 2013

Appendix 8

S.I. 2013/476: memorandum from the Department for Communities and Local Government

Local Authorities (Capital Finance and Accounting) (England) (Amendment) Regulations 2013 (S.I. 2013/476)

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

   Explain why the Regulations do not amend the reference to paragraph 9 of the Schedule to S.I. 2003/3146 in the definition of "sub-liability" in regulation 1(5) of that instrument in consequence of the substitution of that Schedule by the Regulations.

2. The Regulations amend the Schedule to the Local Authorities (Capital Finance and Accounting) (England) Regulations 2003 (S.I. 2003/3146). The Schedule sets out a formula for the calculation of the sub-liability, which forms part of the poolable amount payable by a local authority to the Secretary of State. The amended Schedule sets out the amount of the sub-liability in paragraph 13. The definition of "sub-liability" in regulation 1(5) of S.I. 2003/3146 should have been amended so that it refers to paragraph 13 of the Schedule.

3. This omission will be corrected by the making of a further statutory instrument.

Department for Communities and Local Government
30 April 2013

Appendix 9

S.I. 2013/480: memorandum from Ministry of Justice

Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 (S.I. 2013/480)

1. By a letter dated 24 April 2013, the Committee sought a memorandum on the following points:

   (1) Given the precise rules in Chapter 2 of Part 2 for determining financial resources, explain what is intended to be covered by direct and indirect receipt for the purposes of regulation 6(1) and (2).

2. The reference to 'direct' receipt of benefits in regulation 6(1) is intended to cover where the individual applying for civil legal aid is the benefit claimant themselves. The reference to 'indirect' receipt of a benefit is intended to cover where the individual is included in a benefit claim of someone else, such as their partner. These terms are well established within the legal aid context; the same form of words was used in the equivalent predecessor regulation under the Access to Justice Act 1999 (regulation 4(2) of the Community Legal Service (Financial) Regulations 2000, S.I. 2000/516) and has operated effectively in practice.

   (2) What is the intended relationship between regulation 6(4)(b) and the words "without paying (where applicable) any contributions" in regulation 6(2), and, in particular, which is intended to qualify the other, and why is there no express provision to make the intention clear?

3. Regulation 6(2) provides that an individual in receipt of certain benefits will be automatically eligible for all forms of civil legal services without paying (where applicable) a contribution. This general rule is expressed to be subject to regulation 6(4), which provides that if an individual's disposable capital exceeds £8,000 then the individual will not be eligible for services, and if their capital exceeds £3,000 but not £8,000, then they will be liable to make a contribution out of capital in accordance with regulation 44(3). Therefore, the rule in regulation 6(4) is intended to qualify regulation 6(2).

4. The reference in regulation 6(2) to "without paying (where applicable) any contributions" is included because not all forms of civil legal services under the Regulations attract a contribution (for example, no contributions are required in respect of services provided in the form of legal help). A contribution out of capital will be required in the circumstances set out in regulation 44(3).

(3) Explain exactly how contributions in regulations 41 and 44 are intended to work, by reference in particular to—

a. the apparent absence of dovetailing of the text of regulation 41(1) with Table 1 in that regulation;

b. the absence of indication in regulations 41 and 44 of a rule for those whose income (in that Table and at the end of regulation 44(2)) amounts to a figure between the upper limit of one tranche and the lower limit of the next (e.g. as £25.50 in a case within that Table); and

c. the specification of £315 in regulation 44(2)(b) and £311 in 44(i) below it.

5. In relation to regulations 41 and 44 generally, these provisions have different purposes. Regulation 41 is one of a number of provisions (found at regulations 30 to 43) concerning calculation of an individual's disposable capital. Specifically, regulation 41 prescribes amounts which are to be disregarded when calculating such capital. In the regulations, the amount of an individual's disposable capital is used to determine whether they are financially eligible for legal aid and, if so, whether they are liable to make a contribution from capital. In contrast, regulation 44 does not concern the calculation of an individual's disposable capital. Rather it concerns an individual's liability to pay a contribution out of their calculated disposable income or disposable capital.

6. In particular, the effect of regulation 41 is that where the individual applying for legal aid is aged 60 or over and their monthly disposable income is less than £315, the amount of capital in Table 1 must be disregarded for the purposes of calculating their disposable capital (regulations 2 and 14(1)(b) further make clear that the provisions in regulations 21 to 43 are for the specific purpose of calculating disposable income and disposable capital). The table then sets out the relevant income ranges from nil monthly disposable income to £315 monthly disposable income, and the relevant capital disregards attached to each range. By way of illustration, if the Director determines that an individual has £27 in monthly disposable income, then the Director will disregard £90,000 of the individual's capital in calculating their disposable capital.

7. If, after disregarding such capital as is prescribed in Table 1 of regulation 41 and applying the other provisions of Chapter 3 of the regulations, an individual has over £8,000 in disposable capital, then they will be ineligible for civil legal services. If they have disposable capital over £3,000 they will be liable to pay a capital contribution in accordance with regulation 44(3).

8. In relation to query (a), the Department does not understand the specific point being made by the Committee. Table 1 is explicitly referenced in the text of regulation 41(1).

9. In relation to query (b), in calculating the individual's disposable income the Director will round up the relevant sums to the nearest whole number, in the usual way. This is well-established practice in the legal aid context. Therefore, the final figure for monthly disposable income will always be a round number, which can be applied against the ranges set out in Table 1 of regulation 41.
10. In relation to query (c), regulation 44(2)(b) specifies £315 as the threshold above which an individual becomes liable to make contributions from disposable income. An individual who has disposable income above that threshold is then liable to pay contributions from their income of £311 and above, as set out in regulation 44(2)(b). The figure of £311 is used here so that the minimum contribution a person could be liable for is above £1. By way of illustration, if the individual has disposable income of £316, then they must pay 35% of any income between £311 and £316. This is 35% of £5, which is £1.75.

11. The approach taken in regulations 41 and 44 are consistent with the approach reflected in the equivalent predecessor regulations under the Access to Justice Act 1999 (regulations 35 and 38 of the Community Legal Service (Financial) Regulations 2000). Those provisions have operated effectively and without difficulty in practice throughout their currency.

Ministry of Justice
30 April 2013

Appendix 10

S.I. 2013/499: memorandum from the Department for Education

Residential Family Centres (Amendment) Regulations 2013 (S.I. 2013/499)

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

   Why is it the case that the exception in new regulation 21A(6) of the 2002 Regulations inserted by regulation 13 read literally applies to devices irrespective of how they are actually being used, notwithstanding new regulation 21A(1)?

2. Following discussions with stakeholders, new regulation 21A(6) was inserted into the 2002 Regulations in order to ensure that parents are able to use baby

monitors during their time at the residential centres, without being subject to any of the limits or conditions which the remainder of regulation 21A places on centres wishing to use other surveillance devices.

3 The Department accepts that regulation 21A(6), as currently drafted, has the unintended effect of allowing staff (and others) at residential family centres to use baby monitors without the safeguards provided in regulation 21A in relation to other surveillance devices. The Department is grateful to the Committee for highlighting this.

4. The Department will review and amend regulation 21A of the 2002 Regulations at the earliest appropriate opportunity to ensure that the exception at regulation 21A(6) applies solely to parents who use baby monitors at the centres to monitor their own children's safety (or the safety of those children for whom they are responsible). We will seek to ensure, through that amendment, that the use of baby monitors by any other persons at the centres is subject to the same limits and conditions which currently apply to the use of any other surveillance device.

Department for Education
30 April 2013

Appendix 11

S.I. 2013/500: memorandum from the Department of Health

National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013 (S.I. 2013/500)

1. In its letter to the Department of 24th April 2013, the Committee requested a memorandum on the following points:

> "(1) In relation to regulation 3(2), explain (by reference to hypothetical examples if possible)—
>
> (a) what the duty to treat providers "equally", the duty to treat them "in a non-discriminatory way" and the duty not to treat any of them "more favourably than any other provider" are intended to add to each other, and
> (b) what is intended to be achieved by the inclusion of the words "on the basis of ownership",
>
> and how effect is given to those intentions.

(2) Given that discrimination can presumably be made on the grounds of capability and value for money, explain why there is no express indication of the relationship of regulation 3(2)(b) and (3)."

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

3. It may be helpful to explain, by way of introduction, the Department's general approach on the provisions of these Regulations relating to procurement. These Regulations deal with a particular sub-set of public procurements (for health care services for the purposes of the NHS in England) and will exist alongside the well-established Public Contracts Regulations 2006 (SI 2006/5) ("the 2006 Regulations"). Regulation 3(2) of these Regulations is drafted in similar terms to regulation 4(3) of the 2006 Regulations[d], which in turn is drafted in similar terms to Article 2 of Directive 2004/18/EC[e], which the 2006 Regulations implement[f]. Therefore, to assist the reader and to maintain a consistent approach to interpretation, the general approach was for these Regulations, wherever possible, to mirror the provisions of the 2006 Regulations.

Question (1)(a)

4. In relation to treating providers "equally" and in a "non-discriminatory way", regulation 3(2) of these Regulations draws a distinction between these two concepts in the same way as both Article 2 of Directive 2004/18/EC and regulation 4(3)(a) of the 2006 Regulations. Although non-discrimination can be seen as an elucidation of the general principle of equal treatment, in case law concerning the application of Directives in the area of public contracts, the Court of Justice of the European Union has treated the principle of equal treatment of providers as separate from possible discrimination on the basis of nationality or some other criteria of differentiation[g]. Treating providers equally, in the context of these Regulations, is intended to mean, in particular, that all providers are told the rules for the award of contracts in advance and that those rules apply to everybody in the same way. The intention is to afford equality of opportunity to all providers when competing for the award of a contract, rather than to lay down a rule relating to different treatment based on some criteria of differentiation. As a result, the Department's view is that it is appropriate to draw a distinction between these two concepts in these Regulations.

Question (1)(b)

5. The words "including by not treating a provider, or type of provider, more favourably than any other provider" are intended to be read with the words that follow, "in particular on the basis of ownership". They give an example of what is included within the duties of

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[d] Regulation 4(3) of the Public Contracts Regulations 2006 provides:

"A contracting authority shall (in accordance with Article 2 of the Public Sector Directive)-

(a) treat economic operators equally and in a non-discriminatory way; and

(b) act in a transparent way."

[e] Article 2 of Directive 2004/18/EC provides:

"Contracting authorities shall treat economic operators equally and non-discriminatorily and shall act in a transparent way."

[f] Regulation 5(2) of the Defence and Public Contracts Regulations 2011 (SI 2011/1848) is also drafted in similar terms.

[g] See, for example, Case C-243/89 *Storebaelt*, paragraphs 37 to 40 and Case C-87/94 *Commission v. Belgium (Walloon Buses)*, paragraphs 54 to 56.

equal treatment and non-discrimination to put beyond doubt that such behaviour is included within those duties. It is not intended to add to those duties, but to help explain what those duties include.

6. It was a particular concern of Parliament during debates for the Health and Social Care Act 2012 that the reforms to the National Health Service would lead to increased provision of NHS services by the private sector, to the detriment of NHS trusts and NHS foundation trusts[h]. The wording relating to favourable treatment in regulation 3(2)(b) is intended to put beyond doubt that the NHS Commissioning Board and a clinical commissioning group, when commissioning health care services for the purposes of the NHS, are not to favour providers of such services on the basis of whether they belong to the public sector, the private sector, or the voluntary sector; in other words, on the basis of ownership of the provider.

Question (2)

7. The Department does not believe that different treatment on grounds of capability or value for money would be caught by the duty laid down by regulation 3(2)(b). Regulation 3(2)(b) and (3) are intended to cover different matters and the Department's view is that they do not overlap. The purpose behind regulation 3(3) is to prescribe the criteria against which the Board and clinical commissioning groups are to select providers of health care services for the purposes of the NHS. Capability and value for money are objective factors, amongst others which could alternatively be applied (e.g. lowest cost), against which providers can be distinguished from each other without discriminating against them.

Department of Health
30 April 2013

Appendix 12

S.I. 2013/613: memorandum from the Ministry of Justice

Crime and Disorder Act 1998 (Youth Conditional Cautions: Code of Practice) Order 2013 (S.I. 2013/613)

1. By a letter dated 24th April 2013, the Committee sought a memorandum on the following point:

> Explain why, in the light of the comments of the Committee on S.I. 2012/937 in its 5th Report of the current Session, published on 4th July 2012, the Explanatory Memorandum relating to the Order indicates only that the Code mentioned

[h] See, for example, Hansard 6 March 2012, col. 1682-1693 (debate on amendment 163BZZA).

> in article 2 "can be downloaded from the Official Documents website" and nothing in the Order or its footnotes, or in its Explanatory Note or Explanatory Memorandum includes an address at which the code can be inspected or from which a hard copy of the code can be obtained.

2. The Ministry accepts that it would have been more helpful to the reader to have included more information as to how to obtain a copy of the Code. It is therefore proposed to issue a correction slip to add a short comment into the explanatory note setting out how a copy of the Code can be obtained, including both an internet address and a postal address.

Ministry of Justice
13 May 2013