



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Fifth Report
of Session 2014-15**

Drawing special attention to:

Civil Procedure (Amendment No. 3) Rules 2014 (S.I. 2014/610)

Family Proceedings Fees (Amendment) Order 2014 (S.I. 2014/877)

Immigration (Restrictions on Employment) (Codes of Practice and Amendment) Order 2014 (S.I. 2014/1183)

Local Authorities (Goods and Services) (Public Bodies) (England) Order 2014 (S.I. 2014/1197)

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Joint Committee on Statutory Instruments

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

Remit

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

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

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

The Committee usually meets weekly when Parliament is sitting.

Publications

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

Committee staff

The current staff of the Committee are Simon Patrick (*Acting 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, Peter Milledge and John Crane (*Lords*).

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Instruments reported

At its meeting on 9 July 2014 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 four 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. 2014/610: Reported for defective drafting

Civil Procedure (Amendment No. 3) Rules 2014 (S.I. 2014/610)

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

1.2 The Rules, which were made by the Civil Procedure Rule Committee and allowed by the Lord Chancellor, amend the Civil Procedure Rules to establish a new Planning Court within the High Court.

1.3 New rule 54.21(2)(a)(ix) of the Civil Procedure Rules inserted by rule 3 of these Rules provides that “In this Section, “Planning Court claim” means a judicial review or statutory challenge which— (a) ... involves any of the following matters—

... any other matter the judge appointed under rule 54.22(2)”.

1.4 The Committee found this obscure and asked the Ministry of Justice to explain what mechanism is intended for the specification or description of cases under new rule 54.21(2)(a)(ix).

1.5 In a memorandum printed at Appendix 1, the Department regrets that there is a “transcription error” in new rule 54.21(2)(a)(ix): it explains that “the words ‘considers appropriate’ were omitted in error from the final draft signed by the Civil Procedure Rule Committee” and that “the intention is a Planning Court Claim to be heard in the Planning Court will include a claim which deals with matters that the Planning Liaison Judge considers appropriate to be dealt with by that Court as well as the specific matter listed in rule 54.21(2)(a)”. The Department adds that “The error was identified and a request for a correction slip was made on 8 April 2014” and that the Department is currently waiting for the request to be processed. The Department also explains the measures it has taken to notify appropriate editors and publishers of the omission and the fact that the correction slip had been requested, and records that as a result of the Department’s assurances the versions in various publications contain “the full intended text”. Finally, the Department apologises for the error.

1.6 Although the issue of correction slips is a matter for the Statutory Instruments Registrar, the Committee’s view is this is unlikely to be a suitable case for one to be issued. The Committee regards the issue of a correction slip as acceptable in principle only in the case of a small scale obvious textual error with the correction similarly small scale in textual terms and equally obvious in effect. In general, if a Department receives a query relating to what appears to be a clear error and wishes to persuade the Committee that a correction

slip is a suitable method of rectification, it would be well advised to seek to justify it on that basis.

1.7 No attempt at such a justification has been offered in this case, and the Committee's view is that the error is obvious, given that the provision queried does not work as a phrase, and the scale of the proposed correction is small in textual terms, but the effect of the proposed correction is not obvious. The words sought to be added effect a sub-delegation of an unqualified discretion to a nominated judge of an element of a definition and relate to the allocation of cases to the Planning Court; the Committee does not object to the substance of the sub-delegation in this context, but sees no reason why its unqualified nature should have been regarded as the only possible choice.

1.8 Accordingly, the Committee reports rule 3 for defective drafting, acknowledged, to some extent, by the Department.

2 S.I. 2014/877: Reported for defective drafting

<i>Family Proceedings Fees (Amendment) Order 2014 (S.I. 2014/877)</i>

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

2.2 The Order amends the Family Proceedings Fees Order 2008 so as to increase fees payable in family proceedings and to incorporate fees for family proceedings removed from the Magistrates' Courts Fees Order 2008 on the establishment of the single family court.

2.3 The Schedule introduces a fees table. At the end of item 3 in the fees table, which is subdivided into three classes of proceedings (provisions other than section 22 in Part 1 of the Adoption and Children Act 2002, section 22 of that Act and inherent jurisdiction), there are three notes to deal with potential overlaps and duplication in the table. The notes do not specify to which class or classes of proceedings each relates and the Committee asked the Ministry of Justice to clarify the point.

2.4 In a memorandum printed at Appendix 2, the Department asserts that it is self-evident from the content of the notes which fees they apply to, and goes on to explain to which class of proceedings each note refers. The Department accepts that elsewhere in the table notes are specifically expressed as applying to certain fees, and undertakes that for the purpose of maintaining a consistent approach the table will be amended at the next available opportunity to clarify which fees the notes apply to.

2.5 The Committee is not convinced that the application of each note is self-evident, particularly where so potentially elastic a concept as inherent jurisdiction is involved. It would in any case have been at least desirable for the notes to specify which provisions they were intended to qualify: given that, as the Department notes, the instrument is specific in other cases, the absence of provision in the case of these items ceases to be merely less than helpful and becomes a source of potential confusion and argument. Furthermore the Department may find, once it amends the notes, a need for a degree of adjustment in cases where they might otherwise overlap with each other.

2.6 The Committee accordingly reports Item 3.3 of the Schedule for defective drafting acknowledged, to some extent, by the Department.

3 S.I. 2014/1183: Reported for an unjustified breach of the 21-day rule

Immigration (Restrictions on Employment) (Codes of Practice and Amendment) Order 2014 (S.I. 2014/1183)

3.1 The Committee draws the special attention of both Houses to this Order on the ground that it involves an unjustified breach of the 21 day rule.

3.2 The Order was laid on 8 May 2014 and came into force on 16 May 2014. It brings revised Codes of Practice relating to illegal working into force, and those Codes are expressed themselves to come into force on that day. The Order thus breaches the 21 day rule mentioned in section 4.13 of Statutory Instrument Practice, which requires that instruments subject to annulment should not normally be brought into force until at least 21 days after being laid before Parliament.

3.3 In paragraph 3 of the Explanatory Memorandum accompanying the Order the Home Office explains that it wished to avoid “undue delay” in its coming into force and that it could not be made until the relevant Codes had been laid before Parliament, which could not happen when Parliament was not sitting. The Committee accepts that the Codes themselves, which count as unnumbered Act papers, cannot be laid during an adjournment period. The Committee nonetheless asked the Home Office to explain why it considered that a desire to avoid delaying the coming into force of the Order justified failure to comply with the 21 day rule.

3.4 In a memorandum printed at Appendix 3, the Department emphasises that the Order reflects previously announced policy consulted on some while ago and is part of a package of changes which, because they interrelate, need to come into force simultaneously.

3.5 The Committee has very recently (in its Third Report of this Session) emphasised the importance of compliance with the 21 day rule, which is designed to protect those affected by changes in the law made by subordinate legislation subject to negative Parliamentary procedure from being subject to the effect of the changes before they have had a reasonable opportunity to become aware of them. The Committee wishes to record that mere assertion of a desire to avoid delay will not generally be regarded by the Committee as justification for failing to comply with the rule. In this case a fuller explanation in the Explanatory Memorandum along the lines of that supplied in the memorandum might have assisted the Committee. But, even if such an explanation had been given, the Committee might well still have been inclined to report to the House that it considered it preferable slightly to delay the coming into force of the whole package of changes in order that the 21 day rule could be complied with. In particular the Codes required laying, not approval, and there is no reason why they themselves could not have included a date that respected the 21 day period. **It accordingly reports the Order for an unjustified breach of the 21 day rule.**

4 S.I. 2014/1197: Reported for defective drafting

Local Authorities (Goods and Services) (Public Bodies) (England) Order 2014 (S.I. 2014/1197)

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

4.2 The Order makes provision pursuant to subsections (5) and (6) of section 1 of the Local Authority (Goods and Services) Act 1970. Under that section a local authority may enter into contracts with public bodies for the supply of goods and services etc. In addition the section defines what a public body is and then empowers the Secretary of State by order to widen the definition by adding persons appearing to the Secretary of State to be exercising functions of a public nature. Article 2 of the Order accordingly designates as public bodies for the purposes of section 1 the Community Rehabilitation Companies listed in the Schedule to the Order and the National Probation Service.

4.3 In footnote (c) on page 1 of the Order, the National Probation Service is described as a business unit of the National Offender Management Service which is an Executive Agency of the Ministry of Justice. The Committee asked the Ministry of Justice to explain how the power in section 1(5) and (6) authorises the provision made by article 2 to specify the National Probation Service as a public body given its status as indicated in footnote (c) and the apparent impossibility of any agreement being enforced by a party that appears not to have independent legal capacity.

4.4 In a memorandum printed at Appendix 4 the Department explains the policy intention as being to enable local authorities to enter into agreements for the provision of legal, financial and human resources services to the new National Probation Service which it confirms to be an emanation of the Secretary of State. The Department takes the view that section 1(5) allows the naming of a person without independent legal capacity provided it is sufficiently clearly defined. It considers that any agreement made with a local authority in reliance on the Order would be enforceable by or against the Secretary of State but stresses that it is important for it to be clear that what is being provided for is not a general power for local authorities to contract with the Secretary of State but one to make agreements with a distinct section of the Ministry of Justice. As the order is expected only to have effect over a limited period, the Department does not plan to amend it. However, it considers that it might have been better not to have included the footnote but instead to have adopted in the text of article 2 a reference to the Secretary of State for Justice to the extent that the functions exercised by him relate to the provision of probation services.

4.5 The Committee agrees that it would indeed have been preferable for article 2 somehow to indicate that contracts would be made with the Secretary of State, a person with full legal capacity, while at the same time limiting local authorities' powers to contract with the Secretary of State to certain areas of his activities. The existing text of the article appears to specify something which is no more than an organisational unit of a Government department and which, as such, has no independent capacity to contract. While the Committee accepts as a matter of *vires* that the specification is consistent with the enabling power, and that amendment in the circumstances is not essential, it remains of the view that it makes no sense conceptually to specify as a public body an entity without legal

capacity in a situation where the purpose of the Order is to give local authorities power to enter into a contract with such an entity.

4.6 The Committee accordingly reports article 2 for defective drafting, acknowledged in principle by the Department.

Instruments not reported

At its meeting on 9 July 2014 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

- *denotes written evidence printed with this report*

Annex

Draft Instruments requiring affirmative approval

- Draft S.I.** Local Government (Transparency) (Descriptions of Information) (England) Order 2014
- Draft S.I.** Children and Young Persons Act 2008 (Relevant Care Functions) (England) Regulations 2014
- Draft S.I.** Community Interest Company (Amendment) Regulations 2014
- Draft S.I.** Renewables Obligation Closure Order 2014
- Draft S.I.** Police and Crime Commissioner Elections (Amendment) (No. 2) Order 2014
- Draft S.I.** National Minimum Wage (Amendment) (No. 2) Regulations 2014
- Draft S.I.** Video Recordings Act 1984 (Exempted Video Works) Regulations 2014
- **Draft S.I.** Gangmasters (Licensing Authority) Regulations 2014

Instruments subject to annulment

- S.I. 2014/832** Family Court Warrants (Specification of Orders) Order 2014
- S.I. 2014/840** Family Court (Composition and Distribution of Business) Rules 2014
- S.I. 2014/841** Justices' Clerks and Assistants (Amendment) Rules 2014
- S.I. 2014/842** Family Court (Constitution of Committees: Family Panels) Rules 2014
- S.I. 2014/1333** Channel Tunnel Rail Link (Planning Appeals and Assessment of Environmental Effects) (Revocation) Regulations 2014
- S.I. 2014/1364** Passenger Transport Executives (Exclusion of Bus Operating Powers) (Revocations) (England) Order 2014

- S.I. 2014/1378** Housing (Right to Buy) (Limit on Discount) (England) Order 2014
- S.I. 2014/1382** Crossrail (Insertion of Review Clauses) Regulations 2014
- S.I. 2014/1386** Child Support (Consequential and Miscellaneous Amendments) Regulations 2014
- S.I. 2014/1387** King's College Hospital NHS Foundation Trust (Transfer of Trust Property) Order 2014
- S.I. 2014/1390** Oxford Health NHS Foundation Trust (Transfer of Trust Property) Order 2014
- S.I. 2014/1391** Energy Act 2004 (Designation of Publicly Owned Companies) (Revocation) Order 2014
- S.I. 2014/1403** Energy Efficiency (Encouragement, Assessment and Information) Regulations 2014
- S.I. 2014/1438** Carriage of Passengers and their Luggage by Sea (Interim Provisions) (Notice) (Revocation) Order 2014
- S.I. 2014/1446** Financial Services and Markets Act 2000 (Consumer Credit) (Transitional Provisions) (No. 3) Order 2014
- S.I. 2014/1448** Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No. 2) Order 2014
- S.I. 2014/1451** Immigration (European Economic Area) (Amendment) Regulations 2014
- S.I. 2014/1453** Child Trust Funds (Amendment No. 2) Regulations 2014
- S.I. 2014/1456** Social Security (Recovery of Benefits) (Lump Sum Payments) (Amendment) Regulations 2014
- S.I. 2014/1457** Public Lending Right Scheme 1982 (Commencement of Variations) Order 2014
- S.I. 2014/1465** British Nationality (General) (Amendment) Regulations 2014
- S.I. 2014/1505** Tribunal Procedure (Amendment No. 2) Rules 2014
- S.I. 2014/1507** Plymouth College of Art (Transfer to the Higher Education Sector) Order 2014
- S.I. 2014/1508** Assisted Areas Order 2014
- S.I. 2014/1509** Fuel and Electricity (Heating) (Control) (Revocations) Order 2014

- S.I. 2014/1510** Olympic Lotteries (Payments out of the Olympic Lottery Distribution Fund) Regulations 2014
- S.I. 2014/1621** The Child Support (Consequential and Miscellaneous Amendments) (No. 2) Regulations 2014

Draft Instruments subject to annulment

- Draft S.I.** North Dorset (Electoral Changes) Order 2014
- Draft S.I.** Newark and Sherwood (Electoral Changes) Order 2014
- Draft S.I.** Wellingborough (Electoral Changes) Order 2014

Instruments not subject to Parliamentary proceedings not laid before Parliament

- S.I. 2014/1332** Channel Tunnel Rail Link (Revocations) Order 2014
- S.I. 2014/1354** Inspectors of Education, Children's Services and Skills (No. 4) Order 2014
- S.I. 2014/1355** Limitation of Liability for Maritime Claims (Parties to Convention) Order 1986 and the Carriage of Passengers and their Luggage by Sea (Parties to Convention) Order 1987 (Revocation) Order 2014
- S.I. 2014/1367** Crossrail (Insertion of Review Clauses) Order 2014
- S.I. 2014/1447** Financial Services Act 2012 (Commencement No. 4) Order 2014
- S.I. 2014/1454** Health and Social Care Act 2012 (Commencement No. 8) Order 2014
- S.I. 2014/1460** Energy Act 2004 (Commencement No. 11) Order 2014
- S.I. 2014/1461** Energy Act 2008 (Commencement No. 6) Order 2014
- S.I. 2014/1484** Wireless Telegraphy (Exemption and Amendment) (Amendment) Regulations 2014
- S.I. 2014/1560** Inspectors of Education, Children's Services and Skills (No. 5) Order 2014
- S.I. 2014/1621** Child Support (Consequential and Miscellaneous Amendments) (No 2) Regulations 2014

Appendix 1

S.I. 2014/610: memorandum from the Ministry of Justice

<i>Civil Procedure (Amendment No. 3) Rules 2014 (S.I. 2014/610)</i>
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1. By a letter dated 25 June 2014, the Committee sought a memorandum on the following point:

Explain what mechanism is intended for the specification or description of cases under new rule 54.21(2)(a)(ix) inserted by rule 3, and how effect is given to that intention.

2. We regret there is a transcription error in new rule 54.21(2)(a)(ix) inserted by rule 3. The words “considers appropriate” were omitted in error in the final draft signed by the Civil Procedure Rule Committee. The intention is a Planning Court Claim to be heard in the Planning Court will include a claim which deals with matters that the Planning Liaison Judge considers appropriate to be dealt with by that Court as well as the specific matter listed in rule 54.21(2)(a).
3. The error was identified and a request for a correction slip was made on 8 April 2014. We are currently waiting for the request to be processed.
4. At that time the Ministry of Justice notified the editors of the White and Green Books and other publishers and arranged for a note to go on the Civil Procedure Rules website highlighting the omission and the fact the correction slip had been requested. Consequently, the versions in those publications contain the full intended text.
5. The Ministry of Justice apologises for the error.

Ministry of Justice
26 June 2014

Appendix 2

S.I. 2014/877: memorandum from the Ministry of Justice

<i>Family Proceedings Fees (Amendment) Order 2014 (S.I. 2014/877)</i>
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1. By a letter dated 25th June 2014, the Committee sought a memorandum on the following point:

Explain which items the three notes immediately below item 3.3 in the fees table introduced by the Schedule are intended to relate to, and how the intention is made clear.

2. The Ministry considers that it is self-evident from the content of the notes which fees they apply to. The first note applies to fee 3.1, as that is the fee payable on an application or request for permission under Part 1 of the Adoption and Children Act 2002 and the note is stated as applying “when an application requires the permission of the court”.
3. The second note applies to fee 3.1 and 3.2, as those are the fees payable in respect of applications under the Adoption and Children Act 2002 and the note is stated as applying “where an application is made or permission is sought under or relating to two or more provisions of the Adoption and Children Act 2002.”
4. The third note applies to fees 3.1, 3.2 and 3.3, as appropriate, as they are all fees for adoption and wardship applications and the note is stated as applying “where the same application is made or permission is sought in respect of two or more children.”
5. However, the Ministry of Justice accepts that elsewhere in the table, notes are specifically expressed as applying to certain fees. Therefore, to maintain a consistent approach, the table will be amended at the next available opportunity to clarify which fees the notes apply to.

Ministry of Justice

30 June 2014

Appendix 3

S.I. 2014/1183: memorandum from the Home Office

<p><i>Immigration (Restrictions on Employment) (Codes of Practice and Amendment) Order 2014 (S.I. 2014/1183)</i></p>

1. This memorandum is submitted in response to a question from the Joint Committee on Statutory Instruments to the Home Office on 25 June 2014. The Committee asked:

Explain the Department’s reasons for considering that a desire to avoid delaying the coming into force of the Order justified failure to comply with the 21-day rule.

2. Whilst shortening the period for the Committee’s consideration is regretted, the changes implemented by this instrument reflect policy which has previously been announced and consulted upon. The consultation took place between 9 July and 20 August 2013 with the results published on 10 October 2013. At that time, the Government clearly signalled its intention to bring forward secondary legislation to implement the changes to the illegal working civil penalty scheme in early 2014. This amounted to a package which included this instrument, the Immigration (Employment of Adults Subject to Immigration Control) (Maximum Penalty) (Amendment) Order 2014 (S.I. 2014 No. 1262) and two revised Codes of Practice on preventing illegal working and avoiding unlawful discrimination whilst preventing illegal working. The extent to which the documents interrelate required that the instruments and the Codes come into force simultaneously.
3. This instrument and the Codes followed affirmative resolution debates on S.I. 2014/1262 in both Houses of Parliament—on 19 March (House of Commons) and 24 March (House of Lords)—during which the Department outlined its proposals for reforming the civil penalty regime. The measures have accordingly already been subject to a high degree of scrutiny.
4. The Department apologises for not following the convention. The instruments could not be made until the revised Codes of Practice had been laid before Parliament, which in turn could not happen until both Houses of Parliament were sitting. This resulted in a delay in laying S.I. 2014/1183. For the above reasons, the Department considered it expedient to abridge the 21 days to enable the changes to come into force without further delay.

Home Office

1 July 2014

Appendix 4

S.I. 2014/1197: memorandum from the Ministry of Justice

<p><i>Local Authorities (Goods and Services) (Public Bodies) (England) Order 2014 (S.I. 2014/1197)</i></p>
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1. By a letter dated 25th June 2014, the Committee sought a memorandum on the following point:

Explain how the power in section 1(5) and (6) of the Local Authorities (Goods and Services) Act 1970 authorises the provision made by article 2 to specify the National Probation Service as a public body given its status as indicated in

footnote (c) to that article and the apparent impossibility of any agreement being enforced by a party that appears not to have independent legal capacity.

2. Section 1(5) of the Local Authorities (Goods and Services) Act 1970 (the 1970 Act) provides that:

“[...] any person who is specified in the order or is of a description so specified, being a person or description of persons appearing to those Ministers of the Secretary of State to be exercising functions of a public nature, shall be a public body [...].”

3. It may assist the Committee if we set out some of the policy background to the SI, and why we have used the power in section 1(5) of the 1970 Act. The policy intention behind the SI is to enable Local Authorities to enter into agreements for the provision of legal, financial and HR services to the new National Probation Service (NPS). The NPS was created on 1 June 2014, as part of the Ministry of Justice’s restructuring of probation services under its Transforming Rehabilitation programme. The NPS is a business unit of the National Offender Management Service, an executive agency of the Ministry of Justice, and is therefore an emanation of the Secretary of State. The 1970 Act provides a mechanism for local authorities to provide certain services to public bodies, without the need for the local authority to set up a trading company. Public bodies are defined at section 1(4) of the 1970 Act to mean, amongst other things “... any probation trust...[and] any person who is a public body by virtue of subsection (5) of this section”.. Some local authorities had been providing legal and other services to probation trusts, the bodies which had delivered probation services prior to 1 June 2014. The intention behind the SI was therefore to use the power in section 1(5) to allow local authorities to provide legal and other services to the organisations that had succeeded probation trusts, including the NPS, for a time limited transitional period until alternative longer-term arrangements could be put into place (including the opportunity for Local Authorities to set up trading companies to use their broader powers under the Localism Act 2011 where appropriate).
4. When drafting the SI, we carefully considered the wording of section 1(5) of the 1970 Act and concluded that it permitted us to name a person that does not have strict legal personality provided that we could describe that person with sufficient legal certainty. It is correct that the NPS, or the National Offender Management Service (NOMS), are only descriptions of emanations of the Secretary of State but our view was that it would be helpful to those affected by the order, namely Local Authorities, to have clarity on exactly who they are advising. The Department for Communities and Local Government also felt that in exercising the section 1(5) power, precision was important to ensure that the power was not extended too widely. As this was only ever intended as a transitional arrangement the intention was to be clear that this was not a general power for local authorities to enter agreements with other parts of the Ministry of Justice. The NPS is led by a

Director and has a distinct management structure within the Ministry of Justice and a clear and distinct role in providing probation services on behalf of the Secretary of State. Those staff transferred to the public sector from Probation Trusts were specifically transferred to the NPS as opposed to NOMS or the Ministry of Justice and the NPS is described as such in contracts with other external companies who need work with it. The concept of the NPS, is therefore sufficiently certain for the purposes of these regulations for it to be clear whether or not a local authority is, or would be, advising that emanation of the Secretary of State rather than any other.

5. We concluded that the power in section 1(5) would permit such an approach. If, following this SI, the NPS were to enter into an 'agreement' with Local Authorities for the provision of the services specified in the SI, the NPS would clearly be acting under the authority of the Secretary of State and as such that agreement would be enforceable against the Secretary of State, not the NPS, but our view was that the effect is the same and the agreement could clearly be enforced.
6. However, in light of the Committee's concerns and on further reflection, we accept that the drafting could have been improved. A better approach rather than simply providing a footnote to explain the NPS is an emanation of the Secretary of State may have been to adopt a formulation such as "the Secretary of State for Justice to the extent that the functions exercised by him relate to the provision of probation services".
7. Whilst we agree that the drafting could have better reflected the underlying powers, we consider there is sufficient certainty in the SI for the court to interpret the description of the NPS, as a reference to the Secretary of State. As the Order is intended to provide a time limited transitional arrangement to enable local authorities to provide certain specified services to the successor bodies to Probation Trusts and as arrangements are already in place for local authorities to provide those services (on which the NPS is reliant in the short term), we consider that those are arguments against withdrawing and re-laying the SI to provide additional clarity.

Ministry of Justice

1 July 2014

Appendix 5

Draft S.I.: memorandum from the Home Office

<i>Gangmasters (Licensing Authority) Regulations 2014 (Draft S.I.)</i>

1. The Committee has asked the Home Office for a memorandum on the following point:

“Explain whether it is the intention under these Regulations that the Board should have power to delegate any of its functions to a committee – other than an advisory committee – as it currently can under regulation 6(1) and (2) of S.I. 2005/448 (to be revoked by these Regulations); and, if so, explain how that intention is given effect in this draft”.

2. It is not the intention that under these Regulations the Board should have the power to delegate any of its functions to a committee. This is a deliberate departure from S.I. 2005/488, regulation 6(2).

Home Office

30 June 2014