The Select Committee on the Merits of Statutory Instruments

The Committee has the following terms of reference:

(1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), consider—
   (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
   (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament, with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (2).

(2) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—
   (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
   (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
   (c) that it may inappropriately implement European Union legislation;
   (d) that it may imperfectly achieve its policy objectives.

(3) The exceptions are—
   (a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
   (b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;
   (c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.

(4) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.

(5) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (4) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Rt Hon. Baroness Butler-Sloss GBE  Lord Methuen
Baroness Eaton  Rt Hon. Baroness Morris of Yardley
Lord Eames OM  Lord Norton of Louth
Rt Hon. Lord Goodlad (Chairman)  Lord Plant of Highfield
Baroness Hamwee  Rt Hon. Lord Scott of Foscote
Lord Hart of Chilton

Registered interests

Information about interests of Committee Members can be found in Appendix 3.

Publications

The Committee’s Reports are published on the internet at www.parliament.uk/hlmeritspublications

Information and Contacts

If you have a query about the Committee or its work, including concerns or opinions on any new item of secondary legislation, please contact the Clerk of the Merits of Statutory Instruments Committee, Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email merits@parliament.uk.

Statutory instruments

Fifty-first Report

PUBLIC BODIES ORDER

Draft Public Bodies (Abolition of the National Endowment for Science, Technology and the Arts) Order 2012

The draft Public Bodies (Abolition of the National Endowment for Science, Technology and the Arts) Order 2012 (“the NESTA Order”) was laid on 19 January under section 1 of the Public Bodies Act 2011 (“the 2011 Act”). The NESTA Order was laid by the Department for Business, Innovation and Skills (“BIS”) with an Explanatory Document (“ED”) and an Impact Assessment (“IA”). BIS have also provided the Committee with copies of the consultation responses, along with further information on some specific points (included as an Appendix).

The purpose of the NESTA Order is to abolish NESTA on 1 April 2012, or if the Order is made on or after 1 April 2012, 28 days after the day on which it is made. NESTA would then be reconstituted in the charity sector. The NESTA Order is the first such order abolishing a public body under the 2011 Act.

1. NESTA is an executive non-departmental public body (“NDPB”) sponsored by BIS. NESTA was established by the National Lottery Act 1998 with objects to “support and promote talent, innovation and creativity in the fields of science, technology and the arts”. NESTA has a National Lottery endowment currently valued at £321 million and receives no funding from Government. NESTA is governed by a board of trustees appointed by Ministers from BIS. The Chair and Arts Trustee are appointed jointly with Ministers from the Department for Culture, Media and Sport.

2. As part of the Government’s public bodies reform programme, the Government announced in October 2010 that it would seek to establish NESTA as an independent charity with the National Lottery endowment held in a separate charitable trust. The ED says that whilst the Government’s view is that NESTA performs a valuable function and wants to see the activities continue, its activities are better suited to the voluntary sector (ED paragraph 7.2). The ED says that there is no anticipated negative impact on NESTA’s work as a result of a change in status to a charity (ED paragraph 7.4).

3. A transfer scheme will be made at the same time as the order to abolish NESTA to transfer the property, rights and liabilities of NESTA relating to the National Lottery endowment to the NESTA Trust (“the Trust”) and all other property, rights and liabilities and employees to NESTA Operating Company (“the NOC”). The NOC was incorporated as a private company limited by guarantee on 15 July 2011 and was registered by the Charity Commission on 20 September 2011, and the Trust was established on 22 September 2011 by a Trust Deed by NESTA (see Appendix 1). The transfer scheme will be laid in Parliament once the order has been made, a draft of the transfer scheme having been placed in the House library (ED paragraph 4.4). The ED says that as the sole trustee of the Trust, the NOC will manage the endowment and spend the return from the endowment in furtherance of
the charitable objects of the Trust; and a Protector will be appointed by Ministers to provide assurance of the propriety in the way the endowment is used (ED paragraph 7.3). The transfer of the endowment to the Trust and the various assets and liabilities to the NOC will occur simultaneously with the NESTA Order coming into force. No additional National Lottery funding will be awarded to the Trust (see Appendix 1).

4. During the passage of the 2011 Act through the House, Lord Warner tabled a Committee Stage amendment to remove NESTA from schedule 1 of the Bill, and asked a number of questions about the future of NESTA. Following debate, Lord Warner withdrew his amendment, but asked for assurance in writing that the Government’s proposal to reconstitute NESTA as a charity would not damage NESTA and its future work.

Role of the Committee

5. The Committee’s role as set out in its Terms of Reference is to “report on draft orders and documents laid before Parliament under section 11(1) of the 2011 Act in accordance with the procedures set out in sections 11(5) and (6)”. A key aspect of this role is the Committee’s power to trigger the enhanced affirmative procedure which would require the Government to have regard to any recommendations made by the Committee during a 60 day period from the date of laying. The Committee may also consider taking oral or written evidence in order to aid its consideration of the orders.

Consultation

6. BIS ran a six week public consultation on the proposals for the future of NESTA between 18 October and 29 November 2011. The ED says that the consultation document was made widely available to all interested stakeholders and the wider public by statements on both the BIS and NESTA websites, and the consultation document was sent directly to over 100 stakeholders (ED paragraph 8.1). BIS received 27 responses to the consultation; out of the 12 responses from individuals, they had one response from the NESTA chairman, six responses from current NESTA trustees and three responses from trustees of the new NESTA charity. The ED says that there was strong support for the proposed policy option – to abolish NESTA as an NDPB and reconstitute it as an independent charity and charitable trust (ED paragraph 8.2).

7. The ED says that a number of issues were raised in response to the consultation about the endowment and NESTA’s role (ED paragraph 8.4). These are covered below. The Government’s formal response to the consultation has been published on the BIS website at: www.bis.gov.uk/consultations/

8. Section 10 of the 2011 Act sets out a number of consultation requirements for a Minister proposing to make an order under sections 1 to 5 of the Act. These statutory requirements should be considered in combination with the Government’s broader policy on consultation in the ‘Code of Practice on Consultation’, published by the Department for Business, Enterprise and

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1 HL debates 28 February 2011: cols 802 to 806
2 ‘NESTA: Reconstruction as charity and trust – Government response to consultation’: Jan 2012 (page 5).
Regulatory Reform (a predecessor of BIS) in July 2008. Although at six weeks the consultation was shorter than the normal 12 weeks, it does seem to have been well publicised and directed at key parties. The consultation with the Welsh Ministers is complete, and the process of seeking the consent of the Scottish Parliament and Northern Ireland Assembly is underway in parallel with the process in the UK Parliament (see Appendix 1 for further information).

Tests in the Public Bodies Act 2011: assessment of the proposals

9. A Minister may only make an order under sections 1 to 5 of the 2011 Act if the Minister considers that the order serves the purpose of improving the exercise of public functions, having regard to (a) efficiency, (b) effectiveness, (c) economy and (d) securing appropriate accountability to Ministers (section 8 of the 2011 Act).

Efficiency, Effectiveness and Accountability

10. It is the Government’s view that NESTA’s activities are better suited to delivery by the voluntary sector, whilst the Government maintains oversight of propriety of expenditure of the National Lottery endowment through the Charity Commission and the Protector (ED paragraph 7.5). The ED says that as a result of no longer being an NDPB, NESTA will be subject to reduced accounting, governance and reporting requirements, allowing them to redistribute resources previously allocated to such reporting requirements to other activities which advance their mission (ED paragraph 7.5). In terms of accountability to Ministers, it is the Government’s view that it is not necessary for NESTA to be part of the public sector to carry out its functions or be accountable to Ministers for its activities, and through the ministerially-appointed Protector, Ministers will maintain assurance for propriety of the way in which the National Lottery endowment is used, whilst giving NESTA further distance and independence from Government (ED paragraph 7.5). On balance the consultation responses would seem to support the Government’s views, with a number of responses suggesting that the greater independence provided by the move to charitable status would be a positive step for NESTA’s operations. However, given that the new governance arrangements will be central to NESTA’s effectiveness as a charity, the Committee would have expected to see greater explanation of these arrangements in the ED.

Economy

11. In the debate during the passage of the 2011 Act through the House, the economy of moving NESTA to charitable status was discussed only in general terms, although there was a suggestion that there may be no financial benefit in the move except at the margin. The IA which has been laid with the NESTA Order shows a net benefit for the proposals over 10 years of £1.84 million (present value) (IA page 3).

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4 HL debates 28 February 2011: col 803
12. A number of issues were raised in response to the consultation about the endowment and NESTA’s role. One response suggested that the gilts (in which the majority of the endowment is currently invested) should be transferred with the organisation as it rolls out from government. Another response suggested that putting the endowment investments into a separate charitable trust is complicated and will inevitably give rise to some additional administration costs in the future. Although recognising the Government’s reasons for keeping the endowment within the public sector, other responses said that this may limit the range of investments permitted and therefore the returns, and thought should be given to ensuring NESTA’s management has sufficient latitude to manage in a business-like manner, rather than being tied to the rigid contractual paradigm enforced through a trust deed. In response, BIS reiterates the Government’s position that for National Accounts purposes, transfer of the endowment out of the public sector would have a detrimental effect on Public Sector Net Debt, as this would reduce the stock of government’s assets (see ED paragraph 8.4). The use of the endowment is central to the changes to NESTA, and the debate on the approval motion for the draft Order may give the opportunity to explore the economic effectiveness of the Government’s proposals in this regard.

13. The IA estimates the total cost of the proposals as being £0.285 million, with the main affected groups being NESTA and BIS, as the transition process will incur costs associated with BIS staff costs, NESTA staff costs and legal costs required to implement the transition (IA page 3). The proposed Protector of the trust will also be entitled to receive reasonable out-of-pocket expenses and reasonable remuneration from the Trust (IA page 3).

14. The IA estimates that there will be average annual benefits of £0.292 million, as a result of savings from BIS staff costs; and because of moving NESTA out of the public sector there will be reduced accounting, governance and reporting requirements allowing NESTA to redistribute resources previously allocated to such reporting requirements (IA page 3). However, it is noteworthy that the IA estimates that £0.14 million of the annual benefits will be as a result of the trustees no longer being remunerated under the new governance structure – at present, trustees’ remuneration are £0.14 million annually (IA page 7). The IA explains that it is assumed that as the trustees are volunteering for the role this is an indication that any personal cost they incur as a trustee is matched by a personal gain through volunteering (IA page 7). BIS have confirmed that the new trustees were recruited with the full knowledge that, as trustees of a charity, they would not be remunerated; but acknowledge the possibility that trustees could seek remuneration if the workload becomes heavier than they initially anticipated, and although they do not expect this to happen, they recognise that it would be a decision for the charity to make, not the Government (see Appendix 1). BIS have also confirmed that trustees may be reimbursed reasonable expenses although the IA carries little assessment of this (see Appendix 1).

Safeguards

15. Section 8(2) of the 2011 Act requires that a Minister may make an order only if he considers that (a) the order does not remove any necessary protection, and (b) the order does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise. There is nothing in the ED or consultation responses to suggest the NESTA Order does not meet these tests.
Conclusion

16. This is the first order abolishing a public body under the 2011 Act and is likely therefore to be of interest to the House. The Government has presented a coherent case for the change to charitable status, and in the main the proposals do seem to have broad support. Although the Committee has highlighted a number of issues around the economy of the change, the Committee is content to clear the NESTA Order within the 40 day affirmative procedure, and we see no grounds to trigger the enhanced affirmative procedure.
INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the following instrument and has determined that the special attention of the House should be drawn to it on the grounds specified.

Draft Modifications to the Standard Conditions of Electricity Supply Licences (No.1 of 2012)

*Date laid: 19 January*

*Parliamentary Procedure: negative*

The Feed-in Tariffs (“FITs”) scheme is the Government’s main policy measure to encourage the deployment of small scale low carbon electricity generation in Great Britain. The scheme was implemented in part through the insertion of provisions in the standard conditions of electricity supply licences, requiring electricity suppliers with more than 50,000 domestic customers to offer FITs to accredited small scale generators of electricity using an eligible low-carbon energy source. The modifications in this draft instrument reduce tariffs for solar photovoltaic (“PV”) installations of up to 250kW capacity which become eligible for FITs on or after 3 March 2012 when the instrument comes into force. The changes to be brought in by this instrument were initially part of a broader package of proposals; but as the Government’s approach to other parts of the package has been ruled unlawful, the Government has decided to proceed with the implementation of these tariff changes.

This instrument is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

17. The Feed-in Tariffs (“FITs”) scheme is the Government’s main policy measure to encourage the deployment of small scale low carbon electricity generation in Great Britain. The scheme was implemented in part through the insertion of provisions in the standard conditions of electricity supply licences, requiring electricity suppliers with more than 50,000 domestic customers to offer FITs to accredited small scale generators of electricity using an eligible low-carbon energy source. The licence conditions, among other things, specify the tariffs payable to generators for each unit of electricity generated by eligible installations. An earlier instrument making changes to the FITs scheme was drawn to the special attention of the House by the Committee on the ground that it gave rise to issues of public policy likely to be of interest to the House (34th Report, 23 June 2011).

18. The modifications in this draft instrument, which will come into force on 3 March 2012 (after being laid before Parliament in draft for 40 days in accordance with section 42 of the Energy Act 2008), reduce tariffs for solar photovoltaic (“PV”) installations of up to 250kW capacity which become eligible for FITs on or after that date. The reduced tariffs will apply in respect of electricity generated by those installations on or after 1 April 2012.

19. The Explanatory Memorandum (EM) explains that the Government published a consultation on FITs for solar PV on 31 October 2011, which set out proposals for responding to developments in the solar PV sector. The
consultation was accompanied by a draft Impact Assessment\(^5\) entitled, ‘Comprehensive Review Phase 1 – Consultation on Feed in Tariffs for solar PV’. However, the Administrative Court subsequently ruled that the approach proposed in the consultation document – applying new tariffs to installations which became eligible for FITs from a reference date earlier than the coming into force date of legislation giving effect to the new tariffs – was unlawful (R. on application of Friends of the Earth Ltd and others v. Secretary of State for Energy and Climate Change) (EM paragraph 7.2). The Government appealed against the decision, and at the time the draft instrument was laid, no date had been set for handing down the Court of Appeal’s judgement. The EM says that given the uncertainty about timing, the Government decided to bring forward part of its decision on the aspects of the consultation concerning tariffs for solar PV, and proceed with the implementation of tariff changes to the extent that the power to do so is not in issue in the legal proceedings (EM paragraph 7.3).

20. On 25 January the Government found out that they had lost the appeal, but the Secretary of State announced\(^6\) that the Government was seeking permission to appeal to the Supreme Court. DECC Officials have told the Committee that once they have given full consideration to the judgement they will publish a full response to the consultation along with an updated IA, probably in early February.

21. The EM says that the Government recognises that the scale of the proposed reductions in the tariffs is significant, but they continue to consider that it is justified and necessitated by the magnitude of the recent reductions in the costs of solar PV and the need to manage expenditure (EM paragraph 8.3).


OTHER INSTRUMENTS OF INTEREST

Draft Jobseeker’s Allowance (Domestic Violence) (Amendment) Regulations 2012

22. Section 29 of the Welfare Reform Act 2009 introduced a provision to make regulations to provide an exemption for claimants of Jobseekers’ Allowance who have been subject to or threatened with domestic violence. The exemption allows victims to be treated as meeting the availability and jobseeking conditions for 13 weeks so they can organise new accommodation, children’s schools etc without having to think about trying to find work. These Regulations set out the circumstances in which the 13 week exemption applies including relevant definitions, for example of “domestic violence”. They also insert a qualifying criterion that during the initial 4 weeks of the exemption period the claimant must provide Jobcentre Plus with written evidence from a person acting in an official capacity, such as a health care professional, police officer or registered social worker to confirm that the claimant has been in contact about an incident or threat of domestic violence against them which occurred not more than 26 weeks before the claimant’s initial notification to Jobcentre Plus. The Regulations also state that the person who inflicted or threatened the violence must not be living with the claimant at the time that the initial notification is made. The 4 or 13 week easement will be available once in any 12 month period.

Draft Misuse of Drugs Act 1971 (Amendment) Order 2012

23. This draft Order classifies for control the following drugs under Schedule 2 to the Misuse of Drugs Act 1971 (“the 1971 Act”):
   - desoxypipradrol (“2-DPMP”), diphenylprolinol (also known as “D2PM”), and 2-diphenylmethylpyrrolidine and other pipradrol-related compounds (by use of a generic definition) in Part 2 of Schedule 2 as Class B drugs;
   - any substance which is an ester or ether of Class C pipradrol in Part 3 of Schedule 2 as Class C drugs;
   - 7-bromo-5-(2-chlorophenyl)-1,3-dihydro-2H-1,4-benzodiazepin-2-one (“phenazepam”) in Part 3 of Schedule 2 as a Class C drug.

24. The Explanatory Memorandum (EM) says that these drugs have been sold as so called “legal highs” in the UK (EM paragraph 7.1). The draft Order also classifies 2 anabolic steroids in Part 3 of Schedule 2 of the 1971 Act as Class C drugs. The Government has accepted the recommendations of the Advisory Council on the Misuse of Drugs (“ACMD”) that the harms associated with all these substances are commensurate to Class B and Class C of the 1971 Act, as appropriate. The ACMD reports are available on the Home Office website. The EM says that the Home Office has consulted the Medicines and Healthcare products Regulatory Agency and the Department for Business, Innovation and Skills, who have liaised with chemical industry partners, and with UK Anti-Doping in respect of the two steroids (EM paragraph 8.1). The consultation does not seem to have stretched beyond

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7 Available at [http://www.homeoffice.gov.uk/publications/agencies-public-bodies/acmd1/](http://www.homeoffice.gov.uk/publications/agencies-public-bodies/acmd1/)
these organisations. The Committee\(^8\) has previously drawn attention to the scope of the Home Office's consultation for this type of policy change and the House may wish to have this in mind when debating this draft Order.

**Draft Schools (Specification and Disposal of Articles) Regulations 2012**

25. These draft Regulations specify certain articles that members of staff in schools can search pupils for without their consent, and make provision for the disposal of those articles. The specified articles are: tobacco and cigarette papers and other tobacco based products, fireworks, and pornography. The cigarettes and fireworks may be kept or disposed of, and any pornography may be disposed of unless possession constitutes a specified offence (where this is the case, it must be taken to the police as soon as possible). The Explanatory Memorandum (EM) says that Ministers undertook an informal consultation in September 2010 with Ofsted and five teacher professional organisations; and received three responses, two supported the proposals and one urged that any extension to the power to search without consent should be used with caution (EM paragraph 8.1). With that in mind, the Committee submitted a number of questions to the Department for Education. The responses provide further information on monitoring the use of the power and the associated risks (see Appendix 2). This information may be useful to the House when debating the draft Regulations.

**Statement of Changes in Immigration Rules (HC 1733)**

26. This Statement of Changes in Immigration Rules (“the Statement”) makes a number of changes to the Immigration Rules, the two most notable of which would seem to be (i) the change allowing a decision refusing an application for leave to remain on a temporary basis, and a removal decision to be made at the same time (at present UKBA asks the migrant to leave the UK voluntarily and does not always at the same time make a removal decision); and (ii) making provision for when and what the decision maker should have regard to, when considering “exceptional circumstances” when an unsuccessful asylum or human rights application is being reviewed. UKBA have published\(^9\) an Impact Assessment (IA) for the first of these changes. The IA says that it had been UKBA’s intention to make refusal and removal decisions at the same time in all “in-time” cases later in 2012 - it would complement the roll-out of electronic casework and planned reform of the family route; but in the light of recent case law they need to make the changes earlier than planned (IA page 5). The IA says that in *Mirza & Others ([2011] EWCA Civ 159)* the Court of Appeal held that a removal decision should be served within a reasonable time following refusal of an “in time” application; and in *Sapkota ([2011] EWCA Civ 1320)* the Court of Appeal found that failure to make a removal decision when an “in time” application is refused rendered the refusal unlawful, and as such would need to be considered afresh (IA page 6). The impact of the change is significant: the EM says that UKBA will be required to make approximately 20,000 additional removal decisions each year (EM paragraph 7.7); and the IA

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\(^8\) See 5th Report of Session 2010-12

estimates the net benefit as being £19.1 million, mainly from reduced decision and appeal costs. Given the estimated savings, the Committee would have expected to see greater explanation in the EM as to why the changes were not made sooner. The Committee is also disappointed to note that since Public Service Agreement 3: ‘ensure controlled, fair migration that protects the public and contributes to economic growth’ has been scrapped, UKBA have repeated the error from the last Statement of Changes in Immigration Rules (HC 1693) of saying in the EM that the change will be monitored as part of the review of progress towards meeting that Agreement (47th Report, 20 December 2011).

Syria (European Union Financial Sanctions) Regulations 2012 (SI 2012/129)

27. These Regulations put in place criminal penalties for breach of EU financial sanctions in relation to Syria. The financial sanctions are contained in Council Regulation (EU) No.36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and relate to both asset-freezing and other financial restrictions (“the Council Regulation”). The Council Regulation revokes and replaces earlier EU sanctions and imposes additional financial restrictions, including a prohibition on the sale of Syrian public bonds, which require enforcement. The Explanatory Memorandum (EM) says that guidance on asset-freezing measures in relation to Syria is available on the Treasury’s website, and a dedicated telephone line and email address are available for the financial sector and any other persons to submit any queries (EM paragraph 9).
INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft Instruments subject to affirmative approval

Jobseeker’s Allowance (Domestic Violence) (Amendment) Regulations 2012
Misuse of Drugs Act 1971 (Amendment) Order 2012
Schools (Specification and Disposal of Articles) Regulations 2012
St Albans and Welwyn Hatfield (Boundary Change) Order 2012

Instruments subject to annulment

HC 1733 Statement of Changes in Immigration Rules
SI 2012/66 Agriculture (Miscellaneous Amendments) Regulations 2012
SI 2012/104 M25 Motorway (Junctions 2 to 3) (Variable Speed Limits) Regulations 2012
SI 2012/114 Uplands Transitional Payment Regulations 2012
SI 2012/116 Immigration (Passenger Transit Visa) (Amendment) Order 2012
Further information from the Department for Business, Innovation and Skills

Department for Business, Innovation and Skills officials have provided the following responses to the questions put by the Committee:

Q. Is it definite that the charity trustees will not be remunerated? If so, are they aware of this? Are they content with this state of affairs?

A. Yes. The trustees of NESTA Operating Company, the new charity, were recruited with full knowledge that, as trustees of a charity, they would not be remunerated.

Q. Is there a risk that the trustees could seek remuneration if the workload becomes heavier than they initially anticipated?

A. It could happen but, as with any charity, a trustee cannot be paid for carrying out trustee duties unless they have a suitable authority in the charity's governing document and the approval of the Charity Commission. The Charities Act 1993 requires trustees to "have regard" to Charity Commission guidance and it is worth noting that, according to Charity Commission guidance on "Trustee Expenses and Payments" (June 2008), an important principle of charitable activity is that those who run them act without payment or with only basic expenses covered. There is a general expectation that charity assets should be used directly for the purposes of the charity. As a consequence, any departure from this position is only likely to occur in exceptional circumstances and would need to be fully justified by trustee boards to the Charity Commission as being clearly in the interests of their charity. We do not expect the trustees of NESTA Operating Company to seek such authority but recognise that this decision will be for the charity to make, not Government.

Q. Will the trustees have any expenses paid? If so, which ones?

A. Yes. Under the terms of the charity's Articles of Association, trustees may be reimbursed reasonable expenses properly incurred in acting on behalf of the charity. This is likely to include travel and other costs of attending meetings, travelling on trustee business, providing childcare or care for other dependants while attending to trustee business, but would not include, for example, compensation for loss of earnings.

In terms of the devolved administrations, the consultation with Wales is complete. Responses to the consultation exercise were shared with the
Committee including the response from Huw Lewis, Minister for Housing, Regeneration and Heritage in the Welsh Government (29 Nov 2011).

In terms of seeking consent of the Scottish Parliament and Northern Ireland Assembly, the consent process is underway in parallel with the process in the UK Parliament. We are following the process agreed between the Cabinet Office and each devolved administration, as outlined in the guidance that Cabinet Office has produced for officials on using the Public Bodies Act. Following discussion between officials in BIS and officials in Scotland and Northern Ireland, BIS Minister David Willetts has written to his counterparts requesting that they seek consent to the terms of our draft order. Based on the timetable advised by officials in Scotland and Northern Ireland, we are hopeful of obtaining consent by mid-March for both, before the debate stage takes place in the UK Parliament.

In Scotland, a Legislative Consent Motion has already gone to the Cabinet Sub-Committee for Legislation for clearance. The next step is consideration by a Parliamentary Committee, followed by a debate and vote in the Scottish Parliament.

In Northern Ireland, a debate in the NI Assembly will be scheduled after March 5 (the date by when we will know whether our order is subject to a standard or enhanced affirmative scrutiny procedure in the UK Parliament), but before March 15 (the expiry of the 40 days), to obtain consent. This is so officials in Northern Ireland can be confident no changes have been made to the order during the committee scrutiny process and can advise the Assembly accordingly.

Q. When exactly will the NESTA Trust and the NESTA Operating Company be set up?

A. The NESTA Trust and NESTA Operating Company (NOC) already exist. They had to exist as entities so that they could be registered with the Charity Commission in advance of the proposed transfer of property etc and also so that the proposed transfer scheme could come into force at the same time as the Order comes into force. In addition, their consent to the transfer was required by the Public Bodies Act. NOC was incorporated as a private company limited by guarantee on 15 July 2011 and was registered as a charity by the Charity Commission on 20 September 2011. The Trust was established on 22 September 2011 by a Trust Deed, by NESTA, the non departmental public body. Until the transfer scheme comes into force, they are both "shell" organisations.
Q. Will the transfer of the endowment and assets to these two operations occur simultaneously with the NESTA Order coming into force?
A. Yes.

Q. How do future lottery monies go into the Trust?
A. No additional National Lottery funding will be awarded to the Trust.

Department for Business, Innovation and Skills
January 2012
Further information from the Department for Education

Department for Education officials have provided the following responses to the questions put by the Committee:

Q. Why was the power to search for these items not included in the Education Act 1996 or the Education Act 2011?

A. The Government’s original intention was to make these regulations in autumn 2010 well in advance of legislating for wider powers in an education Bill so it was not considered necessary at that time to include these articles in the Bill clause. However, Ministers subsequently decided not to make them until the debate on the wider power (provided for in the Education Act 2011) had been concluded in both Houses of Parliament.

Q. How does the Department for Education consider this draft Statutory Instrument sits with the Department’s previous commitments to the Merits Committee on the timing of secondary legislation impacting on schools?

A. In his letter of 27 October 2010 to Lord Goodlad, the Minister of State for Schools confirmed that schools’ related Statutory Instruments would be laid by the start of the summer term and would have a common commencement date of 1 September, except in exceptional circumstances, such as where public commitments have already been made, or where a correcting regulation requires urgent change.

The Department’s view is that tabling these Regulations now meets a public commitment. Such a commitment was given to introducing these Regulations in the July 2010 Written Ministerial Statement and in the 2010 White Paper. Schools have known for some time about the proposed content of these Regulations. Furthermore, as they relate to a power rather than a duty it is not necessary for schools to make any special changes in advance of the Regulations coming into force.

Q. Has the Department identified any risks resulting from the draft Regulations? If so, how are these being managed?

A. We consider the risks associated with the draft Regulations are that: parents may be unhappy that their child can be searched without consent; and that teachers may be uncertain of the precise nature of their power to search. We consider that these risks apply to the existing powers and those introduced in the Education Act 2011 as well as to these particular Regulations.
We believe these risks are small but in terms of addressing them, we will ensure that clear advice is available to schools, parents and pupils on the use of these powers. We will do this by updating our current advice to reflect the provisions in these Regulations when they come into force.

Q. Will the Department for Education carry out any monitoring of the use of the power in the draft Regulations eg by sex/ethnicity, searches resulting in seizure?  
A. As explained in paragraph 12 of the Explanatory Memorandum, the Department has no plans to formally monitor or review the use of these powers. However, we will be alert to any feedback from teachers, parents or others on how these powers operate in practice. We will consider and respond to any information we receive.

Q. What is the current position on mobile phones, iPods and personal music players?  
A. Under the current search powers, head teachers and authorised members of staff can search without consent for mobile phones, iPods and personal music players if they reasonably suspect the item has been stolen. While the member of staff would be entitled to confiscate any device found as a result of a search, they would not be able to search or delete the content of that device.

The provisions in section 2 of the Education Act 2011 (as described in paragraph 4 above) may allow searches for mobile phones, iPods and personal music players where the member of staff reasonably suspects that the article has been used to commit an offence or cause personal injury to or damage to property. It may also be possible to search for such articles if they are identified in the school rules as an item which may be searched for. Authorised members of staff will also be able to examine, and if necessary delete, the content of these devices if they have a good reason to do so – in determining ‘good reason’ they are required to have regard to advice issued by the Secretary of State. The Regulations, if approved, will allow for searches of such articles if the member of staff reasonable believes it contains a “pornographic image”.

Q. Regulation 4(4) – will the Department for Education be providing guidance on the disposal of electronic pornographic images which takes account of IT complexities eg interface with Facebook?  
A. The Department’s document “Screening, searching and confiscation – advice for head teachers, staff and governing bodies” will be updated to reflect the provisions in the Education Act 2011. The Department will also update the advice to reflect these Regulations (subject to their approval by
Parliament). The revised advice will cover the disposal of the items included in these Regulations, including the disposal of pornographic images found on electronic devices. We will publish the updated advice when the new provisions come into force.

Department for Education
January 2012
APPENDIX 3: INTERESTS AND ATTENDANCE

Committee Members’ registered interests may be examined in the online Register of Lords’ Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

For the meeting on 31 January 2012 Members declared the following interests:

**Draft Modifications to the Standard Conditions of Electricity Supply Licenses (No. 1 of 2012)**

Baroness Butler-Sloss as the owner of some solar panelling used for small-scale generation of electricity.

**Attendance:**

The meeting was attended by Baroness Butler-Sloss, Baroness Eaton, Lord Goodlad, Baroness Hamwee, Lord Hart of Chilton, Lord Methuen, Lord Norton of Louth and Lord Plant of Highfield.