House of Lords
House of Commons

Joint Committee on Statutory Instruments

Twenty-sixth Report of Session 2016–17

Drawing special attention to:

Non-Contentious Probate Fees Order 2017 **(Draft S.I.)**

Fixed Penalty (Amendment) Order 2017 **(S.I. 2017/66)**

Contracts for Difference (Standard Terms) (Amendment) Regulations 2017 **(S.I. 2017/112)**

Ministry of Defence Police (Conduct, Performance and Appeals Tribunals) (Amendment) Regulations 2017 **(S.I. 2017/84)**

Export Control (Amendment) Order 2017 **(S.I. 2017/85)**

Social Housing Rents (Exceptions and Miscellaneous Provisions) (Amendment) Regulations 2017 **(S.I. 2017/91)**

Civil Procedure (Amendment) Rules 2017 **(S.I. 2017/95)**

Electricity (Connection Charges) Regulations 2017 **(S.I. 2017/106)**

Qualifications Wales Act 2015 (Consequential Provision) Order 2017 **(S.I. 2017/121)**

Criminal Procedure (Amendment) Rules 2017 **(S.I. 2017/144)**

Social Security (Personal Independence Payment) (Amendment) Regulations 2017 **(S.I. 2017/194)**

Ordered by The House of Lords to be printed 29 March 2017

Ordered by The House of Commons to be printed 29 March 2017

HL 152
HC 93-xxvi
Published on 31 March 2017
by authority of the House of Lords
and House of Commons

Joint Committee on Statutory Instruments

Current membership

House of Lords

Lord Lexden *(Conservative)*

Baroness Meacher *(Crossbench)*

Lord Morris of Handsworth *(Labour)*

Lord Rowe-Beddoe *(Crossbench)*

Lord Rowlands (*Labour*)

Baroness Scott of Needham Market *(Liberal Democrat)*

Lord Sherbourne of Didsbury (*Conservative*)

House of Commons

Derek Twigg (*Labour, Halton*) (Chair)

Vicky Foxcroft (*Labour, Lewisham, Deptford*)

Stephen Hammond (*Conservative, Wimbledon*)

Mr Ian Liddell-Grainger (*Conservative, Bridgwater and West Somerset*)

Victoria Prentis (*Conservative, Banbury*)

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. 73, 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 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 Mike Winter (Commons Clerk), Jane White (Lords Clerk) and Liz Booth (Committee Assistant). Advisory Counsel: Daniel Greenberg, Peter Brooksbank, Philip Davies and Peter Davis (Commons); James Cooper, Nicholas Beach and John Crane (Lords).

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Statutory Instruments, House of Commons, London SW1A OAA. The telephone number for general inquiries is: 020 7219 2026; the Committee's email address is: jcsi@parliament.uk.

Contents

Instruments reported

At its meeting on 29 March 2017 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 eleven of those considered. The Instruments and the grounds for reporting them are given below. The relevant Departmental memoranda are published as appendices to this report.

1 Draft. S.I.: Reported for doubtful *vires* and for unexpected use of powers

Non-Contentious Probate Fees Order 2017

The Committee draws the special attention of both Houses to this draft Order on the grounds that, if it is approved and made, there will be a doubt whether it is intra vires, and that it would in any event make an unexpected use of the power conferred by the enabling Act.

Introduction

1.1 Probate fees are payable by executors when they apply for a grant of probate, a formal document needed to administer a deceased person's estate. Fees must be paid by the executors in advance, but they can recover them from the estate once probate is issued. Applications for probate are made to the Probate Registry, which is part of the High Court of England and Wales. The Registry's work is essentially administrative, and it deals exclusively with non-contentious cases. If a will is contested, separate proceedings have to be commenced in the Chancery Division of the High Court for which separate fees are payable.

1.2 Currently a flat fee of either £155 is payable upon a probate application made by a solicitor or £215 for an application made by an individual[1]. These fees were set only in 2014[2]. They raise £45 million per year, which recovers the full cost of running the Probate Registry.

1.3 Paragraph 1 of Schedule 1 to the draft Order would replace these flat fees with a system of bands linked to the value of the estate (before Inheritance Tax), and the same rate applies regardless of whether the applicant is a solicitor or an individual. The amount payable in respect of each band would be as follows:

Value of estate	Proposed fee
Up to £50,000	£0
£50,000 to £300,000	£300
£300,000 to £500,000	£1,000
£500,000 to £1 million	£4,000
£1 million to £1.6 million	£8,000
£1.6 million to £2 million	£12,000
Over £2 million	£20,000

1 No fee is currently payable if the value of the estate does not exceed £5,000.

2 See the Non-Contentious Probate Fees (Amendment) Order 2014 (S.I. 2014/876).

1.4 The proposed new Probate Registry fees are expected to generate an estimated £300 million per annum in additional income. This is to be used to fund other areas of the courts and tribunal service. The Explanatory Memorandum justifies the case for revisiting the way in which probate fees are charged because "of the need to make sure that Her Majesty's Court and Tribunal Service is properly funded to protect the vital principle of access to justice for the long term" and that "court users who can afford to contribute more, should do so".

Vires

1.5 The enabling powers relied on for the proposed Order are section 92 of the Courts Act 2003 ("the 2003 Act") and section 180 of the Anti-social Behaviour, Crime and Policing Act 2014 ("the 2014 Act"). The relevant provisions are reproduced below:

> *Section 92 of the 2003 Act*
>
> (1) The Lord Chancellor may with the consent of the Treasury by order prescribe fees payable in respect of anything dealt with by—
>
> (a) the Senior Courts [which include the High Court],
>
> (b) the family court,
>
> (c) the county court, and
>
> (d) magistrates' courts.
>
> (2) An order under this section may, in particular, contain provision as to … scales or rates of fees.
>
> *Section 180 of the 2014 Act*
>
> (1) In prescribing a fee under an enactment specified in subsection (2), the Lord Chancellor may with the consent of the Treasury prescribe a fee which is intended to exceed the cost of anything in respect of which the fee is charged.
>
> (2) The enactments are—
>
> (a) section 92 of the Courts Act 2003 (Senior Courts, county courts and magistrates' courts fees);
>
> (b) section 54 of the Mental Capacity Act 2005 (Court of Protection fees);
>
> (c) section 58(4)(b) of the Act (Public Guardian fees);
>
> (d) section 42 of the Tribunals, Courts and Enforcement Act 2007 (tribunal fees).
>
> (3) Before prescribing a fee by virtue of subsection (1) under an enactment specified in subsection (2)(a), (b) or (d), the Lord Chancellor must have regard to—

> (a) the financial position of the courts and tribunals for which the Lord Chancellor is responsible, including in particular any costs incurred by those courts and tribunals that are not being met by current fee income, and
>
> (b) the competitiveness of the legal services market.
>
> (4) For the purposes of subsection (3)(a), the courts and tribunals for which the Lord Chancellor is responsible are the courts listed in section 1(1) of the Courts Act 2003 and the tribunals listed in section 39(1) of the Tribunals, Courts and Enforcement Act 2007.
>
> (5) …
>
> (6) A fee prescribed by virtue of subsection (1) [under section 92 of the 2003 Act] must be used to finance an efficient and effective system of courts and tribunals.

1.6 The Committee asked the Ministry of Justice a number of questions so as to probe whether the Lord Chancellor, in making the draft Order, might be acting beyond the enabling powers referred to above because she would, in substance, be imposing a tax on estates rather than prescribing probate fees.

1.7 The Ministry of Justice's response is contained in a memorandum printed at Appendix 1. In summary this contends that:

- The provisions of section 180(3) of the 2014 Act demonstrate "Parliament's clear intention that the Lord Chancellor may set certain fees above cost recovery levels in one part of the court and tribunal system in order to help maintain the efficient and effective operation of the rest of the system".
- The fact that "the Lord Chancellor is required to consider those courts and tribunals where the costs are not being met when exercising the power at section 180 anticipates this cross-subsidisation".
- There is no restriction on this power, such that the fee must be directly related to the cost of the service.
- The Probate Service forms part of the courts and tribunal system, but there is no legislative requirement that the costs raised by probate fees must be reserved to the Probate Service.
- Other above-cost court fees are not reserved to the area in which they are imposed; so, for example, fees raised in respect of civil money claims are not reserved for the funding of the civil courts but may be used to support the operation of the criminal courts.

- The powers in section 180 have been used previously in this manner and approved by Parliament. For example, the Civil Proceedings Fees (Amendment) Order 2015[3] sets enhanced fees for the issuing of a money claim by reference to the value of a claim – from £35 for a claim not exceeding £300 to £10,000 for a claim not exceeding £200,000.

1.8 The Committee understands that, where a statute authorises the charging of a fee in respect of a service, the word "fee" has connotations of recovery of costs, direct or indirect, incurred in the provision of the service concerned or in the administration of the process, and that there must be express authority to charge a fee which exceeds the cost of the service – in this context, the cost of issuing a grant of probate in an individual case. The Committee acknowledges that section 180 of the 2014 Act provides that authority. Nonetheless it remains a power to prescribe a "fee", a concept which is subject to inherent limitations about the relationship to the service for which it is charged – including (arguably) one of proportionality[4]. The Lord Chancellor is not permitted to impose a tax.

1.9 Therefore, despite the arguments put forward by the Ministry of Justice, the Committee has a real doubt as to whether the Lord Chancellor may use a power to prescribe non-contentious probate fees for the purpose of funding services which executors do not seek to use – namely those provided by courts and tribunals dealing with litigation. Applying for probate is not to be compared with the commencement of proceedings. A person can choose whether to litigate, and therefore whether to incur the fees payable on issuing a claim – which may be recoverable from the defendant if the case succeeds. In contrast, executors have to obtain probate to allow them to administer an estate, and the fee for doing so is not refundable. This is an administrative process, akin to the registration of a life event. Nobody applying for an uncontested probate would think for a moment that they were engaging in litigation. That makes it difficult for the Committee to accept that a power to charge enhanced court fees can be extended naturally to require probate fees to reflect the general costs of the court and tribunal system.

1.10 The Ministry of Justice relies on section 180(3) which obliges the Lord Chancellor, in prescribing enhanced fees, to have regard to the financial position of the courts and tribunals for which she is responsible (including in particular any costs incurred by those courts and tribunals that are not being met by current fee income) and to the competitiveness of the legal services market. However, the Committee is not convinced that this generally-worded provision gives the Lord Chancellor, in exercising the specific power to prescribe probate fees, a licence to compel executors to pay whatever amounts she regards as appropriate for the purpose of providing funds for the courts and tribunals – as opposed to the Probate Registry in particular. If Parliament had intended to confer power on the Lord Chancellor to legislate in such a way, the Committee would have expected to see far more explicit provisions in section 180 enabling her to do so[5].

1.11 The charges provided for in paragraph 1 of Schedule 1 to the draft Order appear to the Committee to have the hallmarks of taxes rather than fees, particularly in view of

3 S.I. 2015/576.

4 See the Supreme Court's judgment in R (on the application of Hemming) v Westminster City Council [2015] UKSC 25.

5 See, for example, section 102 of the Finance Act (No. 2) 1987 which expressly links fee increases to specified matters; and section 42 of the Asylum and Immigration Act (Treatment of Claimants, etc.) Act 2004 which confers a power to charge profit-level fees for the issue of a certificate conferring a right of abode in the UK so as to reflect benefits that are likely to accrue to the person to whom it is issued.

the amounts that would payable for larger estates and the scale of the proposed increases (from £155 to as much as £20,000 – a rise of nearly 13,000%) – and because the charges are disproportionate to the service provided by the Probate Registry.

1.12 It is an important constitutional principle that there is no taxation without the consent of Parliament, which must be embodied in statute and expressed in clear terms. This principle is enunciated in the following extract from the Court of Appeal's judgment in *Attorney-General v Wilts United Dairies Ltd* (1921) TLR 884:

> "If an officer of the executive seeks to justify a charge on the subject made for the use of the Crown (which includes all the purposes of the public revenue), he must show, in clear terms that Parliament has authorised the particular charge. The intention of the Legislature is to be inferred from the language used, and the grant of powers may, though not expressed, have to be implied as necessarily arising from the words of the statute; but in view of the historic struggle of the Legislature to secure for itself the sole power to levy money on the subject, its complete success in that struggle, the elaborate means adopted by the Representative House to control the amount, the conditions and the purposes of that levy, the circumstances would be remarkable indeed which would induce the Court to believe that the Legislature had sacrificed all the well-known checks and precautions, and not, in express words, but merely by implication, had entrusted a Minister of the Crown with undefined and unlimited powers of imposing charges upon the subject for the purposes connected with his department."

1.13 The Committee is doubtful whether section 180 of the 2014 Act does in express words entrust the Lord Chancellor with the power to impose charges of the magnitude proposed by the draft Order and for the purposes connected with her department specified in the Explanatory Memorandum.

The Committee therefore reports paragraph 1 of Schedule 1 to the draft Order on the ground that there appears to be doubt as to whether it would be *intra vires*.

Use of powers

1.14 The Committee also asked the Ministry of Justice to explain what indication was given to Parliament, during the passage of the Bill for the 2014 Act, that the power to prescribe probate fees would be used for the purpose in the way proposed.

1.15 In paragraphs 14 to 16 of its memorandum to the Committee, the Ministry of Justice points in particular to the following statements made by the Minister in the House of Commons:

- The Government "believe it is fair and proportionate that those who use the courts and can afford to do so should make a greater contribution to their overall funding. That is why we are bringing forward this provision to allow fees to be set above cost in some circumstances".

- The Lord Chancellor, in prescribing fees under the section 180 power would be required have regard to the principle that "access to the courts must not be denied', and that fees would not therefore be set at excessively high levels which deny persons access to the courts.
- The Government would consult widely on the proposals and "look carefully at how any proposed court fees might compare with the overall cost of litigation, the value of the issues at stake and the fees charged by our international competitors", and that following consultation there would be full parliamentary scrutiny of any enhanced fees that the Government decide to introduce.

1.16 The clause which became section 180 was debated only briefly during the passage of the Bill for the 2014 Act. Appendix 1A sets out all the relevant material identified by the Committee in the legislative history of what is now section 180, including the Ministerial statements highlighted by the Ministry of Justice.

1.17 The emphasis in the debates was on how any proposed enhanced court fees might affect the costs of litigation. Nothing, however, appears to have been said about probate fees which, of course, are not a cost of litigation.

1.18 The Appendix includes an extract from the Ministry of Justice's memorandum to the House of Lords Delegated Powers and Regulatory Reform Committee. This explained that the Government were seeking to take the section 180 power so that it could give effect to its normal rule that "fees should be set at a level to recover the full cost of providing the service" and that power to prescribe enhanced fees was needed so as to secure that "users of a service should contribute more to the cost of that service where they can afford to do so, in order that the courts are properly resourced". This did not suggest that persons applying for probate might be required to contribute to the cost of a service unrelated to the grant of probate.

1.19 Indeed the Committee can find no evidence that the Government suggested to Parliament that the section 180 power would be used to prescribe probate fees in order to fund the operation of the courts and tribunals service generally, or to provide for such large and immediate increases of fees in the way now proposed.

1.20 The Committee is also aware that, according to the Treasury's publication Managing Public Money, the Office of National Statistics (ONS) normally classifies charges higher than the cost of provision, or not clearly related to a service to the charge payer, as taxes[6]. In its memorandum, the Ministry of Justice says that the ONS has not yet taken a view on whether to classify the proposed probate fees as a tax for accounting purposes; and that even if it did, this could have no bearing on the interpretation of section 180 of the 2014 Act. While the Committee agrees that the ONS classification is not relevant to the question of whether there is power to make the proposed Order, it considers that this reference in Managing Public Money is a further indication that the Lord Chancellor is proposing to use the power in a surprising way.

The Committee therefore reports paragraph 1 of Schedule 1 to the draft Order on the ground that it would make an unexpected use of the power conferred by section 180 of the Anti-social Behaviour, Crime and Policing Act 2014.

6 H.M. Treasury, Managing Public Money, para 6.4.3.

2 S.I. 2017/66; S.I. 2017/112: Reported for unjustifiable delay in laying before Parliament

Fixed Penalty (Amendment) Order 2017

Contracts for Difference (Standard Terms) (Amendment) Regulations 2017

2.1 **The Committee draws the special attention of both Houses to this Order and these Regulations on the ground that there appears to have been unjustifiable delay in laying them before Parliament.**

2.2 The Order amends the Fixed Penalty Order 2000 to increase to £200 the fixed penalty amount for the offence of using a hand-held communication device while driving. The Regulations amend the Contracts for Difference (Standard Terms) Regulations 2014 to enable the associated Contracts for Difference ("CFD") Standard Terms and Conditions to set out when payments to generators under a CFD will not be made.

2.3 In both cases, there was a delay in laying before Parliament and each Department was asked to explain the significant interval between making and laying.

2.4 The Order was made on 24 January 2017 and was not laid before Parliament until 6 February. In a memorandum printed at Appendix 1, the Department for Transport explains that the delay was in part due to a delay in registration. The Department accepts that the Order could have been laid earlier and apologises to the Committee for the delay.

2.5 The Regulations were made on 24 January 2017 and were not laid before Parliament until 8 February. In a memorandum printed at Appendix 1A, the Department for Business, Energy and Industrial Strategy explains that it intended to lay the instrument before Parliament at the same time as publishing a package of other CFD documents in advance of a forthcoming CFD allocation round. For operational reasons the publication of the package of documents was delayed until 8 February 2017. The Department acknowledges that in these circumstances the laying of the instrument should not have been delayed and apologises to the Committee for the delay.

2.6 The Committee repeats what it said in its Seventeenth Report of Session 2014–15 (in relation to S.I. 2014/2821) and its Twelfth Report of Session 2015–16 (in relation to S.I. 2015/1776) that it is difficult to imagine why it could have been necessary to postpone such a simple administrative step as laying before Parliament. The statutory arrangements for laying before Parliament remain part of the required formal measures by which publicity is assured and they should not be neglected on account of other informal measures being taken or for other administrative reasons. The Committee considers that, as a general rule and in the absence of exceptional circumstances, a delay of 10 calendar days or more will amount to an unjustifiable delay.

2.7 **The Committee accordingly reports the Order and the Regulations for unjustifiable delay in laying before Parliament, acknowledged by both Departments.**

3 S.I. 2017/84: Reported for requiring elucidation and for defective drafting

Ministry of Defence Police (Conduct, Performance and Appeals Tribunals) (Amendment) Regulations 2017

3.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that they require elucidation in three respects (two of which are related) and are defectively drafted in two respects.**

3.2 The Regulations, prepared by the Ministry of Defence, amend three previous instruments covering Ministry police, two of which are referred to in the Explanatory Note as "the Conduct Regulations" and "the Appeals Tribunals Regulations".

3.3 Regulations 14 and 27 respectively amend regulations 38 and 56 of the Conduct Regulations and cover the new concept of a further meeting or hearing following misconduct or disciplinary proceedings. Those amendments fall to be considered together, in the case of regulation 14, with regulation 8 inserting new regulation 24A and, in the case of regulation 27, with regulation 20 inserting new regulation 45A into the Conduct Regulations. Both new regulation 24A(1) and new regulation 45A(1) provide for the Secretary of State to give a written direction in relation to the proceedings denying or restricting public access in the interest of national security, and both new regulation 24A(4) and new regulation 45A(4) require the person in charge of the proceedings to comply with the direction. In amending regulation 38 of the Conduct Regulations, regulation 14(6)(a) applies regulation 24A(4) to the further stage but not regulation 24A(1); in amending regulation 56 of the Conduct Regulations, regulation 27(6)(a) applies regulation 45A(4) to the further stage but not regulation 45A(1). The Committee sought an explanation for imposing a requirement to comply with a direction without providing for the giving of the direction. In a memorandum printed at Appendix 2, the Department states that the direction "will already have been given" in relation to the earlier proceedings before they "become" a further meeting on hearing. The Committee accepts that this is a plausible construction, although it depends on treating the further meeting or hearing as part of the original proceedings as opposed to a separate stage. **The Committee accordingly reports regulations 14(6)(a) and regulation 27(6)(a) as requiring elucidation, provided in the Department's memorandum.**

3.4 Regulation 26 replaces regulation 56 of the Conduct Regulations. In new regulation 56 paragraph (1) states that, subject to paragraph (2), a special case hearing must be in public. Paragraph (2)(a) empowers the person in charge to exclude from the whole or any part of it any person whose right to attend is just as a member of the public (there are other rights to attend arising from regulations 53 and 54 of the Conduct Regulations) but no criterion for exclusion is set out, while regulation (2)(b) entitles the person in charge to impose conditions on an individual's attendance "in order to facilitate the proper conduct of the hearing". This apparent anomaly was queried by the Committee. In its memorandum the Department states that it is following the precedent in the Police Conduct Regulations 2012, regulation 52. The original form of that regulation applied the facilitation criterion both to exclusion and imposition of conditions. It was replaced by regulation 16 of the Police Conduct (Amendment) Regulations 2015 and the relevant paragraph now reads as follows:

"(2) The person conducting or chairing the special case hearing may—

(a) in relation to the attendance at the hearing of a person under this regulation, exclude any person as he sees fit from the whole or a part of it; and

(b) impose such conditions as he sees fit relating to the attendance under this regulation of any person at the hearing in order to facilitate the proper conduct of it.".

3.5 It follows that the exclusion power under regulation 52 of the 2012 precedent cited was never unconstrained – it was originally constrained by purpose and then constrained by what it could relate to. Paragraph (3) prohibits the attendance at a special case hearing of any witness and companion before the witness is called on to give evidence, but paragraph (1) is not expressed to be subject to it. In response to the Committee's query, the Department in its memorandum justifies the silence on the point on the basis that paragraph (2) is a matter of discretion while paragraph (3) is a separate general rule. In the Committee's view that is a distinction without a difference. Both equally vary the proposition that a special case hearing must be in public. **The Committee accordingly reports regulation 26, in so far as it inserts regulation 56(2)(a) of the Conduct Regulations, as requiring elucidation incompletely provided in the Department's memorandum and, in so far as it inserts regulation 56(3) of the Conduct Regulations without making regulation 56(1) subject to it, for defective drafting.**

3.6 Regulation 38(7) amends regulation 3(1) of the Appeals Tribunals Regulations by moving a specific definition "to the appropriate place in the alphabetical order". In response to the Committee's query on the point the Department in its memorandum accepts that the definition in question was already in the right place – it had relied on a website that was inaccurate. **The Committee reports regulation 38(7) for defective drafting, acknowledged by the Department.**

4 S.I. 2017/85: Reported for failure to comply with accepted drafting practice and for defective drafting

Export Control (Amendment) Order 2017

4.1 **The Committee draws the special attention of both Houses to this Order on the grounds that it fails to comply with accepted drafting practice in one respect and is defectively drafted in another respect.**

4.2 The Order, prepared by the Department for International Trade, amends the Export Control Order 2008 to implement amendments made to Directive 2009/43/EC of the European Parliament and the Council by Commission Directive (EU) 2016/970; it relates to defence-related products subject to export control. The Schedule, which inserts a replacement Schedule 2 into the 2008 Order, largely follows the copy-out method of transposition.

4.3 The opening section of replacement Schedule 2 contains definitions. One of them is a definition of the term "pyrotechnic(s)". This is taken directly from the Annex to the 2009 Directive as amended, but it does not conform to standard drafting practice for United Kingdom legislation. The copy-out method of transposition would not be compromised

by ensuring that in matters like this the text conforms to standard UK legislative practice, variations from which can in principle be confusing for readers. The Department's memorandum printed at Appendix 3, in response to the Committee's question about the definition, adds nothing to change this position; and **the Committee accordingly reports the definition of "pyrotechnic(s)" for failure to comply with accepted drafting practice.**

4.4 Item ML17P in replacement Schedule 2 identifies fuel cells specially designed or modified for military use as a class of the defence related product but limits the class to such cells other than those specified elsewhere in the Schedule itself. The term "fuel cell" appears nowhere else in the Schedule except in the list of definitions at the start. In response to the Committee's query on that point, the Department in its memorandum explains that they can be "specially designed components in a variety of other ML control entries". The memorandum does not specify which ones and it appears to the Committee that there is a mismatch in the terminology – it would have been more accurate to exclude from the class fuel cells in so far as they formed components of products specified elsewhere in the Schedule. Furthermore the item fails accurately to replicate the equivalent item in the Annex, which refers to specification in "the EU Common Military List", and, while it is the duty of the EU Commission, under article 13 of the 2009 Directive, to adapt the Annex to correspond strictly with that list, it is reasonably predictable that between alteration of the list and adaptation of the Annex a mismatch may exist. **The Commission accordingly reports scheduled item ML17P for defective drafting.**

5 S.I. 2017/91: Reported for requiring elucidation

Social Housing Rents (Exceptions and Miscellaneous Provisions) (Amendment) Regulations 2017

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

5.2 The Regulations, prepared by the Department for Communities and Local Government, amend 2016 Regulations that specified terms for exceptions from the duty on providers of social housing to limit charges by reference to amounts laid down in the Welfare Reform Act 2016. Paragraph 1 of Schedule 2 to the 2016 Act is modified in relation to particular circumstances by new regulations 11A and 11B of the 2016 Regulations, as inserted by regulation 6. The modification in part requires an "assumed rent rate" to be modified by "*adjusting the rate by the specified percentage*".

5.3 The Committee considered the requirement for adjustment rather obscure (noting in particular that read literally, it could require adjustment upwards or downwards, and it is unclear exactly what is being adjusted). It asked the Department to explain, with the aid of examples, what the changes were intended to achieve and how effect had been given to the Department's intentions.

5.4 In a memorandum printed at Appendix 4, the Department sets out its intentions with helpful clarity and thoroughness. In particular the table at the end of paragraph 15 of the memorandum makes it clear that the adjustment factor is to be applied to 110% of "the rate" rather than the rate itself. Although that is not what modified sub-paragraph (4) achieves when read literally, the Committee is persuaded by the Department's memorandum (which will now be in the public domain as a result of publication in

this Report) that this is the most likely construction; although there are clearer ways of presenting the modifications which might be considered for future use. Accordingly, **the Committee reports regulation 6 as requiring elucidation, provided in the Department's memorandum.**

6 S.I. 2017/95: Reported for requiring elucidation

Civil Procedure (Amendment) Rules 2017

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

6.2 The Rules were made by the Civil Procedure Rule Committee and allowed by the Lord Chancellor under section 2 of the Civil Procedure Act 1997. They amend the Civil Procedure Rules 1998. Section 2(6)(a) of the 1997 Act contains a prior requirement of consultation by the Rules Committee, in a case where such Rules are made or amended, of "such persons as they consider appropriate".

6.3 The preamble to the Rules recites that the consultation took place but paragraph 8.1 of the Explanatory Memorandum published with the Rules states that the Rules Committee "did not consider that any of the proposals for rules before it required separate consultation". The Committee sought an explanation for the inconsistency.

6.4 In a memorandum printed at Appendix 5 the Department apologises for the shortfalls in the Explanatory Memorandum, undertakes to improve its practice in explaining compliance with consultation requirements and explains that the preamble was accurate. It adds that as well as the consultation carried out by the Department itself, there was sufficient consultation by the Rules Committee though not by means of a formal consultation document. (While consultation by the Department cannot directly satisfy a duty to consult imposed on the Rules Committee, the Committee notes that there is some authority in an unreported decision of the High Court (Pelling v SSHD 5 December 2011) to the effect that consultation carried out by one authority can be taken into account in establishing the validity of a relatively limited consultation by another authority.). **The Committee accordingly reports the preamble to the Rules as requiring the elucidation provided in the Department's memorandum.**

7 S.I. 2017/106: Reported for unexpected use of the enabling powers

Electricity (Connection Charges) Regulations 2017

7.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they make an unexpected use of the enabling powers in one respect.**

7.2 These Regulations, made under powers in Schedule 5B to the Electricity Act 1989, make provision for persons who have paid an electricity distributor for a connection to an electricity distribution network to receive contributions to the cost of the payments where subsequent connections are made to the network for the purposes of the same premises or distribution system.

7.3 Regulation 7 provides that an electricity distributor must demand that a person obtaining a subsequent connection make a reimbursement payment of part of the costs of the person for whom the previous connection was made. But under paragraph (5)(a) no reimbursement has to be demanded if, after deduction of administrative expenses, its amount would be less than £300. Under regulation 9, where an electricity distributor has received a reimbursement payment it must pay it (after deduction of expenses) to persons who made contributions to the costs of the previous connection ("eligible persons"). But under paragraph (3)(a) no payment is required to be made by the electricity distributor to an eligible person if the payment to that eligible person would be less than £300.

7.4 The Committee was concerned that the effect of regulations 7(5)(a) and 9(3)(a), taken together, could involve the electricity distributor being left with some or all of an amount reimbursed to it with no obligation to distribute it to eligible persons. It accordingly asked the Department of Business, Energy and Industrial Strategy to provide an explanation.

7.5 In a memorandum printed at Appendix 6, the Department accepts the identified mismatch between the provisions about reimbursement to, and payments by, electricity distributors and accepts that the aggregate effect of regulations 7(5)(a) and 9(3)(a) is indeed to give rise to the possibility that a person obtaining a subsequent connection has to make a reimbursement payment in circumstances in which the electricity distributor who receives it is not required to pay all (or indeed any) of it to eligible persons. It goes on to explain that under the regulations superseded by these regulations, reimbursement was required to be demanded by a distributor only if the result would be that at least one eligible person would receive £300 or more. On that approach it was, of course, possible that the electricity distributor would not end up paying over the whole amount of the reimbursement, though a payment would always have been made to at least one eligible person. But the changes made in these regulations make it a possibility for the first time that there will be cases in which reimbursement is required to be demanded but no payment (to anyone) is required to be made.

7.6 The Committee believes the policy underlying Schedule 5B to the Electricity Act 1989 to be to secure that, where there has been a subsequent connection, the cost of the previous connection is shared between the person for whom the previous connection was made and the person for whom the subsequent connection (which takes advantage of the previous connection) was made. The Committee believes that in the respect identified the Regulations fail to deliver that policy, in so far as in the case described money will in fact, as accepted by the Department, be retained by the electricity distributor. **The Committee accordingly reports regulations 7(5)(a) and 9(3)(a) for making an unexpected use of the enabling powers.**

8 S.I. 2017/121: Reported for requiring elucidation

Qualifications Wales Act 2015 (Consequential Provision) Order 2017

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

8.2 This Order is made under section 150 of the Government of Wales Act 2006, subsection (1)(a) of which gives the Secretary of State power by order to make provision consequential on any provision of an Act of the National Assembly for Wales.

8.3 Article 2(2) revokes paragraph (c) of the definition of "educational qualification" in regulation 22 of S.I. 1999/2864 ("paragraph (c)"): that definition was inserted in 2010. Paragraph (c) refers to qualifications accredited under section 24(2)(g) or 30(1)(e) of the Education Act 1997. As enacted, section 24 of that Act applied to both England and Wales but in 2005 it was disapplied in relation to Wales. Section 24 was subsequently repealed in 2009 and the repeal was commenced for England in 2010, just before the insertion of the definition of "educational qualification" was made.

8.4 The Committee readily understood why the revocation of the reference to section 30 in paragraph (c) is consequential on the Qualifications Wales Act 2015 ("the 2015 Act"): that section (which applied only to Wales) was itself repealed by the 2015 Act. But the Committee wondered how, in the light of the legislative history of section 24, removing the reference to that section could be regarded as consequential on the 2015 Act. The Committee accordingly asked the Wales Office to explain the source of the power to include in article 2(2) the revocation of whole of paragraph (c).

8.5 In a memorandum printed at Appendix 7, the Department gives a helpful account of the complex legislative history and points out that in 2010, but after the date on which the definition of "educational qualification" was inserted into S.I. 1999/2864, the repeal of section 24 was commenced for Wales. The Department therefore assumed that (despite the 2005 disapplication) section 24 might have still operated in some way for Wales until that commencement. The memorandum goes on to suggest that, when removing the reference to section 30 in consequence of the 2015 Act, it would have been odd to leave paragraph (c) in place, just referring to a provision that by then had plainly been spent for a long time.

8.6 The Committee is prepared to accept the Department's assumption that the reference to section 24 might conceivably originally have had some effect in relation to Wales and that the reform of the system of educational qualifications in Wales by the 2015 Act therefore makes its continued existence a source of confusion. But the Committee considers that removing the reference pushes the power in section 150 to near its limits, because (whatever effect it may have had) it was spent well before the 2015 Act was passed. The Committee is not satisfied that the power conferred by section 150 to make provision consequential on provision made by Welsh legislation is apt to allow the general tidying-up of the statute book by the clearing away of provisions that are or may be spent or no longer of practical utility. On this occasion there is a link between the revoked reference and 2015 Act in terms of subject-matter which just about sanctions the inclusion of the revocation even if the removal of the reference is not an inevitable consequence of a provision of the 2015 Act.

8.7 **The Committee accordingly reports article 2(2) as requiring the elucidation set out in the Department's memorandum, as amplified in this Report.**

9 S.I. 2017/144: Reported for defective drafting

Criminal Procedure (Amendment) Rules 2017

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

9.2 The Rules, made by the Criminal Procedure Rule Committee, amend the Criminal Procedure Rules 2015. Rule 11 inserts a new rule (47.39) and renumbers previous rules 47.39 to 47.57 as rules 47.40 to 47.58 respectively. It also correctly amends references in rule 47.1 to the renumbered provisions. However, in the four of the renumbered provisions themselves, there are references to other renumbered provisions that have been left unchanged. The Committee queried that apparent omission.

9.3 In a memorandum printed at Appendix 8 the Ministry of Justice apologises for the oversight, thanks the Committee for drawing attention to it and indicates that it will arrange rectification at the earliest possible opportunity. **The Committee reports rule 11 for defective drafting, acknowledged by the Department.**

10 S.I. 2017/194: Reported for requiring elucidation

Social Security (Personal Independence Payment) (Amendment) Regulations 2017

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

10.2 These Regulations concern entitlement to personal independence payment. Personal independence payment has two components: the daily living component and the mobility component. Each component is payable at a standard rate and an enhanced rate.

10.3 A person is entitled to the mobility component at the enhanced rate if the person's ability to carry out mobility activities is severely limited by the person's physical or mental condition (section 79(2)(b) of the Welfare Reform Act 2012). Whether a person's ability to carry out mobility activities is severely limited by the person's physical or mental condition is to be determined by regulations; and the regulations must provide for the questions to be determined on the basis of an assessment (or repeated assessments) of the person and for the way in which an assessment is to be carried out and may make provision about matters which are, or are not, to be taken into account in assessing a person.

10.4 Part 3 of Schedule 1 to the Social Security (Personal Independence Payment) Regulations 2013 (S.I. 2013/377) ("the 2013 Regulations") specifies the matters to be taken into account in assessing whether a person is entitled to the mobility component at the enhanced rate. The matters are grouped under the separate activities of "planning and following journeys" and "moving around". For both of those activities a number of "descriptors" are specified and a person is awarded a specified number of points for satisfying a descriptor. A person needs to be awarded 12 points to be entitled to the mobility component at the enhanced rate. A person can score points for both activities but not for more than one descriptor relating to the same activity.

10.5 In MH v Secretary of State for Work and Pensions [2016] UKUT 0531 (AAC) the Upper Tribunal decided that a person could be awarded points under descriptors c, d and f relating to the activity of planning and following journeys because of the effects of psychological distress (but could not score points relating to the activity of moving around because of such effects). Regulation 2(4) reverses the Upper Tribunal's decision on the planning and following journeys activity by amending descriptors c, d and f to make it clear that they cannot be satisfied for reasons of psychological distress.

10.6 The Committee wondered whether the cumulative effect of the amendments made by regulation 2(4) and the Upper Tribunal's finding on the moving around activity might be that a person with a mental condition could never be entitled to the mobility component at the enhanced rate. The Committee accordingly asked the Department for Work and Pensions to explain whether that was so and—

(a) if it was, whether that is consistent with the section 79(2)(b) of the Welfare Reform Act 2012, and

(b) if it was not, in what sorts of circumstances such an entitlement can arise.

10.7 In a memorandum printed at Appendix 9, the Department asserts that the amendments do not have the effect referred to in the question and, after a general discussion of the notions of "mental condition" and "psychological effects", gives examples of cases in which a person with a mental condition (unaccompanied by a physical condition) could still be entitled to the mobility component of personal independence payment at the enhanced rate. In essence the examples rely on the fact that the notions of "mental condition" and "psychological distress" (which is defined in Schedule 1 to the 2013 Regulations as distress related to an enduring mental health condition or an intellectual or cognitive impairment) are not synonymous. Distress is not itself a mental (or physical) condition but a symptom (which may come and go) of a mental (or physical) condition.

10.8 The Committee is grateful for that explanation and the examples and notes that on that basis (which will now be a matter of public record as a result of the publication of the memorandum in this report) that the provision made by regulation 2(4) does not automatically secure that a person with a mental condition cannot ever be entitled to the mobility component at the enhanced rate, whether by accruing 12 points for meeting descriptor f relating to the planning and following up journeys activity or a combination of points under another descriptor relating to that activity and points relating to the moving around activity. Although the change prevents someone acquiring that entitlement because of the effects of psychological distress, the Committee accepts on the basis of the distinction drawn by the Department that the change does not entirely negate the effect of the reference to a "mental condition" in section 79(2)(b) because there are circumstances where a person suffering from a mental condition may be entitled to the mobility component at the enhanced rate. The Department's explanation therefore satisfies the Committee's technical concerns as to whether the changes made are in the reasonable legislative contemplation of the enabling powers; whether the policy that they achieve is desirable is not a matter for the Committee and can be considered elsewhere should Parliament so wish. **The Committee accordingly reports regulation 2(4) as requiring the elucidation set out in the Department's memorandum.**

Instruments not reported

At its meeting on 29 March 2017 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to both Houses.

Annex

Draft instruments requiring affirmative approval

Draft S.I.	Electoral Registration Pilot Scheme (England) (Amendment) Order 2017
Draft S.I.	Electoral Registration Pilot Scheme (England and Wales) Order 2017
Draft S.I.	Electoral Registration Pilot Scheme (Scotland) Order 2017
Draft S.I.	Representation of the People (Scotland) (Amendment) Regulations 2017
Draft S.I.	Specified Agreement on Driving Disqualifications Regulations 2017
Draft S.I.	Immigration Act 2016 (Consequential Amendments) (Biometrics and Legal Aid) Regulations 2017
Draft S.I.	Combined Authorities (Finance) Order 2017
Draft S.I.	Government Resources and Accounts Act 2000 (Audit of Public Bodies) Order 2017
Draft S.I.	Misuse of Drugs Act 1971 (Amendment) Order 2017
Draft S.I.	Trade Union (Deduction of Union Subscriptions from Wages in the Public Sector) Regulations 2017
Draft S.I.	Domestic Renewable Heat Incentive Scheme (Amendment) Regulations 2017
Draft S.I.	International Headquarters and Defence Organisations (Designation and Privileges) Order 2017
Draft S.I.	Greater Manchester Combined Authority (Functions and Amendment) Order 2017

Instruments subject to annulment

S.I. 2017/138	Universal Credit (Benefit Cap Earnings Exception) Amendment Regulations 2017
S.I. 2017/150	National Health Service Litigation Authority (Amendment) Regulations 2017
S.I. 2017/153	Railway Pensions (Substitution) (Amendment) Order 2017
S.I. 2017/174	Social Security (Income-Related Benefits) Amendment Regulations 2017

S.I. 2017/185 Child Trust Funds (Amendment) Regulations 2017

S.I. 2017/187 Court of Protection (Amendment) Rules 2017

S.I. 2017/192 Civil Legal Aid (Immigration Interviews) (Exceptions) (Amendment) Regulations 2017

S.I. 2017/195 Electricity (Necessary Wayleaves and Felling and Lopping of Trees) (Charges) (England and Wales) (Amendment) Regulations 2017

S.I. 2017/196 Electricity (Applications for Consent) (Amendment) (England and Wales) Regulations 2017

S.I. 2017/197 Universal Credit (Surpluses and Self-employed Losses) (Change of coming into force) Regulations 2017

S.I. 2017/198 Courts Act 2003 (Amendment) Order 2017

S.I. 2017/199 Homes and Communities Agency (Transfer of Property etc) Regulations 2017

S.I. 2017/203 Occupational and Personal Pension Schemes (General Levy) (Amendment) Regulations 2017

S.I. 2017/204 Employment and Support Allowance and Universal Credit (Miscellaneous Amendments and Transitional and Savings Provisions) Regulations 2017

S.I. 2017/205 Employment and Support Allowance (Exempt Work & Hardship Amounts) (Amendment) Regulations 2017

S.I. 2017/206 Damages (Personal Injury) Order 2017

S.I. 2017/207 Medical Devices (Fees Amendment) Regulations 2017

S.I. 2017/208 Judicial Pensions (Additional Voluntary Contributions) Regulations 1995 (Amendment) Regulations 2017

S.I. 2017/211 CRC Energy Efficiency Scheme (Allocation of Allowances for Payment) (Amendment) Regulations 2017

S.I. 2017/213 Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2017

S.I. 2017/218 Democratic People's Republic of Korea (European Union Financial Sanctions) Regulations 2017

S.I. 2017/219 National Health Service (Direct Payments) (Amendment) Regulations 2017

S.I. 2017/221 Communications (Television Licensing) (Amendment) Regulations 2017

S.I. 2017/223 High Speed Rail (London – West Midlands) (Fees for Requests for Planning Approval) Regulations 2017

S.I. 2017/227 High Speed Rail (London – West Midlands) (Planning Appeals) (Written Representations Procedure) (England) Regulations 2017

S.I. 2017/230 Recovery of Costs (Remand to Youth Detention Accommodation) (Amendment) Regulations 2017

S.I. 2017/232 Social Security (Industrial Injuries) (Prescribed Diseases) Amendment Regulations 2017

S.I. 2017/234	Criminal Justice Act 2003 (Alcohol Abstinence and Monitoring Requirement) (Prescription of Arrangement for Monitoring) (Amendment) Order 2017
S.I. 2017/238	Health and Safety (Miscellaneous Amendments) Regulations 2017
S.I. 2017/242	Public Service Pensions Revaluation Order 2017
S.I. 2017/243	County of Merseyside Act 1980 (Amendment) Regulations 2017
S.I. 2017/244	Sewerage Services (Exception from Sewerage System Prohibition) (England) Regulations 2017
S.I. 2017/245	Her Majesty's Chief Inspector of Education, Children's Services and Skills (Fees and Frequency of Inspections) (Children's Homes etc.) (Amendment) Regulations 2017
S.I. 2017/246	Water Supply and Sewerage Services (Customer Service Standards) (Amendment) Regulations 2017
S.I. 2017/247	Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2017
S.I. 2017/249	Childcare Act 2006 (Provision of Information to Parents) (England) (Amendment) Regulations 2017
S.I. 2017/252	Universal Credit (Housing Costs Element for claimants aged 18 to 21) (Amendment) Regulations 2017
S.I. 2017/270	Social Security (Fees Payable by Qualifying Lenders) (Amendment) Regulations 2017
S.I. 2017/271	Social Fund (Amendment) Regulations 2017
S.I. 2017/272	Civil Enforcement of Parking Contraventions Designation and Consequential Amendment Order 2017
S.I. 2017/275	National Health Service Pension Scheme and Additional Voluntary Contributions (Amendment) Regulations 2017
S.I. 2017/282	Criminal Procedure (Amendment No. 2) Rules 2017
S.I. 2017/287	Social Security Revaluation of Earnings Factors Order 2017
S.I. 2017/288	Seeds (Miscellaneous Amendments) (England) Regulations 2017
S.I. 2017/291	Social Security (Social Care Wales) (Amendment) Regulations 2017
S.I. 2017/296	National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) (Amendment) Regulations 2017
S.I. 2017/302	Gambling (Personal Licence Fees) (Amendment) Regulations 2017
S.I. 2017/303	Gambling (Operating Licence and Single-Machine Permit Fees) Regulations 2017
S.I. 2017/304	Health and Safety (Miscellaneous Amendments and Revocation) Regulations 2017

S.I. 2017/306 Policing and Crime Act 2017 (Possession of Pyrotechnic Articles at Musical Events) Regulations 2017

S.I. 2017/307 Social Security (Miscellaneous Amendments) Regulations 2017

S.I. 2017/310 Government Resources and Accounts Act 2000 (Estimates and Accounts) Order 2017

S.I. 2017/311 Criminal Legal Aid (Standard Crime Contract) (Amendment) Regulations 2017

S.I. 2017/314 Infrastructure Planning Fees (Amendment) Regulations 2017

S.I. 2017/318 Non-Domestic Rating (Designated Areas etc.) Regulations 2017

S.I. 2017/322 National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) (Amendment) (No. 2) Regulations 2017

S.I. 2017/323 Oil and Gas Authority (Levy) Regulations 2017

S.I. 2017/328 Trade Union (Facility Time Publication Requirements) Regulations 2017

S.I. 2017/333 Childcare Act 2006 (Provision of Information to Parents) (England) (Amendment) (No. 2) Regulations 2017

S.I. 2017/347 Employers' Duties (Implementation) (Amendment) Regulations 2017

Instruments not subject to Parliamentary proceedings laid before Parliament

S.I. 2017/160 Democratic Republic of the Congo (Sanctions) (Overseas Territories) (Amendment) Order 2017

S.I. 2017/169 Syria (Restrictive Measures) (Overseas Territories) (Amendment) Order 2017

S.I. 2017/181 Emergency Powers (Overseas Territories) Order 2017

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2017/57 Welfare Reform Act 2012 (Commencement No. 11, 13, 16, 22, 23 and 24 and Transitional and Transitory Provisions (Modification)) Order 2017

S.I. 2017/111 Pensions Act 2014 (Commencement No. 9) and the Welfare Reform and Work Act 2016 (Commencement No. 4) Regulations 2017

S.I. 2017/159 Social Security (Reciprocal Agreements) Order 2017

S.I. 2017/225 Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Alcohol Abstinence and Monitoring Requirements) Piloting (Amendment) Order 2017

S.I. 2017/235 Criminal Justice (Electronic Monitoring) (Responsible Person) Order 2017

S.I. 2017/236	Crime and Courts Act 2013 (Commencement No. 17, Transitional and Savings Provisions) Order 2017
S.I. 2017/259	Finance Act 2016, Schedule 21 (Appointed Days) Regulations 2017
S.I. 2017/261	Finance Act 2016, Section 164 (Appointed Day) Regulations 2017
S.I. 2017/277	Finance Act 2016, Schedule 22 (Appointed Days) Regulations 2017
S.I. 2017/281	Housing and Planning Act 2016 (Commencement No. 5, Transitional Provisions and Savings) Regulations 2017
S.I. 2017/297	Pensions Act 2014 (Commencement No.10) Order 2017
S.I. 2017/301	Pensions Act 2014 (Pension Protection Fund: Increased Compensation Cap for Long Service) (Pension Compensation Sharing on Divorce) (Transitional Provision) Order 2017
S.I. 2017/315	Infrastructure Act 2015 (Commencement No. 7) Regulations 2017
S.I. 2017/351	Wales Act 2017 (Commencement No. 1) Regulations 2017

Appendix 1

Draft S.I.

Non-Contentious Probate Fees Order 2017

1. On 15 March 2017, the Committee requested that the Ministry of Justice submit a memorandum on the following points:

(1) *Explain why it is thought that the provision made by paragraph 1 of Schedule 1 to the draft Order constitutes the prescription of "fees" authorised by section 92 of the Courts Act 2003 and section 180 of the Anti-social Behaviour, Crime and Policing Act 2014, rather than the imposition of a tax, given that—*

(a) *existing probate fees are already at cost recovery levels;*

(b) *the additional revenue is to be used to fund services other than those provided by Probate registries;*

(c) *the Office of National Statistics normally classifies charges higher than the cost of provision, or not clearly related to a service to the charge payer, as taxes (see Managing Public Money, para 6.4.3).*

(2) *Explain why it is thought that the provision made by paragraph 1 of Schedule 1 to the draft Order, which increases charges for probate applications from £155 to as much as £20,000 (a rise of nearly 13,000%), falls within the class of action that Parliament contemplated when it delegated to the Lord Chancellor the power in section 180 of the Anti-social Behaviour, Crime and Policing Act 2014.*

(3) *Explain what indication was given to Parliament, during the passage of the Bill which became the Anti-social Behaviour, Crime and Policing Act 2014, that the power conferred by section 180 to prescribe enhanced probate fees would be exercised—*

(a) *to generate funds for the operation of services other than those provided by Probate Registries;*

(b) *to provide for charges for probate applications of the magnitude now proposed.*

2. The Department is grateful for the Committee's consideration of this instrument, and responds as set out below.

3. On point (1) raised by the Committee, the Department's view is that the enabling power in section 92 of the Courts Act 2003, read with section 180 of the Anti-social Behaviour, Crime and Policing Act 2014 ('the 2014 Act') gives clear statutory authority to prescribe the fees set out in Schedule 1 to the draft Order.

4. Section 180(1) of the 2014 Act provides that the Lord Chancellor may with the consent of Treasury 'prescribe a fee of an amount which is intended to exceed the cost of anything in respect of which the fee is charged'. In doing so, the Lord Chancellor must have regard (amongst other matters) to 'the financial position of the courts and tribunals for which the

Lord Chancellor is responsible, including in particular any costs incurred by those courts and tribunals that are not being met by current fee income' (s.180(3)(a)). Such fees must be used 'to finance an efficient and effective system of courts and tribunals' (s.180(6), 2014 Act).

5. Taken together, the department considers that these provisions demonstrate Parliament's clear intention that the Lord Chancellor may set certain fees above cost recovery levels in one part of the court and tribunal system in order to help maintain the efficient and effective operation of the rest of the system. Indeed the fact that the Lord Chancellor is required to consider those courts and tribunals where costs are not being met when exercising the power at section 180(1) anticipates this cross subsidisation.

6. The case of Attorney-General v Wilts United Dairies [1922] All ER Rep Ext 845 is authority for the proposition that the Government may not levy a charge or tax without the express authority of Parliament. The Ministry of Food argued that its powers to control the supply of food included an incidental power to levy the payment of sums of money in respect of the supply of milk; the House of Lords found that there was no express or implied statutory power to levy such payments, and therefore the Ministry was acting ultra vires. In contrast to that case, Parliament has here made express statutory provision in the 2014 Act which enables the Lord Chancellor to levy a fee above cost. This situation is therefore wholly different from the Wilts United Dairies case, in which there was no such statutory authority.

7. In the case of R(Attfield) v LB Barnet [2013] EWHC 2089 (Admin), the London Borough of Barnet was found to have acted ultra vires by using the income from parking charges to cross-subsidise other areas of the council's work; this was not authorised by the relevant statutory power. Again, the situation here can clearly be distinguished, since the 2014 Act makes express provision that fees may be charged above cost for the purposes of funding the courts and tribunal system.

8. In response to point (1)(a) raised by the Committee, it is correct that the existing probate fees are set at cost recovery levels. However, as noted, Parliament has conferred an explicit power to set fees at above cost levels, and therefore clearly anticipated that this power would be used to set fees above the level of cost recovery.

9. In response to point (1)(b) raised by the Committee, s180(6) of the 2014 Act provides that fees above cost must be used to finance the courts and tribunals system as a whole. The Probate Service forms part of that courts and tribunals system, but there is no legislative requirement that the costs raised by probate fees must be reserved to the Probate Service. The Department would note that other above cost fees are not reserved to the area in which they are imposed, for example, the fees raised in respect of civil money claims are not reserved for the funding of the civil courts, but may be used, for example, to support the operation of the criminal courts. In contrast, s180(5) limits fees prescribed under s58(4)(b) of the Mental Capacity Act 2005 (which would be charged for services provided by the Office of the Public Guardian), in that these fees must only be used to "finance the efficient and effective discharge of functions of the Public Guardian". The absence of a similar provision for probate fees makes it clear that no restriction was imposed.

10. In response to point (1)(c) raised by the Committee, the ONS has not yet taken a view on whether to classify these fees as a tax for accounting purposes. Regardless of the

accounting treatment, it does not change our view that these are fees charged in return for a specific service – a grant of probate – under a wide power explicitly designed to allow for cross-subsidisation in the court and tribunal system. We do not consider that the classification for accounting purposes has any bearing on the interpretation of this legislative provision and we do not see any reason in principle for reading down the power in such a way as to preclude its exercise in this manner.

11. In response to point (2) raised by the Committee, as noted above, Parliament has explicitly conferred a power to impose fees which are above cost, and there is no restriction on this power such that the fee must be directly related to the cost of the service.

12. These powers have previously been used (and approved by Parliament) in this manner. The Civil Proceedings Fees Order 2008, for example, sets enhanced fees for the issuing of a money claim by reference to the value of the claim; from £35 for a claim not exceeding £300, to £10,000 for a claim exceeding £200,000 (see Fee 1.1 of Schedule 1 to the Civil Proceedings Fees Order 2008). Similarly, the Upper Tribunal (Lands Chamber) Fees Order 2009/1114 sets the fee for certain proceedings by reference to a percentage of the amount awarded by the Tribunal (see fees 9 and 10 of Schedule 1 to that Order).

13. In response to point (3)(a) raised by the Committee, the Department considers that, as noted above, it is clear from the text of the legislation that it was Parliament's intention that fees raised in one part of the court and tribunal system may be used for the purposes of supporting another part of the system.

14. In relation to point (3)(b) raised by the Committee, during the Parliamentary passage of the 2014 Act, the then Minister explained the purpose of the section 180 power to the House of Commons[7]:

> *"We will shortly be consulting on proposals to achieve full cost recovery, less remissions, in the civil and family courts. However, even on this basis the running of the court system in England and Wales costs more than £1 billion a year, so we need to go further in reducing the burden on taxpayers. We believe it is fair and proportionate that those who use the courts and can afford to do so should make a greater contribution to their overall funding. That is why we are bringing forward this provision to allow fees to be set above cost in some circumstances."*

15. The Minister emphasised that the Lord Chancellor, in prescribing fees under this power, '*must have regard to the principle that access to the courts must not be denied*', and that fees would not therefore be set at excessively high levels which deny persons access to the courts.

16. The specific proposals in this Order were not set out at that point. That was because, as the Minister went on to say, *'we want to take some time to ensure that we get the measures right. As I said, we will consult widely on the proposals and look carefully at how any proposed court fees might compare with the overall cost of litigation,* ***the value of the issues at stake*** *and the fees charged by our international competitors. Following the consultation there will, as I have indicated, be full parliamentary scrutiny of any enhanced fees that we decide to introduce'.* (emphasis added)

7 Hansard, 15 October 2013, Volume 568, column 602

17. We consider that the proposals in this Order are consistent with the section 180 power, as well as the assurances given to Parliament at the time. The Lord Chancellor has, in particular, had careful regard to the need to ensure that this scheme of fees would not deny access to the court (as per s.92(3), Courts Act 2003). Fees are recoverable from the estate, and setting fees by reference to the value of the estate – with the lifting of the lower threshold for paying fees from £5k to £50k – ensures the affordability of fees for those who ultimately bear their cost. As provided for by the 2014 Act, Parliament has the opportunity to scrutinise these particular proposals as part of the affirmative procedure.

18. We hope that the explanation as set out above is of assistance to the Committee in its consideration of this instrument.

Ministry of Justice

16 March 2017

Appendix 1A

Draft S.I.

Non-Contentious Probate Fees Order 2017

Extracts from Parliamentary materials on the Anti-social Behaviour, Crime and Policing Bill

House of Commons Report Stage – 15 October 2013

(Official Report, volume 568, Col 607)

Damian Green (Minister for Policing and Criminal Justice, Ministry of Justice): New clause 28 contains substantive provisions to replace clause 147, which, as we made clear, was a placeholder clause. The new clause provides the Lord Chancellor with a general power to set fees at a level that exceeds the cost of the related services. The services are those provided by the courts in England and Wales, including the Court of Protection, the tribunals for which the Lord Chancellor is responsible and the Office of the Public Guardian. The primary focus of our proposals for using this power will be the courts of England and Wales. The courts play a vital role in our society, providing access to justice so that the public can assert their legal rights. Ensuring that they are properly resourced is essential to maintaining access to justice. This must be delivered when public spending is required to fall—deficit reduction is one of the Government's key priorities—and the courts and those who use them must make a contribution.

As new clause 28 makes clear, the purpose of enhanced fees is to finance an efficient and effective court system. This change to the way that fees are set will help to ensure that courts are properly resourced to deliver modern, efficient services so that access to justice is protected. The proposed legislation provides a general power; specific fees would be increased through secondary legislation. When a specific fee or fees are set at an enhanced

level for the first time, the order will be subject to the affirmative resolution procedure—there will be full debate in both Houses. Any subsequent changes to those fees will be subject to the negative procedure.

We will shortly be consulting on proposals to achieve full cost recovery, less remissions, in the civil and family courts. However, even on this basis the running of the court system in England and Wales costs more than £1 billion a year, so we need to go further in reducing the burden on taxpayers. We believe it is fair and proportionate that those who use the courts and can afford to do so should make a greater contribution to their overall funding. That is why we are bringing forward this provision to allow fees to be set above cost in some circumstances.

Let me assure the House that we will not be using the power to set excessively high fees. In setting fees, the Lord Chancellor must have regard to the principle that access to the courts must not be denied. The new clause requires him to have regard to the overall financial position of the courts and tribunals, and the international competitiveness of the legal services market. We are not bringing forward specific plans for charging enhanced fees at this stage. We want to take some time to ensure that we get the measures right. As I said, we will consult widely on the proposals and look carefully at how any proposed court fees might compare with the overall cost of litigation, the value of the issues at stake and the fees charged by our international competitors. Following the consultation there will, as I have indicated, be full parliamentary scrutiny of any enhanced fees that we decide to introduce.

Ministry of Justice's memorandum to the House of Lords Delegated Powers and Regulatory Reform Committee

17 October 2013

Clause 155: Power to make provision about court and tribunal fees

Power conferred on: Lord Chancellor

Power exercisable by: Order or Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure on first exercise of the power, negative procedure thereafter

91. Section 92 of the Courts Act 2003, sections 54 and 58(4)(b) of the Mental Capacity Act 2005 and section 42 of the Tribunals, Courts and Enforcement Act 2007 confer on the Lord Chancellor powers to make provision by order in respect of court and tribunal fees and fees charged for services provided by the Office of the Public Guardian. Clause 155 would enable the Lord Chancellor, in exercise of those powers, to set fees in amounts that are greater than the cost of the activities in respect of which those fees are charged. In doing so, the Lord Chancellor must have regard to the overall financial position of the courts and tribunals and the competitiveness of the legal services market.

92. Managing Public Money governs, amongst other things, the setting of fees for the provision of public services. The normal rule is that fees should be set at a level to recover the full costs of providing the service. This power would enable the Lord Chancellor to prescribe the charging of enhanced fees, set at a level above cost, which must be used to finance an efficient and effective system of courts and tribunals. This better reflects the

principle that users of a service should contribute more to the cost of that service where they can afford to do so, in order that the courts are properly resourced. The Government considers it appropriate that any order, that for the first time sets a fee in an amount that exceeds cost, should be subject to the affirmative resolution procedure. This will enable the principle of charging in excess of cost in respect of specific fees to be subject to a high degree of parliamentary scrutiny. Once that principle has been established, the negative resolution procedure is considered appropriate for any subsequent increases.

House of Lords Committee Stage – 11 December 2013

(Official Report, volume 750, col. 863)

Clause 155: Court and tribunal fees

Amendment 95AA

Moved by Lord Beecham

Lord Beecham: My Lords, I shall also speak to Amendments 95AB, 95BA and 95D in relation to the issue of court and tribunal fees. At Second Reading I described the Bill as not so much a curate's egg as a curate's omelette, comprising as it does so many ingredients, both good and bad, mixed up together. It is perhaps fitting that the Committee should end with a debate on a clause which impels me to produce another culinary analogy, for this clause and the process which has informed it can best be described as half-baked.

It is perfectly reasonable to update the fees for proceedings in courts and tribunals to keep pace with inflation and, in appropriate cases, to seek full-cost recovery, provided there is a reasonable and effective scheme for the remission of fees, in whole or in part, for those of modest means or less. Equally, I have few qualms about fees in cases such as those in the commercial court which the Government are anxious to promote internationally as a forum of choice, but the approach of the Government to this clause has been cavalier in the extreme.

On 4 December the Minister wrote to me to say that the Government had launched a consultation on the provisions of Clause 155, as announced the previous day, that is to say four working days before the clause comes to be considered by this House. Had progress been quicker on earlier clauses, we would have reached this clause on the very day that the Minister's letter reached me. The consultation, incidentally, is to last seven weeks, including the Christmas and new year period. It will end on 21 January, by which time we will presumably have reached Report, if not concluded it, and there will be little or probably no time at all for the Government to give their response before the Bill's final stage is reached.

That is not all. Impact assessments for these proposals published on 2 December say next to nothing about the impact on claimants applying to tribunals or to the courts, as opposed to the amounts the Government hope to rake in from increased fees. The Government's attitude to consultation is underlined by paragraph 20 of the current consultation paper which refers to an earlier consultation, CP15/2011, *Fees in the High Court and Court of Appeal Civil Division*, to which, the consultation paper records,

> "the Government has not yet responded"

after some two years, and which are, the consultation paper says, "superseded"—without, I may say, any explanation—by the current proposals.

The saga does not end there—perhaps I should say does not start there—for the Government launched yet another consultation last April, this time on fee remissions for courts and tribunals, with a four-week period for responses, and published their response, conveniently, no doubt, for them on 9 September, when Parliament was in recess. Interestingly, that document introduced a disposable capital test and airily dismissed concerns that this might have a deterrent effect on claimants. There is, incidentally, currently concern about an apparently significant drop in employment tribunal claims following the hotly contested introduction of fees, which were widely regarded as too high. Perhaps the Minister would save me the trouble of tabling a Question by agreeing to write to me in the new year with details of the number of claims before and after the imposition of charges. It is, after all, an analogous situation to that which this clause deals with.

The Government's latest consultation paper refers to interviews and research, both of which are said to have been the subject of a full report published alongside the consultation, but for which no references are given. Painting, as ever, with a broad brush, the Government say that they believe,

> "that all those who issue a court case benefit equally from the existence of the civil justice system as a whole and should share in contributing towards its indirect costs",

and, therefore, they divide the indirect costs of the system between all cases that are issued. It is not clear to me whether the apportionment applies equally to all cases, or whether it is in some way proportionate to the amount claimed. On the face of it, this looks very like the application of the principle of the poll tax to the cost of making a claim to a court or tribunal.

Paragraph 60 of the consultation proposes to combine the fees for issue and allocation to a track—the small claims track, fast track or multi-track—without any clear explanation of the rationale. Paragraph 63 acknowledges that the hearing fees for the higher track cases are higher than the average cost of such, but it does not propose to adjust them, thereby importing the concept of more than full-cost recovery by the back door. In divorce cases, while the Government say, at paragraph 71, that they will maintain the issue fee at £410, already above the actual cost price of £270, they will impose an extra charge of £300 to cover the cost of the remainder of the proceedings. Given that, in many cases these will be a mere formality, this looks suspiciously like another example of more than full-cost recovery, though not, of course, for the complex cases where there are major issues as to income and property, where such charges might be thought to be not unreasonable.

Ominously, the Government propose changes to the fees in money claims, including, no doubt at the behest, yet again, of their friends in the insurance industry, in personal injury cases. They go so far as to say that their proposals, if applied in their entirety, would lead to reduced fees on claims of around £10,000 or less but, typically, they will not be changing those fees.

The Committee will understand that there are many questions about these proposals, but there is an overriding question about the abuse of the legislative process which, not for the first time, is being perpetrated by this Government. I acknowledge and welcome the

concessions made in the Government's amendments as far as they go. They will ensure that any increase in fees other than inflation-related increases will have to be approved by affirmative resolution, and that is a welcome improvement. But will the Government consider the amendments I have tabled, which seek to ensure that access to justice is a prime consideration before setting the size of the fee increases, and that the remission arrangements are properly scrutinised and agreed? Will they revise the existing remission arrangements in the light of the proposed major changes, and will they review the proposals to take disposable capital into account?

Given the shambles of the process thus far, I have to say that on Report the Opposition may well press for a sunrise clause along the lines of Amendment 95D to ensure that there is proper parliamentary scrutiny of the complete package when its final contents are developed. As I say, that is unlikely to be the case before this Bill receives its Third Reading.

In addition, in the mean time it will be helpful to know whether, in the indefinite age of austerity that the Chancellor has decreed for public services, the principle of full-cost recovery, and especially of more than full-cost recovery, will be extended to other services such as further and higher education, prescription charges or other parts of the health service. By what logic, one wonders, would the Government differentiate between some of the proposals they are making in this Bill, incorporating more than full-cost recovery for access to justice, and those or other public services? I beg to move.

Lord McNally (Minister of State, Ministry of Justice): My Lords, I shall not try to follow the noble Lord, Lord Beecham, down his culinary route. One of the pleasures of responding to the noble Lord is that it is almost like doing a school exam. So many questions are fired at you in quick succession. If I do not cover them all in this reply, I will carefully read what he has said, note the question marks that Hansard inserts and try to send suitable replies, including on the point he made in opening about the figures for claims at employment tribunals after the introduction of charges.

Perhaps I may deal first with the two government amendments in the group, namely, Amendments 95B and 95C. These give effect to the recommendation made by the Delegated Powers and Regulatory Reform Committee relating to the power to charge enhanced court fees. Clause 155 currently provides that, when the power to set a fee or fees at an enhanced level is used for the first time, the relevant statutory instrument should be subject to the affirmative resolution procedure, with any subsequent changes to the fee or fees being subject to the negative procedure. The Government's intention was that the principle of charging an enhanced fee should be subject to a full debate in Parliament, after which the negative procedure would provide the necessary level of parliamentary oversight for any subsequent changes to the fee.

However, the Delegated Powers and Regulatory Reform Committee was concerned that this would provide the Lord Chancellor with a very wide discretion to set the level of fees. Although the legislation requires the Lord Chancellor to have regard to the financial position of the courts and tribunals and to the competitiveness of the legal services market when setting fees, the committee felt it was possible that, in future, very different considerations might apply and that these should be taken into account. The committee therefore recommended that the power to set an enhanced fee should be subject to the

affirmative procedure unless the amendment is being made solely to reflect the change in the value of money. The Government agree that this change would be appropriate and, accordingly, Amendments 95B and 95C will implement this recommendation.

I turn now to the amendments in the name of the noble Lord, Lord Beecham. Amendments 95AA and 95AB seek to require the Lord Chancellor to have regard to the principle of "access to justice" when setting fees. I can wholeheartedly agree with the noble Lord that this is an important consideration. However, the Lord Chancellor is already under a duty to do exactly this when setting fees under Section 92 of the Courts Act 2003. Subsection (3) of that section provides that the Lord Chancellor,

> "must have regard to the principle that access to the courts must not be denied".

Amendment 95BA seeks to make the remission scheme subject to the affirmative resolution procedure. As noble Lords will be aware, there is already a remission scheme in place. Indeed, the scheme has been in place for a number of years, but was updated and revised as recently as 7 October 2013 when the Courts and Tribunals Fee Remissions Order 2013 came into force. It is the Government's intention that the existing remission scheme will continue to apply in all cases where enhanced fees would be introduced.

The current scheme provides for certain court and tribunal fees to be remitted in whole or in part where litigants meet certain criteria based on their disposable capital and gross monthly income. The existing scheme is made under the same order-making powers as apply to the setting of fees, for example, Section 92 of the Courts Act 2003, which relates to fees payable in respect of proceedings in the senior courts, county courts and magistrates' courts. As the remission scheme relies on the same order-making powers as the statutory instruments prescribing court and tribunal fees, they are subject to the same level of parliamentary procedure—namely, the negative procedure. In its seventh report of Session 2002–03, the Delegated Powers and Regulatory Reform Committee welcomed a government amendment to make the order-making power in what is now Section 92 of the Courts Act 2003 subject to the negative procedure. Given that previous endorsement by the committee, and the fact that the current arrangements have been in place for some years, I see no good reason why we should now alter the level of parliamentary scrutiny.

Finally, Amendment 95D would require the Lord Chancellor to report to Parliament on the outcome of the public consultation on these proposals and to obtain approval for its response. As the noble Lord indicated, the Government on 3 December set out their detailed proposals for using the power to set enhanced fees in the consultation paper, Court Fees: Proposals for reform. This seeks views on a series of proposals for charging enhanced fees, including for money claims, in commercial proceedings and for divorce, alongside proposals for reducing the current deficit of £100 million in the cost of running the Courts and Tribunals Service. The consultation closes on 21 January. In the normal way, we will publish a response to that consultation in due course and Parliament will have an opportunity to consider it when we lay a draft order under Clause 155. I therefore take Amendment 95D as a probing amendment rather than an attempt to enshrine in statute the normal process of reporting on the outcome of a consultation.

As I have said, it is our normal practice to publish a government response to a consultation once we have considered the views of consultees, and we will do so with the response to

these proposals. Those enhanced fees we decide to introduce following the consultation will be brought forward by statutory instrument, subject to the affirmative procedure. The Government believe that a full debate in both Houses with the benefit of the consultation outcome will provide sufficient parliamentary scrutiny of the proposed enhanced fee increases.

For all these reasons, the Government consider the amendments of the noble Lord, Lord Beecham, to be unnecessary. I hope that, as I intend to read his speech carefully to see his questions, he will read my speech carefully to see my answers. I hope he will withdraw his amendment.

Lord Beecham: My Lords, I always read the noble Lord's speeches carefully and I am certainly willing to do so on this occasion. I am grateful to the Minister for his reply, and I suspect that this short debate will be seen as something of an aperitif for the rather more weighty matters that we are about to discuss when the noble Lord, Lord Carlile, moves his prayers to annul two other orders.

The Minister fails to acknowledge, however, that a negative procedure might be sufficient when one is dealing with a stable situation, but the Government are here proposing an entirely new basis for the levying of fees: in the first place, to ensure full-cost recovery, but, more significantly, potentially going beyond that to ensure more than full-cost recovery. That puts a whole different perspective on the likely impact of fees on litigants or applicants to tribunals. In these circumstances, a different procedure than the conventional negative procedure is required, at least in the early stages. This is a matter to which we may wish to return on Report.

The consultation effectively comes after the completion of the process of enacting this Bill, which will allow the Government to introduce new principles. It is the wrong way around: the consultation should have taken place and we should have had the result of that before we discussed this clause, which makes a significant difference to the way our courts operate. It is now too late for that to happen and that is a matter of regret. I am afraid that I do not resile for a moment from the criticisms I made, not of the Minister, who is not personally responsible—he is well aware of that—but of others occupying, perhaps, more senior positions, who ought to reflect on the way they are treating Parliament and its due processes when they push forward proposals of this kind in this way. Nevertheless, in the circumstances, I beg leave to withdraw the amendment.

Appendix 2

S.I. 2017/66

Fixed Penalty (Amendment) Order 2017

1. By a letter dated 8th March 2017, the Joint Committee on Statutory Instruments requested a memorandum as follows.

> *Explain the significant interval between making and laying.*

2. The Department always endeavours to meet its obligation to lay statutory instruments before Parliament as soon as possible after registration. However, in this case the SI did not come back from registration until the afternoon of Friday 27th January and could not have been laid until Monday 30th January at the earliest. Unfortunately the processing of this instrument coincided with that for a number of others, some of which had tighter deadlines. Accordingly, priority was given to processing those first.

3. The period between making and laying looks somewhat longer than perhaps it really was due to two intervening weekends and in fact the instrument was laid on 6th February, being the 9th working day after it was made. However, the Department accepts that it could have been laid earlier and accordingly apologises to the Committee for the slight delay.

Department for Transport

14 March 2017

Appendix 2A

S.I. 2017/112

Contracts for Difference (Standard Terms) (Amendment) Regulations 2017

1. The Committee, by letter (sent by email) dated 8 March 2017, asked the Department to submit a memorandum to explain the following point:

> *Explain the significant interval between making and laying.*

2. This instrument (the "Amending Regulations") amends the Contracts for Difference (Standard Terms) Regulations 2014 (S.I. 2014/2012) (as amended) to enable the associated Contracts for Difference ("CFD") Standard Terms and Conditions ("Standard Terms") to set out when difference payments are not required to be paid to generators.

3. At the time the Amending Regulations were being prepared, the Department was also preparing to publish a number of other CFD documents. The Department decided to publish these documents as a package in advance of the second, forthcoming CFD allocation round to give generators early visibility of the Standard Terms that they would be signing if they applied and were successful in the allocation round. This approach also would allow prospective applicants time to review the Standard Terms and to familiarise themselves with the auction rules before the allocation round formally opens. The other documents in the package were:

- the Government response to a consultation on the Amending Regulations and changes to the Standard Terms;
- drafts of the versions of the Standard Terms applicable to different types of projects; and
- the draft allocation framework relating to the CFD allocation round.

4. The Department intended to lay the instrument before Parliament at the same time as publishing these other documents. Unfortunately it proved necessary for operational reasons to delay publication of the package of documents until 8 February. Accordingly the Regulations were not laid before Parliament until the Government response referred to in the Explanatory Memorandum to the Amending Regulations was publicly available.

5. Upon further consideration, the Department acknowledges that in these circumstances the laying of the instrument should not have been delayed, and the Department apologises for the delay between making the instrument and laying it. The Department wishes to point out that the instrument was laid on 8 February, 21 days before the coming into force date. While regrettable, the Department believes that the delay has had no detrimental effect on the interests of CFD stakeholders.

6. We hope the above explanation will assist the Committee.

Department for Business, Energy and Industrial Strategy

14 March 2017

Appendix 3

S.I. 2017/84

Ministry of Defence Police (Conduct, Performance and Appeals Tribunals) (Amendment) Regulations 2017

The Joint Committee on Statutory Instruments (JCSI) has requested further information about various points in the Ministry of Defence Police (Conduct, Performance and Appeals Tribunals) (Amendment) Regulations 2017 (SI/2017/84). The questions raised and the Ministry's responses are set out below.

1. *Explain why regulations 14(6)(a) and 27(6)(a) respectively appear to bring in to regulations 38 and 58 the duty to comply with 'the direction' but not the power to give the direction in question.*

Response to question 1

A national security direction under either regulation 24A or 45A of the Ministry of Defence Police (Conduct etc.) Regulations 2015 (SI/2015/25, "the Conduct Regulations") will already have been given in relation to misconduct proceedings or a special case hearing before those proceedings become a further hearing (under regulation 38 or 58 of the Conduct Regulations). Accordingly, for the purposes of those further hearings, it is only necessary to require the persons conducting them to comply with the national security direction that has already been given. There would not be an additional direction for the further hearing(s).

2. *Explain, in relation to the replacement regulation 56 inserted by regulation 26 –*

(a) *the need for inclusion, in paragraph (2)(a) and (b), of the concept of persons entitled by virtue of paragraph (1) to attend a hearing, given that paragraph (1) indicates that the hearing is to be in public as a default assumption;*

(b) *the purpose of bestowing an unlimited power in the case of excluding individual members of the public from a hearing altogether (paragraph (2)(a)) but only a power limited by purpose in the case of imposition of conditions on an individual attending a hearing (paragraph (2)(b)); and*

(c) *why paragraph (1) is expressed to be subject to paragraph (2) rather than subject to paragraphs (2) and (3).*

Response to question 2(a)

The purpose of the words "who would otherwise be entitled to attend the hearing by virtue or paragraph (1)" in regulation 56 of the Conduct Regulations (as substituted by regulation 26 of the amending Regulations) is to exclude from the broad sweep of new regulation 56(1) those persons who derive their entitlement to attend the hearing from other provisions. For example, there was concern that without the above words in regulation 56(2)(a) the power to exclude under regulation 56(2) would be very broad and could be construed as enabling the exclusion of, for example, persons who are authorised to attend by virtue of regulations other than regulation 56(1) (for example, the officer concerned and a relevant lawyer under regulation 53 or other persons under regulation 54).

Response to question 2(b)

The approach taken follows regulation 52 of the Police (Conduct) Regulations 2012 (in relation to conventional domestic police forces).

Response to question 2(c)

It was not considered necessary to express regulation 56(1) as also being subject to regulation 56(3). This was because paragraph (2) of regulation 56 qualifies the general rule in paragraph (1) of that regulation, but paragraph (3) of regulation 56 sets out a somewhat different and specific rule about when a witness (and an accompanying person) may attend, rather than an exception to the general rule (in paragraph (1)) that such hearings are to be open to the public. Moreover, regulation 56(2) would provide the power to exclude a witness or an accompanying person from part of a hearing. But regulation 56(3) contains an additional and separate rule to specify when those persons are excluded so as to try to ensure the integrity of any witness evidence.

3. *Identify the exact location to which the definition referred to in regulation 38(7) is intended to be moved.*

Response to question 3

It is accepted that the amendment made by regulation 38(7) is probably unnecessary. This change was included because the Westlaw version of the amended Regulations (the Ministry of Defence Police Appeals Tribunals Regulations 2009 (SI/2009/3070)) was used for checking amendments. In the Westlaw version, the definition of "relevant decision" appears in the wrong place in the alphabetical order in regulation 3 of SI/2009/3070.

4. *Given the insertion of new regulation 12A into S.I. 2009/3070 by regulation 41, explain the absence of any amendment to regulation 12 of S.I. 2009/3070 to change '13 to 21' to '12A to 21'.*

Response to question 4

New regulation 12A is expressed in such a way that it has general application. As such, it will apply anyway and it was not therefore considered necessary to make the amendment suggested above (to regulation 12 of SI/2009/3070).

Ministry of Defence

14 March 2017

Appendix 4

S.I. 2017/85

Export Control (Amendment) Order 2017

1. In its letter to the Department for International Trade of 8 March 2017, the Joint Committee requested a memorandum on the following two points:

> *In relation to the Schedule, explain:*
>
> (a) *why, following the definition of "fuel cell", its apparently solitary use, which appears in ML17P, refers to fuel cells other than those "specified elsewhere in this Schedule", and*
>
> (b) *why the term "pyrotechnics(s)" appears as a defined term when it appears nowhere in that exact form within the Schedule.*

2. On "fuel cells", the control entry ML17p covers generic versions of these devices. Fuel cells may also be specially designed for a range of portable applications and can therefore be controlled as specially designed components in a variety of other ML control entries.

3. On the defined term "pyrotechnic(s)", these are a form of energetic materials specified in ML8c while pyrotechnic devices are specified in ML4. The Department recognises the point being made that the definition of "pyrotechnic(s)", either in singular or plural form, does not appear in this construct in the Schedule. The Department feels, however, that having the form "pyrotechnic(s)" does conveniently cover both the singular form used in ML4 and the plural form used in ML8, the definition for both instances being the same.

Department for International Trade

13 March 2017

Appendix 5

S.I. 2017/91

Social Housing Rents (Exceptions and Miscellaneous Provisions) (Amendment) Regulations 2017

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

> *Explain, with the aid of hypothetical examples, what the changes made by new regulation 11B(a) to (d) of S.I. 2016/390 (inserted by regulation 6) are intended to achieve and how effect is given to the intention.*

Background

2. Government policy, implemented through the Welfare Reform and Work Act 2016 ("the Act"), is to require registered providers of social housing to reduce rents they charge for social housing by 1% a year for 4 years ("social rent reductions"). Regulation 11B makes alternative provision in relation to domestic violence refuge accommodation ("DVRA") which is excepted from this general rule.

3. During the passage of the Act the Government announced that supported housing providers[8] would not be required to make the social rent reductions in the first relevant year[9], and in that relevant year they would be permitted to increase rents by up to CPI + 1% per annum. They would also be able to set initial rents at a higher level than general needs housing throughout the 4 years.

4. This was put into effect by S.I. 2016/390 by creating exceptions from section 23 of, and Schedule 2 to, the Act and putting in place alternative provision about those excepted cases under section 27 of the Act to enable supported housing providers (including providers of DVRA) to increase rents by 0.9% (CPI + 1%) in the first relevant year[10]; to enable such providers to set initial rents for new tenants at up to 10% above the rate of formula rent; and to uplift that amount by CPI + 1% in the first relevant year before reducing it by 1% in years 2 to 4 to determine the maximum social rent rate for supported housing.

Overview of changes made by S.I. 2016/390 related to DVRA

8 Supported housing providers are registered providers of social housing which provide supported housing which is defined in regulation 2 of S.I. 2016/390.

9 "Relevant year" is defined in section 23 of the Welfare Reform and Work Act 2016.

10 This was a continuation of the social rent policy relating to supported housing that applied prior to the commencement of the Act that providers should be able to increase rents by CPI + 1% per annum and that the formula for calculating rents for new tenants would be uplifted by that sum each year. That policy was reflected in the requirements of the regulator of social housing's Rent Standard 2015 (applicable to private registered providers of social housing) and in the Guidance on Rents for Social Housing (applicable to local authorities).

5. In September 2016 the Government announced that DVRA[11] would be excepted from the requirement to reduce rents by 1% per annum for the remainder of the four years. The previously announced policy on rent reductions for other forms of supported housing was unchanged.[12]

6. New regulations 11A and 11B of S.I. 2016/390, taken together, put into effect the policy changes in relation to DVRAs announced in September 2016.They make new provision about the maximum amount of rent payable in each of four relevant years (or parts of such years) to a registered provider of DVRA by a tenant of such accommodation in relation to whom Part 1 of Schedule 2 to the Welfare Reform and Work Act 2016 ("Schedule 2") would apply[13] ("a new tenant") but for the exception in new regulation 4(m). This is achieved by modifying Schedule 2 to the Act.

7. Schedule 2 sets out requirements for determining the maximum rent that should be paid by new tenants in each of the 4 relevant years. Where no exception applies the maximum rent for standard social rented properties is found by first determining a reference sum under paragraph 1(4)(a) or 1(5)(a) as applicable and then reducing this by 1% at the beginning of each relevant year (up to and including the relevant year in question) to find the social rent rate or assumed rent rate respectively.[14]

8. In overview, the amendments made by S.I. 2017/91 enable DVRA providers to increase rents in the 2nd to 4th relevant year by CPI + 1% (whereas other providers of supported housing remain required to reduce their rents by 1% in the 2nd to 4th relevant years). New regulation 11B(a) to (d) modifies the provision in paragraph 1 of Schedule 2 for determining the social rent rate and the assumed rent rate.

9. Regulations 10 and 11 continue to apply to supported housing that is not DVRA and the equivalent provision to 11B(a) to (d) is made by regulation 11(a) to (c).

Regulation 11B(a) and (b) – modifications to the social rent rate

10. Paragraphs (a) and (b) of new regulation 11B both modify provision in relation to the determination of the social rent rate for DVRA in each of the four relevant years.

11. New regulation 11B(a) replicates provision made in regulation 11(a) which modifies paragraph 1(4)(a) to give a higher starting point for the calculation of social rent rate (10% above the rate of formula rent which applied to general needs providers in 2015).

12. New regulation 11B(b) provides for that reference sum (110% of the rate of formula rent) to be increased at the beginning of each relevant year by the specified percentage to

11 DVRA is a sub-set of supported housing. Prior to the amendments made by S.I. 2017/91 there was no distinction between the rent requirements applicable to DVRA and other supported housing under S.I. 2016/390.

12 Written Ministerial Statement - Supported Housing (15/09/16)https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016–09–15/HCWS154/

13 Part 1 of Schedule 2 applies to new tenancies granted to new tenants after the beginning of 8 July 2016 until that tenant has been in the tenancy for a full relevant year. After that period the maximum rent is governed by the requirements of section 23 (as modified, in the case of DVRA and supported housing, by regulation 13 of S.I. 2016/390).

14 Under paragraph 1 of Schedule 2 a social landlord may charge a new tenant of established social housing the higher of the social rent rate or the assumed rent rate. Under paragraph 2 of Schedule 2 the social rent rate is the maximum rent that may be charged to a new tenant of new social housing.

give the applicable social rent rate for a relevant year. The specified percentage is found by adding 1% to the change in CPI over a 12 month period (determined in accordance with provision inserted under 11B(d)).

13. Regulation 11(b) is the equivalent provision for supported housing and was previously applicable to DVRA. It provides for the reference sum to be increased by 0.9% at the beginning of the first relevant year and then the previous year's sum to be reduced by 1% at the beginning of each subsequent relevant year (up to and including the relevant year in question) to give the social rent rate.

14. In relation to the first relevant year the modification which provides that reference sum is to be increased by the "specified percentage" is a drafting change only as the specified percentage for the first relevant year is 0.9%.[15] The effect of the changes is felt in the subsequent relevant years when the figure for the previous year will be increased (or decreased, though this is less likely in practice) for DVRA in line with changes in the specified percentage rather than automatically decreased by 1% as will apply to other forms of supported housing under regulation 11.

15. The example below illustrates how the changes would impact on the rent that a provider of DVRA will be able to charge in respect of a bedsit in South Yorkshire[16] in each of the relevant years compared with the rent for an equivalent supported housing property that is not DVRA. It illustrates that the social rent rate for DVRA under paragraph 1 of Schedule 2 (as modified) rises by CPI + 1% in the 2nd – 4th relevant years as against a decrease of 1% in the 2nd – 4th relevant years for the equivalent supported housing that is not DVRA.

EXAMPLE

COMPARISON OF SOCIAL RENT RATE OF DVRA AND GENERAL SUPPORTED HOUSING IN THE FOUR RELEVANT YEARS		
	DVRA	Supported housing (but not DVRA)
RY1	Rate of formula rent[1] = £3074.76[2] 110% rate of formula rent = £3382.23 Adjusted by 0.9% (CPI + 1%) = £3412.68	Rate of formula rent = £3074.76 110% rate of formula rent = £3382.23 Adjusted by +0.9% (RY1) = £3412.68
RY2	Social rent rate in RY1 = £3412.68 Adjusted by +2%[3] (CPI + 1%) Social rent rate in RY2 = £3480.93	Social rent rate in RY1 = £3412.68 Reduced by 1% Social rent rate in RY2 = £3378.55
RY3	Social rent rate in RY2 = £3480.93 Adjusted by +1.5% (assumed CPI + 1%) Social rent rate in RY3 = £3533.14	Social rent rate in RY2 = £3378.55 Reduced by 1% Social rent rate in RY3 = £3344.76
RY4	Social rent rate in RY3 = £3533.14 Adjusted by 2% (assumed CPI + 1%) Social rent rate in RY4 = £3603.80	Social rent rate in RY3 = £3344.76 Reduced by 1% Social rent rate in RY4 = £3311.21

1 The rate of formula rent is a rent set in accordance with the method specified in the Schedule to S.I. 2016/390.
2 Assumes bedsit in South Yorkshire, value of property as at January 1999 of £20,000
3 The specified percentage for relevant year 2 (see paragraph 11).

15 As the first relevant year ends on a date between 31/3/17 and 31/3/18 this approach enabled the drafter to avoid a complex coming into force provision in relation to the changes made to effect the new policy for DVRAs.

16 The illustration assumes that the value of the property as at January 1999 was £20,000 and that CPI is 0.5% in relation to the 3rd relevant year and 1% in relation to the 4th relevant year.

Regulation 11B(c) – modifications to the assumed rent rate

16. Regulation 11B(c) modifies provision in relation to the determination of the assumed rent rate for DVRA in each of the four relevant years.

17. The modifications which it makes in relation to the assumed rent rate are the same as the modifications made by regulation 11B(b) in relation to the social rent rate save that the adjustment is made in relation to a different reference sum (the amount found in accordance with paragraph 1(5)(a) of Schedule 2 not in relation to that found in accordance with paragraph 1(4)(a) (as modified)).

18. Regulation 11(c) is the equivalent provision for supported housing. As is the case in relation to the modifications to the social rent rate the change has no effect in the first relevant year but in the 2nd to 4th relevant years the assumed rent rate is increased by CPI + 1% rather than decreased by 1%.

Regulation 11(d) – determination of the specified percentage

19. Regulation 11(d) modifies paragraph 1 of Schedule 2 to insert provision regarding the determination of the specified percentage.

20. The specified percentage is found by determining the change in CPI in the year to the September preceding the 31st March preceding the relevant year and adding 1%. The effect of the provision is to ensure that the CPI reference point remains constant for all providers in the equivalent relevant year.

EXAMPLE:

> Provider A's second relevant year begins on 1st April 2017
>
> Provider B's second relevant year begins on 1st January 2018
>
> To find the specified percentage for a provider for a relevant year we must first determine what the percentage change in the consumer prices index was over the specified period (inserted paragraph 1(9)(a))
>
> For both providers the specified period in relation to the second relevant year is the year to September 2016 (the September preceding the 31st March immediately preceding the relevant year) (inserted paragraph 1(10))
>
> The change in CPI in the year to September 2016 = 1%
>
> To which is added 1% to find the specified percentage (inserted paragraph 1(9))
>
> The specified percentage for both providers for the second relevant year is 2%

Department for Communities and Local Government

14 March 2017

Appendix 6

S.I. 2017/95

Civil Procedure (Amendment) Rules 2017

1. On 8 March 2017, the Committee requested that the Ministry of Justice submit a memorandum on the following points:

> *Explain the apparent inconsistency between paragraph 8.1 of the Explanatory memorandum and the preamble and, if it turns out that paragraph 8.1 is factually accurate, why it was concluded that the Department had power to approve the Rules.*

2. The Ministry of Justice is grateful to the Committee for highlighting this issue, which does indicate a need to improve, in particular, the way in which the fulfilment by the Civil Procedure Rule Committee of the requirement to "consult such persons as they consider appropriate" is explained in Explanatory Memoranda submitted with statutory instruments making or amending Civil Procedure Rules.

3. In this case, the explanation in paragraph 8.1 of the Explanatory Memorandum was focused on public consultation by way of a formal consultation document. That focus arose from a possibly mistaken reading of the guidance for completing the Explanatory Memorandum and has produced what the Ministry would concede to be an incomplete explanation. The Rule Committee did not consider it appropriate for it to undertake separate public consultation of the sort already undertaken and summarised in paragraph 8.2; but while paragraph 8.1 is factually accurate in that respect, it is as the Ministry concedes incomplete, because formal public consultation of that sort, while undertaken where the Rule Committee considers it appropriate (as, for example, prior to the making of the Civil Procedure (Amendment No. 3) Rules 2016 (S.I. 2016/788)), is not the only way in which the Rule Committee fulfils the requirement as to consultation.

4. The Rule Committee consults, as it considers appropriate to the rules or amendments to rules in question, in a number of other ways of differing degrees of formality, including specific correspondence with bodies considered appropriate to be consulted; involving representatives of interested organisations in the work of sub-committees reviewing particular aspects of the Rules; inviting and reviewing suggestions and observations solicited by its members from among the groups from which each is drawn; and inviting and reviewing suggestions from relevant Government departments and other authorities affected by rules of civil procedure. The Ministry is satisfied that the Rule Committee properly fulfilled by such means the requirement to consult such persons as considered appropriate for this instrument, as for previous instruments making or amending Civil Procedure Rules. But the Ministry does accept that the Explanatory Memorandum did not explain this sufficiently, and undertakes to improve for future instruments the explanation provided in the Explanatory Memorandum of how the requirement has been fulfilled.

Ministry of Justice

15 March 2017

Appendix 7

S.I. 2017/106

Electricity (Connection Charges) Regulations 2017

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

> *Given that regulation 7 appears to require a distributor to demand reimbursement unless there would be a total of less than £300 to be paid out under regulation 9, explain why paragraph (3) of regulation 9 appears to allow the distributor not to make a payment to any particular person if the payment to that person would be less than £300 (even where the total of the payments to all persons under that regulation would exceed that amount).*

2. Regulations 7(5)(a) and 9(3) are included in the Regulations to avoid imposing on distributors the administrative burden of being required to collect or make small payments.

3. In providing that a distributor is not required to make a payment to an eligible person if the amount of that payment would be less than £300, regulation 9(3) maintains the existing position under regulation 7(4) of the Electricity (Connection Charges) Regulations 2002 ("the old Regulations"). Regulation 7(5)(a) is in slightly different terms from regulation 6(4)(a) of the old Regulations, which requires a distributor to demand reimbursement only if the total available to be paid out would be sufficient to provide a payment of £300 or more to at least one person. That change was made with the aim of making the new Regulations simpler.

4. It is acknowledged that regulations 7(5)(a) and 9(3), taken together, give rise to the possibility of a person obtaining a second connection being required to make a reimbursement payment, but the distributor not being under a requirement to pay all, or in exceptional cases any, of the amount it receives (minus the distributor's administrative expenses) to eligible persons.

5. In most of the cases in which these provisions apply, the new Regulations will operate in the same way as the old Regulations. Suppose, for example, a distributor obtains reimbursement of £1,000 (after deduction of administrative expenses), and there are two eligible persons who are eligible in the proportions 3:1. Under both the old and the new Regulations, the distributor must pay out £750 to the first person, but is not under an obligation to pay out £250 to the second person.

6. The new Regulations will operate differently only if there are two or more eligible persons, all of whom would (but for regulation 9(3)) be entitled to a payment of less than £300. Under the old Regulations, the distributor would not be required to demand reimbursement, but under the new Regulations the distributor might be required to do so. The Department expects that this situation will rarely arise, and notes that no objections to this point were made during the Department's consultation on a draft of the Regulations (the relevant provisions of which were in the same terms as regulations 7(5)(a) and 9(3) of the final Regulations).

7. The Department will keep under review the operation of these provisions, and in particular will consider when the Regulations are next reviewed whether to adjust the amounts specified in regulations 7(5)(a) and 9(3) so that the first of those amounts is greater than the second, which would reduce the possibility of a distributor being required to demand an amount but not being required to pay it to eligible persons.

Department for Business, Energy and Industrial Strategy

14 March 2017

Appendix 8

S.I. 2017/121

Qualifications Wales Act 2015 (Consequential Provision) Order 2017

1. On 8th March, the Joint Committee on Statutory Instruments requested a memorandum on the following point:

> *Explain the source of the power to include in article 2(2) the revocation of paragraph (c) of the definition of "educational qualification" in regulation 22 of S.I 1999/2864 which appears to include a reference to legislation which has never had any application in relation to Wales.*

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

3. Article 2(2) includes the revocation of paragraph (c) of the definition of "educational qualification" in regulation 22 of S.I. 1999/2864 ("the Regulations"). That definition was inserted by regulation 6(b) of S.I. 2010/1203 and came into force on 1 May 2010. When originally inserted, the definition had six paragraphs: (a) to (f).

4. Paragraph (c) of the definition refers to qualifications accredited by the Qualifications and Curriculum Authority under sections 24(2)(g) or section 30(1)(e) of the Education Act 1997 ("the 1997 Act"). It is our understanding that this paragraph was included to ensure that such qualifications relevant to Wales were caught by the definition. However the position in relation to the inclusion of section 24(2)(g) is difficult to work out.

5. Section 24 of the 1997 Act when originally enacted applied to England and Wales. In particular, section 24(2)(a) to (g) applied to Wales via subsection (3) of that section. However, subsection (3) was later omitted by the Qualifications, Curriculum and Assessment Authority for Wales (Transfer of Functions to the National Assembly for Wales and Abolition) Order 2005 (SI 2005/3239).

6. Sections 21 to 26 of the 1997 Act were repealed by the Apprenticeships, Children, Skills and Learning Act 2009. The repeal came into force in relation to England on 1 April 2010. As such, it is paragraph (e) of the "educational qualification" definition in the Regulations which is relevant to England. By the time the definition was inserted, it was the 2009 Act that was relevant to qualifications in England. Any qualifications previously accredited under section 24(2)(g) in relation to England were treated as now accredited under the 2009 legislation.

7. The repeal of section 24(2)(g) was commenced in relation to Wales on 1 November 2010 by the Apprenticeships, Skills, Children and Learning Act 2009 (Commencement No 2 and Transitional Provisions) (Wales) Order 2010, which is later than the date of insertion of the definition of "educational qualification" in the Regulations. Notwithstanding that subsection 24(3) had been omitted, we surmise that section 24(2)(g) was included in the definition to ensure that in relation to qualifications in Wales, everything that was intended to be caught was so caught.

8. The revocation of the reference to section 30 of the 1997 Act is consequential on the Qualifications Wales Act 2015. Dealing just with the omission of the section 30 reference would leave paragraph (c) of the definition of "educational qualification" devoid of content since section 24 no longer exists. As such we consider it appropriate and within the spirit and meaning of section 150 of the Government of Wales Act 2006 to revoke paragraph (c) in its entirety.

Wales Office

14 March 2017

Appendix 9

S.I. 2017/144

Criminal Procedure (Amendment) Rules 2017

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

> *Explain, in the light of rule 11(a) and the re-numbering of rules 47.39 to 47.57 of the Criminal Procedure Rules 2015 in rule 11(b), why the Rules do not appear to make consequential changes to the cross-references to re-numbered rules in rules 47.42, 47.43, 47.44 and 47.56.*

2. This is an oversight for which the Department apologises. The Department is grateful to the Committee for drawing attention to the error and will correct it at the earliest possible opportunity.

Ministry of Justice

13 March 2017

Appendix 10

S.I. 2017/194

Social Security (Personal Independence Payment) (Amendment) Regulations 2017

1. In its letter to the Department of 8th March 2017, the Committee requested a memorandum on the following points:

> *Explain whether the amendments made by regulation 2(4) have the effect that a person with a mental condition (unaccompanied by a physical condition) can never be entitled to the mobility component of personal independence payment at the enhanced rate and—*
>
> (i) *if so, whether that is consistent with section 79(2)(b) of the Welfare Reform Act 2012, and*
>
> (ii) *if not, in what sorts of circumstances such an entitlement can arise.*

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

3. The Department confirms that the amendments made by regulation 2(4) do not have the effect that a person with a mental condition (unaccompanied by a physical condition) can never be entitled to the mobility component of personal independence payment ("PIP") at the enhanced rate. Examples are given at paragraph 5 below.

4. In order to standardise assessments across different health conditions that are not easily compared, a claimant's entitlement to PIP is assessed by reference to their functional impairments, and not according to whether the source of those impairments is a physical or a mental condition. As a result, the PIP assessment enables a more accurate, objective, consistent and transparent consideration of individuals, to identify those with the greatest need. It also avoids the practical difficulty that it may not always be straightforward to determine whether particular limitations that a claimant faces stem from a physical condition or a mental condition (or a combination of the two). For example, some conditions, such as Chronic Fatigue Symptom (CFS), also known as myalgic encephalomyelitis (ME), have complex causes which are still not well understood, but which may involve both physical and psychological factors. Distress is not itself a "mental condition", but rather a symptom which may come and go at different times and with varying frequency or causes depending on the individual.

5. The following is a non-exhaustive list of examples of situations where a person with a mental condition (unaccompanied by a physical condition) could receive the mobility component of PIP at the enhanced rate:

- A person (person A) with a cognitive impairment who cannot, due to their impairment, work out where to go, follow directions or deal with unexpected changes in their journey, even when the journey is familiar, would score 12 points under descriptor f in mobility activity 1 ("planning and following journeys"), and hence be entitled to the enhanced rate of the mobility component. Examples of

such conditions could include dementia, or a learning disability such as Down's Syndrome. (Some people covered by this example may experience psychological distress as well, and may also meet descriptor b, requiring "prompting" – i.e. reminding, encouraging or explaining – from another person in order to be able to undertake a journey. They will still receive 12 points under descriptor f and be entitled to the enhanced rate.)

- A person (person B) with a developmental disorder could qualify on a similar basis to person A if the disorder affects their ability to work out where to go, follow directions or deal with unexpected changes in their journey. If their disorder results in them having difficulty assessing and responding to risks, or in impulsivity, then they could also score 12 points under descriptor f on the basis that they need to be accompanied for their own safety. Examples of developmental disorders which could have these effects include Autistic Spectrum Disorder and Attention Deficit Hyperactivity Disorder (ADHD).

- A person (person C) who suffers psychosomatic pain could qualify for the enhanced rate through satisfying descriptors e or f in mobility activity 2 ("moving around"). The case of NK v SSWP [2016] UKUT 146 (AAC) concerned a claimant who suffered significant pain when moving around, but the pain resulted from a mental condition rather than any physical impairment. The Upper Tribunal found that the claimant could score points towards an award of the mobility component under mobility activity 2, even though her pain did not have a physical cause.

- A person (person D) who has chronic fatigue syndrome (CFS) and experiences symptoms including significant fatigue following physical exertion, muscular and joint pain and balance problems, together with psychological difficulties which manifest as depression and panic attacks, could qualify for the enhanced rate under mobility activity 2, or by scoring points on a combination of mobility activity 1 (4 points under descriptor b, for requiring prompting to avoid psychological distress when undertaking any journey) and mobility activity 2 (8 points under descriptor c, for being able to stand and then move unaided more than 20m but no more than 50m). As explained above, Chronic Fatigue Symptom (CFS), also known as myalgic encephalomyelitis (ME), has complex causes which are still not well understood, but which may involve both physical and psychological factors.

Department for Work and Pensions

14 March 2017