



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**First Report
of Session 2009-10**

Drawing special attention to:

Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (S.I. 2009/2265)

Valuation Tribunal for England (Membership and Transitional Provisions) Regulations 2009 (S.I. 2009/2267)

Financial Transparency (EC Directive) Regulations 2009 (S.I. 2009/2331)

Business Rate Supplements (Transfers to Revenue Accounts) (England) Regulations 2009 (S.I. 2009/2543)

Identity Cards Act 2006 (Provision of Information with Consent) Regulations 2009 (S.I. 2009/2575)

Court Martial Appeal Court Rules 2009 (S.I. 2009/2657)

Highway Litter Clearance and Cleaning (Transfer of Responsibility) (England) Order 2009 (S.I. 2009/2677)

Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009 (S.R. 2009/313)

Ordered by the House of Lords to be printed

2 December 2009

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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. 74, available on the Internet via www.parliament.uk/jcsi.

Remit

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

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

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

The Committee usually meets weekly when Parliament is sitting.

Publications

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

Committee staff

The current staff of the Committee are John Whatley (*Commons Clerk*), Kath Kavanagh (*Lords Clerk*) and Jennifer Steele (*Committee Assistant*). Advisory Counsel: Peter Davis, Peter Brooksbank and Christine Cogger (*Commons*); Allan Roberts and Peter Milledge (*Lords*).

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Statutory Instruments, Delegated Legislation Office, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2830; the Committee's email address is: jcsi@parliament.uk.

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Instruments reported

At its meeting on 2 December 2009 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 eight of those considered. The Instruments and the grounds for reporting them are given below. The relevant Departmental memoranda are published as appendices to this report.

1 S.I. 2009/2265: Reported for defective drafting

Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (S.I. 2009/2265)

1.1 The Committee draws the special attention of both Houses to this Order on the ground that it is defectively drafted in several respects.

1.2 Schedules 1 to 4 of this Order set out model provisions for inclusion in draft orders which are required to accompany an application to the Infrastructure Planning Commission for development consent.

1.3 Article 1(1) in each Schedule defines “relevant planning authority” as including a National Park Authority and the Broads Authority. In a memorandum printed at Appendix 1, the Department for Communities and Local Government accepts that in each case the definition should have included the words “if the land to which the provisions of this Order or requirements apply is situated in the area of that authority.

1.4 Article 26 in Schedule 1, article 32 in Schedule 2, and article 36 in Schedule 3 each contain provisions which, in specified circumstances, will apply instead of section 8(1) of the Compulsory Purchase Act 1965. Article 21(3) in Schedule 1, article 27(3) in Schedule 2, and article 31(3) in Schedule 3 are each expressed to be “subject to section 8 of the 1965 Act, as substituted” by article 26, 32 or 36 (as the case may be). The Department acknowledges that the wording in articles 21(3), 27(3) and 31(3) is unclear as it does not state that a revised version of section 8(1) only is substituted.

1.5 The Department also acknowledges that certain wording in Schedule 4 which is intended to require that something may not occur until specified documents have been submitted is defective as it states that something may not occur until the documents “shall be” submitted.

1.6 The Department states that it will revise the wording in future versions of the model provisions, to be included in an order proposed to be made in 2010.

1.7 The Committee accordingly reports this Order for these instances of defective drafting, acknowledged by the Department.

2 S.I. 2009/2267: Reported for the unexpected use of the enabling power

Valuation Tribunal for England (Membership and Transitional Provisions) Regulations 2009 (S.I. 2009/2267)

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

2.2 Regulation 5(1) provides that a person shall be disqualified for membership of the Valuation Tribunal for England (“the VTE”) in various specified circumstances. Regulation 5(3) states that a member of the VTE who is disqualified under paragraph (1) ceases to be a member of the VTE on the day on which that paragraph first applies to that member; this is expressed to be subject to paragraphs (4) and (5). Paragraphs (4) and (5) state when a person’s disqualification ceases in cases where the reason for disqualification was one related to bankruptcy.

2.3 The Committee understood the words of subsection in regulation 5(3) to mean that a person who was a member but was disqualified for reasons related to bankruptcy would automatically become a member again if the disqualification ceased by virtue of paragraph (4) or (5). In a memorandum printed at Appendix 2, the Department for Communities and Local Government confirms that the Committee had correctly understood the Department’s intention. The Department compares this instrument with the Valuation and Community Charge Tribunals Regulations 1989, but the relevant provisions of those Regulations did not contain anything comparable to regulation 5(3), for the provisions they refer to did no more than bring disqualification from membership to an end.

2.4 The Department states that the possibility that a member of the VTE would need to rely on paragraph (4) or (5) must be remote, and that if its interpretation of paragraph (3) is correct it must be doubtful whether a person who had been disqualified in such circumstances and “rehabilitated” by virtue of those paragraphs would want to be a member; an immediate resignation is perhaps the more likely outcome. If its interpretation is incorrect (that is, that the person does not automatically become a member again), it considers it doubtful that such a person would seek appointment as a member of the VTE.

2.5 It appears to the Committee from the Department’s comments that it had not envisaged the likelihood of a member who has become disqualified seeking to be a member again once his disqualification ceased. It has nevertheless legislated, not so much to enable such circumstances to happen as to cause membership to be restored as a matter of automatic consequence. **This appears to the Committee to amount to an unexpected use of the enabling power, and the Committee reports regulation 5(3) accordingly.**

3 S.I. 2009/2331: Reported for unexpected use of the enabling power and defective drafting

Financial Transparency (EC Directive) Regulations 2009 (S.I. 2009/2331)

3.1 The Committee draws the special attention of both Houses to these Regulations on the grounds that they make an unexpectedly limited exercise of power in one respect and are defectively drafted in several related respects.

3.2 These Regulations are made under section 2(2) of the European Communities Act 1972 and provide for the implementation of Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on transparency within certain undertakings. The structure of the Regulations is as follows:

- Regulation 2(1) contains key definitions. In particular, “contract” is to be construed as any agreement linking a public authority to a public undertaking (both expressions are defined) in respect of compensation (as defined).
- Regulations 3 to 5 impose requirements on any public undertaking with respect to the maintenance and retention of records of any public funds which are made available to it either directly by a public authority, or by a public authority through another public undertaking or financial institution, and with respect to the provision of certain information to the Secretary of State on request.
- Regulations 6 to 8 impose requirements on certain undertakings falling within paragraph (1) of regulation 6 (these undertakings are not necessarily public ones) to maintain and retain separate accounts showing the costs and revenues associated with different activities and full details of the methods by which costs and revenues are assigned or allocated to different activities, and to provide certain information to the Secretary of State on request.
- Regulation 9 requires public undertakings operating in the manufacturing sector to provide the Secretary of State with certain information each financial year and with such further information as is requested.
- Regulations 11 and 12 make provision as to contract terms with an implicit sanction for breach of contract. Those regulations state:

11. Where a public authority is a party to a contract that public authority shall ensure that the contract contains the elements specified in—

- (a) Regulations 3, 4 and 5, in respect of public undertakings;*
- (b) Regulations 6, 7 and 8, in respect of an undertaking required to maintain separate accounts; and*
- (c) Regulation 9 in respect of public undertakings operating in the manufacturing sector.*

12. It is an implied term of a contract that undertakings to the contract comply with the provisions of—

- (a) Regulations 3, 4 and 5, in respect of public undertakings;
- (b) Regulations 6, 7 and 8, in respect of an undertaking required to maintain separate accounts; and
- (c) Regulation 9 in respect of public undertakings operating in the manufacturing sector.

3.3 It seemed to the Committee that regulations 11 and 12 were unclear, and it sought a response from the Department for Business, Innovation and Skills on various questions designed to clarify the intended scope and purpose of those provisions. In a memorandum printed at Appendix 3 the Department—

- explains that regulations 11 and 12 are intended to be mutually exclusive and that the failure to set this out in the Regulations was an oversight;
- explains that in regulation 12 the phrase “undertakings to the contract” is intended to cover any undertaking which is a party to the contract (as defined), and accepts that this could have been expressed more clearly in the drafting;
- recognises that in regulation 12 the drafting does not adequately make clear that the implied term cannot be excluded by any contrary agreement;
- acknowledges that, as a result of the definition of “contract” in regulation 2, the scope of regulations 11 and 12 is too narrow and fails to cover cases involving undertakings which are not public ones.

3.4 The Department states that it will make an amending instrument to remedy these errors as soon as possible. **The Committee accordingly reports regulations 11 and 12 for defective drafting as respects the matters identified in the first three bullets in paragraph 3.3 above, acknowledged by the Department, and reports those regulations for making an unexpectedly limited use of power in respect of the matter identified in the fourth bullet in that paragraph, also acknowledged by the Department.**

4 S.I. 2009/2543: Reported for defective drafting

Business Rate Supplements (Transfers to Revenue Accounts) (England) Regulations 2009 (S.I. 2009/2543)

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

4.2 In a memorandum printed at Appendix 4, the Department for Communities and local Government acknowledges that the date “2010” in paragraph 3(1) of Schedule 1 should be “2011”.

4.3 Paragraph 1 of Schedule 2, states that “final return”, *except in the expressions “revised provisional return” and “varied provisional return”*, means the return required by paragraph 7(1). The Department acknowledges that the inclusion of the italicised words is a drafting error: they should have appeared in the definition of “provisional return”.

4.4 Paragraph 5 of Schedule 2 deals with the situation where provisional amounts transferable by billing authorities to relevant levying authorities fall to be adjusted. Sub-paragraph (2) requires a billing authority to submit to the relevant levying authority a return setting out: (a) the amount it has transferred from its collection fund to the relevant levying authority's revenue account during the year concerned; (b) the total amount it expects to transfer from its collection fund to the relevant levying authority's revenue account during the year concerned; and (c) the amount of the difference. Sub-paragraph (7) states what is to happen "if the amount referred to in sub-paragraph (2)(c) is greater than zero" but, read literally, that amount could be either (a) minus (b) or (b) minus (a). The Department does not consider that, if paragraph 5 is read as a whole and in context, there will be any uncertainty as to the meaning. Sub-paragraphs (7), (8) and (9) of paragraph 5 are intended to deal with the three possible cases: where (b) is greater than (a), where the amounts are equal, and where (a) is greater than (b) respectively.

4.5 The Committee would agree that there is unlikely to be a serious risk of confusion among authorities as to what is intended but the lack of clarity is something to be avoided and, as the Department has indicated its willingness to clarify the provision, the Committee encourages it to do so. The Department may wish to consider using in sub-paragraph (7) wording similar to that used in sub-paragraphs (8) and (9): "If the total amount calculated under sub-paragraph (3) is greater than the aggregate of the instalments the billing authority has paid to the relevant levying authority in the relevant year". The relationship between the three sub-paragraphs would then be completely clear.

4.6 Finally, the Department acknowledges that paragraph 10(1)(b) of Schedule 2 contains an erroneous repetition of a phrase.

4.7 The Department undertakes to make the necessary amendments before April 2010.

4.8 The Committee reports the above provisions for defective drafting, largely acknowledged by the Department.

5 S.I. 2009/2575: Reported for defective drafting

Identity Cards Act 2006 (Provision of Information with Consent) Regulations 2009 (S.I. 2009/2575)

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

5.2 Regulation 1(2) contains a definition of "airside pass" which refers to a "restricted zone", but the latter expression is not defined. In a memorandum printed at Appendix 5, the Home Office acknowledges that a definition should have been included.

5.3 The definition of "Passport validation service" in regulation 1(2) refers to an organisation that has entered into an agreement with the Identity and Passport Service, and regulation 4(1) refers to a person accredited by the Identity and Passport Service. The Department states that the Regulations should have included a definition of the Identity

and Passport Service (it is defined in other instruments as the Secretary of State acting through the Identity and Passport Service).

5.4 In its memorandum the Department undertakes to deal with the errors (and make one further small change that it considers desirable) in amending regulations to be laid in the immediate future. **The Committee accordingly reports these Regulations for defective drafting consisting of the omission of these two definitions, acknowledged by the Department.**

6 S.I. 2009/2657: Reported for defective drafting

Court Martial Appeal Court Rules 2009 (S.I. 2009/2657)

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

6.2 Rule 51(1) states:

The registrar must serve—

- (a) *on the person whose conviction or sentence the Commission refers to the court under section 12A of the 1995 Act, or on the person in relation to whom the finding was made that the Commission refers under that section, a copy of the reference;*
- (b) *on the person with respect to whose—*
 - (i) *conviction the Judge Advocate General or the Secretary of State makes the reference of a finding under section 34, or*
 - (ii) *sentence the Secretary of State makes the reference of a sentence under section 34,**a copy of the reference; and*
- (c) *on any other person directly affected by a reference referred to in subparagraph (a) or (b).*

6.3 In a memorandum printed at Appendix 6 the Ministry of Defence acknowledges that text has been omitted in error from rule 51(1)(c) and explains that the words “, a copy of the reference” should have been included at the end. The Department states that it will issue a correction slip if acceptable to the Committee. The Committee’s approach to correction slips is set out in its Thirteenth Report of Session 2008-09 in relation to S.I. 2009/356. In this case there is an obvious error and it is small-scale, but the nature of the correction required is not obvious, for it might be thought that in the case of a person mentioned in rule 51(1)(c) the intention was to require additional material to be served, not merely a copy of the reference. The Committee accordingly considers that a correction slip is not appropriate in this case and that an amending instrument is called for. **It reports rule 51(1)(c) for defective drafting, acknowledged by the Department.**

7 S.I. 2009/2677: Reported for defective drafting

Highway Litter Clearance and Cleaning (Transfer of Responsibility) (England) Order 2009 (S.I. 2009/2677)

7.1 The Committee draws the special attention of both Houses to this Order on the grounds that it is defectively drafted in four related respects.

7.2 The Order transfers certain responsibilities as respects specified parts of the trunk roads listed in the Schedule from the local authorities who would otherwise be responsible to the Secretary of State for Transport. In a memorandum printed at Appendix 7 the Department for Transport accepts that the specification of the relevant parts of the trunk roads concerned is incomplete in the case of three of the entries in the Schedule and that a fourth entry in the Schedule is incorrectly worded. The memorandum explains what was intended in each case and states that the Department will make a correcting instrument at the earliest opportunity. **The Committee accordingly reports the Schedule for defective drafting, acknowledged by the Department.**

8 S.R. 2009/313: Reported for failure to comply with proper drafting practice

Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009 (S.R. 2009/313)

8.1 The Committee draws the special attention of both Houses to these Rules on the ground that they fail to comply with proper drafting practice in two related respects.

8.2 Rule 2 contains a list of definitions which apply unless the context otherwise requires. "Category of offence" is defined in that rule as having the meaning given by paragraph 2 of Schedule 1, which reads as follows:

Categories of Offence

2. For the purposes of this Schedule—

- (a) the terms "summary offence", "hybrid offence", "I/TS offence" and "indictable only offence" have the respective meanings given in the list of offences established and maintained by the Public Prosecution Service for Northern Ireland and published by the Commission in August 2009, as amended;
- (b) aiding, abetting, counselling or procuring the commission by another person of an offence falls within the same category as the substantive offence to which they relate; and
- (c) attempts, conspiracy or incitement to commit an offence fall within the same category as the substantive offence to which they relate.

8.3 The only other reference in the Rules to the expression "categories of offence" is in that Schedule, in an italic sub-heading in Table 1 following paragraph 9. The Committee asked

the Northern Ireland Court Service what doubt was intended to be overcome by the inclusion of the definition of this expression in rule 2, and how that intention was achieved.

8.4 In a memorandum printed at Appendix 8 the Department states that section 10(2) of the Interpretation Act (Northern Ireland) 1954 provides that marginal notes in an enactment shall not be construed as part of the enactment and shall be deemed to be inserted for convenience of reference only; that paragraphs 4, 5(1) and 10(a) in Schedule 1 “include references to a category of offence, by way of the offence with which the assisted person was charged”; and that it considers that without the definition in rule 2 there may have been scope for argument as to which category of offence the assisted person was charged with.

8.5 Though not expressly stated in the memorandum, the intention may have been to identify by way of a substantive provision (rather than by means of a heading) what the expression “category of offence” meant. However the Committee is not persuaded that the definition in rule 2 as drafted serves any useful purpose, because the expression “categories of offence” does not appear in the body of paragraph 2 of Schedule 1 but only in the heading to that paragraph so the definition takes the reader no further forward; the Committee also notes that paragraphs 4, 5(1) and 10(a) of Schedule 1 do not themselves use the expression defined in rule 2. Given that the expression “categories of offence” only appears in Schedule 1, the Department could have dispensed with the referential definition in rule 2 and reworked paragraph 2(a) of Schedule 1 so that it stated that a category, *in relation to offences*, meant the following: a summary offence, a hybrid offence, an I/TS offence or an indictable only offence and that those terms had the respective meanings given in the list of offences [...]. **The Committee reports the Rules for failure to accord with proper drafting practice in this respect.**

8.6 Rule 2 states that “a Very High Cost Case” has the meaning given by rule 9, but that rule does not itself use that expression except in the heading. In its memorandum the Department does not answer the Committee’s question as to why the definition was so drafted. The Committee considers that in a situation like this either rule 2 should have stated that “a Very High Cost Case” was a case to which rule 9 applied or the body of rule 9 itself should have been expanded to provide an express meaning for the term. **The Committee reports the Rules for failure to accord with proper drafting practice in this respect.**

Instruments not reported

At its meeting on 2 December 2009 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported.

Annex

Instruments to which the Committee does not draw the special attention of both Houses

- *denotes that the written evidence submitted in connection with the instrument is printed with this Report*
- *denotes written evidence has been submitted but not printed*

Draft Instruments requiring affirmative approval

| | |
|-------------------|---|
| Draft S.I. | Banking Act 2009 (Exclusion of Insurers) Order 2009 |
| Draft S.I. | Charities Act 2006 (Changes in Exempt Charities) Order 2009 |
| Draft S.I. | Charities Act 2006 (Principal Regulators of Exempt Charities) Regulations 2009 |
| Draft S.I. | Climate Change Levy (Solid Fuel) (Revocation) Regulations 2009 |
| Draft S.I. | Community Radio (Amendment) Order 2010 |
| Draft S.I. | Crime (International Co-operation) Act 2003 (Designation of Participating Countries) (England, Wales and Northern Ireland) (No. 3) Order 2009 |
| Draft S.I. | Criminal Justice Act 2003 (Mandatory Life Sentence: Determination of Minimum Term) Order 2009 |
| Draft S.I. | European Communities (Definition of Treaties) (1996 Hague Convention on Protection of Children etc.) Order 2009 |
| Draft S.I. | General and Specialist Medical Practice (Education, Training and Qualifications) Order 2010 |
| Draft S.I. | Local Government (Wales) Measure 2009 (Consequential Modifications) Order 2009 |
| Draft S.I. | Immigration (Biometric Registration) (Amendment No. 2) Regulations 2009 |
| Draft S.I. | National Assembly for Wales (Legislative Competence) (Welsh Language) Order 2009 |
| Draft S.I. | Non-Domestic Rating (Chargeable Amounts) (England) Regulations 2009 |
| Draft S.I. | Pharmacy Order 2010* |

Instruments subject to annulment

- | | |
|-----------------------|---|
| S.I. 2009/1924 | Education (Miscellaneous Amendments relating to Safeguarding Children) (England) Regulations 2009 |
|-----------------------|---|
- **S.I. 2009/2375** Insolvency (Scotland) Amendment (No. 2) Rules 2009

| | |
|-----------------------|--|
| S.I. 2009/2562 | Cosmetic Products (Safety) (Amendment No. 3) Regulations 2009 |
| S.I. 2009/2829 | Controls on Dogs (Non-application to Designated Land) Order 2009 |
| S.I. 2009/2863 | Local Services (Operation by Licensed Hire Cars) Regulations 2009 |
| S.I. 2009/2875 | Criminal Defence Service (Interests of Justice) Regulations 2009 |
| S.I. 2009/2876 | Criminal Defence Service (General) (No. 2) (Amendment No. 4) Regulations 2009 |
| S.I. 2009/2878 | Criminal Defence Service (Financial Eligibility) (Amendment) Regulations 2009 |
| S.I. 2009/2890 | Scotch Whisky Regulations 2009 |
| S.I. 2009/2894 | Nursing and Midwifery Council (Midwifery and Practice Committees) (Constitution) (Amendment) Rules Order of Council 2009 |
| S.I. 2009/2908 | Immigration (Restrictions on Employment) (Amendment) Order 2009 |
| S.I. 2009/2909 | Child Support (Miscellaneous Amendments) (No. 2) Regulations 2009 |
| S.I. 2009/2930 | Occupational and Personal Pension Schemes (Authorised Payments) Amendment Regulations 2009 |
| S.I. 2009/2938 | Materials and Articles in Contact with Food (England) (Amendment) Regulations 2009 |
| S.I. 2009/2956 | Plant Health (Fees) (Forestry) (Amendment) Regulations 2009 |
| S.I. 2009/2957 | Waste Electrical and Electronic Equipment (Amendment) Regulations 2009 |
| S.I. 2009/2964 | Private Security Industry Act 2001 (Exemption) (Aviation Security) Regulations 2006 (Amendment) Regulations 2009 |
| S.I. 2009/2969 | Export Control (Amendment) (No. 4) Order 2009 |
| S.I. 2009/2970 | Rail Passengers' Rights and Obligations (Exemptions) Regulations 2009 |
| S.I. 2009/2974 | Statistics of Trade (Customs and Excise) (Amendment) Regulations 2009 |
| S.I. 2009/2984 | School Organisation (Establishment and Discontinuance of Schools) (England) (Amendment) Regulations 2009 |
| S.I. 2009/2992 | Public Contracts (Amendment) Regulations 2009 |
| S.I. 2009/2995 | Limited Liability Partnerships (Amendment) (No. 2) Regulations 2009 |
| S.I. 2009/3020 | Plant Health (Forestry) (Amendment) (No. 2) Order 2009 |
| S.I. 2009/3021 | Crime (International Co-operation) Act 2003 (Exercise of Functions) Order 2009 |
| S.I. 2009/3040 | Administrative Justice and Tribunals Council (Listed Tribunals) (Amendment) Order 2009 |

Instruments not subject to Parliamentary proceedings not laid before Parliament

| | |
|-----------------------|---|
| S.I. 2009/2260 | Health and Social Care Act 2008 (Commencement No. 12) Order 2009 |
| S.I. 2009/2862 | Primary Care Trusts (Establishment and Dissolution) Amendment Order 2009 |
| S.I. 2009/2873 | Charities Act 2006 (Principal Regulators of Exempt Charities) Regulations 2009 |
| S.I. 2009/2874 | Bolton Primary Care Trust (Establishment) Amendment Order 2009 |
| S.I. 2009/2879 | Criminal Justice Act 2003 (Commencement No. 23) Order 2009 |
| S.I. 2009/2892 | Geneva Conventions and United Nations Personnel (Protocols) Act 2009 (Commencement No.1) Order 2009 |
| S.I. 2009/2927 | Offshore Installations (Safety Zones) (No.3) Order 2009 |
| S.I. 2009/2950 | Youth Rehabilitation Order (Electronic Monitoring Requirement) Order 2009 |
| S.I. 2009/3032 | Identity Cards Act 2006 (Commencement No. 5) Order 2009 |

Appendix 1

S.I. 2009/2265: memorandum from the Department for Communities and Local Government

Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (S.I. 2009/2265)

1. The Committee has requested a memorandum on the following points–
 - (1) *In article 1(1) of the model conditions in Schedules 1 to 4, should sub-paragraphs (ii) and (iii) in the definition of “relevant planning authority” include the words “if the land to which the provisions of this Order or requirements apply is situated in the area of that authority”?*
 - (2) *Article 21(3) of the model conditions in Schedule 1 refers to “section 8 of the 1965 Act, as substituted by article 26”. Article 27(3) in Schedule 2 and article 31(3) in Schedule 3 contain wording to the same effect. Explain the intended effect of these provisions, given that article 26 in Schedule 1 (and the equivalent provisions in the other Schedules) does not purport to substitute a revised version of section 8 but states that the provisions of that article apply instead of section 8(1) (but not explicitly the remainder of section 8) of the 1965 Act if specified conditions are satisfied.*
 - (3) *In Schedule 4, should requirement 17(1) say “has been” instead of “shall be”, requirement 19(1) say “has ... been” instead of “shall ... be”, and requirements 20(1), 21(1) and 22(1) say “have ... been” instead of “shall ... be”?*
2. As regards the first point, the Department accepts that the wording quoted should have been included in sub-paragraphs (ii) and (iii) of the definitions of “relevant planning authority” in article 1(1) of the model conditions in Schedules 1 to 4.
3. On the second point, the Department accepts that the wording in article 21(3) is unclear in that it does not state that article 26 only substitutes a revised version of section 8(1), if certain conditions are satisfied, and not the whole of section 8.
4. In respect of the third point, the Department accepts that in those requirements it should have read “has been”, “has...been” or “have...been”, as the case may be, rather than “shall be” or “shall ... be”.
5. The wording will be amended in future versions of the model provisions, to be included in an Order which the Department proposes to make in 2010. In the meantime the Department will write to the Infrastructure Planning Commission and draw these issues to its attention.

10th November 2009

Department for Communities and Local Government

Appendix 2

S.I. 2009/2267: memorandum from the Department for Communities and Local Government

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| <p><i>Valuation Tribunal for England (Membership and Transitional Provisions) Regulations 2009 (S.I. 2009/2267)</i></p> |
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1. The Committee has requested a memorandum on the following point–

“Are the words “but this is subject to paragraphs (4) and (5)” in regulation 5(3) intended to have the effect that a person to whom either of those paragraphs applies automatically becomes a member again? If not, explain the intended purpose and effect of including those words”.

2. Yes. The intention was that regulation 5(3) should produce an effect in relation to persons of the descriptions in paragraph (1)(c) and (d) similar to that produced by virtue of paragraphs (2) and (3) of regulation 9 of the Valuation and Community Charge Tribunals Regulations 1989 (S.I. 1989/439) (“the 1989 Regulations”) in relation to persons of the similar descriptions in paragraph (1) of that regulation.
3. As the Committee will have noticed, the wording in paragraph (2) of regulation 5 of the 2009 Regulations differs from that in paragraphs (4) and (5). Paragraph (2) includes the words “paragraph (1) shall not apply to M if M's conviction is a spent conviction at the date of M's application for appointment”. Had the Department wished to achieve in paragraph (3) the same effect as is achieved by paragraph (2), wording similar to that in paragraph (2) would have been used.
4. So far as the Department is aware, neither paragraph (2) nor paragraph (3) of regulation 9 of the 1989 Regulations has ever been relied on. The possibility that a member of the Valuation Tribunal for England would need to rely on regulation 5(4) or (5) of the 2009 Regulations must be remote.
5. If the Department’s construction of regulation 5(3) is correct, it must be doubtful whether a person who had been disqualified in the circumstances mentioned in regulation 5(1)(c) or (d) and rehabilitated by virtue of paragraph (4) or (5) would want to continue as a member; an immediate resignation is perhaps the more likely outcome. If the Department’s construction is incorrect, it is doubtful that such a person would seek appointment as a member of the Tribunal.

10 November 2009

Department for Communities and Local Government

Appendix 3

S.I. 2009/2331: memorandum from the Department for Business, Innovation and Skills

Financial Transparency (EC Directive) Regulations 2009 (S.I. 2009/2331)

1. This Memorandum has been prepared by the Department for Business, Innovation and Skills and contains information for the Joint Committee on Statutory Instruments.

Issue 1

2. In its letter to the Department of 11 November 2009, the Committee requested a memorandum on the following point:

Are regulations 11 and 12 intended to be mutually exclusive? If so, why is this not stated? If not, how can the same obligations be the subject of both express and implied contractual terms?

3. Regulations 11 and 12 are intended to be mutually exclusive. The failure to set this out in the regulations is an over-sight for which the Department apologises. The Department will make an amending instrument to remedy this error.

Issue 2

4. In its letter to the Department of 11 November 2009, the Committee requested a memorandum on the following point:

In regulation 12...what is the phrase “undertakings to the contract” intended to cover and how is the intention given effect?

5. This phrase is intended to cover any undertaking which is a party to a contract (as defined in regulation 2). On reflection, the Department considers that this could have been expressed more clearly in the drafting. The Department will make an amending instrument to improve the drafting.

Issues 3 and 4

6. In its letter to the Department of 11 November 2009, the Committee requested a memorandum on the following two points:

In regulation 12...given the general obligation on undertakings required to maintain separate accounts, to retain them and supply information to

the Secretary of State about them (regulations 6 to 8, for breach of which there is no direct sanction, and Articles 4 and 6 of Commission Directive 2006/111/EC why –

- (i) *is the compliance duty expressed as an implied contractual term and thus apparently overridden by an express contractual term;*
 - (ii) *does the implicit sanction for breach of contract only apply in the case of “contracts” (see definition in regulation 2) in which case there is a link between a “public authority” and a “public undertaking” in respect of “compensation” (as defined in regulation 2), and not apply to other agreements within the scope of that Directive to which undertakings required to maintain separate accounts are parties?*
7. With regard to issue 3, the Department notes that the “*rule that a term will not be implied which is inconsistent with an express term does not apply in the case of a statutory implied term: any conflict must be resolved as a matter of construction*”¹, so it would be a matter of construction whether any express term affected the applicability of the implied term in regulation 12. The Department recognises that such uncertainty is undesirable. The Department will make an amending instrument to improve the drafting to provide that this statutory implied term cannot be excluded by any contrary agreement.
 8. The fourth issue which the Committee raises is correct, the implicit sanction for breach of contract will only apply in the case of contracts (as defined in regulation 2), and this has brought to light an unfortunate error in the application of the Regulations. As a result of the current definition of “contract”, where the undertaking concerned is not a public undertaking (as defined in regulation 2), they will fall outside the scope of regulations 11 and 12. The Department will make an amending instrument to remedy this error.
 9. The Department apologises for the presence of the errors in the Financial Transparency (EC Directive) Regulations 2009 and will make an amending instrument to remedy these errors as soon as possible. Copies of the amending instrument will be issued free of charge to purchasers of the defective instrument.

Department for Business, Innovation and Skills.

18 November 2009

¹ Chitty on Contracts (13th ed., 2008) Vol.1, para.13-029

Appendix 4

S.I. 2009/2543: memorandum from the Department for Communities and Local Government

Business Rate Supplements (Transfers to Revenue Accounts) (England) Regulations 2009 (S.I. 2009/2543)

1. The Committee has requested a memorandum on the following points–
 - 1) *Since an authority cannot levy BRS before 1 April 2010 (see section 27(1) of the Business Rate Supplements Act 2009), why does paragraph 3(1) of Schedule 1 require the billing authority to calculate the amount it received in BRS in the financial year ending on 31 March 2010?*
 - 2) *What is the intended purpose of the words “except in the expressions “revised provisional return” and “varied provisional return”” in the definition of “final return” in paragraph 1 of Schedule 2?*
 - 3) *How, for the purposes of paragraph 5(7) of Schedule 2, is it to be determined whether the amount referred to in sub-paragraph (2)(c) is greater or lesser than zero, given that the amount in question could be either that in sub-paragraph (2)(a) minus that in sub-paragraph (2)(b) or vice versa?*
 - 4) *In paragraph 10(1)(b) of Schedule 2, why do the words in parentheses duplicate what precedes them?*

2. The Department for Communities and Local Government’s response to those points is set out below.
 - (1) *Since an authority cannot levy BRS before 1 April 2010 (see section 27(1) of the Business Rate Supplements Act 2009), why does paragraph 3(1) of Schedule 1 require the billing authority to calculate the amount it received in BRS in the financial year ending on 31 March 2010?*

3. Having reviewed this paragraph we agree that the reference should be to the financial year beginning on 1st April 2011 and not 1st April 2010. We will amend at the earliest suitable opportunity prior to 1st April 2010.
 - (2) *What is the intended purpose of the words “except in the expressions “revised provisional return” and “varied provisional return”” in the definition of “final return” in paragraph 1 of Schedule 2?*

4. This is a drafting error. The words “except in the expressions “revised provisional return” and “varied provisional return” should appear in the definition of “provisional return” in the same paragraph. Again, we will amend the instrument to correct this error at the earliest suitable opportunity.

(3) How, for the purposes of paragraph 5(7) of Schedule 2, is it to be determined whether the amount referred to in sub-paragraph (2)(c) is greater or lesser than zero, given that the amount in question could be either that in sub-paragraph (2)(a) minus that in sub-paragraph (2)(b) or vice versa?

5. We have considered the point raised, but do not think that, reading paragraph 5 as a whole and in context, there would be any uncertainty as to the meaning of the wording in paragraph 5(7) referred to. Paragraph 5 makes provision for revisions to provisional returns and for the adjustment of instalments following a variation to a BRS. Sub-paragraphs (7), (8) and (9) make provision for what happens in the three possible cases which could arise following a variation: (7) deals with the case where the revised estimated amount payable for the year is greater than the amount already paid; (8) deals with the case where the revised estimated amount is equal to the amount already paid; and (9) deals with the case where the revised estimated amount is less than the amount already paid. The cross referencing in sub-paragraph (7) to paragraph 4 and the modifications made in sub-paragraph (7) to paragraph 4 (where (7) applies), make it clear that sub-paragraph (7) only applies where the revised estimated amount payable for the year is greater than the amount already paid (i.e. where instalments are still payable). Whilst we do not think it is necessary to add any words of clarification in paragraph 5(7), we would be content to do so (alongside the other amendments) should the JCSI think otherwise.

(4) In paragraph 10(1)(b) of Schedule 2, why do the words in parentheses duplicate what precedes them?

6. This is a drafting oversight. Whilst we do not believe that the additional wording has any practical or legal effect, we will remove it when we make the other amendments referred to above.

Department for Communities and Local Government
10th November 2009

Appendix 5

S.I. 2009/2575: memorandum from the Home Office

Identity Cards Act 2006 (Provision of Information with Consent) Regulations 2009 (S.I. 2009/2575)

1. This Explanatory Memorandum has been prepared by the Home Office and the Identity and Passport Service at the request of the Joint Committee on Statutory Instruments (“the Committee”) in a letter dated 4 November 2009.
2. The Committee has requested information from the Home Office on the following points:
 - (1) What is the meaning of “restricted zone” in the definition of “airside pass” in regulation 1(2), and why is “restricted zone” not defined itself?
 - (2) Why do –
 - (a) the definition of “Passport validation service” in regulation 1(2), and
 - (b) regulation 4(1),

appear to identify the Identity and Passport Service (which does not appear to have legal capacity separate from that of the Secretary of State) as the party to an agreement in the first case and the party responsible for accreditation in the second case?
3. The Home Office accepts that there are two definitions, those of “restricted zone” and “the Identity and Passport Service”, that should have been included in these Regulations. These definitions appear in other instruments laid at the same time as these Regulations and were omitted from these Regulations as an oversight.
4. The Home Office apologises for these omissions and undertakes to lay amending regulations in the next few days correcting this error. These amending regulations will also make one other small desirable change to the Regulations that has come to light since the Regulations were made. Copies will be issued free of charge to purchasers of the defective instrument.

Identity and Passport Service
November 2009

Appendix 6

S.I. 2009/2657: memorandum from the Ministry of Defence

Court Martial Appeal Court Rules 2009 (S.I. 2009/2657)

The Committee has asked the Ministry of Defence to submit a memorandum on the above instrument dealing with the following point:

What text has been omitted from rule 51(1) (c)?

The text, “, a copy of the reference” was omitted in error from rule 51(1) (c) and should have been included immediately after the words “in sub-paragraph (a) or (b)”. The intended effect was that the duty to provide a copy of the reference should also apply to those persons detailed in sub-paragraph (c).

The Ministry of Defence apologises for this error, and if it is acceptable to the Committee, will issue the necessary correction slip.

The Ministry of Defence
16 November 2009

Appendix 7

S.I. 2009/2677: memorandum from the Department for Transport

Highway Litter Clearance and Cleaning (Transfer of Responsibility) (England) Order 2009 (S.I. 2009/2677)

By a letter dated 11th November 2009 the Committee has asked for a memorandum on the following points:

In column 2 of the Schedule –

- (a) *in the third item, should the words “to the boundary between the Borough of Elmbridge” have been included before the words “and the Royal Borough of Kingston upon Thames”;*
- (b) *in the fifth entry, there appears to be a missing boundary – how should the provision read;*
- (c) *in the sixth entry, there appears to be a missing boundary – in relation to the A30 – how should the provision read;*

(d) *in the last entry but one, should “at the junction” be “to the junction”?*

The Department accepts that in Column 2 of the Schedule in the third item the words “to the boundary between the Borough of Elmbridge” should be included before the words “and the Royal Borough of Kingston Upon Thames”.

In the fifth entry, the words “and the Borough of Runnymede to the boundary between the Royal Borough of Windsor and Maidenhead” should be included before the words “and the Borough of Spelthorne”.

In the sixth entry, in relation to the A30 the words “and the Royal Borough of Windsor and Maidenhead to the boundary between the Borough of Spelthorne” should be included before the words “and the London Borough of Hounslow”.

In the last entry but one, the words “at the junction” should be “to the junction”.

The Department accepts that the drafting of the Schedule does not provide the clarity that ought to have been provided and is grateful to the Committee for drawing attention to the errors. The Department apologises for this and will make a correcting instrument at the earliest opportunity.

In the meantime the litter clearance and cleaning duties are currently being carried out on behalf of the Secretary of State for Transport on the correct parts of the highways and therefore there will be no practical impact on litter duties as a result of these corrections.

Department for Transport
16th November 2009

Appendix 8

S.R. 2009/313: memorandum from the Northern Ireland Court Service

Magistrates' Courts and County Court Appeals (Criminal Legal Aid) (Costs) Rules (Northern Ireland) 2009 (S.R. 2009/313)

1. What doubt is intended to be overcome by the inclusion of a definition of “category of offence” in rule 2, and how does the inclusion of that rule achieve that intention?

The expression “category of offence” is used in the following provisions contained in Schedule 1 to this instrument: paragraph 2 (in the heading, and by reference in subparagraphs (b) and (c)), and also in the sub-heading used in Table 1 under the heading ‘cases heard in the magistrates’ court’.

Section 10(2) of the Interpretation Act (Northern Ireland) 1954 – 1954 c. 33 (N.I.) provides that marginal notes in an enactment shall not be construed as part of the enactment and shall be deemed to be inserted for convenience of reference only.

Paragraphs 4, 5(1) and 10(a) in Schedule 1 to the instrument also include references to a category of offence, by way of the offence with which the assisted person was charged.

In developing the levels of the various fees prescribed by this instrument, the department analysed the payments made under the previous instrument in operation in Northern Ireland according to the category of offence with which the assisted person was charged and the nature of the disposal of the case. To ensure the smooth operation of this instrument, it was necessary to include a definition covering the various categories of offence in question.

The policy decision taken was to link that definition to the respective meanings given to the terms “summary offence”, “hybrid offence”, “I/TS offence” and “indictable only offence” given in the list of offences established and maintained by the Public Prosecution Service for Northern Ireland. Furthermore, to ensure transparency, the policy decision was also taken to require the Northern Ireland Legal Services Commission to publish that list on its website.

If a definition of the expression “category of offence” had not been included in rule 2, it is considered there may have been scope for argument between the representative who acted in an individual case and the Commission as to which category of offence the assisted person was charged with.

2. Explain why the definition of “a Very High Cost Case” in rule 2 is drafted by reference to a provision which does not itself use that expression apart from in the heading.

Apart from the heading in rule 9, the expression “a Very High Cost Case” is used in the following provisions contained in this instrument:

rules 5(2), 6(5), 8(4), 10(1) and 12(1)(c); paragraph 1(2) in Schedule 1; and in Schedule 2, the heading, together with paragraphs 2(2) and 3(4).

The expression is also used in the Explanatory Note to the instrument.

Section 10(2) of the Interpretation Act (Northern Ireland) 1954 provides that marginal notes in an enactment shall not be construed as part of the enactment and shall be deemed to be inserted for convenience of reference only.

Rule 9 prescribes the mechanism by which a case is to be designated as a Very High Cost Case, and the criteria to be applied by the Commission where a representative applies under this rule.

Northern Ireland Court Service

Date: 18 November 2009