House of Lords
House of Commons

Joint Committee on Statutory Instruments

Fortieth Report of Session 2017–19

Drawing special attention to:

Non-Contentious Probate (Fees) Order 2018 **(Draft S.I.)**

Merchant Shipping (Work in Fishing Convention) Regulations 2018 **(S.I. 2018/1106)**

Merchant Shipping (Work in Fishing Convention) (Survey and Certification) Regulations 2018 **(S.I. 2018/1107)**

Merchant Shipping (Work in Fishing Convention) (Medical Certification) Regulations 2018 **(S.I. 2018/1108)**

National Health Service (Pharmaceutical Services, Charges and Prescribing) (Amendment) Regulations 2018 **(S.I. 2018/1114)**

Childcare (Miscellaneous Amendments) (EU Exit) (England) Regulations 2018 **(S.I. 2018/1116)**

Ministry of Defence Police (Conduct and Appeals Tribunals) (Amendment) Regulations 2018 **(S.I. 2018/1119)**

Non-Contentious Probate (Amendment) Rules 2018 **(S.I. 2018/1137)**

Social Security (Scotland) Act 2018 (Best Start Grants) (Consequential Modifications and Saving) Order 2018 **(S.I. 2018/1138)**

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Joint Committee on Statutory Instruments

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Powers

The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 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 Jeanne Delebarre (Commons Clerk), Jane White (Lords Clerk) and Liz Booth (Committee Assistant). Advisory Counsel: Daniel Greenberg, Klara Banaszak, Peter Brooksbank, Philip Davies and Vanessa MacNair (Commons); James Cooper, Nicholas Beach, John Crane and Ché Diamond (Lords).

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Instruments reported

At its meeting on 5 December 2018 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 nine 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 unexpected use of powers

Non-Contentious Probate (Fees) Order 2018

1.1 **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

1.2 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. Under existing legislation,[1] executors must pay a fee of £155 if the application is made by a solicitor, or £215 if the application is made by the executors in person, regardless of the value of the estate—except that no fee is payable if the estate is valued at less than £5,000.

1.3 In February 2017, the Lord Chancellor laid the draft Non-Contentious Probate Fees Order 2017 ("the 2017 Order") before Parliament for approval by both Houses. The Order would have replaced the current flat fee system with a sliding scale of fees rising with the value of the estate. The amount payable in respect of each valuation band would have been 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

1.4 In its 26th Report of Session 2016–17 (published on 31 March 2017),[2] the Committee drew the 2017 Order to the special attention of both Houses. This was on the grounds that: (a) the charges prescribed by it would in substance constitute a tax on estates, rather than

1 See the Non-Contentious Probate (Fees) Order 2004 (S.I. 2004/3120) as amended by S.I. 2014/876.

2 See: https://publications.parliament.uk/pa/jt201617/jtselect/jtstatin/152/15203.htm#_idTextAnchor003

probate fees, and may therefore be *ultra vires*; and (b) the Committee doubted whether Parliament contemplated that the enabling powers would be used in the way proposed by the Lord Chancellor.

1.5 The 2017 Order was debated by the Commons Second Delegated Legislation Committee on 19 April 2017,[3] but it was not approved by the House of Commons itself or by the House of Lords. The draft Order was eventually withdrawn, without having been made, on 5 November 2018. On the same day, the Lord Chancellor laid before Parliament the draft Non-Contentious Probate (Fees) Order 2018 ("the 2018 Order"). If it is approved by both Houses, the Lord Chancellor may proceed to make the Order, and it will then come into force 21 days later.[4]

1.6 The 2018 Order provides for the same banded fee system linked to the value of the estate proposed in the 2017 Order, although the fees themselves are significantly lower. The amount payable in respect of each band is follows:

Value of estate	Proposed fee
Up to £50,000	£0
£50,000 to £300,000	£250
£300,000 to £500,000	£750
£500,000 to £1 million	£2,500
£1 million to £1.6 million	£4,000
£1.6 million to £2 million	£5,000
Over £2 million	£6,000

1.7 These fees are expected to generate substantial revenues, estimated at over £145 million in fee income in 2019–20 above the income from the existing flat fee system[5] (which raises £49 million per annum and recovers the full cost of running the Probate Registry). The additional revenues are expected to rise yearly in line with increases in estate values. They are to be used to subsidise parts of H.M. Courts and Tribunals Service other than the Probate Registry.

1.8 As the Committee was concerned that the 2018 Order may be flawed for similar reasons to those given in its report on the 2017 Order, it asked the Ministry of Justice to explain, in light of the conclusions reached in that report, why the fees prescribed by the 2018 Order are: (a) considered to be within the Lord Chancellor's powers; and (b) within the contemplation of Parliament when it conferred those powers. The Ministry of Justice's response is given in the memorandum printed at Appendix 1.

Vires

1.9 Any fees which produce an income above the levels to recover costs are termed "enhanced fees". The Lord Chancellor has power under section 180(1) of the Anti-social Behaviour, Crime and Policing Act 2014 ("the 2014 Act"), with the consent of the Treasury, to "prescribe a fee [under section 92 of the Courts Act 2003 in respect of anything done by the High Court (which includes the Probate Registry)] of an amount which is intended to exceed the cost of anything in respect of which the fee is charged".

3 See: https://hansard.parliament.uk/commons/2017–04–19/debates/984a6b12-abdf-4b35-bf18-ff88bb11fb28/DraftNon-ContentiousProbateFeesOrder2017

4 See article 1 of the 2018 Order.

5 See paragraph 12.2 of the Explanatory Memorandum: http://www.legislation.gov.uk/ukdsi/2018/9780111174319/pdfs/ukdsiem_9780111174319_en.pdf

1.10 Before prescribing an enhanced fee, the Lord Chancellor must have regard 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", and
- "the competitiveness of the legal services market".[6]

The fees must be used "to finance an efficient and effective system of courts and tribunals".[7]

1.11 The Ministry of Justice contends in its memorandum that:

- The provisions of section 180 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 or that the income raised must be reserved to the Probate Service.
- There is no legislative requirement that the costs raised by probate fees must be reserved to the Probate Service. The legislation clearly anticipates cross-subsidisation across the court and tribunal service.
- Section 180(5) of the 2014 Act specifies that fees under the Mental Capacity Act 2005 charged for services provided by the Office of the Public Guardian 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 such restriction was intended.
- There is no basis for distinguishing the services provided by the Probate Registry, which are non-contentious and administrative, from other matters dealt with by H.M. Courts and Tribunals Service.
- The powers in section 180 have been used previously in this manner and approved by Parliament.[8]

1.12 These arguments do not dispel the Committee's doubts about *vires* expressed in its report on the 2017 Order.

1.13 The Committee accepts that section 180 of the 2014 Act allows for a fee to be prescribed which exceeds the cost of the provision of the service—in this context, the cost of issuing a grant of probate in an individual case. However, as it observed in its report on the 2017

6 Section 180(3) of the 2014 Act.

7 Section 180(6) of the 2014 Act.

8 See, for example, the Civil Proceedings Fees (Amendment) Order 2015 (S.I. 2015/576) which set 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.

Order, 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. Although section 180 permits "enhanced fees", 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 one of proportionality. The Lord Chancellor is not permitted to impose a tax.

1.14 The Committee retains significant doubt that 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. The Committee observed in its 26th Report of Session 2016–17 that:

> "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."

1.15 The Committee is not convinced that section 180(3) of the 2014 Act, which simply requires the Lord Chancellor to have regard to the financial position of courts and tribunals, clearly authorises him to require executors to pay whatever amounts he regards as appropriate for the purpose of providing funds for the courts and tribunals—as opposed to the Probate Registry in particular. The Committee remains of the view that, if Parliament had intended to confer power on the Lord Chancellor to legislate in such a way, it would have included explicit provisions in section 180.

1.16 The Committee considers that the charges provided for in the 2018 Order have all the characteristics of taxation rather than fees. This is particularly in view of the amounts that would be payable for larger estates and the scale of the proposed increases (from £155 to as much as £6,000—a rise of 3,770%)—and because (a) the charges bear no proportion at all to any service provided by the Probate Registry, and (b) the revenue generated is to be used to fund completely different services. Moreover, the Government's justification for the proposed charges given in the Explanatory Memorandum appears to support the Committee's assessment that this is a taxation measure:

> "We believe … it is appropriate and progressive to charge an increased fee for a grant of probate in order to increase the contribution from those users of the court and tribunals services who can afford to do so. This, therefore, goes some way to rebalancing the contribution to the courts and tribunal service between the taxpayer and direct user."[9]

9 See paragraph 7.5 of the Explanatory Memorandum.

1.17 It strikes the Committee that the 2018 Order would, in effect, levy a type of stamp duty on grants of probate, although dressed up as "fees". Indeed, the proposed banded system of fees has much in common with the banded system of Stamp Duty Land Tax payable on transfers of residential property:

Transfer value of property	Stamp duty rate
Up to £125,000	Zero
The next £125,000 (the portion from £125,001 to £250,000)	2%
The next £675,000 (the portion from £250,001 to £925,000)	5%
The next £575,000 (the portion from £925,001 to £1.5 million)	10%
The remaining amount (the portion above £1.5 million)	12%

1.18 It is an important constitutional principle that there should be no taxation without the consent of Parliament, which must be embodied in statute and expressed in clear terms.[10] In the Committee's view, the 2018 Order is a measure of taxation for which there is no clear statutory authority.

1.19 **The Committee accordingly 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

1.20 The Committee also asked whether the Ministry of Justice considered that, in prescribing the proposed new probate fees, the Lord Chancellor would be acting in a way contemplated by Parliament when it enacted section 180 of the 2014 Act. The Ministry of Justice responds to this question in the affirmative, for essentially the following reasons:[11]

- The fact that there was no specific reference to probate fees in the Parliamentary debates on the clause which became section 180 of the 2014 Act cannot be taken as an indication that Parliament intended that non-contentious probate fees should be excluded from the scope of the power to prescribed enhanced fees.
- There are a wide range of court and tribunal proceedings within the scope of section 180, and it cannot be expected that each of these would be discussed by Parliament individually.
- Any intention to exclude probate and other non-contentious matters from the scope of section 180 would have been explicitly discussed.

1.21 As indicated above, the Committee acknowledges that section 180 allows the Lord Chancellor to prescribe enhanced probate fees, and that it is drafted in broad terms. Nonetheless, the Committee doubts whether Parliament intended to confer a power on the Lord Chancellor to exercise the power in the way now proposed. The Committee's report on the 2017 Order said that there appeared to be "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".[12] The Ministry of Justice has provided no new evidence or arguments that would cause the Committee to change that assessment.

10 See the Court of Appeal's judgment in Attorney-General v Wilts United Dairies Ltd (1921) TLR 884.

11 See paragraphs 12 to 16 of the memorandum printed at Appendix 1 to this report.

12 Appendix 1A to the Committee's report on the 2017 Order set out relevant extracts from Parliamentary debates and explanatory material relating to the clause which became section 180 of the 2014 Act: https://publications.parliament.uk/pa/jt201617/jtselect/jtstatin/152/15206.htm#_idTextAnchor029

1.22 The Committee's view that the Lord Chancellor proposes to exercise the section 180 power in an unexpected way is reinforced by the recent report of the House of Lords Secondary Legislation Scrutiny Committee ("the SLSC") on the 2018 Order.[13] The SLSC pointed out that the proposed fees appear not to conform with Managing Public Money, the standard guidance issued to Government departments by HM Treasury. Paragraph 6.3.6 of that document states: "different groups of customers should not be charged different amounts for a service costing the same, e.g. charging firms more than individuals. Similarly, cross subsidies are not standard practice, e.g. charging large businesses more than small ones where the cost of supply is the same".

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

2 S.I. 2018/1106; S.I. 2018/1107; S.I. 2018/1108: Reported for defective drafting

Merchant Shipping (Work in Fishing Convention) Regulations 2018; Merchant Shipping (Work in Fishing Convention) (Survey and Certification) Regulations 2018; Merchant Shipping (Work in Fishing Convention) (Medical Certification) Regulations 2018

2.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that each of them is defectively drafted in the same one respect.**

2.2 These three Regulations are part of a package of instruments designed to bring UK law into line with the Work in Fishing Convention 2007 (which came in to force internationally on 16 November 2017).

2.3 In relation to non-UK fishing vessels S.I. 2018/1108 (regulation 3(1)(b)) states that certain regulations apply to those vessels while they are in a "United Kingdom port" or "United Kingdom waters" whereas S.I.s 2018/1107 (regulation 3(2)) and 2018/1106 (regulation 3(b)) apply to non-UK fishing vessels while they are in "United Kingdom waters" only. The Committee asked the Department for Transport to explain the difference of language.

2.4 In a memorandum printed at Appendix 2, the Department explains that as UK waters include the waters within UK ports, there is no substantive difference between the two provisions. The Department acknowledges that the wording could be misconstrued as signifying a different scope of application for the three instruments and undertakes to address this in guidance. It is an important principle of statutory interpretation that a change of language implies a change of meaning, and drafters of an instrument or package of instruments should ensure that consistent language is used. **The Committee accordingly reports regulation 3(1)(b) of S.I. 2018/1108, regulation 3(2) of S.I. 2018/1107 and regulation 3(b) of S.I. 2018/1106 for defective drafting, acknowledged by the Department.**

13 Secondary Legislation Scrutiny Committee (Sub-Committee A), 6th Report of Session 2017–19, HL paper 235, paragraphs 16 and 20: https://publications.parliament.uk/pa/ld201719/ldselect/ldseclega/235/23504.htm

3 S.I. 2018/1107: Reported for defective drafting and for requiring elucidation

Merchant Shipping (Work in Fishing Convention) (Survey and Certification) Regulations 2018

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

3.2 These Regulations implement the parts of the Work in Fishing Convention 2007 relating to the survey and inspection of fishing vessels.

3.3 Regulation 4(1)(b) states that a renewal survey for vessels that require a Work in Convention Certificate must be completed at specified intervals as set out in Merchant Shipping Notice 1885(F) (that is, every four years (for vessels over 24 metres in length) otherwise every five years). Regulation 4(2) repeats this information but suggests that a renewal survey is only required at a specified interval after the "initial" survey rather than the previous survey. The Committee asked the Department for Transport to explain. In a memorandum printed at Appendix 3, the Department acknowledges that there is duplication in regulations 4(1)(b) and 4(2) and that the drafting could have been better expressed. The Committee believes that the drafting of regulation 4 is defective as it is inconsistent and confusing; renewal surveys are required at specified intervals (in accordance with Merchant Shipping Notice 1885(F) as applied by regulation 4(1)(b)) but the language of regulation 4(2) only works correctly for the first renewal. **The Committee accordingly reports regulation 4(2) for defective drafting.**

3.4 Regulation 4(3) states that a fishing vessel which does not fall within regulation 4(2) is subject to a renewal survey every five years. Given that regulation 4(2) appears to cover all fishing vessels, the Committee asked the Department to explain how a fishing vessel could not fall within that regulation. In its memorandum, the Department explains that regulation 4(3) is intended to make provision for fishing vessels that are not subject to regulation 4(1) (that is, vessels which do not require a Work in Fishing Convention Certificate). The Committee accepts that the courts and other readers will be forced to this conclusion, but the language is again confusing, and regulation 4(3) should have been made subject to regulation 4(1). **The Committee accordingly reports regulation 4(3) for defective drafting.**

3.5 Regulations 11(1) and 14(1) state that a fishing vessel is liable to be detained where a relevant inspector has "clear grounds" for believing that the vessel does not comply with these Regulations (regulation 11(1)) or the Work in Fishing Convention (regulation 14(1)). The Committee asked the Department to explain the meaning of "clear grounds". In its memorandum, the Department explains the derivation of the expression "clear grounds" and sets out the definition. The Department further explains that although the term does not appear in the text of the Work in Fishing Convention, it is a well-established concept in Port State Control. **The Committee accordingly reports regulations 11 and 14 for requiring the elucidation provided in the Department's memorandum.**

4 S.I. 2018/1114: Reported for defective drafting

National Health Service (Pharmaceutical Services, Charges and Prescribing) (Amendment) Regulations 2018

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

4.2 These Regulations amend existing regulations to provide, among other things, a statutory gateway for the sharing of prescription data between NHS contractors, commissioners and the NHS Business Services Authority (NHS BSA) which is a Special Health Authority.

4.3 One of the enabling powers cited is section 7(1C) of the National Health Services Act 2006 (power to confer additional functions on Special Health Authorities). Section 272(6) of the Act states that a statutory instrument containing regulations under section 7(1C) is subject to affirmative resolution. The Committee asked the Department of Health and Social Care to explain why the affirmative procedure was not used.

4.4 In a memorandum printed at Appendix 4, the Department states that section 7(1C) was cited in the preamble in error and the relevant regulation (regulation 15, which inserts regulation 18A in to the National Health Service (Charges for Drugs and Appliances) Regulations 2015) was in fact made under section 272(8)(a) of the 2006 Act. Section 272(8)(a) relates to the making of incidental, supplementary or consequential provision. The Department explains that new regulation 18A makes provision facilitating the discharge of existing data handling functions of the NHS BSA which is properly characterised as an incidental measure made under section 272(8)(a) and contains no "additional functions" for the NHS BSA within the meaning of section 7(1C). The decision of the Court of Appeal in Vibixa Ltd and Polestar Jowetts Ltd v. Komori UK Ltd and others [2006] EWCA Civ 536 gives preambles a particular importance, and they were never a light matter; since the Department acknowledges that this instrument would be ineffective (not having been subjected to the correct procedure) if it were treated as having been made in reliance on each of the provisions stated in the preamble, the Department may wish to consider whether merely asserting that it did not need or intend to rely on section 7(1C) is sufficient to resolve any difficulty in relation to the lawfulness of the instrument. **The Committee accordingly reports the preamble for defective drafting.**

5 S.I. 2018/1116: Reported for defective drafting

Childcare (Miscellaneous Amendments) (EU Exit) (England) Regulations 2018

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

5.2 These Regulations make minor drafting changes to three existing sets of regulations to ensure that information-sharing provisions between England and national childcare regulators in the European Economic Area are retained after the UK's withdrawal from the European Union. The instrument is made using powers conferred by the Childcare Act 2006 and not those under the European Union (Withdrawal) Act 2018 (EU(W)A).

Regulation 1 states that the instrument comes in to force at 11pm on 29th March 2019. Instruments made under the EU(W)A usually come in to force on "exit day" to allow for any change in exit day under section 20(4) of that Act. The Committee asked the Department for Education to confirm whether it is intended that this instrument comes in to force at 11pm on 29 March 2019 in any event. In a memorandum printed at Appendix 5, the Department states that if the definition of exit day is amended the intention is that these regulations should come into force on that day and undertakes to amend the Regulations to that effect when a suitable opportunity arises. **The Committee accordingly reports regulation 1 for defective drafting, acknowledged by the Department.**

6 S.I. 2018/1119: Reported for requiring elucidation

Ministry of Defence Police (Conduct and Appeals Tribunals) (Amendment) Regulations 2018

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

6.2 These Regulations allow disciplinary proceedings to be bought against former Ministry of Defence police officers in certain circumstances. They achieve this by applying modifications to the existing conduct regulations, which only allowed such proceedings while an individual remained employed by the Ministry. Due to the large number of modifications, many of them technical, that will need to be read into the conduct regulations for proceedings against former officers, the Committee asked whether the Ministry of Defence intended to produce a text showing the regulations as modified by this instrument, and if so, how that text would be published (having regard to the importance of accessibility to legislation, as set out in the Committee's First Special Report of 2017–19 on Transparency and Accountability in Subordinate Legislation). In a memorandum printed at Appendix 6, the Department agrees that it is important for legislation to be accessible to those it might affect and confirms that it intends to place a version of the text setting out the modified procedures on the gov.uk website, and to make hard copies available on request. **The Committee finds this undertaking helpful and accordingly reports this instrument for requiring elucidation, provided by the Department's memorandum.**

7 S.I. 2018/1137: Reported for defective drafting and for requiring elucidation

Non-Contentious Probate (Amendment) Rules 2018

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

7.2 These Rules amend the Non-Contentious Probate Rules 1987 to simplify the process of applying for probate by, *inter alia*, allowing applications to be made online by applicants who are not represented by a solicitor (personal applicants).

7.3 There are standard and alternative procedures for personal applications, as set out in rules 5 and 5A of the 1987 Rules. For online personal applications, the standard procedure is set out in a new rule 5ZA and the alternative procedure is in rule 5A, as amended by this instrument. Rule 6(2) amends the heading of 5A to reflect this change, but the amendment is made by reference to a word ("online") that does not appear in the original heading, so it cannot have effect. This has repercussions for other amendments to the 1987 rules which cite the heading of 5A as amended (the version in new rule 5ZA contains a separate, unrelated error as it refers to "alternative online applications" in place of "alternative online procedure"). The Committee asked the Ministry of Justice to explain what it will do to correct these errors and to ensure that references to the heading of rule 5A are consistent throughout the 1987 Rules. In a memorandum printed at Appendix 7, the Department acknowledges the error in rule 6 and undertakes to correct it at the earliest available opportunity. The Committee is grateful for this undertaking and hopes the Department will use that opportunity to correct the error in rule 5ZA. **The Committee accordingly reports rule 6 for defective drafting, acknowledged by the Department.**

7.4 The Committee also asked the Department to explain why the statement of authority to sign on behalf of the Lord Chancellor, which appears in three previous instruments that amended the 1987 Rules, does not appear in this instrument. The Department states that it has updated its internal drafting practice to better align with that of other Government departments. This practice treats such wording as superfluous when the power is exercised by a junior Minister, who has clear authority under the Carltona principle to sign statutory instruments falling within his or her area of responsibility. The Committee is grateful for this explanation of the change to the Department's practice and **accordingly reports the instrument for requiring elucidation, provided by the Department's memorandum.**

8 S.I. 2018/1138: Reported for requiring elucidation

Social Security (Scotland) Act 2018 (Best Start Grants) (Consequential Modifications and Saving) Order 2018

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

8.2 The Order amends the Sure Start Maternity Grant (SSMG) scheme to reflect the creation of a parallel scheme that applies only in Scotland, so that payments are not made under both schemes in respect of the same child.

8.3 To be eligible for payments under the Scottish scheme, a person must be "ordinarily resident in Scotland" or fall into a specified category, such as being a refugee or under humanitarian protection. This Order creates a corresponding residence test for the SSMG scheme to require that "the claimant lives in England or Wales," which is not defined in the relevant legislation. The Committee therefore asked the Office of the Secretary of State for Scotland to explain what "the claimant lives in England or Wales" means for the purposes of the SSMG scheme, and whether there may be individuals who currently qualify for SSMG but would not meet the residence test.

8.4 In a memorandum printed at Appendix 8, the Department explains that the residence test for England and Wales is intended to bear a natural-language meaning. It will be satisfied if the claimant lives at an address in England or Wales, which the Department

will ascertain by checking the claimant's address and postcode when they make their SSMG claim. The Department took this approach to avoid creating a "double test" for residence, as a claimant can only be entitled to SSMG if they have already been awarded a qualifying benefit with its own residence test. The Department considers that everyone living in England and Wales who would currently qualify for SSMG will still do so once the residence test is in force. The Committee hopes that the Department will keep that matter under review. The Scottish Government also confirms that all those in Scotland who would have qualified for SSMG will qualify under the Scottish scheme, as it makes wider provision than its predecessor. **The Committee is grateful for these clarifications from the Department for Work and Pensions and the Scottish Government and accordingly reports this instrument for requiring elucidation, provided by the Department's memorandum.**

Instruments not reported

At its meeting on 5 December 2018 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.	Ship and Port Security (Amendment etc.) (EU Exit) Regulations 2018
Draft S.I.	Services of Lawyers and Lawyer's Practice (Revocation etc.) (EU Exit) Regulations 2019
Draft S.I.	Interchange Fee (Amendment) (EU Exit) Regulations 2018
Draft S.I.	Justification Decision Power (Amendment) (EU Exit) Regulations 2018
Draft S.I.	Aviation Safety (Amendment etc.) (EU Exit) Regulations 2019

Instruments subject to annulment

S.I. 2018/1120	Animal By-Products and Transmissible Spongiform Encephalopathies (England) (Amendment) (EU Exit) Regulations 2018
S.I. 2018/1160	Air Navigation (Amendment) (No. 2) Order 2018
S.I. 2018/1185	School and Early Years Finance (England) (No. 2) Regulations 2018
S.I. 2018/1186	Export of Objects of Cultural Interest (Control) (Amendment etc.) (EU Exit) Regulations 2018
S.I. 2018/1189	Privacy and Electronic Communications (Amendment) Regulations 2018
S.I. 2018/1193	Non-Domestic Rating (Alteration of Lists) and Business Rate Supplements (Transfers to Revenue Accounts) (Amendment etc.) (England) Regulations 2018
S.I. 2018/1202	Merchant Shipping and Fishing Vessels (Health and Safety at Work) (Miscellaneous Amendments) (EU Exit) Regulations 2018

Instrument not subject to Parliamentary proceedings laid before Parliament

S.I. 2018/1159	Merchant Shipping (Confirmation of Legislation) (Falkland Islands) Order 2018

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2018/1140 Wireless Telegraphy (Exemption and Amendment) (Amendment) (No. 2) Regulations 2018

S.I. 2018/1167 Antarctic (Jersey) Regulations 2018

S.I. 2018/1168 Antarctic (Guernsey) (Amendment) Regulations 2018

S.I. 2018/1169 Antarctic (Isle of Man) (Amendment) Regulations 2018

Appendix 1

Draft S.I.

Non-Contentious Probate (Fees) Order 2018

1. On 21 November 2018, the Committee requested that the Ministry of Justice submit a memorandum on the following points:

> *Explain, in light of the Committee's 26th Report of Session 2016–17 on the draft Non-Contentious Probate Fees Order 2017, why the fees prescribed in paragraph 1 of Schedule 1 to this draft Order ("application for a grant or resealing of a grant") are considered to be—*
>
> *a) within the powers conferred on the Lord Chancellor by section 92 of the Courts Act 2003 read with section 180 of the Anti-social Behaviour, Crime and Policing Act 2014; and*
>
> *b) within the contemplation of Parliament when it conferred those powers."*

2. The Department is grateful for the Committee's consideration of this instrument, and responds as set out below. References to "the Report" are to the Committee's 26th Report of Session 2016–17, in which the Committee considered the draft Non-contentious Probate Fees Order 2017.

Fees prescribed are within the powers conferred by statute

3. The Department agrees with the Committee's comment (para 1.12 of the Report) that "*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*". The Department's view is that the enabling power in section 92 of the Courts Act 2003 ("the 2003 Act"), read with section 180 of the Anti-social Behaviour, Crime and Policing Act 2014 ("the 2014 Act") gives the necessary clear statutory authority to prescribe the fees set out in Schedule 1 to the draft Order.

4. The probate service forms part of the Senior Courts of England and Wales, and therefore the Lord Chancellor has power to prescribe fees payable in respect of the probate service in accordance with s92(1)(a) of the 2003 Act.

5. Section 180(1) of the 2014 Act provides that the Lord Chancellor may with the consent of Treasury, in prescribing a fee under s92 of the 2003 Act, "*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).

6. 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) of the 2014 Act anticipates this cross subsidisation.

7. There is no restriction in the power conferred under s180(1) of the 2014 Act such that the fee must be directly related to the cost of the service. The Department does not agree with the Committee's comment that the concept of a "fee" is subject to inherent limitations about the relationship to the service for which it is charged (para 1.8 of the Report). The specific legislative provision in s180 of the 2014 Act breaks the link between the cost of the service and the fee that may be charged; this was clearly the intention of Parliament in making such provision.

8. There is also no restriction such that income raised by probate fees must be reserved to the probate service; as noted above, the probate service is squarely within scope of the legislation, which clearly anticipates cross-subsidisation across the courts and tribunal service. The Department does not therefore agree with the Committee's comment (para 1.10 of the Report) that more explicit provisions would be expected in legislation to enable the Lord Chancellor to charge probate fees above cost in order to fund other parts of the courts and tribunal system.

9. 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 such restriction was intended.

10. The powers in s180(1) of the 2014 Act 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). The fees raised under these orders are not reserved for the funding of the area in which they are levied, but may be used, for example, to support the operation of the criminal courts.

11. The Department does not agree with the Committee's comment (para 1.9 of the Report) that the non-contentious and administrative nature of probate means that it should be distinguished from other matters dealt with by the courts and tribunals system. As noted above, there is no such distinction drawn in s92 of the 2003 Act or s180 of the 2014 Act, and therefore there is no statutory basis for drawing a distinction between probate (or other non-contentious matters) and litigation for the purposes of the fee powers.

Fees prescribed are consistent with the contemplation of Parliament

12. The Department considers that the fees prescribed in Schedule 1 to the draft Order are within the scope of fees in the contemplation of Parliament when enacting s180 of the 2014 Act.

13. The Report notes that the Parliamentary debates made references to the costs of litigation, and did not expressly mention probate as a non-contentious procedure (para 1.17 of the Report). The Department does not consider however that these references should be taken as excluding non-contentious proceedings. Indeed, since (as set out above), probate and other non-contentious matters are caught by the legislative provisions, one would expect that if there were an intention for such matters to be excluded, then this would have been explicitly discussed.

14. The fact that there was no specific reference to probate in the Parliamentary debates cannot be taken as an indication that Parliament intended for non-contentious probate fees to be excluded from the scope of the power under s180 of the 2014 Act. There are a wide range of court and tribunal proceedings within the scope of the provisions, and it cannot be expected that each of these would be discussed by Parliament individually.

15. We consider that the proposals in this Order are consistent with the power under section 180 of the 2014 Act, as well as the assurances given to Parliament at the time. 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.

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

Ministry of Justice

27 November 2018

Appendix 2

S.I. 2018/1106; S.I. 2018/1107; S.I. 2018/1108

Merchant Shipping (Work in Fishing Convention) Regulations 2018; Merchant Shipping (Work in Fishing Convention) (Survey and Certification) Regulations 2018; Merchant Shipping (Work in Fishing Convention) (Medical Certification) Regulations 2018

1. By a letter dated 21st November 2018, the Joint Committee on Statutory Instruments has requested a Memorandum on the following point:

> *In relation to vessels which are not United Kingdom fishing vessels, explain why S.I. 2018/1108 applies while those vessels are in "a United Kingdom port or United Kingdom waters", whereas S.I.s 1106 and 1107 apply while those vessels are in "United Kingdom waters" only.*

2. As UK waters include the waters within UK ports, there is no substantive difference between the two provisions. The drafting follows the precedent of related legislation implementing the Maritime Labour Convention, 2006 on medical certification, survey and certification and other provisions of the MLC (S.I. 2010/737, S.I. 2013/1785 and S.I. 2014/1613 respectively).

3. The Department acknowledges that this could be misconstrued as signifying different scope of application for the three instruments above and will address this in guidance.

Department for Transport

27 November 2018

Appendix 3

S.I. 2018/1107

Merchant Shipping (Work in Fishing Convention) (Survey and Certification) Regulations 2018

1. By a letter dated 21st November 2018, the Joint Committee on Statutory Instruments has requested a Memorandum on the following points:

> *1. Given regulation 4(1)(b), is regulation 4(2) needed and if it is needed should "initial" be replaced with "previous"?*
>
> *2. If regulation 4(2) applies to fishing vessels with a length of 24 metres or more and those with a length of less than 24 metres, how can a fishing vessel not fall within that regulation, as envisaged by regulation 4(3)?*
>
> *3. In regulations 11(1) and 14(1), explain what "clear grounds" means.*

2. The Department accepts that the periodicity of renewal surveys in regulation 4(2) is duplicated in MSN 1885(F). However, the Department felt that it was helpful to have this requirement on the face of the instrument. There are additional provisions about renewal surveys in MSN 1885(F). In this context, however, the Department accepts that this could have been better expressed.

3. Regulation 4(3) is intended to make provision for fishing vessels that are not subject to paragraph (1), because the requirement for a survey before the issue of a Work in Fishing Convention Certificate only apples to fishing vessels which are subject to regulation 5.

4. We accept that this could have been better expressed and should have referred to "paragraphs (1) and (2)". However, as regulation 4(2) applies to the same vessels as regulation 4(1), this does not materially change the effect of the regulation.

5. In regulations 11(1) and 14(1), the expression "clear grounds" is derived from IMO Resolution A.1052(27) on Port State Control and the Paris MOU on Port State Control Guidelines. This is defined as follows:

*"**Clear Grounds***

> *4. In applying Table 4 above, examples of "clear grounds" for a more detailed inspection include but are not limited to the following:*
>
> *1. the absence of principal equipment or arrangements required by the relevant conventions;*
>
> *2. evidence from a review of the ship's certificates that a certificate or certificates are clearly invalid;*
>
> *3. evidence that documentation required by the relevant conventions and listed in Annex 10 of the Memorandum is not on board, incomplete, not maintained or falsely maintained;*

4. *evidence from the PSCO's general impressions and observations that serious hull or structural deterioration or deficiencies exist that may place at risk the structural, watertight or weathertight integrity of the ship;*

5. *evidence from the PSCO's general impressions or observations that serious deficiencies exist in the safety, pollution prevention or navigational equipment;*

6. *information or evidence that the master or crew is not familiar with essential shipboard operations relating to the safety of ships or the prevention of pollution, or that such operations have not been carried out;"*

6. Although the term does not appear in the text of the ILO Work in Fishing Convention, it is a well-established concept in Port State Control and is used in the ILO Guidelines for Port State Control officers in relation to the Maritime Labour Convention, 2006. Accordingly, we do not consider that any further elucidation is necessary in the instrument.

Department for Transport

27 November 2018

Appendix 4

S.I. 2018/1114

National Health Service (Pharmaceutical Services, Charges and Prescribing) (Amendment) Regulations 2018

1. The Committee has asked the Department for Health and Social Care for a memorandum on the following point:

> *Given that the preamble cites section 7(1C) of the National Health Service Act 2006 as an enabling power, explain why the affirmative procedure was not used (section 272(6) of the Act)?*

2. The Department considers that section 7(1C) of the National Health Service Act 2006, which relates to conferring additional functions on Special Health Authorities, has been cited in error—and apologises for doing so.

3. The relevant provision of the Regulations—regulation 15, which inserts regulation 18A of the National Health Service (Charges for Drugs and Appliances) Regulations 2015 (S.I. 2015/570, as amended)—is in fact made under section 272(8)(a) of the 2006 Act.

4. Section 272(8)(a), in so far as it is relevant, relates to the making of incidental, supplementary or consequential provision. The Department's view is that the new regulation 18A makes incidental provision, facilitating the discharge of existing functions, rather than adding new functions.

5. The main importance of the new regulation 18A, for present purposes, is how it affects the data handling activities of the National Health Service Business Services Authority (NHS BSA), which is a Special Health Authority. The rationale for the new regulation 18A is described in the following terms in paragraph 7.10 of the Explanatory Memorandum:

> *Providing statutory authority for this processing places existing arrangements on a secure statutory footing, within the terms of the Data Protection Act 2018, and the new statutory gateway will also ensure that staff processing prescription data have an appropriate confidentiality obligation.* (emphasis added).

6. The essential intention of the new regulation 18A is therefore, as the Department made clear, to deal with existing functions of NHS BSA and others. The existing functions in question are those set out in the new regulation 18A(4), but summarised in paragraph 7.9 of the Explanatory Memorandum as:

- *The invoicing and reimbursement/remuneration of contractors;*
- *Post exemption checking and enforcement action to minimise fraud;*
- *Limited management functions.*

7. The Department's view, accordingly, is that the new regulation 18A is properly characterised as an incidental measure having been made under section 272(8)(a)—and it contains no "*additional functions*" for the NHS BSA, within the meaning of section 7(1C), as that provision should be fairly and reasonably understood.

Department of Health and Social Care

27 November 2018

Appendix 5

S.I. 2018/1116

Childcare (Miscellaneous Amendments) (EU Exit) (England) Regulations 2018

1. In its letter to the Department of Education of 21 November 2018, the Joint Select Committee requested a memorandum on the following point:

> *Is it intended that this instrument comes in to force at 11pm on 29 March 2019 even if the definition of exit day is amended in accordance with section 20(4) of the European Union (Withdrawal) Act 2018?*

2. This memorandum has been prepared by the Department of Education.

3. If the definition of exit day is amended the intention is that these regulations should come into force on that day and not at 11pm on 29 March 2019. We acknowledge that the regulations as drafted do not provide for that eventuality and we will look for a suitable opportunity to amend the regulations accordingly.

4. We hope this addresses your query.

Department for Education

27 November 2018

Appendix 6

S.I. 2018/1119

Ministry of Defence Police (Conduct and Appeals Tribunals) (Amendment) Regulations 2018

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

> *Confirm whether the Department will produce a text showing the conduct regulations as modified by the Schedule, and if so how that text will be published (given the number and nature of the modifications, and the principle that disciplinary proceedings should be transparent to those who may be subject to them; and having regard to the importance of accessibility to legislation as set out in the Committee's First Special Report of 2017–19 on Transparency and Accountability in Subordinate Legislation).*

2. The Ministry of Defence agrees that it is important for legislation to be accessible to those it might affect. The power in section 3A of the Ministry of Defence Police Act 1987 enables the Secretary of State to make provision for the procedures that have been established for existing officers to apply (with or without modifications) to former officers. A large number of modifications were required and in this case the Department intends to place a version of the text setting out the modified procedures on the relevant page of the gov.uk website where it can be downloaded. It will also explain that hard copies can be obtained on request, together with email and telephone contacts. A draft can be provided on request.

Ministry of Defence

27 November 2018

Appendix 7

S.I. 2018/1137

Non-Contentious Probate (Amendment) Rules 2018

1. On 21 November 2018, the Committee requested that the Ministry of Justice submit a memorandum relating to the above instrument (the "Amending Rules") relating to the following points:

> *Explain why the statement of authority to sign on behalf of the Lord Chancellor that appears in S.I.s 2016/972, 2009/1083 and 2004/2985 does not appear in this instrument.*
>
> *Confirm that the references to "alternative online applications for personal applications" in rule 5, "online procedure for personal applications" in rule 6(1), and "Online" in rule 6(2) are wrong, and explain what the Department will do to correct these errors and ensure that references to the heading of rule 5A are consistent throughout the amended instrument.*

2. The Department is grateful for the Committee's consideration of the Amending Rules and sets out its response to the matters raised below.

Statement of Authority to Sign

3. The Committee is correct to note that, historically, where a statutory instrument was signed by a junior Minister, it was the practice of the Ministry of Justice to specify that the instrument was signed under the authority of the Lord Chancellor (or the Secretary of State for Justice as the case may be). It is the Department's view that this wording is superfluous as a junior Minister has clear authority under the Carltona principle[1] to sign statutory instruments falling within his or her area of responsibility. Statutory Instrument Practice (SIP)[2] clearly envisages that instruments may be signed by junior Ministers, stating that:

> *"In most Departments any instrument which comes before the JCSI is signed by a Minister. This will usually be the junior Minister responsible for the instrument's subject matter."*

4. The relevant paragraph of SIP[3] does not recommend any alteration to the form of the signature block of text where a junior Minister signs an instrument, in contrast to the guidance concerning instruments which are signed by officials,[4] which states that:

> *"Where an instrument is local and not laid before Parliament so that it does not come before the JCSI it is often signed by an official. If an official is signing the preferred formula is title of post followed by "for and on behalf of the Secretary of State for […]"*

1 Carltona v Commissioner of Works [1943] 2 All ER 560 (CA)
2 Statutory Instrument Practice (5th Edition), paragraph 3.7.1
3 paragraph 3.7.4
4 paragraph 3.7.5

5. In March 2017, the Ministry of Justice updated its internal drafting guidance, recommending that Departmental practice be altered to better align with the practice of other Government Departments and with SIP. Following this change of practice, a statement of authority is no longer included as a matter of course in instruments signed by a junior Minister of the Ministry of Justice.

References to "alternative online applications for personal applications" in rule 5, "online procedure for personal applications" in rule 6(1) and "Online" in rule 6(2).

6. The Committee is correct to note that there is an error in rule 6 of the Amending Rules. The existing heading of rule 5A of the 1987 Rules is "alternative procedure for personal applications". Rule 6(2) of the Amending Rules should read "In the heading, for "alternative", substitute "alternative online"" in order that the new heading would read "Alternative online procedure for personal applications". The new provisions inserted by rules 2 and 5 of the Amending Rules refer to rule 5A of the 1987 Rules as amended, with the amended heading. The Department is grateful to the Committee for alerting the Department to this error and will make the correction at the earliest available opportunity

Ministry of Justice

27 November 2018

Appendix 8

S.I. 2018/1138

Social Security (Scotland) Act 2018 (Best Start Grants) (Consequential Modifications and Saving) Order 2018

1. In its letter to the Department of 21st November 2018, the Committee requested a memorandum on the following points:

> *Explain:*
>
> *1. what "the claimant lives in England or Wales" means for the purposes of meeting the new residence condition created by article 3(4), and*
>
> *2. whether there may be individuals who currently qualify for Sure Start Maternity Grants but would meet neither the "ordinarily resident in Scotland" test nor the "lives in England or Wales" test, and therefore not qualify for either SSMG or the equivalent benefit in Scotland.*

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

3. With regard to the Committee's first question, "the claimant lives in England or Wales" has a natural meaning and the Department considers that this is clear. The condition will be satisfied if the claimant lives at an address in England or Wales. This will be ascertained by the Department checking the claimant's address and postcode at the time they make their claim for a Sure Start Maternity Grant ("SSMG").

4. While the term "ordinarily resident" may be more commonly used elsewhere in social security legislation, it is the Department's view that its use in article 3(4) would not deliver the policy intention in this instance.

5. Entitlement to a SSMG depends, in part, on the claimant having been awarded a qualifying benefit (being one of the benefits listed in regulation 5(2) of the Social Fund Maternity and Funeral Expenses (General) Regulations 2005). Each qualifying benefit has its own residence test and for this reason, a separate residence test has not previously applied to the SSMG scheme.

6. The purpose of the condition introduced by article 3(4), is only to ensure that the scheme is not available to persons for whom the Scottish Government is competent to make provision. The Department does not wish to introduce a "double test" for residence. For this reason, the wording "lives in England or Wales" was chosen because it has a natural meaning, which most closely fits the modification required to be made to the scheme, namely, that a person must live at an address in England or Wales at the time they make their claim.

7. It is not the Department's policy intention to match the approach the Scottish Government has chosen to take on residence requirements for its Best Start Grant ("BSG") scheme, which has different entitlement criteria and makes provision for a wider range of people. Divergence between the two schemes is to be expected as a natural consequence of devolution.

8. With regard to the Committee's second question, the Department considers that everyone living in England or Wales who currently would qualify for a SSMG, will still qualify for a SSMG once the modifications made by the Order come into force, subject to the person making their claim within the prescribed time limits.

9. The Department is most grateful to Scottish Government officials for their assistance in providing the following explanation of the Early Years Assistance (Best Start Grants) (Scotland) Regulations 2018, which will introduce the BSG Pregnancy and Baby Grant.

10. Under the Regulations, Scottish Ministers will pay a BSG Pregnancy and Baby Grant to any person who meets the qualifying criteria and who is "ordinarily resident in Scotland". The Regulations will extend entitlement to some persons who would not currently qualify for a SSMG, including those aged under 18 who are not in receipt of a qualifying benefit and those aged 18 and 19 who are dependants of a parent or carer.

11. Since the BSG scheme will be available to a small group who are not in receipt of a qualifying benefit and who will not already have passed a residence test, it is necessary for the Regulations to include a specific residence test of "ordinary residence". This is the lowest threshold that Scottish Government considered it could introduce for residence, whilst minimising the risk of there being persons residing in Scotland who do not have a sufficient quality of residence.

12. Scottish Government expect that any person living in Scotland, who would previously have qualified for a SSMG, will qualify for a BSG Pregnancy and Baby Grant. The BSG scheme makes wider provision than the SSMG scheme it replaces.

Department for Work and Pensions

27 November 2018