House of Lords
House of Commons

Joint Committee on Statutory Instruments

Excluding the inert from secondary legislation

First Special Report of Session 2013–14

Report, together with formal minutes

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Joint Committee on Statutory Instruments

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Lord Lyell (*Conservative*)
Lord Selkirk *(Conservative)*
Baroness Stern (*Crossbench*)
Lord Walpole (*Crossbench*)

House of Commons
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Mr Ian Liddell-Grainger MP (Conservative*, Bridgwater and West Somerset*)
Toby Perkins MP (Labour*, Chesterfield*)

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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Report

1 Introduction

1. We have decided to produce a series of Reports on certain themes, which will follow up our ongoing work in areas where we believe some additional comment would be of use to Government Departments and our wider readership. This Report, the first in that series, concentrates on the inclusion of material contained in statutory instruments that has no legal effect, and related subject matter.

2. We are aware that there are examples of primary legislation containing inert content for the purposes of elucidation. Thus the whole of Part 1 of the Income Tax Act 2007 appears to be of this nature. Primary legislation is not our remit, even if it provides Departments with a starting point for drafting secondary legislation. However, during the 2010-12 session, we noted that this practice had spread somewhat randomly into secondary legislation in ways that indicated that insufficient thought might have been given to the extent to which, if at all, it might be appropriate for secondary legislation. We considered that it might also give rise to confusion on the part of readers.

3. For example, in our 17th Report of the 2012-13 session, in respect of the Draft Universal Credit Regulations 2013, we commented on a provision described by the Department responsible as having no direct legal effect, but acting as aid to navigating the instrument. We said:

> The Committee deprecates the use of legislative text of an instrument, which by its nature should have—and is expected by the reader to have—legal effect, for the purpose of accommodating material which is merely explanatory in character and which is acknowledged by the Department to have no legal effect".[1]

Further examples are set out in the Annex to this Report.

4. In preparing this Report, we wrote in September 2012 to all Departments who had had instruments reported to the Houses for:

- containing inert material presented as if it were operative;
- containing operative material presented as if it were inert; or
- excluding essential operative material from the text altogether.

5. We initially asked for general responses, and then in December 2012 sent these specific questions, together with the instrument in question, our original memorandum request, the original departmental memorandum and our original report:

- A. Do you have any comment on the proposition that the operative text of any statutory instrument –
  - Should contain everything legally necessary, and

[1] Joint Committee on Statutory Instruments, 17th Report of Session 2012-13, HL Paper 110/HC 135-xvii, Para 5.4

- Should contain nothing else, apart from short parenthetic descriptions of legislation referred to, inclusion of which is regarded as particularly helpful (Statutory Instrument Practice, paragraph 2.7.4)?

- B. In the light of your reply to question A, do you have any comment to make on the material attached to this letter?

Substantive responses we received are printed as an Appendix to this Report.

2 Our view

6. The legislation that governs statutory instruments does not expressly specify what provisions in an instrument as published count as operative, and we therefore consider that clear presentational distinction between operative and inert material is essential.

7. In the Annex to this Report we give a number of examples of our dialogue with Government Departments in respect of statutory instruments since 2010, either where material included in text that appears operative has no legal effect, or where essential elements that should be found in text that appears operative are found instead elsewhere. We remain firmly of the opinion that Departments should remain constant in distinguishing provisions that need to be included in legislation from those that do not properly belong there. We have three main reasons:

- the justification for items to be included in provisions generally presented as operative (in other words, regulations, articles, rules and Schedules) in secondary legislation is that they should have *a legal effect*: it is the only thing that operative provisions alone can do;
- once non-essential items are entered into such provisions there could well be the unintended consequence that courts will treat them as operative; and
- it also becomes impossible to draw a consistent line between what is right and wrong to include, in particular to draw a line between information and advertisement.

8. We discount the explanation on the part of the Departments that they wish to make explanations readily accessible to the non-expert reader, commendable though that aim is. There are various ways of achieving that in secondary legislation, for example via:

- the Explanatory Memorandum printed with every SI subject to parliamentary procedure;
- parts of the instrument generally recognised as inoperative provisions, such as footnotes, headings, Explanatory Notes and suitably presented brackets; and
- explanatory literature wholly separate from the SI.

These methods reduce confusion to other readers and the courts, and in the case of the final option, are likely to be more accessible to lay readers of secondary legislation than the instrument itself.

9. On a related point, among the examples[2] cited in the Annex can be found our comments on the use of the auxiliary verb 'will', where 'must', 'shall' or 'may' might have been used. As a matter of normal usage:

- 'may' always implies discretion;

[2] For example, the Civil Procedure (Amendment No. 4) Rules 2011 (S.I. 2011/3103)

- 'must' always implies an obligation;
- 'shall' (in the second and third persons) can imply either an obligation or futurity (depending on context and therefore is accepted by us as implying an obligation when used in legislation); and
- 'will' always implies futurity.

'Will' can therefore only be used appropriately in legislation if straight futurity calls for legal effect, for example, in 'this provision will cease to have effect three years after it comes into force' (although 'ceases to have effect' is equally efficacious) or similarly. If it is otherwise used in a provision presented as operative, it is objectionable as it omits to clarify whether discretion or an obligation is intended, unless an interpretation provision rectifies the omission.

10. We are aware that those involved in setting rules of court, in which 'will' has been used extensively in cases regarded by us as unjustified—for example, 'X will provide a copy to Y'—are planning a co-ordinated memorandum on the issue to accompany the next Criminal Procedure Rules, and we therefore reiterate our views in this Report to amplify the arguments that they will be expected to address.[3]

11. Given our approach to the general issue raised in question A, we do not propose to make any further consideration of the specific comments provided by Departments on the material covered by question B beyond recognition that there will be occasions when we disagree with Departments on future action to be taken.

[3] See chapter 5 of our Committee's Ninth Report of Session 2012-13, HL Paper 56/HC 135-ix, in relation to the Criminal Procedure Rules 2012 (S.I. 2012/1726)

3 Conclusion

12. **We take this opportunity to stress that we will continue to draw the special attention of Parliament to instances where we consider there has been blurring of material that should be included in operative provisions of legislation with those that should not. In particular, we consider that inert material, if included at all, should not be presented as if it were part of the operative text. Explanations should be provided in non-operative parts of the instrument or other documents, and drafting should be as precise as possible to minimise the need for amplification and the potential for confusion.**

13. **We also reiterate our view, subject to the qualification indicated in paragraph ten, that the auxiliary verb "will" should only be used in legislation if straight futurity calls for legal effect. It should not be otherwise used in provision presented as operative, as it creates uncertainty as to whether discretion or obligation is intended.**

Annex: Examples from JCSI weekly reports

We have drawn the following examples from our weekly reports from the 2010-12 session. Further examples may be found in the 21st Report in relation to S.I. 2011/581, the 31st Report in relation to S.I. 2011/1709, the 33rd Report in relation to S.I. 2011/1848, the 39th Report in relation to S.I. 2011/2962, and the 15th Report of Session 2010-12 in relation to S.I.2010/2955.

1. Visits to Former Looked After Children in Detention (England) Regulations 2010 (S.I. 2010/2797) [Department for Education]

A. Extracts from SI

From Regulation 2

> (1) In these Regulations [...] "relevant youth offending team case manager" means the person within the responsible authority's youth offending team [*FN*] who is managing A's case;
>
> *[Standard referential footnote:* Under section 39(1) of the Crime and Disorder Act 1998 (c.37) a local authority has a duty to establish one or more youth offending teams for their area.]

From Regulation 3

> (1) The circumstances prescribed for the purposes of section 23ZA(1)(b) of the 1989 Act(1) are that the child is detained pursuant to an order of a court in—
>
> (i) a young offender institution [*FN*],
>
> [*Standard referential footnote:* A youth offender institute is defined in section 43(1)(aa) of the Prison Act 1952 (c.52) as amended by the Criminal Justice Act 1988 (c.33), section 170, Schedule 15, paragraph 11 and the Criminal Justice and Public Order Act 1994 (c.33), section 18(3), and the Criminal Justice and Immigration Act 2008 (c.4), section 148(1), Schedule 26, Part 2, paragraph 3.]
>
> (ii) a secure training centre [*FN*],
>
> [*Standard referential footnote:* A secure training centre is defined in section 43(1)(d) of the Prison Act 1952, as amended by the Criminal Justice and Public Order Act 1994, section 5(2), the Crime and Disorder Act 1998 (c.37), the Powers of Criminal Courts (Sentencing Act) 2000 (c.6).]

From Regulation 6

> (3) The responsible authority must give a copy of the report to [...] the governor, director or registered manager [*FN*] of the institution [...]
>
> [*Standard referential footnote*: That is, a person who is registered under Part 2 of the Care Standards Act 2000 as a manager of a secure children's home.]

B. Extract from Committee questions

Why does the operative text of the Regulations (as opposed to footnotes) neither contain nor cross-refer to definitions of the following terms:

(a) "youth offending team", which appears in the definition of "relevant youth offending team case manager" in regulation 2(1);

(b) "young offender institution", which appears in regulation 3 [...];

(c) "secure training centre", which appears in regulation 3 [...]; and

(d) "registered manager", which appears in regulation 6(3)?

C. Extract from Department for Education response

The Department accepts that it would have been appropriate to define these terms in the operative text of the Regulations

D. Extracts from JCSI 12th Report of Session 2010-12

Regulation 2 [...] contains a reference to the expression "youth offending team", regulation 3 [...] refers to "young offender institution" and "secure training centre", and regulation 6 [...] refers to the "registered manager" of an institution. None of these expressions is defined either in the operative text of the instrument or in the enabling Act. Instead, in each case a footnote is inserted giving a reference to other legislation which defines or otherwise explains the intended meaning of the expression. [...] The Department accepts that it would have been appropriate to define the expressions in the operative text of the instrument [...] . The Committee accordingly reports these Regulations for defective drafting, acknowledged by the Department.

2. Civil Procedure (Amendment No. 4) Rules 2011 (S.I. 2011/3103) [Ministry of Justice]

A. Adapted extracts from SI

From rule 4

In Part 3 [of the Civil Procedure Rules 1998] [...]

(b)after rule 3.5 insert—

" [...]

3.5A. If—

(a) a claimant files a request for judgment which includes an amount of money to be decided by the court in accordance with rule 3.5; and

(b) the claim is a designated money claim,

the court will transfer the claim to the preferred court upon receipt of the request for judgment.".

From rule 5

In Part 12 [...]

(b) after rule 12.5 insert—

" [...]

12.5A. If—

(a) a claimant files a request for judgment which includes an amount of money to be decided by the court in accordance with rules 12.4 and 12.5; and

(b) the claim is a designated money claim,

the court will transfer the claim to the preferred court upon receipt of the request for judgment.".

From rule 7

In Part 14 [...]

(b)after rule 14.7, insert—

" [...]

14.7A. If—

(a) a claimant files a request for judgment for an amount of money to be decided by the court in accordance with rule 14.6 or 14.7; and

(b) the claim is a designated money claim,

the court will transfer the claim to the preferred court.";

(c)in rule 14.12—

(i)in paragraph (2), for "must" substitute "will";

B. Adapted extracts from Committee questions

Given the [previous] comments [of the Committee] on the use of the expression "will", explain .... what that expression is intended to mean in each of the provisions inserted or substituted in the Civil Procedure Rules 1998 in which it features and how effect is given to that intention.

C. Extracts from Ministry of Justice response

The CPRC takes the view that in relation to the functions of the court, it is appropriate to refer to what the court "will" do, not what it "must" do. There are two reasons for this. [...] First, as in the rules under consideration, the use of the word

"will" reflects the fact that, under the Rules, the functions of the court fall to be performed in light of particular circumstances, in particular the actions of parties to the proceedings, without discretion - it describes an essentially automatic step in the proceedings. For example, rule 7(b) inserts in the Rules a new rule 14.7A(a) and (b), which provide that if (a) a claimant files a request for judgment for an amount of money to be decided by the court and (b) the claim is a designated money claim, the court will transfer the claim to the preferred court. The transfer of the proceedings by the court is something which will follow upon the actions of the claimant in this specific type of case and set of circumstances. In this context, the use of the expression "will" is accurate and its meaning clear. Neither the Ministry of Justice nor the CPRC is aware of any instance where the use of the word "will" when referring to such functions of the court has given rise to any complaint among practitioners or court users that the meaning or outcome is unclear. [...]

Secondly, the court is (exceptionally in the overall scheme of the Rules) required by rule 1.2 to give effect to the overriding objective of dealing with cases justly whenever exercising any power provided by the Rules or when interpreting any rule (which will include interpreting any rule which provides that the court will do a specific thing in specific circumstances), and by rule 1.4 to further the overriding objective by actively managing cases. The Rules do not in general operate by compelling the court to perform its non-discretionary functions by imposing a duty in relation to each one and there is no sanction which applies to the court should it fail to do so. Imposing a further notional duty on the court to perform its individual functions by use of the word "must", is considered by the CPRC to be, in general, unnecessary and, arguably, misleading. Should the court exceptionally fail to perform a non-discretionary function, either party (or both) may have recourse to the court (which is bound by the general overarching duty under rule 1.2) to ensure that the omission is rectified and neither party is disadvantaged. [...]

The Committee will no doubt have noted that there are some instances in the current Rules of the use of the word "must" in relation to the functions of the court. Those instances largely derive from pre-CPR usage: when first drafted, some of the Rules replicated or closely followed the words which appeared in the earlier County Court Rules. Many of the Rules have since been developed by the CPRC and, in particular, "will" has been substituted for "must", where the CPRC has deemed it appropriate, as and when various parts of the Rules have fallen to be considered for amendment. For example, rule 7(c)(i) of the Rules presently under consideration substitutes "will" for "must" in rule 14.2(12) of the Rules, the effect of which is to provide that, where a judge is to determine the time and rate of payment at a hearing, the proceedings will be transferred automatically to the defendant's home court, if conditions (a) to (e) are met. In this instance, the transfer will be automatic; it is unnecessary to use the word "must" to compel transfer for the reasons stated [...] above.

D. Adapted extracts from JCSI 41st Report of Session 2010-12

The Committee accepts that in some of the contexts in which the word "will" is used in the Rules it does indeed appear to be intended to denote an automatic outcome and that in other contexts it seems to be intended to impose a duty. But the

Committee considers that the word "will" is not the most apt term to achieve either of those objectives. Legislative provisions do not commonly indicate automatic outcome by use of the word "will"; and duties are more usually connoted by use of the word "must" or "shall". And if a legislative provision imposes a duty that is not absolute it invariably qualifies it so as to indicate the circumstances in which it does (or does not) apply. The Committee considers that use of the same term to indicate automatic outcome (in some cases) and a duty (in others) is particularly confusing. Users of legislation are entitled to language which makes it absolutely clear that a provision is specifying automatic outcome or is imposing a duty and, in the case of a duty not intended to be absolute, to be given criteria by reference to which it can be judged when the duty does and does not apply [...] The Committee accordingly reports regulations 4, 5 [and] 7 [...] for failing to comply with proper drafting practice.

3. Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2011(S.I. 2011/ 2552) [Ministry of Defence]

A. Extracts from SI

From Article 9

(1) In Part 1 of Schedule 3—

(b)in Table 8 (fractures and dislocations)— .

(i)for item 17 substitute— .

"17 Shoulder joint *[FN]* instability which has required or is expected to require operative treatment with permanent significant functional limitation or restriction."

[*Standard referential footnote*: In this table, shoulder includes acromio-clavicular and sterno-clavicular joints.]

B. Committee question

In article 9(1)(b), why is the statement of what the term "shoulder" includes presented as a standard page footnote (as if it were purely referential) when it is in fact a substantive amendment of Table 8 in Part 1 of Schedule 3 to the Armed Forces and Reserve Forces (Compensation Scheme) Order 2011?

C. Extract from Ministry of Defence response

The footnote to article 9(1)(b) was drafted on the advice of our medical adviser. The footnote is in keeping with other footnotes in Tables 1-9 of Part 1 of Schedule 3, also drafted on the advice on our medical adviser. The substantive provision is made in the column (b), in the text inserted by the amendment in column (b). The footnotes are explanatory.

D. Extracts from JCSI 35th Report of Session 2010-12

> The Committee considers that the Department's response fails to acknowledge the need to avoid presentational confusion of efficacious legislative provisions with other material. It seems inescapable from the content of the note that the amplification of the term "shoulder" is sufficiently substantive to count as either an extension of the term or a clarification of doubt as to its meaning. A number of the Tables in Part 1 of Schedule 3 to the principal Order already contain links to lettered notes amplifying notions contained in the text of the Tables, with the notes in question being distinguished from lettered footnotes of a purely referential nature by being placed in mid-page at the foot of the Tables themselves rather than at the foot of the page ... If the treatment of this amplification was indeed to be "in keeping" with what is done in those Tables it would have been cast as an additional lettered note to be added to the asterisked notes at the foot of Table 8 and not as a referential footnote. [...] The Committee accordingly reports article 9(1)(b)(i) for defective drafting.

4. Social Security (Contributions) (Amendment No. 5) Regulations 2011 (S.I. 2011/2700) [HM Revenue and Customs]

A. Adapted extract from SI

From regulation 4:

> In Part 5 of Schedule 3 [to previous Regulations] in paragraph 7—
>
> (a) for sub-paragraph (1) substitute— .
>
> "(1) A qualifying childcare voucher, where an employee joined a scheme—
>
> (a) before 6th April 2011; .
>
> (b) before 6th April 2011 but ceased to be employed by the employer and was subsequently re-employed by the employer and re-joined the scheme before 6th April 2011; or .
>
> (c) before 6th April 2011 and there was a continuous period of 52 weeks ending before 6th April 2011 [...]"

B. Adapted extracts from Committee question

> Why is replacement sub-paragraph (1), inserted into paragraph 7 of Part 5 of Schedule 3 to [previous] Regulations [...] by regulation 4, constructed so that paragraphs (b) and (c) appear to fall totally within paragraph (a)?

C. Extracts from HM Revenue and Customs response

> The Department recognises that paragraphs (b) and (c) of replacement sub-paragraph (1) are constructed in such a way as to fall totally within paragraph (a). The Department considered that such an approach was appropriate in this particular case given [...] previous concerns raised by the Committee about the position of

those who had a break in their period of employment with the employer and who subsequently re-joined the scheme or who went through a 52 week continuous period without vouchers. In the light of those concerns the Department decided to state explicitly what the position would be in relation to such individuals where such events occurred before 6 April 2011 as well as where such events either straddled 6 April 2011 or took place wholly on or after 6 April 2011.

D. Extract from JCSI 37th Report of Session 2010-12

Simply extending the class as achieved by new paragraph 7(1)(a) would have met the Committee's earlier point entirely; and had emphasis or publicity been thought necessary in connection with the removal of the earlier lacuna, the Explanatory Note or other explanatory material would have been the correct place for it. To include unnecessary provisions in legislation for the sake of emphasising changes in the law is likely to confuse the reader and to invite arguments about what the legislative intent of the apparently unnecessary provisions may have been. The Committee accordingly reports regulation 4 for defective drafting.

5. Local Authorities (Referendums) (Petitions) (England) Regulations 2011 (S.I. 2011/2914) [Department for Communities and Local Government]

A. Adapted extracts from SI

From regulation 6

(1) [...] [A] local authority shall hold a referendum by virtue of this Part where they receive a valid petition (but shall not be required to hold such a referendum where they receive a petition which is not a valid petition).

B. Extract from Committee question

Explain what the parenthetical words in regulation 6(1) achieve that would not be achieved by silence.

C. Extracts from Department for Communities and Local Government response

While not strictly necessary, the parenthetical words in regulation 6(1) are intended to be a helpful signpost to local authorities that they are not compelled to hold a referendum, if they deem a petition is invalid. They provide local authorities with certainty that [...] unless a petition meets the validity criteria at regulation 9, they are not required to hold a governance referendum [...] . It would, however, be open to a local authority should it wish having considered an invalid petition, to resolve to hold a [...] referendum, under section 9M of the Local Government Act 2000.

D. Extract from JCSI 41st Report of Session 2010-12

> The Committee considers that, as the words imposing the duty to hold a referendum impose the duty only where there is a "valid petition", the additional parenthetical words do not add anything to clarify the scope of the duty and so are unnecessary. The Department's memorandum, however, goes on to say that "it would [...] be open to a local authority should it wish having considered an invalid petition, to resolve to hold a [...] referendum". The Committee is not clear whether the Department is seeking to justify the inclusion of the parenthetical words as clarifying that point. But if that was the reason for their inclusion, the proposition that they make, which addresses the local authority's duty (and not their power) to hold a referendum, is not the right one to achieve it. The Committee accordingly reports regulation 6(1) for defective drafting, acknowledged in part by the Department.

Appendix: Responses from Departments

The following memoranda were submitted by Government Departments in response to our requests as detailed in paragraphs 4 and 5.

Department of Health and the Department for Work and Pensions

The Department sets out below its response in three parts:

- Firstly, in answer to question A, the Department's view on whether revoking a lapsed provision should be included in an S.I..
- Secondly, also in answer to question A, the Department's view on whether anything introductory or explanatory should be included in an S.I..
- Thirdly, in answer to question B, confirmation that the Department has no further comments on the two Orders in question.

Should an S.I. revoke a lapsed provision?

The Department is of the view that an S.I. which revokes a lapsed provision should not be considered defective. The Department accepts that provisions can automatically lapse when their enabling powers are repealed. It follows that there is no requirement to revoke such a provision. However, the Department considers that revoking such a provision can be extremely helpful for readers.

There are many long S.I.s which rely on more than 20 different enabling powers. Where one of those powers is repealed, specifically revoking the provisions which were made under that power can make things much easier for the reader. They will know which provisions are no longer in force. If no revocation is made, the reader would have to:

- find which powers are used for the S.I. (not always easy: where there have been many amending S.I.s, the reader would need to find which S.I. introduced the provisions in question and which powers it used),
- check whether those powers have been repealed by other Acts or S.I.s (which can be complex if the repeal is done in stages or is dependent on circumstances), and
- work out which provisions in the S.I. were made using the repealed powers.

This last bullet can be particularly difficult. Legitimate legal arguments could arise on whether a provision has been made under a particular power and is therefore impliedly revoked because that power is repealed. Having an S.I. which specifically revokes the provision removes any such arguments.

Other issues could also arise in particular cases if there is no express revocation. A provision may be made under more than one enabling power. Provisions may be made under consequential powers which say something like "a power to make Regulations under this Act includes a power to make consequential amendments". They may be difficult to

identify for readers and if they needed to be revoked (because the main power was repealed but not the consequential power), the S.I. would need detailed explanatory material to explain to readers what is happening.

The Department accepts that it could give its view in an Explanatory Note as to which provisions have lapsed due to the repeal of their enabling power. The Department does not consider that using the EN would be so helpful to the reader and this would not assist if no S.I. was available to include such a view.

The Department therefore considers that having no revocations of lapsed provisions in any case makes legislation less user friendly and more likely to be misunderstood by the public. The Department is keen to make legislation clearer and more helpful to readers. To this end, the Department has previously sometimes revoked lapsed provisions. If this practice is stopped, the Department considers that some legislation will become harder to understand for readers.

In summary, the Department considers that in appropriate cases, it should be acceptable to revoke lapsed provisions to help the reader.

Should introductory or explanatory provisions be included in S.I.s?

The Department considers that in some cases, explanatory and introductory material can be usefully included to help the reader. This is especially so where an S.I. is complicated. A brief introductory paragraph (or even regulation) can be a significant help for readers in understanding what the S.I. does. It can also be a significant help to understand how the provisions operate, both in conjunction with other provisions in the S.I. and with the primary legislation.

This is particularly applicable to social security legislation where the basic framework for entitlement to a benefit is often set out in the primary legislation and the S.I.s are essentially filling in the gaps. Provisions that make the relationship between the primary and secondary legislation clearer to the reader may add meaning and greater clarity for the reader.

Recent primary legislation is more commonly including explanatory material to assist readers. Section 1 of the Income Tax Act 2007 is a particular of example of an overview that helps the reader to understand the wider legislative landscape in a way that could not be achieved simply by a contents page. An example in an S.I. is rule 10.1 of S.I. 1998/3132, especially rule 10.1(1) and the end of 10.1(3).

In summary, the Department considers that in appropriate cases, it should be acceptable to including explanatory and introductory provisions to help the reader.

The two Orders in question

The Department confirms that it has no further comments to make about the two Orders in question.

20 December 2012

Ministry of Defence

Thank you for your letter of 13 September advising us that the Joint Committee has decided to publish occasional themed reports on specific issues and that you are proposing to produce one on the failings of departments properly to distinguish provisions that ought to be included in legislation from those that should not. We welcome the opportunity to make comments on the three instruments you have identified.

Armed Forces (Terms of Service) (Amendment) Regulations 2011 ("AFTSAR 2011")

We received helpful observations from, and had some correspondence with, the Committee in July and September 2011. However, we do not appear to be in possession of any correspondence which raises issues about a failure to distinguish provisions that ought to be included in legislation from those that should not. We are therefore not in a position to comment at the moment and would welcome some indication of the particular concern so that we can give this consideration.

Defence and Security Public Contracts Regulations 2011 ("DSPCR 2011")

The Committee previously asked for a memorandum on seven points and we responded with detailed comments on 25 October 2011. We assume from your letter that you remain concerned about superfluous words within the definitions of "disabled person", "land", "recognised bodies" and "values".

We explained in our 25 October memorandum that DPSCR 2011 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"). That is because the particular defence and security public procurements to which the DSPCR 2011 apply are, in effect, 'carved out' of the application of the Public Contracts Regulations 2006 and the Public Contracts (Scotland) Regulations 2006. Directive 2009/81/EC, which DSCPR 2011 implements, 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. The DSPCR 2011 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 DSPCR 2011, wherever possible, to mirror the provisions of the 2006 Regulations. In all of these respects DSPCR 2011 was drafted in identical terms to the 2006 Regulations. The 2006 regulations also contain the superfluous text.

For these reasons, whilst we agree that the Committee is technically correct in its points, we consider we were justified in drafting the DSPCR 2011 in the way we did. A criticism of MOD for purportedly failing to remove superfluous words would not address the underlying problem stemming from the 2006 Regulations.

Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2011

We think your concern may be the one raised in the Committee's letter to us of 23 November 2011, about article 9(1)(b) and why the statement of what the term "shoulder" includes was presented as a standard page footnote (as if it were purely referential) when it is in fact a substantive amendment of Table 8 in Part 1 of Schedule 3. We understand the

concern to be that we included something in a footnote that should have been included in the main body of a table.

The footnote to article 9(1)(b) was drafted on the advice of our medical adviser. We took the view that the footnote is in keeping with other footnotes in Tables 1-9 of Part 1 of Schedule 3, also drafted on the advice on our medical adviser. The substantive provision is made in the column (b), in the text inserted by the amendment in column (b). The footnotes are explanatory and we therefore did not see a need to include it in the substantive provision. However, we acknowledge that there might have been an alternative way to draft this provision that would have avoided any possibility of the footnote being seen as making a substantive amendment to the Table. We will, in the future, explore with our medical adviser the possibility of drafting such an alternative formulation.

11 October 2012

Department for Education

I note that the Committee intend to publish a themed Report on the failures of Departments properly to distinguish provisions that ought to be included in legislation and those which should not.

We responded to the Committee's request for a memorandum in respect of both instruments. In relation to the Visits to Former Looked After Children in Detention Regulations 2010 we accepted that the expressions referred to should have been defined and have no further comments.

In relation to the Fostering Services (England) Regulations 2011 we accepted that the expression "working days" should have been defined. We explained why we consider "personality" needed no further clarification and have noted the Committee's comments. We would only add that "personality" had appeared in the previous Fostering Services Regulations and other similar Regulations and has not caused any problems in practice. In relation to the parenthetical phrases as we explained these were included to assist the reader and not intended to have any legal effect as such. As the Committee accepted the utility of such an approach we wonder whether the Committee consider there might be circumstances when such an approach would be justified.

17 October 2012