STATUTORY INSTRUMENTS

2012 No. 2613

TOWN AND COUNTRY PLANNING, ENGLAND

The Town and Country Planning (Local Planning) (England) (Amendment) Regulations 2012

Made - - - -	*8th October 2012*
Laid before Parliament	*18th October 2012*
Coming into force - -	*12th November 2012*

The Secretary of State, in exercise of the powers conferred by sections 33A(9) and 122(1) of the Planning and Compulsory Purchase Act 2004(**a**), makes the following Regulations.

Citation, commencement and application

1.—(1) These Regulations may be cited as the Town and Country Planning (Local Planning) (England) (Amendment) Regulations 2012 and come into force on 12th November 2012.

(2) These Regulations apply in relation to England only.

Amendments to the Town and Country Planning (Local Planning) (England) Regulations 2012

2.—(1) The Town and Country Planning (Local Planning) (England) Regulations 2012(**b**) are amended as follows.

(2) For regulation 4(2) substitute—

"(2) The bodies prescribed for the purposes of section 33A(9) of the Act are—

(a) each local enterprise partnership; and

(b) each local nature partnership.".

(3) For regulation 4(3) substitute—

"(3) In this regulation—

"local enterprise partnership" means a body, designated by the Secretary of State, which is established for the purpose of creating or improving the conditions for economic growth in an area; and

"local nature partnership" means a body, designated by the Secretary of State, which is established for the purpose of protecting and improving the natural environment in an area and the benefits derived from it.".

Richard Benyon
Parliamentary Under Secretary of State

(**a**) 2004 c.5. Section 33A was inserted by section 110(1) of the Localism Act 2011 (c.20).
(**b**) S.I. 2012/767.

Date 8th October 2012

Department for Environment, Food and Rural Affairs

EXPLANATORY NOTE

(This note is not part of the Regulations)

The Planning and Compulsory Purchase Act 2004 ("the Act") established a system of local development planning in England. The Town and Country Planning (Local Planning) (England) Regulations 2012 ("the Principal Regulations") make provision for the operation of that system. Section 33A of the Act imposes a duty on local planning authorities, county councils and prescribed persons to co-operate with each other and with persons prescribed under section 33A(9) in relation to the planning of certain categories of sustainable development or use of land. Each person bound by this duty must also have regard to the activities of persons prescribed under section 33A(9), so far as they are relevant to activities specified in section 33A(3). These Regulations amend the Principal Regulations so that such prescribed persons include each local nature partnership.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sectors is foreseen.

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Live Music Act 2012

4 Short title, commencement and extent

(1) This Act may be cited as the Live Music Act 2012.

(2) This Act shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint.

(3) This Act extends to England and Wales only.

Official Secrets Act 1989

14 Orders

(1) Any power of the Secretary of State under this Act to make orders shall be exercisable by statutory instrument.

(2) No order shall be made by him for the purposes of section 7(5), 8(9) or 12 above unless a draft of it has been laid before, and approved by a resolution of, each House of Parliament.

(3) If, apart from the provisions of this subsection, the draft of an order under any of the provisions mentioned in subsection (2) above would be treated for the purposes of the Standing Orders of either House of Parliament as a hybrid instrument it shall proceed in that House as if it were not such an instrument.

Planning and Compulsory Purchase Act 2004

122 Regulations and orders

(1) A power to prescribe is (unless express provision is made to the contrary) a power to prescribe by regulations exercisable—

(a) by the Secretary of State in relation to England;

(b) by the National Assembly for Wales in relation to Wales.

(2) References in this section to subordinate legislation are to any order or regulations under this Act.

(3) Subordinate legislation—

(a) may make different provision for different purposes;

(b) may include such supplementary, incidental, consequential, saving or transitional provisions (including provision amending, repealing or revoking enactments) as the person making the subordinate legislation thinks necessary or expedient.

(4) A power to make subordinate legislation must be exercised by statutory instrument.

(5) A statutory instrument is subject to annulment in pursuance of a resolution of either House of Parliament unless it contains—

(a) . . .

(b) an order under section 98, 116(1) or 119(2);

(c) an order under section 110(2);

(d) an order under section 121(1) to which subsection (8) applies;

(e) an order under section 121(4);

(f) provision amending or repealing an enactment contained in an Act;

(g) subordinate legislation made by the National Assembly for Wales.

(6) A statutory instrument mentioned in subsection (5). . . (c) or (f) must not be made unless a draft of the instrument has been laid before and approved by resolution of each House of Parliament.

DRAFTING STATUTORY INSTRUMENTS – DAY 1

DANGEROUS DOGS – PART 2

PART 2A

It is now November. Parliament was adjourned until 20 September and then prorogued between 30 September and 1 November. The Order was made on 25 July, laid on 26 July and came into force on 12 August (in breach of the 21 day rule). It has been in force for nearly three months.

An Opposition MP, the Honourable Member for the Isle of Dogs, lodges a prayer for annulment of the Order on 3 November.

Is this in order?

Part 2B

Attached are copies of the Order as made in 1991 (S.I. 1991/1743) and a version of the same Order drafted in a different way (marked "A").

Can you find any small errors of a typographical nature in S.I. 1991/1743?

What differences of approach have been taken by the drafter of A?

STATUTORY INSTRUMENTS

1991 No. 1743

DOGS

The Dangerous Dogs (Designated Types) Order 1991

Made - - - -	*25th July 1991*
Laid before Parliament	*26th July 1991*
Coming into force	*12th August 1991*

In exercise of the powers conferred upon me by section 1(1)(c) of the Dangerous Dogs Act 1991(a), I hereby make the following Order:

1. This Order may be cited as the Dangerous Dogs (Designated Types) Order 1991 and shall come into force on 12th August 1991.

2. There are hereby designated for the purposes of section 1 of the Dangerous Dogs Act 1991 dogs of the following types, being types appearing to be bred for fighting or to have the characteristics of types bred for that purpose, namely:

(a) any dog of the type known as the Dogo Argentino; and

(b) any dog of the type known as the Fila Braziliero.

Home Office
25th July 1991

Kenneth Baker
One of her Majesty's Principal Secretaries of State

(a) 1991 c.65.

A

STATUTORY INSTRUMENTS

1991 No.

DOGS

The Dangerous Dogs (Designated Types) Order 1991

Made - - - -	*25th July 1991*
Laid before Parliament	*26th July 1991*
Coming into force - -	*12th August 1991*

The Secretary of State makes the following Order in exercise of the powers conferred by section 1(1)(c) of the Dangerous Dogs Act 1991(**a**).

Citation and commencement

1. This Order may be cited as the Dangerous Dogs (Designated Types) Order 1991 and comes into force on 12th August 1991.

Designation

2.—(1) For the purposes of section 1 of the Dangerous Dogs Act 1991 the types of dog specified in paragraph (2), being types appearing—

(a) to be bred for fighting, or

(b) to have the characteristics of types bred for that purpose,

are designated.

(2) The types of dogs are—

(a) the type known as the Dogo Argentino; and

(b) the type known as the Fila Braziliero.

Home Office
25th July 1991

Kenneth Baker
One of Her Majesty's Principal Secretaries of State

(**a**) 1991 c. 65.

Draft Order laid before Parliament under section 14(2) of the Official Secrets Act 1989, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2012 No.

OFFICIAL SECRETS

The Official Secrets Act 1989 (Prescription) (Amendment) Order 2012

Made - - - -	***
Coming into force - -	*22nd November 2012*

The Secretary of State makes the following Order in exercise of the powers conferred by sections 12(1)(g) and 13(1)(**a**) of the Official Secrets Act 1989(**b**).

In accordance with section 14(2) of that Act a draft of this Order was laid before Parliament and approved by a resolution of each House of Parliament.

Citation and commencement

1. This Order may be cited as the Official Secrets Act 1989 (Prescription) (Amendment) Order 2012 and comes into force on 22nd November 2012.

Amendment to the Official Secrets Act 1989 (Prescription) Order 1990

2.—(1) The Official Secrets Act 1989 (Prescription) Order 1990(**c**) is amended as follows.

(2) At the end of Schedule 2 insert—

"A Police and crime commissioner
A Deputy police and crime commissioner
Mayor's Office for Policing and Crime
Deputy Mayor for Policing and Crime
The Lord Mayor of the City of London
The representative of the Court of Common Council acting in its capacity as the Police Authority for the City of London"

Signed by the authority of the Secretary of State

Date

Ministry of Justice

(**a**) See the definition of "prescribed".
(**b**) 1989 c.6.
(**c**) S.I. 1990/200. Schedule 2 to that Order has been amended by S.I. 1999/1042, S.I. 2004/1823 and S.I. 2006/362.

EXPLANATORY NOTE

(This note is not part of the Order)

Section 1 of the Police Reform and Social Responsibility Act 2011 ("the 2011 Act") provides for the establishment of a police and crime commissioner for each police area in England and Wales outside London, with the functions of securing the maintenance of an efficient and effective police force for the area and holding the chief constable to account for the exercise of the chief constable's functions. A police and crime commissioner may appoint a deputy and arrange for the deputy to exercise any of the police and crime commissioner's functions (section 18(1) of the 2011 Act).

Section 3 of the 2011 Act provides for the establishment of the Mayor's Office for Policing and Crime with the same functions in relation to the metropolitan police district. The Mayor's Office for Policing and Crime is occupied by the person who is the Mayor of London (section 3(3) of the 2011 Act). The Mayor's Office for Policing and Crime may appoint a Deputy Mayor for Policing and Crime to exercise functions of the Office (section 19(1) of the 2011 Act).

The 2011 Act does not change the policing governance arrangements in the City of London, which are set out in the City of London Police Act 1839 ("the 1839 Act"). Under the 1839 Act the Common Council (which is presided over by the Lord Mayor) has the functions of a police authority in relation to the City of London police area, and section 56 allows the Common Council to appoint a committee to carry out these functions.

This Order amends the Official Secrets Act 1989 (Prescription) Order 1990 by adding the holders of the offices mentioned above to those who are prescribed as Crown servants for the purposes of the Official Secrets Act 1989 ("the Act"). Accordingly, the information that these persons hold by virtue of their office becomes information to which the Act applies, if it otherwise falls within sections 1 to 4 and 8 of the Act, and these persons are Crown servants for the purposes of the provisions of the Act relating to offences which can be committed by Crown servants and the authorisation of disclosures.

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DRAFTING STATUTORY INSTRUMENTS

DAY 1: Review of Handling and Practice

BEFORE YOU PICK UP A PEN . . .

You work in the Department of Public Information, headed by the Minister of Information.

You are instructed to draft some regulations using the following power contained in the Print What You Like Act 1968—

> "The Minister of Public Affairs, after consultation with Media representatives, shall make regulations prescribing the size of print used in newspapers, magazines and other printed matter."

Based on this limited information, what might you start to think about before putting pen to paper?

Draw up a checklist.

DRAFTING STATUTORY INSTRUMENTS – DAY 1

DANGEROUS DOGS – PART 1

The Secretary of State has been warned by the Kennel Club of Great Britain that imports of the Fila Braziliero and the Dogo Argentino are about to start. Both these breeds are large, fierce and aggressive dogs used for dog-fighting in South America. In addition, the Secretary of State was recently bitten by a Corgi at a Royal Garden Party. Corgis are small, fierce and aggressive dogs and come from Wales.

The Secretary of State intends to use his powers in section 1(1)(c) of the Dangerous Dogs Act 1991 to designate the Fila, Dogo and Corgi for the purposes of section 1 (attached). He accepts that Corgis have not been bred for fighting but, as far as he is concerned, they have all the characteristics of a fighting dog – after all, he was the victim of an unprovoked attack by one.

It is 14 July. Parliament is adjourning for the long vacation on 27 July. The Secretary of State, a great admirer of the Doges, is jetting off to Venice on 28 July for a well-deserved break. He would like the Order made, laid and in force by 27 July. He wants to have a press conference before he leaves for his holiday to show that he has "done something" about dangerous dogs. Your administrator can't tell you anything else but says that the Secretary of State won't accept an answer that involves any element of saying "no".

What advice will you give about—

- the policy to be implemented, and
- procedural difficulties relating to the making of the Order?

If you have time, start to think about what the Order might look like in outline.

1 Dogs bred for fighting

(1) This section applies to—

(a) any dog of the type known as the pit bull terrier;

(b) any dog of the type known as the Japanese tosa; and

(c) any dog of any type designated for the purposes of this section by an order of the Secretary of State, being a type appearing to him to be bred for fighting or to have the characteristics of a type bred for that purpose.

(2) No person shall—

(a) breed, or breed from, a dog to which this section applies;

(b) sell or exchange such a dog or offer, advertise or expose such a dog for sale or exchange;

(c) make or offer to make a gift of such a dog or advertise or expose such a dog as a gift;

(d) allow such a dog of which he is the owner or of which he is for the time being in charge to be in a public place without being muzzled and kept on a lead; or

(e) abandon such a dog of which he is the owner or, being the owner or for the time being in charge of such a dog, allow it to stray.

(3) After such day as the Secretary of State may by order appoint for the purposes of this subsection no person shall have any dog to which this section applies in his possession or custody except—

(a) in pursuance of the power of seizure conferred by the subsequent provisions of this Act; or

(b) in accordance with an order for its destruction made under those provisions;

but the Secretary of State shall by order make a scheme for the payment to the owners of such dogs who arrange for them to be destroyed before that day of sums specified in or determined under the scheme in respect of those dogs and the cost of their destruction.

(4) Subsection (2)(b) and (c) above shall not make unlawful anything done with a view to the dog in question being removed from the United Kingdom before the day appointed under subsection (3) above.

(5) The Secretary of State may by order provide that the prohibition in subsection (3) above shall not apply in such cases and subject to compliance with such conditions as are specified in the order and any such provision may take the form of a scheme of exemption containing such arrangements (including provision for the payment of charges or fees) as he thinks appropriate.

(6) A scheme under subsection (3) or (5) above may provide for specified functions under the scheme to be discharged by such persons or bodies as the Secretary of State thinks appropriate.

(7) Any person who contravenes this section is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale or both except that a person who publishes an advertisement in contravention of subsection (2)(b) or (c)—

(a) shall not on being convicted be liable to imprisonment if he shows that he published the advertisement to the order of someone else and did not himself devise it; and

(b) shall not be convicted if, in addition, he shows that he did not know and had no reasonable cause to suspect that it related to a dog to which this section applies.

(8) An order under subsection (1)(c) above adding dogs of any type to those to which this section applies may provide that subsections (3) and (4) above shall apply in relation to those dogs with the substitution for the day appointed under subsection (3) of a later day specified in the order.

(9) The power to make orders under this section shall be exercisable by statutory instrument which, in the case of an order under subsection (1) or (5) or an order containing a scheme under subsection (3), shall be subject to annulment in pursuance of a resolution of either House of Parliament.

STATUTORY INSTRUMENTS

2012 No. 2115 (C. 84)

LICENCES AND LICENSING, ENGLAND AND WALES

The Live Music Act 2012 (Commencement) Order 2012

Made - - - - *14th August 2012*

The Secretary of State makes this Order in exercise of the powers conferred by section 4(2) of the Live Music Act 2012(**a**).

Citation

1. This Order may be cited as the Live Music Act 2012 (Commencement) Order 2012.

Commencement

2. The Live Music Act 2012 comes into force on 1st October 2012.

John Penrose
Parliamentary Under Secretary of State
Department for Culture, Media and Sport

14th August 2012

(**a**) 2012 c.2

EXPLANATORY NOTE

(This note is not part of the Order)

This Order brings into force on 1st October 2012 all the provisions of the Live Music Act 2012.

The Live Music Act 2012 amends section 177 of and Schedule 1 to the Licensing Act 2003, and also inserts a new section 177A. The changes to the Licensing Act 2003 deregulate in part the performance of live music, remove regulation about the provision of entertainment facilities and extend the exemption which relates to music accompanying morris dancing or dancing of a similar nature.

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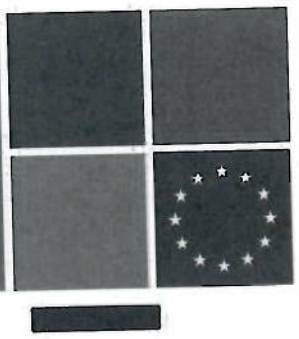
Drafting SIs – Implementing European Obligations



Introduction

- European obligations
- Powers
- Drafting
- Guidance

European obligations

- European instruments
- Regulations
- Directives
- Interpreting Directives
- Advising on implementation
- Gold plating

European obligations

Sources of obligations

4

- We are usually presented with–
  - a Regulation, or
  - a Directive
- There are other sources of obligations too–
  - Treaties
  - Decisions
  - subordinate legislation issued by the Commission
  - judgments interpreting European obligations

European obligations

Regulations

5

- A Regulation is "... binding in its entirety and directly applicable in all Member States ..."
  - section 2(1) of the European Communities Act 1972 gives them legal effect without any need for further legislation
- Regulations are implemented but not transposed
- Inconsistent national provisions should be repealed
- We often need to provide for–
  - appointment of a "competent authority"
  - enforcement – sanctions, inspection powers, etc

European obligations

Directives

6

- Directives are "... binding as to the result to be achieved ... but shall leave to the national authorities the choice of form and method"
- Directives must be transposed into law
- There are limited exceptions, e.g. reporting obligations

Interpreting Directives

- You need to understand what the text means
  - ... but remember that European law doesn't always mean what it says, and doesn't always say what it means ...
- Consider the purpose of the provision, looking at –
  - the recitals
  - other language versions
  - the negotiating history
- Interpret derogations restrictively

Advising on implementation

- Infraction proceedings
  - late or inadequate transposition can lead to fines
- Direct and indirect effect
  - untransposed provisions may be enforced against the State
  - conflicting provisions may be set aside
  - domestic law must be interpreted consistently
- *Francovich* damages
  - Claims brought against the State for serious breaches
- Judicial review

Gold plating

- Coalition policy is that we will not gold-plate when implementing European law
- Any provisions which go beyond the minimum EU obligations count as a departmental "in" for the purposes of One In Two Out
- Ultimately, lawyers will be asked whether gold-plating has taken place
- In practice it can be very hard to identify

Powers

- Overview
- Section 2(2) of the European Communities Act 1972
- Scope and limitations on the use of section 2(2)
- Combining powers
- Ambulatory references
- Procedural issues when using section 2(2)

Overview of powers for implementing European law

11

- In practice, tight timetables limit our ability to use primary legislation
- Suitable domestic powers should be used if possible
- Where they are not adequate, section 2(2) of the European Communities Act 1972 can be used
- Section 2(2) is a wide power – but is not unlimited
- Powers can be combined

The power in section 2(2)

12

- The power is only available to a designated minister or department
- The power is to make orders, rules, regulations or schemes
- Section 2(2)(a)–
  - power to make provision for the purpose of implementing EU obligations or enabling rights to be enjoyed
- Section 2(2)(b)–
  - power to make provision for matters "arising out of or related to" any such obligations or rights

The scope and limitations of the power

Section 2(4) and Schedule 2

13

- Section 2(4) enables us to "make any such provision (of any such extent) as may be made by Act of Parliament"
- But that is subject to Schedule 2, which imposes important limitations–
  - no power to impose or increase taxation
  - no retrospective effect
  - no sub-delegation of legislative power
  - no criminal penalties of more than the specified amount

No power to impose or increase taxation

14

- You cannot "make any provision imposing or increasing taxation" – paragraph 1(1)(a)
- But you can impose fees and charges for services
- Where it is available, you should rely on section 56 of the Finance Act 1973 to impose fees or charges–
  - applies to fees charged by government departments
  - fees must be for services required by European obligations
  - requires Treasury consent
  - restricted to regulations

No retrospective effect

15

- You cannot make a provision "taking effect from a date earlier than that of the making of the instrument" – paragraph 1(1)(b)
- So you can't use section 2(2) to try to get around the effects of late implementation by backdating the provisions

No sub-delegation of legislative power

16

- You cannot "confer any power to legislate by means of orders, rules, regulations or other subordinate instrument, other than rules of procedure for any court or tribunal" – paragraph 1(1)(c)
- Paragraph 1(2) contains provisos–
  - you can modify an existing power to legislate or extend it for purposes of a like nature to those for which it was conferred
  - you can confer a power to make directions as to matters of administration

Limitations on criminal penalties

17

- You cannot create any new criminal offence–
  - punishable, on conviction on indictment, with imprisonment of more than 2 years
  - punishable, on summary conviction, with imprisonment of more than 3 months or with a fine of more than level 5 on the standard scale
- Applies equally where an existing offence is extended

Section 2(2) – procedural issues

18

- Timing – meet your transposition deadline
- Do you need a Designation Order?
- Which Parliamentary procedure will you use?
  - you can choose negative or affirmative resolution
- You will need Parliamentary Counsel's approval to amend primary legislation
- Don't forget ... devolution/Gibraltar/Isle of Man

Combining powers

19

- It has always been possible to combine powers and make a single instrument, where the instrument is of the same type and the procedure is identical
- But don't underestimate the complexity that results
- When using section 2(2) you can also combine instruments with different procedural requirements
  - see paragraphs 2A, 2B and 2C of Schedule 2 to the 1972 Act
- In essence, you apply the procedure which requires the higher level of Parliamentary scrutiny

Ambulatory references

20

- Paragraph 1A of Schedule 2 allows the drafter, when implementing EU obligations, to provide that cross-references to EU instruments are to be ambulatory
- Applies when making subordinate legislation under any domestic power – not just under section 2(2)
- Only works for textual amendments – not where the old provision has been repealed and re-enacted
- Take care when creating criminal offences

Drafting

- Interpretation
- Copy out -v- Elaboration
- Ambiguity
- Review provisions

Interpretation

22

- Many useful terms are defined in the Interpretation Act 1978 and the European Communities Act 1972
  - don't forget Part II of Schedule 1 to the 1972 Act
- Section 20A of the Interpretation Act 1978 provides that references to EU instruments are references to those instruments as last amended, extended or applied
  - removes the need for "... as last amended by ..."
  - but does not have ambulatory effect
  - does not cater for repeal and re-enactment

Copy out -v- Elaboration

Meaning of terms and coalition policy

23

- Copy out – repeating as far as possible original wording of the Directive
- Elaboration – setting out obligations in your own words
- The Guiding Principles for EU Legislation include–
  - always use copy-out for transposition where it is available, except where doing so would adversely affect UK interests e.g. by putting UK businesses at a competitive disadvantage compared with their European counterparts.
  - decisions not to copy out will need to be justified

Copy out -v- Elaboration

Dealing with ambiguity

24

- Copy-out reduces the chance of gold-plating
- But it passes any ambiguity and risk to business
- Clarity provides legal certainty and is essential when imposing criminal sanctions
- It can be difficult to apply copy-out principles when amending complex domestic provisions
- In practice, UK interests may be best served by a mixture of copy out and elaboration

Review clauses

- Implementing legislation should contain a review clause – not a sunset clause
- Duty to review the legislation every 5 years and report conclusions
- Assessment of whether–
  - legislation has met its objectives
  - objectives could be met with lower regulatory burden
- Model provision is available

Some points from Statutory Instrument Practice

- Titles of instruments (2.17.3)
- Citing enabling provisions (2.17.4)
- Need to identify EU obligations you are implementing (2.17.5) and to identify provisions that do not implement EU law (2.17.6)
- Method of citing EU instruments (2.17.7 and Appendix D)
- Choice of procedure (4.11.1)
- Transposition notes (4.11.2 and following)
- Papers for JCSI/SCSI (5.4.10)

Accompanying documents

- Explanatory Note
- Explanatory Memorandum
- Transposition Note (a table)
- Copies of the European legislation
- Notification to Commission of implementation

Guidance

- LION – European Zone
  - COELA Guidance – "Implementing European Law"
  - Designation Order database
  - Guidance on electronic notification of transposition
- BIS website
  - Better Regulation Framework Manual July 2013
- JCSI reports

GLS Core Training

DRAFTING STATUTORY INSTRUMENTS

8th – 10th October 2014

One Kemble Street

Day 2 drafting exercise: the Weights and Burdens Regulations 1951

1. Draft a statutory instrument, including the explanatory note, based on the drafting instructions that follow.

2. Give the policy lead any advice of a legal, legal policy or procedural nature that you think necessary to accompany the draft or enable further drafts to be developed.

Assume that you have been given all the necessary statutory material and that there are no complicating EU law, human rights or devolution issues.

DRAFTING INSTRUCTIONS

1. There is a small job I have been meaning to put to your colleagues for some time and I should be grateful for your help. I do not think you will find the following is too taxing and I look forward to receiving a draft which we can put in the Secretary of State's weekend box tomorrow for signature.

2. The Department for Weights and Burdens has, of course, been in existence for a very long time and we and our predecessors over many generations have laboured to ensure that weights and so on are just and true in the interests both of manufacturers and traders and of what we are now accustomed to calling consumers. We have a proud tradition which we would be reluctant to see Ministers jeopardise but, equally, we do not want to be seen as so bound by tradition that we do not see a good idea when we meet it. In the current spirit of deregulation, we have identified a number of areas in which some of the existing controls might be modified in order to meet changing patterns of trade and developments in technology.

3. This minute concerns one which we believe Ministers would see not only as deregulation but also as having the additional benefit of being environmentally friendly.

4. Body Beautiful Stores ("BBS") have pointed out to us that a great number of their cosmetics containers, some of which represent quite a high proportion of the cost of the product and are inevitably of a quality which will stand more than one use, could be recycled. BBS, of course, also see some benefit by way of encouraging customer loyalty. They intend to refill bottles which are constructed to hold, say 100 ml and to do this by using unstamped equipment to measure the contents and to do this in the presence of the customer. We have therefore been looking at the possibility of relaxing the provisions of the present Weights and Burdens legislation. Obviously we would want any relaxation to apply to cosmetics but we cannot see why the principle should not be extended to anything which is originally sold in a suitable container. However we would want the new provision to apply only at the retail level.

5. The legislative background is that the Weights and Burdens Regulations 1951 (S.I. 1951/9999) ("the 1951 Regulations") apply (with exceptions) to all weighing and measuring equipment for use with trade. Regulation 1(2) says:

(2) Nothing in these Regulations shall apply to any weighing or measuring equipment of the following descriptions –

6. Here follow paragraphs (a) to (j) which specify equipment which is covered by other provisions such as capacity measures to which the Beer Containers (Mugs and Jars) Regulations 1950 apply. The effect is to exempt the equipment specified from the requirements relating to construction, testing, stamping and use contained in the 1951 Regulations. I do not think you need to concern yourself with the details of these requirements.

7. The 1951 Regulations have been amended at least a dozen times - we are wondering whether a consolidation might be a good idea but I hope you will agree that can wait for the present - and were made under section 11 of the Weights and Burdens Act 1867 (30 & 31 Vict c3). This Act conferred powers on the Board of Weighty Matters, a sister to the Board of Trade. It was much amended over the years and was consolidated under the same title (such is tradition!) in 1990. Section 11 comes in Part I of the 1990 Act and is in the same terms as section 11 of the 1897 Act:

> *11- (1) The provisions of this section shall apply to the use for trade of weighing and measuring equipment of such classes or descriptions as may be prescribed.*
> *(2) No person shall use any article for trade as equipment to which this section applies unless it-*
>
> > *(a) has been passed by an inspector as fit for such use, and*
> >
> > *(b) except as otherwise expressly provided by or under this Act, bears a stamp indicating that it has been so passed which remains undefaced otherwise than by reason of fair wear and tear.*

8. You may like to know that "prescribed" is defined in section 94(1) as meaning "prescribed by the Secretary of State by regulations". Regulations are made by statutory instrument and may make different provisions for different circumstances (section 86(1)). They are subject to annulment by resolution of either House (section 86(6)).

9. You may also be curious to see section 7:

7 - (1) In this Act, "use for trade" means use in Great Britain in connection with, or with a view to, a transaction falling within subsection (2) below where-

(a) the transaction is by reference to a quantity or is a transaction for the purposes of which there is made or implied a statement of the quantity of goods to which the transaction relates, and

(b) the use is for the purpose of the determination or statement of that quantity.

(2) The transaction falls within this subsection if it is a transaction for-

(a) the transferring or rendering of money or money's worth in consideration of money or money's worth, or

(b) the making of a payment in respect of any toll or duty.

9. I speak "capacity measures". They are not defined in the 1990 Act nor in the 1951 Regulations and you should notice that "capacity measurement" is defined in section 94(1) of the 1990 Act in terms which restrict the expression to liquids. So far as cosmetics are concerned, we are happy to limit the relaxation to liquids.

10. To return to what we believe Ministers will want to do. I am sure that they will wish to see a compete SI and I should be grateful if you could let me have a draft.

11. We look at the problem in this way. As I have said, many used containers are in themselves perfectly suitable to be refilled. However, if a capacity measure is used to determine volume, then, as I have also indicated, current legislation requires it to be tested and stamped by a trading standards officer and to satisfy certain specifications. In practice, at present, bottles are filled by way of stamped dispensing machines. An unstamped bottle cannot be used. The cost of stamping would be over £4 a bottle. This clearly rules out the use of stamped containers as containers of cosmetics filled in a shop where there is no dispensing machinery. To avoid imposing such a burden on traders and yet to permit the practice of re-using old bottles, we propose that, if a retailer uses a container provided by a customer to determine the volume of the product, the container would be exempted from the 1951 Regulations.

12. Cosmetic products are defined in paragraph 54 of Schedule 23 to the 1990 Act as meaning–

any substance or preparation intended to be placed in contact with the various external parts of the human body (that is to say, the epidermis, hair system, nails, lips and external genital organs) or with the teeth and the mucous membranes of the oral cavity with a view exclusively or mainly to cleaning them, perfuming them, changing their appearance, correcting bodily odours, protecting them or keeping them in good condition.

13. (This comes from some EC Directive or other.) One of your colleagues remarked to me some time ago that the Schedule hangs on section 21 of the 1990 Act which deals with the interpretation of Part 2.

14. We certainly want a relaxation for cosmetic products, but does it really have to be restricted to cosmetics? Can you see any reason why it should not apply to any container - or at least any container for goods sold by volume? If not, can you draft in general terms from the outset? But we do not want to hold things up for cosmetics because of difficulties which may arise.

15. I hope there can be no objection to the new Regulations coming into force on Monday 28th July 2014?

A Policy Colleague

Thursday 9th October 2014

1 *[This Statutory instrument has been made in consequence of [a] defect[s] in SI 2013/000 and is being issued free of charge to all known recipients of that Statutory Instrument]*

*[Draft Order laid before Parliament under section *** of the *** Act ***, for approval by resolution of each House of Parliament.] [for other headings see SIP references in the note]*

2 [DRAFT]STATUTORY INSTRUMENTS

2013 No.

3 **SUBJECT/SUBSUBJECT**

4 The XYZ Regulations/Rules/Order 2014

5 *Made* - - - - ***

Laid before Parliament ***

6 *Coming into force* - - ***

7 CONTENTS

8 [The Secretary of State is a Minister designated for the purposes of section 2(2) of the European Communities Act 1972(**a**) in relation to [insert description of subject matter of designation](**b**)

[A draft of this instrument was laid before Parliament in accordance with [section [ ] of that Act/ the [XYZ] Act 1972(**c**)] and approved by a resolution of each House of Parliament.]

[The ***, in exercise of the powers conferred by sections *** of the *** Act ***(**d**), [with the concurrence of ********] [and after consulting ******] makes the following [Order/Regulation/Rules/Scheme].

Citation and commencement

9 **1.** These Regulations/Rules/This Order may be cited as the XYZ Regulations/Order 2014 and come(s) into force on [date]/[the day/[ ] days after the day on which they are made].

10

(**a**) 1972 c.
(**b**) In an instrument made under section 2(2) insert the SI number of the relevant designation order.
(**c**) [ ]
(**d**) [ ]

Interpretation

11 **2.** In these Regulations/Rules/this Order:

"……." means [ ]

Name
Parliamentary Under Secretary of State
Department for Business Innovation and Skills

[date] 2013

12 SCHEDULE Regulation 7

13 **EXPLANATORY NOTE**

(This note is not part of the Order/Regulations/Rules)

This Order/these Regulations these Rules amend/revoke etc……

NOTES	
1	**Does the instrument need an italic headnote?** NB The italic headnotes included in the template above are the more common examples Some instruments require a heading in italics. In particular such a heading will be required where: • the instrument is a draft instrument that is being laid before Parliament (NB Where you are processing an instrument that has been approved in draft you will need to remove the headnote saying that the instrument is a draft instrument); • the instrument only **corrects errors** in earlier instruments (in which case it should be issued free of charge to purchasers of the instrument amended); or • it is a local instrument subject to special parliamentary procedure. Failure to include the requisite headnote is likely to be criticised by the JCSI. (See SIP 2.2.1-2.2.3 and FP2 on pages 97-98 which sets out precedents)
2	**Tramlines/Banner** Is the instrument a draft instrument? If so you need to include 'DRAFT' in the tramlines/banner. Conversely where the instrument has been approved, the word 'DRAFT' needs to be removed.
3	**Classification** Has the correct subject classification been used (including any territorial one e.g CHARITIES, ENGLAND AND WALES)? Usually it will possible to identify the correct classification by looking at instruments previously made under the powers. If you are unsure check with the SI Registrar (siregistrar@nationalarchives.gsi.gov.uk). (See SIP 2.3.6-2.3.10)
4	**Title of instrument** Is the title of the instrument appropriate? In particular: • The title at the top of the instrument must begin with "The" and end with the year of making (and not the year that the instrument comes into force). • The title of the instrument must be suitable in the light of the content of the instrument. • Check to ensure that the title of the instrument is not identical to earlier instruments made in the same calendar year. If it is you may need to add (No.2) or (No.3) etc to the title. • If the instrument amends something this should be reflected in the title of the instrument e.g. the Insolvency (Amendment) Rules 2010. • The form of the instrument must be correctly described, so if the power is to make an 'order' the instrument must be an Order and not Regulations. (See SIP 2.3.11-2.3.14)
5	**'Laid before Parliament'** • Is the instrument required to be laid before Parliament? Instruments subject to annulment are required to be laid before Parliament (see section 5 of the Statutory Instruments Act 1946). • If the instrument is not required to be laid, remove this. Some instruments can be subject to a requirement to be laid but subject to no other procedure although this is rare. • 'Laid before Parliament' is not required for an affirmative instrument.
6	**'Coming into force'** • Is the date in "Coming into force" the same as the date in the coming into force provision in the

	body of the instrument? • A coming into force date is generally only required in a commencement order if the making of the commencement order is subject to Parliamentary procedure (see, e.g.. the Patents Act 2004 (Commencement No.2 and Consequential, etc. and Transitional Provisions) Order 2004).
7	**Table of contents** A lengthy instrument may have a table of contents before the preamble which cites the powers under which the instrument is made. Inclusion of such a table after the preamble is likely to attract adverse comment from the JCSI. Proper use of the SI template should result in the insertion of a table of contents at the right place. (See SIP 2.3.19)
8	**Preamble (including citation of powers)** *General* • Have all the powers necessary to the making of the instrument been cited and footnoted? (See SIP 2.4.1-2.4.4) including: o powers that are relied upon to make incidental, supplementary or transitional provision; and o (for amending and revoking instruments relying on powers existing before 1st January 1979 when the Interpretation Act 1978 came into force) powers relied upon to amend or revoke instruments. • Are all the powers actually cited in the draft necessary to the making of the instrument? (Unnecessary citation of powers will attract adverse comment from the JCSI.) • Where the powers to be exercised in the making of the instrument have been transferred to the Secretary of State (e.g. by a transfer of functions order) has this been correctly identified and footnoted? (An example of a recital where there has been a transfer of functions would read: **"In exercise of the powers conferred by section [ ] of the [ ] Act 19[ ] and now vested in the Secretary of State [footnote with reference to legislative transfer of functions], the Secretary of State makes . . ."**) • Is the concurrence/consent of any person required to the making of the instrument e.g. Treasury consent? If so has this been reflected in the preamble (and signature block). • Have all other prerequisites to the making of the instrument been cited (e.g requirements to consult)? • Do not include a sweeping up phrase such as "and all other powers enabling him in that behalf" except in the rare case where prerogative powers are relied upon. *EU instruments* • If the instrument is made by a Minister has the appropriate designation order been referred to and footnoted?
9	**Citation and commencement** As regards the provisions relating to citation and commencement: • Commencement should usually be by reference to a specified date but may be by formula. It is not appropriate to use the formula "These Regulations come into force on the day they are made" since references in legislation to a day is the first point in that day and this would on its face involve retrospection thereby resulting in uncertainty as to when the instrument actually came into force. The correct form here is "These Regulations/this Order come(s) into force on the day after the day on which [they are/it is] made.
10	**Footnotes** • Check all footnotes to see that they are all complete. • In particular where a provision is referred to that has been amended does the footnote refer to all relevant amending legislation? • The correct form of references to SIs is as follows o Reference to SI which has been amended where all amendments relevant:

	S.I. 1967/172, amended by S.I. 1967/1093, S.I. 1972/656, and S.I. 1975/594. ○ Reference to SI where there is a relevant instrument but other irrelevant ones: **S.I. 1967/172, amended by S.I. 1975/594; there are other amending instruments but none is relevant.** ○ Reference to SI where there are a number of instruments but only some are relevant: **S.I. 1967/172; relevant amending instruments are S.I. 1967/1093 and S.I. 1975/594.** ○ Reference to SI where there are amendments but none is relevant: **S.I. 1967/172; there are amending instruments but none is relevant.** • Acts passed after 1963 should generally be referred to as follows: **1972 c. 68.** Relevant amendments should be noted. • EU legislation should be referred to in the following format: **OJ No. L129, 15.5.86, p.1.**
11	**Interpretation/Definitions** Check the following points: • Provisions dealing with the interpretation of words and phrases should not begin "Unless the context otherwise requires……" If this phrase is included remove it and identify those instances where a contrary intention is shown and adjust the draft to specifically deal with those cases. • Are the definitions ordered with references to legislation coming first e.g. "the Act" and otherwise in alphabetical order? • Are all defined terms used more than once in the instrument? If not remove them – for instances of a single use of a defined term incorporate the definition in the body of the instrument where it is used. The JCSI will comment adversely where a term is defined but not used in the instrument. • Check that definitions in the Act under which the instrument is made are not repeated in the instrument as this is unnecessary in the light of section 11 of the Interpretation Act 1978. (Where the instrument uses terms defined in the Act under which it is made there should be a suitable footnote.) • Check that definitions are not repeats of definitions in the Interpretation Act 1978. • Check that provisions with substantive effect are not included in interpretation provisions (e.g. provisions that impose obligations). If they are, they should be moved to the body of the instrument. • Don't cross refer to definitions in other legislation if it is more convenient for the definition to be written out in full in your instrument. Failure to do this will attract adverse comments from the JCSI. • Don't rely on definitions in the preamble. These should be included in the interpretation provision. • Avoid including provisions such as "any reference to a numbered regulation is a reference to a regulation bearing that number" unless you are satisfied that this is necessary to avoid ambiguity.
12	**Schedules** Schedules should be introduced by an operative provision in the body of the instrument. Check that the shoulder note reference is correct and that the numbering starts from 1 and that a sole Schedule is headed 'SCHEDULE' rather than 'SCHEDULE 1'.
13	**Explanatory Note** Is the Explanatory Note an appropriate and clear summary of the instrument? (See SIP 2.13 especially 2.13.10). In particular does the Note: • identify earlier SIs that are amended, consolidated or revoked and replaced by the SI? • identify any legislation which needs to be read with the SI in order to understand the SI? • explain where copies of outside publications referred to in the SI (e.g. maps and plans)can be obtained? (NB for references to Command papers see SIP para 2.71.) • state whether an impact assessment has been prepared or not in relation to the instrument and, if

	so where this can be obtained, e.g. **"A full impact assessment of the effect that this instrument will have on the costs to business and the voluntary sector is available from [ ] and is published with an Explanatory Memorandum alongside the instrument on legislation.gov.uk."?** • where the instrument has retrospective effect, identify the statutory authority for this?

Better Regulation and Legislative Reform Orders

[redacted]

Overview of this session

- Political/policy context for Better Regulation
- Roles and responsibilities within Government
- Clearances
- Scope and focus of Better Regulation agenda
- Key better regulation controls: IAs, SMBA, EU transposition, SNR, OITO, sun-setting and review, CCDs
- Small Business, Enterprise and Employment Bill
- Legislative Reform Orders

Political impetus

- "There has been an assumption that central government can only change people's behaviour through rules and regulations. Our government will be a much smarter one, shunning the bureaucratic levers of the past and finding intelligent ways to encourage, support and enable people to make better choices for themselves"
  [Coalition Programme for Government, May 2010]

- "We need to tackle regulation with vigour to free businesses to compete and create jobs, and give people greater freedom and personal responsibility.....I want us to be the first government in modern history to leave office having reduced the overall burden of regulation, rather than increasing it."
  [Prime Minister's letter to all Cabinet Ministers, 6 April 2011]

Alternatives to Regulation

"... There has been the assumption that central government can only change people's behaviour through rules and regulations. Our government will be a much smarter one, shunning the bureaucratic levers of the past and finding intelligent ways to encourage, support and enable people to make better choices for themselves ..."
Coalition Agreement

"The Government will regulate to achieve its policy objectives only: having demonstrated that satisfactory outcomes cannot be achieved by alternative, self-regulatory, or non-regulatory approaches..."
Reducing Regulation Committee (RRC): Principles of Regulation

No new intervention: Is action by government better than none?	*Do nothing at all* *Simplify, clarify existing regulation* *Improved enforcement* *Make remedies more accessible*
Information and education: Empower consumers to take their own informed decisions.	*Ratings systems* *Labelling* *Disclosure*
Self-regulation: An approach initiated and undertaken by those whose behaviour is to be regulated	*Sector codes of conduct*
Co-regulation: Similar to self-regulation but some explicit government involvement .	*Statutory or approved code* *Voluntary agreements* *Accreditation and standards*
Economic instruments: Adjusting the economic incentives.	*Taxes or subsidies* *Quotas and permits* *Auctions*

Policy context

Principles of Regulation – the Government will regulate to achieve its policy objectives only:

- having demonstrated that satisfactory outcomes cannot be achieved by alternative, self-regulatory, or non-regulatory approaches
- where analysis of the costs and benefits demonstrates that the regulatory approach is superior by a clear margin to alternative, self regulatory or non-regulatory approaches
- where the regulation and the enforcement framework can be implemented in a fashion which is demonstrably proportionate, accountable, consistent, transparent, and targeted

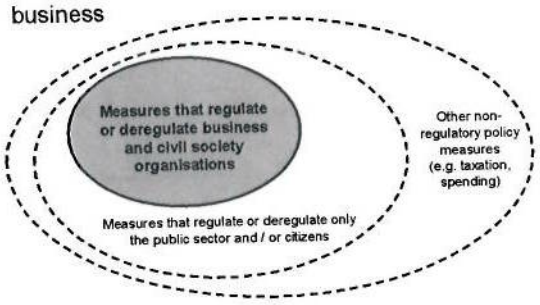
Better regulation policies

- **Better Regulation Framework Manual** at www.gov.uk/government/publications/better-regulation-framework-manual

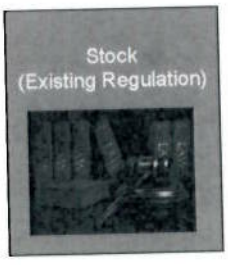
- Policy rules impact on –
  - Planning an SI project
  - Policy design and content
  - SI drafting
  - Policy clearance
  - Future review of the SI

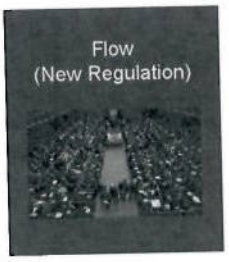
Programme scope and focus

- Priority is measures that regulate or deregulate business



Sources of Regulation





Roles and responsibilities

- **Reducing Regulation sub-Committee (RRC)** – *a Cabinet sub-Committee*
- **Regulatory Policy Committee (RPC)** – *an advisory Non-Departmental Public Body (NDPB)*
- **Better Regulation Executive (BRE)** – *part of Department for Business, Innovation & Skills (BIS)*
- **Departmental Better Regulation Units/Teams (BRUs/BRTs)** – *located in government departments*
- **Better Regulation Ministers and Board Level Champions**

Reducing Regulation sub-Committee (RRC)

- Cabinet sub-committee
- Agrees the government's objectives for regulation and deregulation
- Sets the better regulation policy rules for Whitehall departments
- Enforces these policy rules through the "write-round" policy clearance process
- Holds individual Ministers and departments to account for their performance on regulation/deregulation
- Clears contents of Statement of New Regulation (SNR)

Regulatory Policy Committee (RPC)

- Advisory Non-Departmental Public Body (NDPB) composed of regulatory experts, business people and economists
- Not part of Government; but terms of reference agreed by Regulatory Policy sub-Committee (RRC)
- Provides independent advice to Ministers to help drive up the quality and consistency of analysis supporting new regulatory proposals
  - focuses on the analysis, not the policy decision

13 BIS | Department for Business Innovation & Skills

The policy clearance process: **RRC clearance**

- Policy clearance by **Reducing Regulation sub-Committee (RRC)**, with input from Regulatory Policy Committee (RPC)
- **RRC** clearance is required for all proposed measures regulating or de-regulating business or civil society organisations (if the measure requires collective agreement)
- RRC clearance is through Ministerial correspondence, in parallel with clearance by lead Cabinet policy committee
- No RRC clearance required for pure public sector or private citizen measures, or for trivial/mechanical measures
- Other exceptions: see Better Regulation Manual
- RRC enforces the better regulation policies, so letters seeking RRC clearance must explain how relevant policy rules have been complied with (or request waivers where relevant/available)
- Where required, letter to RRC must be accompanied by Impact Assessment (IA) and RPC Opinion

14 BIS | Department for Business Innovation & Skills

Role of RPC in policy clearance process

- RPC scrutinises impact assessments (IAs) before department writes to the Reducing Regulation Committee (RRC) for policy clearance
- RPC gives Opinion on impact assessment (IA). IA must be "fit for purpose" before submission to RRC.
- **BUT: "fast-track" process for deregulatory measures, Red Tape Challenge (RTC) measures and "low-cost" regulatory measures (except gold-plated EU implementation)**
  - Full IA not required
  - No RPC Opinion required
  - RPC confirms eligibility for "fast-track" (but RTC measures automatically qualify)
- "Low cost" = gross cost to business is no more than £1million per annum
- RPC emphasis on quality and consistency of impact assessments. Have costs and benefits and impacts been identified and reflected in the choice of options?
- Allow 30 days for RPC scrutiny
- RPC Opinion and IA accompany letter asking for RRC clearance

15 BIS | Department for Business Innovation & Skills

Implications of "fast track" eligibility

- Originally **all** measures impacting on business required full impact assessment (IA) and RPC Opinion
- "Fast track" designed to speed up implementation of deregulatory measures and focus scrutiny on regulatory measures with the biggest impact on business
- Quicker clearance process
- Full impact assessments not required – greater departmental discretion
- Exemption from some better regulation policies
- So… work out early in policy formation process whether measure will qualify for fast track

Impact Assessments (IAs)

- Continuous process and a published document
- Considers and records reasons for government intervention, expected impacts, costs and benefits
- Full IA required for proposals to regulate business or civil society organisations where RRC clearance required
- But not for "fast-track" measures, ie low-cost measures, deregulatory measures or Red Tape Challenge (RTC) measures. Departmental discretion.
- Publication
- RPC scrutiny
- *Ex Parte Seabrook Warehousing [2010] EWCH Civ 140*
- *Ex Parte Sinclair Collis Ltd [2011] EWCA Civ 437*

Small and Micro-business assessment (SMBA)

- Successor to the micro-business and start-ups moratorium.
- Applies to small businesses (up to 49 full-time equivalent employees) and micro-businesses (up to 10 full-time equivalent employees).
- Applies to domestic measures that regulate business or civil society organisations and that are expected to come into force after 31 March 2014...
- ...unless they qualify for the fast track
- Default option is a full exemption
- Where full exemption not viable, need to support this conclusion with analysis.
- And, if no exemption, need also to consider options for mitigating the burdens.

Examples of Mitigating Action:
- full exemption (default option);
- partial exemption;
- extended transition period;
- temporary exemption;
- varying requirements by type or size;
- specific information campaigns or user guides, training and dedicated support for smaller businesses;
- direct financial aid for smaller businesses;
- opt-in and voluntary solutions.

EU Transposition Principles

- New domestic measures implementing an EU measure must follow the EU Transposition Principles set out in the Guiding Principles for EU Legislation
- Project plan for implementation
- Letters seeking RRC clearance must explain how the Principles have been applied
- Ensure that (save in exceptional circumstances) the UK does not go beyond the minimum requirements of the measure which is being transposed
- Whenever possible, seek to implement EU obligations via alternatives to regulation
- Do not put UK business at a competitive disadvantage to European counterparts
- Always use copy-out for transposition where it is available unless doing so would adversely affect UK interests
- Bring measures into force on, rather than before, the transposition deadline unless compelling reasons for earlier implementation
- Include a statutory duty for Ministerial review every 5 years

Statements of New Regulation (SNR)

- Published by government in July and December
- Informs business of changes to regulation over the following six month period, and reports on how the government is performing against One In Two Out (OITO)
- Scope: includes measures in scope of One In Two Out (OITO); EU-derived measures (regulatory or deregulatory) and Red Tape Challenge (RTC) measures
- Can't legislate if not published in SNR
- Exceptions: RRC agreement
- Departmental BRUs/BRTs deal with the process

One in Two Out (OITO)

Any new measure expected to result in a direct net cost to business must be offset by deregulatory measures providing savings to business of at least double that amount

- Scope – measures requiring RRC clearance
- Triggered if new regulation expected to impose direct net cost on business or civil society organisations (= "IN")
- But not (strict) implementation of EU obligations
- Other exceptions: taxes; regulation for civil emergencies or systemic financial risks; temporary measures with lifespan of 12 months or less
- "OUTs" = deregulatory measures conferring direct net benefit on business or civil society organisations
- **RPC** scrutiny and validation: classification and value of INs and OUTs

OITO (continued)

- Not just SIs but also Acts, codes of practice backed by statutory force and guidance issued under statutory powers
- EU and international measures out of scope but beware gold-plating
- Generating OUTs – Legislative Reform Orders?
- Statements of New Regulation (SNRs) report on performance

OITO Mechanism

- **Impact Assessment**
- Cost and benefits to business calculated for each new proposed regulation
- Net cost is scored for OITO ('Equivalent Annual Net Cost to Business' or EANCB)
- EANCB subject to independent verification by Regulatory Policy Committee

Mechanism

For every new regulation imposing a net cost (IN), double the equivalent value must be taken out (OUT). Each department is responsible for its own account.

'IN' = *'OUT'*

- Business costs only
- Net *direct* costs
- Domestic legislation

Flow

- ***Regulatory priorities implemented cost-effectively***

Stock

- ***Simplifications or deregulatory measures taken from existing stock***

OITO Examples

			OIOO/OITO Classification
A	*Regulatory* Measure	Cost = £20M Benefit = £5M Net Cost = £15M	**£15M 'IN' (OIO** **£30M 'IN' (OITO)**
B	*Regulatory* Measure	Cost = £2M Benefit = £2M Net Cost = £0M	**'Zero net Cost'**
C	*Deregulatory* Measure	Cost = £2M Benefit = £12M Net Cost = -£10M	**£10M 'OUT'**

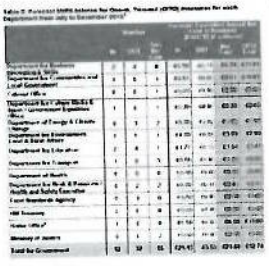
OITO Transparency

- Government reports publically on performance every six months, as part of the 'Statement of New Regulation' (SNR)
- SNR also lists the measures expected to come into force over the following six months

OITO Scope

- **Who?** All Government Departments. Independent regulators have been invited to participate.
- **Coverage?** UK legislation which impacts on business and civil society organisations.
- **Exclusions:** Tax; civil emergencies; spending decisions; fines and penalties; financial systemic risk.
- **EU/International:** is in scope when there is:
  - gold-plating (going beyond minimum EU requirements)
  - failure to use available derogations

OITO Benefits : Departments



- Public reporting on performance to strengthen accountability
- Improved management of regulatory programmes (closer to financial budget management)
  - better planning, including prioritisation between new regulatory proposals
  - strong incentives to find OUTs

OITO Benefits : Policy-Makers

How will my idea impact on business?

How can I minimise the costs to business ?

Do I have an 'OUT' that will offset any 'IN' ?

Sunsetting and review

- Two elements:
  - Duty to review
  - Automatic expiry
- Involves putting a provision in the regulations/order
- Scope: new regulatory measures affecting business or voluntary sector and requiring collective agreement; **but not "fast track" measures**
- Regulations transposing EU measures: just a duty to review
- Vires: Interpretation Act 1978, section 14A

Common Commencement Dates

- New domestic measures that regulate business must come into force on one of two dates each year
- RRC agreement required to deviate (waiver)
- Business benefits :-
  - reduced familiarisation cost
  - avoids disruption associated with frequent changes to regulatory requirements

Better Regulation – future developments

- Small Business, Enterprise and Employment Bill should be enacted before the election
- Some provisions will come into force automatically (those about the target)
- Provisions relevant to making SIs are the deregulatory target, statutory reviews and the micro business exemption

Deregulation target: duty to publish target

Clauses 18-19

- SoS BIS under an obligation to publish a deregulation target with the first year of new Govt, covering the whole of the Parliament
  - Interim target covering first three years
  - Target must relate to the economic impact of new regulation on business (including third sector)
  - Methodology for calculating impacts, and any exempted categories of regulation must be published at same time
- Target etc. can be amended at a later stage; but this must be done transparently, and would require reports to be republished

Clause 23

Deregulation target : duty to report

Clauses 20-21

- SoS must publish annual reports (and a final report) on progress against the target, covering measures that have come into force (or ceased to have effect)
  - all measures in scope of the target must be scored
- Reports will also cover:
  - actions taken to mitigate disproportionate regulatory burdens on small and micro-businesses
  - EU and international obligations where implementation went beyond minimum requirements ("gold-plating")

Deregulation target : verification

Clause 22

- SoS must appoint an "independent body" to verify economic impact of new regulations in scope of the target
  - must be independent of Ministers; have expertise in appraisal and cost/benefit analysis of impact of regulation on business, including small business
  - appointment is for the whole period covered by the target, and must be made within first year of Parliament

Statutory Reviews

Clauses 25-29

- When making or amending secondary legislation that regulates business, Ministers must either :- 25(2)
  - include a statutory review provision in the legislation, or
  - publish a statement that a review is not appropriate 27
- Review provision creates a statutory obligation on Ministers to carry out and publish a review within five years of the measure coming into force
- Guidance to be issued on circumstances when review not appropriate 28
  - e.g. measures with very small impacts; exceptional need for long term certainty

Small and micro-business definitions

Clause 30

- Establishes a definition of small / micro business that can be used in other secondary legislation, for example where an exemption is being applied

37 BIS Department for Business Innovation & Skills

Key contacts

- Better Regulation Executive
  - Sits within BIS and leads the Government agenda on Better Regulation

BRE website:
- www.bis.gov.uk/bre

- Better Regulation Lawyers Working Group
  - [redacted]

38 BIS Department for Business Innovation & Skills

Departmental Better Regulation Units/Teams

- BRUs/BRTs located in government departments
- Responsible for the co-ordination of the better regulation agenda in each department
  - work closely with BRE
- Better regulation experts
  - advice to departmental policy officials
  - access to detailed Q&A on main areas
  - can refer complex or novel queries to BRE
- Support departmental Better Regulation Ministers and Board Level Champions
  - includes briefing for RRC meetings and decisions

39 BIS Department for Business Innovation & Skills

LEGISLATIVE AND REGULATORY REFORM ACT 2006

Legislative Reform Orders (LROs)

40 BIS Department for Business Innovation & Skills

What does this have to do with better regulation?

- LRO's are deregulatory and can be used to remove or reduce burdens resulting from legislation as well as improve the way regulatory functions are carried out
- OITO – potential way to generate OUTs

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Legislative Reform Orders - Powers

- LRO is a statutory instrument, made under the Legislative and Regulatory Reform Act 2006, which can amend primary legislation.
- **LRO's are used to *reduce or remove burdens* which arise from legislation and which affect a person (s.1).**
- What is a burden?
  - A financial cost;
  - An administrative inconvenience;
  - An obstacle to efficiency, productivity or profitability
  - A sanction, criminal or otherwise, which affects the carrying on of any lawful activity
- **LRO's can also be made if they ensure that regulatory functions are exercised in line with the principles of good regulation (s.2 and s.32) [less commonly used]**
- The order making power can be exercised with s.2(2) ECA 1972 so that an LRO can implement EU law to remove burdens from pre-existing legislation which are unnecessary following the implementation of new EU requirements.

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Section 1: Power to remove or reduce burdens

(1) A Minister of the Crown may by order make any provision that he considers would serve the purpose of
(2) ..removing or reducing any burden or the overall burdens resulting directly or indirectly from any legislation
(3) burden means (a) financial cost; (b) administrative inconvenience; (c) obstacle to efficiency, productivity or profitability (d) sanction
(4) Provision may not be made.. which affects only a Minster of the Crown or a government department, unless it [is] .. in the exercise of a regulatory function
(5) ..a financial cost or administrative inconvenience may result from the form of any legislation (e.g. where it is hard to understand)
(6) Meaning of legislation
(7) Abolish confer or transfer or delegate functions of any description

Section 2: Power to promote regulatory principles

(1) A Minister of the Crown may make any provision which he considers would serve the purpose of
(2) Securing that regulatory functions are exercised so as to comply with the [following] principles
(3) Regulatory activities should be carried out in a way which is (a) transparent, accountable, proportionate and consistent and (b) targeted
(4) May include: (a) modifying the way a function is exercised (b) amend constitution of a body (c) transfer or delegate functions
(5) Includes: (a) creating a new body and (b) abolishing a body
(6) Cannot: confer any new function or abolish any function

Restrictions: section 3 preconditions

(1) Minister may not make provision under s.1 or 2 unless he considers
(2) (a) Policy objective cannot be secured by non legislative means
(b) policy is proportionate to objective
(c) strikes a fair balance
(d) does not remove any necessary protection
(e) does not prevent exercise of any right or freedom reasonably expected to continue
(f) not of constitutional significance
(3) Provision restating an enactment must make the law more accessible or more easily understood
(4) "restate" means replace it with alterations only of form or arrangement

Restrictions: other

- Section 4: sub-delegation
- Section 5: taxation
- Section 6: criminal penalties
- Section 7: forcible entry
- Section 8 : excepted enactments (Human Rights Act; Legislative and Regulatory Reform Act)
- Section 9: Scotland (legislative competence)
- Section 10: Northern Ireland
- Section 11: Wales

Legislative Reform Orders - Procedure

- Analysis against criteria
- Consultation
- Clearance from Parliamentary Counsel and PBL
- Lay in Parliament with scrutiny procedure recommended by Minister. Committee can bump up any ministerial recommendation
- LRO is scrutinised by the Regulatory Reform Committee (Commons) and the Delegated Powers and Regulatory Reform Committee (Lords) – it is helpful to consult informally before you lay.

LRO's – Procedure continued .....

- The Committees have the power to veto which can only be overturned by a resolution of the relevant house.
  - Negative Resolution for technical changes. Parliament has 40 days to scrutinise and the LRO can be made if neither House vetoes
  - Affirmative Resolution for policy changes. Parliament has 40 days to scrutinise and you then need approval by resolution of each House before you can make the LRO
  - Super Affirmative Resolution for complex or controversial policy changes. Parliament has 60 days to scrutinise followed by a period of up to 25 days depending whether changes are needed for scrutiny. The LRO then needs to be approved by each House.

Procedure

- Section 13: consultation
- Section 14: draft Order and Explanatory Document
- Section 15: Parliamentary procedure
- Section 16: negative resolution
- Section 17: affirmative resolution
- Section 18: super-affirmative resolution
- Section 20: combining powers with European Communities Act 1972

Finally on LRO's ..... Remember

- The powers in sections 1 and 2 of the LRRA 2006, to legislate by order and which can be used to amend primary legislation, can potentially be very useful
- It is a resource intensive process and takes an average of 10 – 14 months from consultation
- LRO's unlike Bills can not be amended as they progress (limited exception changes requested by Committee re super affirmative)

Further materials and contacts – LRO's

- Your BRU
- Legislative Reform Orders – 'Guide for Policy Officials' (BIS Guide)
- LION

[redacted]

Drafting Statutory Instruments Course
Day 2 drafting exercise

The Weights and Burdens Regulations 1951

1. Draft a statutory instrument, including the explanatory note, based on the drafting instructions in your pack.

2. Give the policy lead any advice of a legal, legal policy or procedural nature that you think necessary to accompany the draft or enable further drafts to be developed.

Assume that you have been given all the necessary statutory material and that there are no complicating EU law, human rights or devolution issues.

Email your team answer by 11.30am
Get coffee!
Come back to this room by 11.45am

DRAFTING STATUTORY INSTRUMENTS – DAY 1

DANGEROUS DOGS – PART 3

The business managers are nodding. The Honourable Member wins the vote and the prayer motion, on 13 November, is successful. The Order ceases to have effect from that day.

A couple of days later, your administrator is back in touch. The Secretary of State is very cross about what has happened. He has decided to make a new Order containing the same provisions as the one that was annulled. He expects that it will take a few days to prepare the new Order and get it signed.

This will mean that, in the interval, Filas and Dogos can walk the streets unmuzzled. With that in mind, the Secretary of State has decided that the new Order (which will probably be signed on 20 November) should be effective from 13 November so as to ensure that legislative control is unbroken. This is made even more important by the fact that, on 14 November, three people were convicted at Horseferry Road Magistrates Court of selling Dogos.

What advice will you give?

Drafting Statutory Instruments

Course Pack

GLS COURSE - FOLLOW UP TO SYNDICATE EXERCISES 10-10-14 on HOW THE JCSI/SCSI OPERATES

Exercise 1

SCSI 8th Report of 2010-12: S.I. 2011/2534

TEXT REPORTED

8. In the Schedule, after the sixth entry (Article 47 of the Code) under the heading "Presentation of Goods to Customs", insert the following—		
"Column 1 *Description of Relevant Rule / Relevant Rule of a description* **Directions made on 2 August 2011 under section 30 of the Act** No goods to which section 30 applies to be moved except: (a) on the instructions of a proper officer; (b) in the manner and under the conditions specified by a proper officer.	Column 2 *Person of a description* The declarant. The person who moves the goods.	Column 3 *Penalty for contravention* £1,000. £1,000."

Adapted extract from Committee Report

Regulation .. 8.. amend[s] the Schedule to the 2003 Regulations [as defined]. The text inserted ... includes italic column headings which are already present in the Schedule. The Committee asked why that is so. In its memorandum [the Department] states that the headings are included ""by way of a "signpost", to make clear that the inserted columns fall under those headings in the 2003 Regulations". The Committee considers that unnecessary material should not be included in amendments. It is important to be able to ascertain precisely the textual changes being made to existing legislation by a textual amendment of existing legislation.

WHAT COULD HAVE AVOIDED QUESTIONING BY THE SCSI

8. In the Schedule, after the sixth entry (Article 47 of the Code) under the heading "Presentation of Goods to Customs", insert in each column identified by number and heading in the table below the text set out under it in that table —		
Column 1 *Description of Relevant Rule / Relevant Rule of a description* "**Directions made on 2 August 2011 under section 30 of the Act** No goods to which section 30 applies to be moved except: (a) on the instructions of a proper officer; (b) in the manner and under the conditions specified by a proper officer. "	Column 2 *Person of a description* "The declarant. The person who moves the goods."	Column 3 *Penalty for contravention* "£1,000. £1,000."

Exercise 2

JCSI 37th Report of 2010-12: S.I. 2011/2649

TEXT REPORTED

6. A person is not guilty of an offence under the 2008 Order who would, apart from this article, be guilty of—
(a) an offence under these Regulations, and
(b) a corresponding offence under the 2008 Order.

Adapted extract from Committee Report

The Regulations make provision for enforcing certain EU restrictive measures ... In particular the Regulations create criminal offences, some of which may overlap with offences under [the 2008 Order as defined]. .... The Committee asked ... why regulation 6, when read literally, appears to secure that a person who has committed both an offence under the Regulations and a corresponding offence under the 2008 Order is relieved from being guilty not only of the corresponding offence but also of any other offence under the 2008 Order. In [its] memorandum ... the Department acknowledges that regulation 6 can be read as having that effect. It attributes the mistake to "recent efforts to improve and simplify" ... legislation. .. . The Committee is concerned that the error in this case might have been attributable to the way in which a number of the provisions of the Regulations have been constructed. Regulation 6, like regulations 4 and 5, employs a rather unusual formulation along the lines "A person [is subject to specified consequences] who [does something] ...". This is a forced construction which is inconsistent with normal English usage and can make provisions which employ it difficult to understand. In the context of regulation 6 promoting the words setting out the operative proposition of the regulation before the words describing the situations in which it applies may have contributed to the former being cast unduly wide. Both because of its strain on syntax and because it runs the risk of causing slips of this kind the Committee considers that this construction is best avoided.

[NOTE: A second error might also have been commented on by the JCSI]

WHAT COULD HAVE AVOIDED QUESTIONING BY THE JCSI

6. If a person ('X') is, but for this regulation, guilty of—
(a) an offence under these Regulations, and
(b) a corresponding offence under the 2008 Order,
X is not guilty of the corresponding offence.

Exercise 3

JCSI 39th Report of 2010-12: S.I. 2011/2947

TEXT REPORTED

Rule 7. (1) The Secretary of State shall serve on the Board and, subject to rule 8, the prisoner [,..] where a case relates to the initial release of a prisoner, the information specified in Part A of Schedule 1 to these Rules and the reports specified in Part B of that Schedule

Schedule 1, Part B paragraph 4: An up-to-date risk management report prepared for the Board by an officer of the supervising local probation trust, including information on the following where relevant:

(a) details of the home address, family circumstances and family attitudes towards the prisoner;
(b) alternative options if the offender cannot return home;
(c) the opportunity for employment on release;
(d) the local community's attitude towards the prisoner (if known);
(e) the prisoner's attitude to the index offence ...

Adapted extract from Committee Report

In a number of places in the Schedules ... , dealing with information and reports to be submitted to the Board [as defined] in different cases, the Rules refer to "the index offence". [The term "index offence"] not being a defined term in the Rules or their parent Act, the Committee asked the Department what it means and how readers are expected to understand the intended meaning. In its memorandum the Department says: "The index offence is the offence for which the offender received the sentence which is being considered by the ... Board. The [Department's] approach is not to define terms which the intended reader will understand (and which can only be understood in one sense). The term 'index offence' will be familiar to anybody who has to interact with the ... Board. Accordingly, the [Department] does not believe it is necessary to define this term." The Committee agrees that in choosing language for the drafting of an instrument it is appropriate and desirable to consider the principal target audience of the instrument; and that may lead to the adoption of trade jargon in appropriate cases. However, unless the subject matter of an instrument is so technical or specialist that by its nature it is bound to be impenetrable to those not intimately involved in the subject area, it is undesirable to draft in language that in effect excludes the reader without specialist knowledge from understanding the effect of legislation that is addressed to citizens at large.

WHAT COULD HAVE AVOIDED QUESTIONING BY THE JCSI

Inclusion of a definition in the interpretation provision on the following lines:
"'index offence', in relation to a prisoner whose sentence for imprisonment is under consideration by the Board, means the offence for which the sentence was imposed;"

Exercise 4

JCSI 16th Report of 2010-12: S.I. 2011/2911

TEXT REPORTED

Rule 8: If payment is not made by a leviable body in accordance with the requirements of rule 7, the Board is entitled to charge interest on any amount unpaid ...

Adapted extract from Committee Report

The Committee asked how the decision whether or not to charge interest is to be taken, and what the *vires* were for conferring the discretion to make that decision. In its memorandum the Department says "The use of the word "entitled" in rule 8 is intended to provide for the [Board as defined] to charge interest where the levy is not paid in accordance with the rules. The vires is conferred by section 174(7) of the 2007 Act. Rule 8 is not intended to confer a discretion ...." The Committee notes that section 174(7) allows the rules to "provide that if the whole or any part of an amount of the levy payable under the levy rules is not paid by the time when it is required to be paid under the rules, the unpaid balance from time to time carries interest ...". ... The Committee accepts the Department's assurance that there was no intention to confer a discretion; but that makes it difficult to understand why the rule departs from the language of the Act and uses the expression "entitled", which suggests some kind of discretionary power. In the Committee's opinion the choice of language is, at least, unnecessarily confusing.

WHAT COULD HAVE AVOIDED QUESTIONING BY THE JCSI

Rule 8: If payment is not made by a leviable body in accordance with the requirements of rule 7, the obligation to pay any amount unpaid carries an obligation to pay interest on that amount ...

Exercise 5

JCSI 20th Report of 2013-14: S.I. 2013/3037

TEXT REPORTED

Regulation 5(3): The amount of the school's surplus is calculated in accordance with Ax(B/C) where—

(a) A is the amount referred to in paragraph (2);

(b) B is the total number of pupils registered at the school on the date used for ascertaining pupil numbers specified in regulations made under section 47 of the 1998 Act in force immediately before the conversion date [defined in the parent Act as the date on which a school or replacement school opens as an academy]; and

(c) C is the total number of pupils registered at all of the schools within the federation [defined elsewhere] on that date.

Adapted extract from Committee Report

Regulation 5 makes provision for determining whether a federated school has a surplus and calculating the amount of any surplus. Paragraph (3) specifies a formula for the calculation, the final component of which is defined in sub-paragraph (c) by reference to "the total number of pupils registered at all of the schools within the federation on that date". There are two dates specified in the previous sub-paragraph: "the date used for ascertaining pupil numbers specified in regulations" and "the conversion date". The Committee suspected that, contrary to normal usage according to which "that date" would mean the last date mentioned, the intention was to refer to the first of the two dates mentioned in the previous paragraph. Accordingly the Committee asked the Department ... to explain the intended meaning. In [its] memorandum ... the Department confirms the Committee's suspicion and asserts that the intended effect of the provision is "clear from the drafting" in the context set out in the memorandum. The Committee agrees that ... it [is] likely that in any dispute a court would reach the conclusion, as asserted by the Department, that "that date" must be intended, contrary to normal usage, to refer to the first of the two dates previously specified. However the Committee does not accept that ambiguity requiring a strained construction of the text is acceptable.

WHAT COULD HAVE AVOIDED QUESTIONING BY THE JCSI

Regulation 5(3): The amount of the school's surplus is calculated in accordance with Ax(B/C) where—

(a) A is the amount referred to in paragraph (2);

(b) B is the total number of pupils registered at the school on the date used for ascertaining pupil numbers specified in regulations made under section 47 of the 1998 Act in force ('the calculation date') immediately before the conversion date and

(c) C is the total number of pupils registered at all of the schools within the federation on the calculation date.

Technical Regulation: EU and World Trade Organisation notification requirements

National regulations which require goods and services to comply with technical requirements can create barriers to cross border trade in goods and services. Goods or services which comply with the requirements of one country may not be saleable in another without modifications. This effect can be multiplied worldwide so that importers and exporters have to comply with rules which differ from country to country. EU law and the WTO rules are needed to limit the creation of such barriers and to prevent them from being used as a de facto form of protectionism.

There are three overarching sets of rules to control these technical barriers in respect of goods and services. The first two are the EU's Directive on Technical Standards and the EU Services Directive [***Note: the Dangerous Traction Engines Exercise does not concern services and the Services Directive does not affect the regulations to be drafted as part of this exercise.***] The third is the World Trade Organisation's rules which apply to members of the WTO (which include EU members and the EU itself). Where the EU makes technical regulations these are notified to the WTO by the EU. **[Note: In the Dangerous Traction Engines Exercise it is not clear from the assumed facts whether notification of the draft regulations to be drafted as part of the exercise would need to be notified to the TBT Committee of the WTO. Please assume for the purpose of the exercise that no reference needs to be made in the draft to WTO issues.]**

The Technical Standards Directive (98/34/EC)

Subject to limited exceptions, the Technical Standards Directive requires Member States to notify in draft to the Commission measures such as mandatory rules, guidance or any document which it is intended users should follow (referred to as 'technical regulations') which apply in the UK or a major part of it and which regulate:

- industrially manufactured or agricultural products (including bans on products, rules about their composition, packaging or testing and rules that relate to their subsequent use), or
- services provided on a commercial basis over the internet or through any similar medium (these are referred to as 'information society services').

A measure is a 'draft' if the text is at a stage of preparation at which substantial amendments can be made (Article 1(12)). (Thus, for example, it is too late to make a notification in relation to an SI if the Minister has already signed it.)

Subject to limited exceptions, after notification to the Commission, a standstill period of a minimum of 3 months (which can be extended in the event of objections from the Commission or another Member State) applies. During that period the draft measures may not be adopted. Any amendments of substance made to the draft after notification will require re-notification.

Failure to comply with these requirements can render a Member State's national law imposing technical standards unenforceable, and can expose the UK to the risk of infraction proceedings. For this reason if in doubt it is safer to notify a measure in draft.

The directive applies not only to legislation but also to "soft law" such as guidance (an example of this is the guidance produced in relation to the Building Regulations which the UK has notified in draft). The test is whether the rule is in practice followed whether or not there is a strict legal requirement to do so (fiscal rules that mean that it is advantageous to manufacture products in a particular way would for example be caught).

Notification under the Directive may be necessary even where the rules in question implement another Directive.

WTO : Technical Barriers to Trade

The World Trade Organisation's *Agreement on Technical Barriers to Trade* (TBT) binds the UK and the EU and imposes substantive and procedural requirements relating to all "technical regulations", "standards" and "conformity assessment procedures" that apply to trade in goods.

The TBT requires a WTO Member who wishes to introduce a technical regulation that is not based on an international standard and may have a significant impact on trade to notify the draft measure to the TBT Committee of the WTO before its adoption and allow other WTO Members a reasonable period to comment on the proposal.

The TBT requires WTO Members

- to comply with the Most Favoured Nation Treatment and National Treatment principles;
- only to impose regulations that are no more trade restrictive than necessary to fulfil a legitimate objective; and
- to base those regulations on relevant international standards unless such standards would be an ineffective or inappropriate means of fulfilling the legitimate objectives pursued (see Article 2.2 for a non-exhaustive list).

The Agreement also requires Members to:

- consider accepting the technical regulations of other WTO Members as equivalent to their own if they adequately fulfil the same objective;
- wherever appropriate, specify technical regulations in terms of performance requirements, rather than by prescribing particular designs or characteristics; and
- take into account the needs of developing countries.

Standards are covered by a Code of Good Practice, annexed to the TBT Agreement. Central Government bodies are bound by the Code, and are required to take reasonable measures to ensure that other standardising bodies also comply with it.

In principle failure to notify under the WTO procedure will not make the measure invalid although it could give rise to dispute settlement proceedings. Dispute settlement proceedings would probably not be brought in response to a single failure to notify, in the absence of any breach of substantive requirements, as it is difficult to see what remedy a complainant would seek. However a WTO member could well face censure in the TBT Committee, however, and a pattern of procedural breaches could be the subject of dispute settlement proceedings.

You can find more information on the International Law section of LION and the WTO website. For information about how to notify, see the Department for Business website.

GLS COURSE - SYNDICATE EXERCISES 10-10-14 on HOW THE JCSI/SCSI OPERATES

Exercises

Five exercises are attached on the following pages. Each one contains actual SI text and the JCSI or SCSI criticism of that text. Each syndicate is requested to look at one of the exercises and report back on how the drafting could have been changed to avoid questioning by the JCSI or SCSI - other syndicates can then comment if time permits. At the end papers will be handed out giving examples of possible solutions.

Exercise 1

SCSI 8th Report of 2010-12: S.I. 2011/2534

TEXT REPORTED

8. In the Schedule, after the sixth entry (Article 47 of the Code) under the heading "Presentation of Goods to Customs", insert the following—		
"Column 1 *Description of Relevant Rule / Relevant Rule of a description* **Directions made on 2 August 2011 under section 30 of the Act**	Column 2 *Person of a description*	Column 3 *Penalty for contravention*
No goods to which section 30 applies to be moved except: (a) on the instructions of a proper officer; (b) in the manner and under the conditions specified by a proper officer.	The declarant. The person who moves the goods.	£1,000. £1,000."

Adapted extract from Committee Report

Regulation .. 8.. amend[s] the Schedule to the 2003 Regulations [as defined]. The text inserted ... includes italic column headings which are already present in the Schedule. The Committee asked why that is so. In its memorandum [the Department] states that the headings are included ""by way of a "signpost", to make clear that the inserted columns fall under those headings in the 2003 Regulations". The Committee considers that unnecessary material should not be included in amendments. It is important to be able to ascertain precisely the textual changes being made to existing legislation by a textual amendment of existing legislation.

WHAT COULD HAVE AVOIDED QUESTIONING BY THE SCSI

Exercise 2

JCSI 37th Report of 2010-12: S.I. 2011/2649

TEXT REPORTED

6. A person is not guilty of an offence under the 2008 Order who would, apart from this article, be guilty of—
(a) an offence under these Regulations, and
(b) a corresponding offence under the 2008 Order.

Adapted extract from Committee Report

The Regulations make provision for enforcing certain EU restrictive measures ... In particular the Regulations create criminal offences, some of which may overlap with offences under [the 2008 Order as defined]. .... The Committee asked ... why regulation 6, when read literally, appears to secure that a person who has committed both an offence under the Regulations and a corresponding offence under the 2008 Order is relieved from being guilty not only of the corresponding offence but also of any other offence under the 2008 Order. In [its] memorandum ... the Department acknowledges that regulation 6 can be read as having that effect. It attributes the mistake to "recent efforts to improve and simplify" ... legislation. .. . The Committee is concerned that the error in this case might have been attributable to the way in which a number of the provisions of the Regulations have been constructed. Regulation 6, like regulations 4 and 5, employs a rather unusual formulation along the lines "A person [is subject to specified consequences] who [does something] ...". This is a forced construction which is inconsistent with normal English usage and can make provisions which employ it difficult to understand. In the context of regulation 6 promoting the words setting out the operative proposition of the regulation before the words describing the situations in which it applies may have contributed to the former being cast unduly wide. Both because of its strain on syntax and because it runs the risk of causing slips of this kind the Committee considers that this construction is best avoided.

[NOTE: A second error might also have been commented on by the JCSI]

WHAT COULD HAVE AVOIDED QUESTIONING BY THE JCSI

Exercise 3

JCSI 39th Report of 2010-12: S.I. 2011/2947

TEXT REPORTED

Rule 7(1) The Secretary of State shall serve on the Board and, subject to rule 8, the prisoner [,..] where a case relates to the initial release of a prisoner, the information specified in Part A of Schedule 1 to these Rules and the reports specified in Part B of that Schedule

Schedule 1, Part B, paragraph 4: An up-to-date risk management report prepared for the Board by an officer of the supervising local probation trust, including information on the following where relevant:

(a) details of the home address, family circumstances and family attitudes towards the prisoner;
(b) alternative options if the offender cannot return home;
(c) the opportunity for employment on release;
(d) the local community's attitude towards the prisoner (if known);
(e) the prisoner's attitude to the index offence ...

Adapted extract from Committee Report

In a number of places in the Schedules ... , dealing with information and reports to be submitted to the Board [as defined] in different cases, the Rules refer to "the index offence". [The term "index offence"] not being a defined term in the Rules or their parent Act, the Committee asked the Department what it means and how readers are expected to understand the intended meaning. In its memorandum the Department says: "The index offence is the offence for which the offender received the sentence which is being considered by the ... Board. The [Department's] approach is not to define terms which the intended reader will understand (and which can only be understood in one sense). The term 'index offence' will be familiar to anybody who has to interact with the ... Board. Accordingly, the [Department] does not believe it is necessary to define this term." The Committee agrees that in choosing language for the drafting of an instrument it is appropriate and desirable to consider the principal target audience of the instrument; and that may lead to the adoption of trade jargon in appropriate cases. However, unless the subject matter of an instrument is so technical or specialist that by its nature it is bound to be impenetrable to those not intimately involved in the subject area, it is undesirable to draft in language that in effect excludes the reader without specialist knowledge from understanding the effect of legislation that is addressed to citizens at large.

WHAT COULD HAVE AVOIDED QUESTIONING BY THE JCSI

Exercise 4

JCSI 16th Report of 2010-12: S.I. 2011/2911

TEXT REPORTED

Rule 8: If payment is not made by a leviable body in accordance with the requirements of rule 7, the Board is entitled to charge interest on any amount unpaid ...

Adapted extract from Committee Report

The Committee asked how the decision whether or not to charge interest is to be taken, and what the *vires* were for conferring the discretion to make that decision. In its memorandum the Department says "The use of the word "entitled" in rule 8 is intended to provide for the [Board as defined] to charge interest where the levy is not paid in accordance with the rules. The vires is conferred by section 174(7) of the 2007 Act. Rule 8 is not intended to confer a discretion ...." The Committee notes that section 174(7) allows the rules to "provide that if the whole or any part of an amount of the levy payable under the levy rules is not paid by the time when it is required to be paid under the rules, the unpaid balance from time to time carries interest ...". ... The Committee accepts the Department's assurance that there was no intention to confer a discretion; but that makes it difficult to understand why the rule departs from the language of the Act and uses the expression "entitled", which suggests some kind of discretionary power. In the Committee's opinion the choice of language is, at least, unnecessarily confusing.

WHAT COULD HAVE AVOIDED QUESTIONING BY THE JCSI

Exercise 5

JCSI 20th Report of 2013-14: S.I. 2013/3037

TEXT REPORTED

Regulation 5(3): The amount of the school's surplus is calculated in accordance with Ax(B/C) where—

(a) A is the amount referred to in paragraph (2);

(b) B is the total number of pupils registered at the school on the date used for ascertaining pupil numbers specified in regulations made under section 47 of the 1998 Act in force immediately before the conversion date [defined in the parent Act as the date on which a school or replacement school opens as an academy]; and

(c) C is the total number of pupils registered at all of the schools within the federation [defined elsewhere] on that date.

Adapted extract from Committee Report

Regulation 5 makes provision for determining whether a federated school has a surplus and calculating the amount of any surplus. Paragraph (3) specifies a formula for the calculation, the final component of which is defined in sub-paragraph (c) by reference to "the total number of pupils registered at all of the schools within the federation on that date". There are two dates specified in the previous sub-paragraph: "the date used for ascertaining pupil numbers specified in regulations" and "the conversion date". The Committee suspected that, contrary to normal usage according to which "that date" would mean the last date mentioned, the intention was to refer to the first of the two dates mentioned in the previous paragraph. Accordingly the Committee asked the Department ... to explain the intended meaning. In [its] memorandum ... the Department confirms the Committee's suspicion and asserts that the intended effect of the provision is "clear from the drafting" in the context set out in the memorandum. The Committee agrees that ... it [is] likely that in any dispute a court would reach the conclusion, as asserted by the Department, that "that date" must be intended, contrary to normal usage, to refer to the first of the two dates previously specified. However the Committee does not accept that ambiguity requiring a strained construction of the text is acceptable.

WHAT COULD HAVE AVOIDED QUESTIONING BY THE JCSI

DRAFTING STATUTORY INSTRUMENTS
DEVOLUTION EXERCISE

PART 1: INFORMATION

The Order

We are asked to draft an order amending the Decent Homes Agencies Order 1996 (SI 1996/4321). The order extended to Great Britain and has already been amended by four amendment orders:

- a first amending order for England & Wales, and Scotland (SI 1998/5432),
- a second amending order for England & Wales alone (SI 1998/6543), and
- two further amending orders for Scotland alone.

The amendment

The provision in the 1996 Order to be amended currently provides:

> "18.- (5) An Agency shall not make a determination under this article if the application for it is withdrawn."

We work for the Secretary of State. We are asked to add a further case where the agencies are not to make determinations. That case is where the application for a determination relates to a hostel and is made after the period specified in article 18(3).

The enabling power

One of the enabling powers for the earlier order is section 15A of the Housing and Immigration Act 1995. That section contains the only relevant power for our amendment order. It is a power to make provision, by order, for housing provided by decent homes agencies - which are statutory bodies established under that Act (each operating in a specified area).

Section 98 of the 1995 Act (extent) provides -

> "98. – (1) The provisions of this Act extend to England and Wales, and only to England and Wales, subject as follows.
>
> (2) The following provisions (together with this section) also extend to Scotland -
>
> sections 9 to 11
> sections 13 to 16
> sections 21 to 23
> sections 87 to 89.
>
> (3) Sections 35 and 36 (together with this section) also extend to Northern Ireland."

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PART 2: QUESTIONS

Question 1: To what part(s) of the UK does the enabling power extend?

Question 2: Assume (a) the enabling power was devolved to the National Assembly for Wales (by virtue of the National Assembly for Wales (Transfer of Functions) Order 1999 (SI 1999/672)) and has now been transferred to the Welsh Ministers by virtue of paragraphs 30 and 32 of Schedule 11 to the Government of Wales Act 2006; (b) the enabling power was also devolved to the Scottish Ministers (by virtue of section 53 of the Scotland Act 1998); and (c) the subject matter is considered to be about "housing". What should be the heading?

(a) HOUSING
(b) HOUSING, ENGLAND
(c) HOUSING, ENGLAND AND WALES

Question 3: Assuming, instead, that the power was not devolved/transferred and that the order is to extend to England and Wales and Scotland, what should the heading then be?

(a) HOUSING, ENGLAND AND WALES AND SCOTLAND
(b) HOUSING, ENGLAND AND WALES
HOUSING, SCOTLAND
(c) HOUSING, GREAT BRITAIN
(d) HOUSING

Question 4: Another alternative assumption – that the enabling power extended to the whole of the UK but was devolved only for Scotland, and the order is extend to England and Wales and Northern Ireland. What should the heading be then?

Question 5: Back to the original assumption - that the power has been devolved to the Welsh Ministers and the Scottish Ministers. Should the title be:

(a) The Decent Homes Agencies (Amendment) Order 2014
(b) The Decent Homes Agencies (Amendment No. 2) (England) Order 2014
(c) The Decent Homes Agencies (Amendment) (England) Order 2014
(d) something else?

Question 6: Should we have a provision indicating that the order is limited to England?

Question 7: If so, should the provision say :

(a) "This Order extends to England"
(b) "This Order applies in relation to England only", or
(c) Something else (and if so, what might that be)?

Question 8: The order will have to recite the enabling power: "The Secretary of State, in exercise of the power conferred by section 15A of the Housing and Immigration Act 1995 (**a**) . . . "

What devolution aspects should footnote (**a**) cover?

[If you have time, can you try drafting the text of the footnote, from the information given above?]

Question 9: Finally, the drafting of the amendment to the Decent Homes Agencies Order 1996 which we have been asked to undertake; how should we go about making that amendment? Should we -

(a) make a textual amendment to the principal order,
(b) not amend the order but have a deeming provision in the new order relating just to England, or
(c) do something else?

Question 10: Can you draft the amendment?

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JCSItalk10-10-14(final)

HANDOUT FOR GLS 10 JULY 2014

HOW THE JOINT AND SELECT COMMITTEES ON STATUTORY INSTRUMENTS OPERATE

[redacted]

Introduction

1. The aim of this talk is to add to your understanding of how the Joint and Select Committees on Statutory Instruments operate, in order to help you when you need or choose to deal with them. The way I plan to proceed is to start fairly briefly with their constitution and procedures, and turn then at greater length to main reporting grounds (with some examples). Following that I will set aside a bit of time for a syndicate exercise. Then, so far as it hasn't been picked up in discussion of the exercise, I will try to cover some basic working assumptions and underlying factors followed by communications with the Committees. At the end I plan to leave a few minutes for questions.

Constitution and procedures

2. In simplified outline, the JCSI is a technical Committee of 7 Commons and 7 Lords members (with a quorum of 2 each), responsible for considering the materials tabulated in outline below:

All general (as opposed to local) statutory instruments whether they have a parliamentary procedure or not;
all local ones with any parliamentary procedure;
all other documents with an affirmative procedure;
unless they fall within the remit of the Regulatory Reform Committee or the Human Rights Committee.

The JCSI is constituted by specific Standing Orders of each House (151 for Commons, 74 for Lords). Where instruments are - under their enabling legislation - subject to House of Commons but not House of Lords procedure (the most common category being instruments on taxation) the Lords members depart, only the Commons Standing Order applies and the members become the SCSI. On relations with other parliamentary committees, although there is scope for advisers[1] to alert each other if they spot matters of likely common concern, the committees are themselves wholly independent - hence the differences you will sometimes spot between the approach of the JCSI/SCSI on the one hand and that of the House of Lords Secondary Legislation Scrutiny Committee (which covers merits) on the other.

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[1] The staff assisting the JCSI/SCSI comprises: House of Lords staff (all instruments requiring affirmative procedure in both Houses) [redacted]

3. The JCSI meets almost every Wednesday that Parliament is sitting and considers instruments laid from around 12 to 19 sitting days before the meeting. Immediately after the JCSI meets there is a meeting of the SCSI if there are any Commons only instruments for it to consider.

4. If the relevant Committee sees nothing significant wrong with the instruments before it, that is that. If it considers there is or might be something significant wrong with any of them, it then sends a memorandum request to the Department (the request is normally e-mailed before the end of the Wednesday and seeks a memorandum in response by noon the following Tuesday). The Department's memorandum in response is then considered by the Committee two meetings later. If the response looks satisfactory and complete, that is that. If the response looks potentially satisfactory but incomplete, a further question is likely to follow with consideration of the follow up reply a fortnight later[2]. If the response looks unsatisfactory (or the follow up reply does), then the instrument is drawn to the special attention of Parliament in that week's Committee report. The reports also list instruments in the batch that have passed the Committee without comment.

Main reporting grounds (with examples)

5. The function of the JCSI is to determine whether the special attention of each House[3] should be drawn to any instrument on grounds specified in the relevant standing orders.

The grounds in full, in relation to any statutory instrument, are -
'(a) that it imposes a charge on the public revenues or contains provisions requiring payments to be made to the Exchequer or any government department or to any local or public authority in consideration of any licence or consent or of any services to be rendered, or prescribes the amount of any such charge or payments;
(b) that it is made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts, either at all times or after the expiration of a specific period;
(c) that it purports to have retrospective effect where the parent statute confers no express authority so to provide;
(d) that there appears to have been unjustifiable delay in the publication or in the laying of it before Parliament;
(e) that there appears to have been unjustifiable delay in sending a notification under the proviso to subsection (1) of section 4 of the Statutory Instruments Act 1946, where an Instrument has come into operation before it has been laid before Parliament;
(f) that there appears to be a doubt whether it is intra vires or that it appears to make some unusual or unexpected use of the powers conferred by the statute under which it is made;
(g) that for any special reasons its form or purport call for elucidation;
(h) that its drafting appears to be defective;
or .. any other ground which does not impinge on its merits or on the policy behind it'.

6. In formal terms, the grounds listed in the terms of reference are of considerable vintage and would probably be among those to be considered for revision if ever there were a general look at standing orders. For a start, if they were followed in full, the first ground alone would call for reporting of all fees instruments. However the fact that reporting is discretionary rather than obligatory and the existence of the residual reporting ground - the one providing for reporting on anything outside the specified grounds other than

[2] Although the power has not yet been exercised in the nine years that I have been in my post, the Committee also has power to call for representatives of Departments to answer oral questions.
[3] For SCSI it is House of Commons alone. The Standing Order also imposes a duty on each Committee, i.e., before reporting that the special attention be drawn to any instrument, the Committee must afford to the Department concerned an opportunity of furnishing such explanations as the Department may think fit.

policy and merits – prevents either Committee from being hamstrung by the antiquity of some of the reporting grounds. It follows that the grounds themselves give only a partial picture and that it is not possible in a talk of this length to give a complete picture[4], but I shall try nonetheless to indicate both some prominent themes in reports on individual instruments.

7. If one takes the Committees together, the recent figures show defective drafting as by far the most common reporting ground, followed by the residual ground, followed by doubtful vires/unexpected use, followed by elucidation, followed by delay, followed by retroaction, with no reports on the revenues/payment ground, or on the exclusion from courts ground. So it is clear that defective drafting calls for the fullest focus. In outline, it is used to cover failure to state literally what the instrument is intended to mean, making provision that (literally read) leads to an ambiguity or (subject to recognised exceptions) including material that has no legal effect. Incidentally, under the residual ground, there are sometimes reports for failure to comply with proper drafting practice – e.g. cases which do not fall into those categories but would give an editor or a successor unnecessary trouble (e.g. making an instrument without a title provision – see 2007/8 JCSI 11th Report, SI 2007/2706). The examples of **defective drafting** and the allied grounds of **failure to comply with proper drafting and legislative practice** in the reports show a number of classifiable features.

8. Probably the most important feature is failure to get an offence provision clear. There are various specific examples set out below. Thus –

- in the 2013-14 JCSI 9th Report, SI 2013/1478 is a case where it is not clear whose act comprises the offence (products themselves had to meet certain standards, and failure to comply was identified as an offence, but there was no indication of who personally had the compliance duty);
- in the 2005-6 JCSI 11th Report, SI 2005/2924 was reported for including an offence of failing to comply with a direction, without an indication of a time limit for compliance;
- in the 2008-9 JCSI 3rd Report, SI 2008/2924 was reported for including an offence of heading out to sea before having the requisite survey following an important repair, without any clarification of what 'important' meant.

The underlying message is that, if anyone is at risk of being subject to a criminal penalty, it is the responsibility of the Department to ensure that the person at risk knows precisely what might give rise to the penalty in question. There is however one qualification to note; the Committees have recognised that at times securely lawful implementation of an EU instrument cannot in any way be reconciled with total precision; thus the sanctions on trading with North Korea in relation to 'luxury' perfumes without further definition were convincingly defended by the responsible Department, the justification being that there was actually no other means of secure compliance with EU rules; note however that

[4] The reports, starting with the 1997/8 session, can be found in full on the internet by clicking on Google - UK Parliament - Committees - Joint Select Committees [for JCSI]/ Commons Select Committees [for SCSI] - Statutory Instruments (Joint Committee on Statutory Instruments) [for JCSI]/ Statutory Instruments (Select Committee on Statutory Instruments) [for SCSI] - Reports and Publications. In addition there are regular summaries of significant reports on the statutory instruments section on the LION website.

equivalent allowance has not been afforded in cases where EU legislation does not apply but the responsible Department wants as a matter of policy to have a provision that in material terms is as near as possible to EU implementation in a connected field [5].

9. A second feature that comes up fairly regularly is inconsistency in the same instrument. The assumption here is that the same terms should be used for the same meanings, and that approaches to parallel issues are expected to be followed through whenever appropriate. Thus –

- there has been criticism of use of different terms ('request' and 'require') to mean exactly the same thing (2006-7 JCSI 1st Report, SI 2006/2084); and
- provisions -
    - that introduce a series of indents are expected to cover all of them conceptually and grammatically - see 2014-15 JCSI 3rd Report, SI 2014/572; and
    - that introduce a Schedule are expected to be good enough between them to cover the whole Schedule – see 2012-13 JCSI 3rd Report, SI 2012/504, where a provisions introducing a Schedule covered only three Parts of a four Part one;
- on gender neutrality -
    - remember that there may be implications for the text as a whole - see 2000-12 JCSI 27th Report, SI 2011/1484, where avoidable ambiguity was generated by use of 'he or she' in a provision that might have related to companies, and 2012-13 JCSI 2nd Report, SI 2013/384, where 'it' was used in a provision that was intended to relate to the Secretary of State; and
    - if you are inserting gender neutral provisions into existing legislation drafted gender specifically, you will need to do it in a way that does not clash with what is already there - see 2008-9 JCSI 7th Report, SI 2008/3195, which includes the following general statement of approach:

> **The Committee, while not regarding failure to adopt gender-neutral drafting as alone being a ground for reporting, has no difficulty with gender-neutral drafting as a matter of principle, and is prepared to make allowance for a degree of extra clumsiness in the drafting which may result. However, it does not consider that such allowance should be made for ambiguity or internal inconsistency ...**

10. A third feature that comes up is that of inclusion of superfluous text or omission of essential text[6]. Instances include:

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[5] See 2006/7 JCSI 17th Report, SI 2007/1134, the Department's memorandum on which, covering not only the constraints on them but also what administrative procedures they had in place to assist traders, was printed without any comment. The SI was based on a UN Resolution that allowed member states significant choice in how they expressed themselves and then an EU Regulation that did not. Tolerance was not extended to equivalent provisions applying to overseas territories such as the Falklands, where the SI was based purely on the UN Resolution - for the imprecision in that case was in strict terms a matter of policy choice (2006/7 JCSI 10th Report, SI 2006/3327). Similarly the JCSI, in an elucidation based reports, was not persuaded that imprecise EU terminology on non-discrimination, frequently interpreted by the ECJ, could properly be imported without further definition into related SIs where EU law did not necessarily apply, for the CJEU interpretations might well be irrelevant (2013/14 JCSI 2nd Report, SI 2013/500).

[6] See for a general approach the JCSI's First Special Report of Session 2013-14.

- definition of terms never used outside the definition itself (2012-13 JCSI 15th Report, SI 2012/2840), or only in a heading (2009-10 JCSI 1st Report, SR 2009/313): that can best be avoided in a final check by use of the "find" facility on the computer plus the term in question;
- use of material rendered unnecessary by other material in the same instrument (2008-9 JCSI 21st Report, SI 2009/1388) or by virtue of the Interpretation Act 1978 (2008-9 JCSI 15th and 17th Reports, SI 2009/795 and SI 2009/1120), or duplicating material in the Act under which the SI is made (2009-10 JCSI 3rd Report, SI 2009/2937) or in applicable provisions of the Magistrates' Courts Act 1980 (2012-13 JCSI 5th Report, SI 2012/947); and
- presentation of structurally essential material as if it were not operative (2010-12 JCSI 35th Report, SI 2011/2552; 2014-15 JCSI 3rd Report, SI 2014/790).

11. A fourth feature is conceptual unclearness or incompleteness: examples include –
    - 2006-7 JCSI 13th Report, SI 2007/402 (including conflicting propositions without anything express on which one trumps the other) and, as a mirror image, 2012-13 JCSI 4th Report, SI 2012/1108 and 2013-14 JCSI 13th Report, SI 2013/2619 (expressing one proposition as being subject to another when they don't in fact conflict or where one simply defines the other);
    - 2008-9 JCSI 5th Report, SI 2008/3166 (joining two indented paragraphs setting out conditions, without either 'and' or 'or' between them, in a case where it was not apparent whether they were meant to be cumulative or alternative);
    - 2012-13 JCSI 3rd Report, SI 2012/637 (leaving the term "normal working hours" unspecified further, in a provision that could relate to both the sender and the recipient of material); similar criticism was attached to the undefined terms "business days" (2012-13 JCSI 13th Report, SI 2012/2563) and "working days" (2013-14 JCSI 15th Report, SI 2013/2537) and - more generally - using the individual seasons without adding dates for start and end of each (2012-13 JCSI 16th Report, SI 2012/2885-6);
    - 2012-13 JCSI 5th Report, SI 2012/1034 (imposing a duty without either creating a sanction for breach of the duty or ensuring that it fastened on a sanction found elsewhere);
    - 2013-14 11th Report, SI 2013/1506 (attempting to amend a preamble); and
    - 2014-15 5th Report, SI 2014/1197 (designating an organisation that has no legal personality as a party to a potential contract).

12. A fifth feature comprises failure of focus. Examples include -
    - taking it for granted that Lexis has an up to date text right when actually it hasn't (2012-13 JCSI 16th Report, SI 2012/2885-6);
    - making a provision come into force at a time that cannot exist (2014-15 JCSI 3rd Report, SI 2014/870)
    - use of a formulaic expression to cover permutations only some of which it covers (2013-14 JCSI 14th Report, SI 2013/2299 and 2013-14 JCSI 15th Report, SI 2013/2669);
    - inaccuracy in use of common terminology with a technical meaning - e.g. in relation to where a company counts as being incorporated (2013-14 JCSI 22nd

Report, SI 2013/3208) and what a government department comprises (2013-14 JCSI 22nd Report, SI 2013/3220); and

- drafting that reads as if it aims to give an impression rather than to reflect legal effect, e.g. imposition on local planning authorities of a requirement to include, in planning application decision notices, a statement explaining *how* they had dealt with the applications in a positive and proactive manner, when there was no pre-existing duty to deal with them in that way in the first place (JCSI 2010-12 11th Report, SI 2012/2274).

13. Last, and perhaps most frequent, is the case of the simple checking error, such as wrong cross-reference, duplication and incorrect nomenclature. One question that is bound to arise here is whether those types of error should be covered by reports at all or just by an informal letter from me suggesting rectification by correction slips and/or in the website or annual edition. The approach used is explained in 2012-13 JCSI 15th Report (SI 2012/2748); on an analogy with case law cited in the Report, suitability for a correction slip requires an error to be small scale and obvious on its face, and for the specific textual correction to be equally obvious; if so, then my starting assumption is that it makes sense for me to write rather than necessarily put it forward as a potential item for report; those letters can also cover minor errors not capable of being so rectified but equally insignificant, as future reference points. There are four points here to note:

- first, if you get what looks like a defective drafting related query and wish to claim it is rectifiable by a correction slip, there is nothing intrinsically wrong with seeking to persuade the Committee, but remember to set out your reasons for doing so (2012-13 JCSI 2nd Report, SI 2012/767);
- secondly, the fact an error is obvious does not make it small scale (removal of two definitions would have been too large (2009-10 JCSI 13th Report, SI 2010/458)), and the fact that something is very small scale does not mean that the correction is obvious (2014-15 JCSI 5th Report, SI 2014/610);
- thirdly, if (without a question being raised) a Department gets a letter stating that a perceived error should be noted for future reference, and the perceived error is repeated without the Department either writing back to argue that it is not an error or explaining why in the Explanatory Memorandum, the Department should not be surprised if a report follows. This happened in relation to 2012-13 JCSI 2nd Report, SI 2012/815, where the defective drafting report covered instances of duplication following long standing practice;
- finally, a mass of small scale errors in the same instrument can be evidence of such general carelessness that they will be included in the Report – see 2007/8, JCSI 9th Report, SR 2007/476.

14. The ground of **unusual/unexpected exercise of powers** is potentially incongruous, for the exclusion of reporting on policy and merits is accepted by the Committee as covering not just the residual reporting ground but also all the specific ones. Thus a policy that might seem strange but also seems to have been thought through is unlikely to be reported on this ground. As for what is left -

- there is one obvious case. Suppose a Government has assured Parliament in debate that in given circumstances it will avoid use of an enabling power.

Parliament expects it and its successors to abide by the undertaking: for - apart from expectations of probity - the undertaking might have been a factor in the passing of what became the Act in question. In consequence there was a clear case for JCSI criticism of use of section 2(2) ECA 1972 when a separate tailor-made enabling power was available, for that cut across an assurance given that such an approach would be taken only when there were special reasons for it - see 2003-4 JCSI 15th Report, SI 2004/590[7];

- other cases largely involve a choice of approach so surprising that it could not possibly have been made had adequate thought been given. Examples include -
    - 2005-6 JCSI 6th report, SI 2005/1508 – requiring all school governors entering into any contract whatever to have regard to a scheduled code, in a case where the code in question just covered employment rights (and was thus of significance where - say - catering was being contracted out, but not where - say - the contract covered supply of textbooks);
    - 2009-10 1st Report, SI 2009/2267 - providing for those removed from a statutory body for bankruptcy to be *automatically reappointed when discharged* (as opposed to becoming eligible for reappointment, given that replacement appointees may well have already have occupied their previous places up to the limit).

15. Turning next to **doubtful vires**, there is a fairly recent example (2010-12 JCSI 4th Report, SI 2010/1723) where a general power was relied on as authority for a provision - overturning Tribunal awards - so surprising that one would have expected to see specific authority for it. The fullest explanation of types of provision that would need specific authority is, so far as I am aware, set out in Craies on Legislation, 9th Edition, Chapter 19[8].

16. Sub-delegation beyond enabling powers is an intermittent issue as well. Thus in the 2005-6 SCSI 2nd report, SIs 2005/3348 & 3350 were reported for providing for definitions in the SI to have meanings given in changeable computerised sourcebooks:

As is explained in paragraph 2.8.1 of Statutory Instrument Practice, where an instrument refers to an external publication, such a reference must be to an existing publication, and should give the publisher's name, the place and year of publication and the edition. In this way any subsequent amendments to the publication will not alter the effect of the instrument.
These Regulations do not contain that information, or any ... specification of the date as at which the publications in question are to be read.

[7] That SI was treated as incompatible with a Government assurance given by the relevant Minister, Geoffrey Rippon MP, and set out in House of Commons Hansard of 15 February 1972, columns 279 to 284; see also the 19th JCSI Report for the 2012-13 Session (SI 2012/3171), where a similar approach was taken to parting company from the Explanatory Notes published with the Bill about what the enabling power permitted. In contrast the practice of including impact assessments with SIs, also based on a Government assurance to Parliament (Hansard, House of Commons debates 19 July 1994, column 184) offered by a statement in less dramatic circumstances, was acceptably varied in relation to tax assessments by a parallel HMRC statement.

[8] The case of R (ORANGE PERSONAL COMMUNICATIONS) Ltd v SECRETARY OF STATE FOR TRADE AND INDUSTRY (2002 AER 1526) is authority for the proposition that section 2(4) of the European Communities Act 1972 ('any such provision ... as might be made by Act of Parliament') is - although general - clear enough to provide the necessary specific authority provided that the unexpected effect (in that case by-passing a right to be consulted) is clearly articulated.

The phrase about the instrument failing to include any specification of the date at which the publications in question are to be read highlights an interesting point about Statutory Instrument Practice. Clearly, it is impossible literally to comply with all of paragraph 2.8.1 in referring to a purely computerised extraneous document; to the extent that compliance is impossible, reference to the date at which the document is to be read (assuming it is readily accessible by all who might affected) can be assumed to be enough to respect the underlying principle, which is what really counts in such a case. Note incidentally (2012-13 JCSI 5th Report, SIs 2012/937 & 938) that -

- reliance on an external computerised document is expected by the Committee to be supported by an indication in the Explanatory Note or a footnote of where a printed copy can be found, unless it is manifest that no potential reader is going to be without access to a computer; and
- reference to any outside document as part of the SI structure is not regarded by the Committee as justification for flaws that would not be accepted were the text relied on directly included in the SI.

17. Other examples include -

- forgetting to insert the right enabling power in the preamble (2012-13 JCSI 13th Report, SI 2012/2636, a case where the Secretary of State in question clearly had the necessary power - the Report identifies the court case that renders completeness of the preamble nonetheless significant);
- assuming that the existence of an EU obligation extended an enabling power to beyond what it could mean (2014-15 JCSI 3rd Report, SI 2014/953);
- making an instrument in advance of the relevant power bring in force, in a case where section 13 of the Interpretation Act 1978, which permits anticipatory exercise to an extent, didn't help (2012-13 JCSI 16th Report, SI 2012/2690); and
- using negative procedure where draft affirmative appeared to be called for (2013-14 JCSI 24th Report, SI 2014/182)[9].

18. Need for **elucidation** tends to arise where an apparent omission or a peculiarity might have been explained in accompanying material but has not. Sometimes this is reported in neutral terms, sometimes in more critical terms. Thus –

- a neutral case is found in the 2010-12 JCSI 1st Report, SI 2010/532, where there was a convincing but unexplained reason for a blank question in a form included in the SI (the forms in parallel instruments in England and in Wales needed to be scanned on the same computer and the blank question in England was about Welsh speaking in Wales) - had that been identified in the Explanatory Memorandum there would probably have been no question;
- a more critical case is found in the 2013-14 JCSI 21st Report, SI 2013/3239. In that instrument those responsible for running of children's homes were required to compile statement of purposes covering various specified matters including 'the arrangements for enabling the children to enjoy and achieve' without any object

[9] If, as sometimes happens, your power appears to be on the borderline of the two procedures, the safe course is to go for draft affirmative since, at worst, that can involve unnecessary debates whereas, in contrast, going for negative procedure wrongly involves omission of a n essential precondition and therefore nullity.

for those verbs. The Department defended the drafting as open-ended in order to leave compilers of statements free to decide what they wished to write – in other words they were aiming at maximum flexibility. Now, while it is reasonable to expect the Committee not automatically to be critical of jargon, the Committee does expect usage that matches standard language. Accordingly it cited the Shorter Oxford Dictionary to show, in effect, how narrow the meaning of those terms without an object might be and reported the instrument as requiring elucidation not satisfactorily provided in the memorandum.

19. Additionally, in dealing with examples, I should remind you that the Committees, as well as covering content, also cover **procedural matters** – items partly covered by specific reporting grounds such as delay in giving the necessary notification to the Speakers of both Houses under the proviso to section 4(1) of the Statutory Instruments Act 1946 when the S.I. comes into force before it is laid (remember that the explanation will be needed where coming into force is on the laying date, given section 4(a) and 23 of the Interpretation Act 1978) and partly in the residual category such as failures to follow Statutory Instrument Practice - e.g. failure to issue copies of an instrument free of charge (and to include text to say so above the heading) where it has been made wholly or mainly to correct an error in a previous instrument (2013-14 JCSI 18th Report, SI 2013/2882). Note, incidentally, that this applies to policy errors as well as drafting errors (2008-9 JCSI 1st Report, SI 2008/2783).

20. Still on the procedural side, breach of 21 day rule is a matter that needs specific focus. The 21 day rule is explained in paragraph 4.13 of Statutory Instrument Practice. A negative procedure instrument should normally be laid at least 21 days before it comes into force, and the Committee may also seek an explanation in any case where they consider that the interval between making and coming into force is unreasonably short, even though the instrument is subject to no Parliamentary procedure. Note that laying in adjournment periods is possible, and that the 21 day rule is a matter of convention not law; in practice, if the JCSI/SCSI related section of the Explanatory Memorandum (or a separate voluntary memorandum) demonstrates both the unexpectedness of the need for the SI to come into force early and the expedition shown by the Department in preparing it, criticism is unlikely. But -

- make sure you volunteer the explanation, otherwise there could be criticism for failure to do so (see 2005-6 JCSI 34th Report, SI 2006/1509, and 2005-6 JCSI 37th Report, SI 2006/1721, where both the breach and the failure explain it were inadvertent and accordingly commented on);
- note also that the Committee is unlikely to be satisfied where the process has been slowed by consultation within Government rather than as a result of external factors (2012-13 JCSI 5th Report, SIs 2012/953 & 954), or where the explanation comprises no more than a wish to avoid delay (2014-15 JCSI 5th Report, SI 2014/1183); and
- ensure you back up any need for expedition by actual conduct (see 2013-14 JCSI 9th Report, SI 2013/1474, where the statement of urgency was accepted but not the 8 days it took to lay a signed instrument before Parliament).

BREAK FOR SYNDICATE EXERCISE

Basic working assumptions and underlying factors

21. As I see it, there are two ***basic working assumptions*** for you to bear in mind:

- the first is that the Committee is likely to be neutral on style but strict on concept and structure – see 2013-14 JCSI 20th Report, SI 2013/2977. In that instrument –
    - a definition was incorrectly placed so that some of the terminology it defined was in provisions it did not appear to relate to,
    - a reference to 'the following conditions' and 'either condition' was made, where on a literal reading there appeared to be only one, and
    - a provision used an indenting structure of '(a) and (b) or (c)' (which can mean (a) and (b) combined *or* (c) alone but can equally mean (a) and (b) combined *or* (a) and (c) combined).

  It was defended on the basis that the intended policy should nonetheless be clear. The reaction in the Report was as follows: '*The Committee, while concluding that, in a dispute, a court would be likely on balance to reach the conclusion suggested by the Department, sees it as axiomatic that legislative propositions should be structured properly.*';
- the second is that the Committee, while expecting the drafting to be fully thought out so that inadvertent errors do not appear, is likely to be even more critical of deliberate imprecision – see 2013-14 JCSI 21st Report, SI 2014/1. In that instrument, as read with a predecessor previously criticised by the JCSI –
    - the relevant policy called, in effect, for a restriction on the power of bailiffs to seize goods from premises where those on the premises weren't of adequate capacity to challenge the bailiffs; and
    - it was sought to be achieved by describing such persons as 'vulnerable' without defining the term, the plan being that the assessment of vulnerability was to be a matter for individual bailiffs after they had been trained to assess it; and
    - there was a statement in the Department's memorandum that a deliberate degree of imprecision was therefore unavoidable.

  The reaction in the Report was as follows: '*A policy to the effect that assessment of vulnerability is to be a matter of discretion for individual enforcement agents, who are to be required to undertake approved training ..., would be achievable were Parliament to agree an amendment to enabling powers to that effect, but under the enabling powers cited the Committee currently considers that at most it might be possible to move part of the way towards that policy. .. In its memorandum the Department argues that, to achieve its policy, ... a degree of limited uncertainty cannot be avoided. ... The Committee here observes that, as a general rule, uncertainty is inimical to equality before the law, as it increases the scope for those with greater resources to settle disputes on favourable terms. Its deliberate adoption in secondary legislation, where the primary legislation does not permit the flexibility desired, could be alarming if adopted more widely.*'

22. On ***underlying factors*** there are two features that someone newly considering the JCSI and SCSI might find incongruous. First, they deal for the most part with instruments

that have already been made, and to that extent they have no direct influence in the making of any such instrument. Secondly, any report from either Committee is technically no more than an expression of the opinions of its members; a report, however critical, does not invalidate an instrument that is otherwise valid. So the question arises - why bother? The answer is that there is a constitutional basis - i.e. Ministers have powers to legislate only because Parliament has delegated the power and have not cancelled the delegation, and the JCSI and SCSI are accordingly mechanisms for making the recipients of those powers answerable to the donor. In addition there are, in my view, two connected justifications.

23. The first justification involves comparing Westminster procedures for primary and secondary legislation. In making primary legislation, both Houses go though Public Bill Committee and Report stages, at which point any amendment moved, whether by Ministers, back benchers or opposition, has to be debated. At times those stages can be pretty bland, but the mere fact that nobody can be sure in advance that those stages will be bland has a major relevance, in my view, to precision. It means that, when Bills are prepared by the government to survive those stages, that can only be done securely if those preparing Bills think out what they want to achieve in detail, and express it in full as exactly as they can, rather than hoping to skate over difficult issues without them being noticed, and internal government machinery operates with that in mind[10]. In contrast, with almost no exceptions, there is no formal procedure for amending secondary legislation, and therefore there is not equivalent internal government machinery and the temptation to skate over matters is inevitably stronger. So, although the publication of JCSI/SCSI reports does no more than make public what otherwise might be concealed, that very publicity is - as was recognised by a previous Attorney-General - probably the most cogent means of replicating, for secondary legislation, the disciplines that the very existence of Public Bill Committee and Report stages imposes on the making of primary legislation.

24. The second justification involves consideration of the budgetary constraints on Departments, which are regularly under pressure to cut expenditure. An obvious short term solution is to pare away the time spent on detailed statutory instrument work. Inevitably, officials within individual Departments will stand at differing points on a line from those looking for short term to those looking for long term solutions. The JCSI/SCSI approach – I would say – is primarily helpful to those at the long term end.

25. This leads me to what I regard as the most fundamental point to remember - the difference of Parliament from Government; the JCSI and SCSI are committees of Parliament, invariably in my experience headed by an opposition MP. In consequence their priorities and that of individual Departments will at times part company.

26. So, on expectations, you should always bear in mind that in a number of cases the Committees may well not share your starting assumptions. Thus –

[10] Significant cross-Departmental agreement is needed for a Bill to proceed, and it will be drafted in the Office of Parliamentary Counsel, which is not part of the instructing Department.

- the Committees can only look at what comes before them at the time it does; thus SI 2009/2023 (covered by the 2008-9 SCSI 5th Report) was reported for unexpected use of powers in that, for wholly understandable policy reasons, it included provisions the compatibility of which with EU law depended on the later issue of a retroactive EU derogation applied for but not yet consented to. Of course in such a case the later issue of the retroactive derogation (if made) would eliminate the ground of criticism, but at the time of reporting that couldn't be taken for granted;
- common commencement dates comprise a policy of the Government but are not taken for granted in Parliament (see 2014-15 JCSI 3rd Report, SI 2014/880);
- the Committees cannot be expected to accept an assumed outcome of parliamentary proceedings - see 2012-13 JCSI 13th Report, SI 2012/2522, where making an instrument depend on a draft SI not yet approved without covering the permutation that it might not be was criticised under the residual ground as unacceptable legislative practice;
- a Department may well accept a degree of surface ambiguity on the basis that a court would be likely to interpret it in the way intended but, save to extent that case law renders the interpretation effectively certain (2013-14 JCSI 11th Report, SI 2013/1855), the Committees are unlikely to accept that as a justification – see 2013-14 JCSI 24th Report, SI 2013/3204, where the Committee commented that 'however ambiguously a provision is drafted in any legislation, a court will never decline to interpret it, but the Committee's aim is to encourage makers of secondary legislation to reduce avoidable areas of ambiguity in the first place'.

Communicating with JCSI/SCSI

27. In the context of ***formal communications*** I would recommend firstly that you operate with at least reasonable familiarity with recent JCSI Reports, secondly that you neither under-estimate nor over-estimate JCSI/SCSI significance. I should expand on those concepts.

28. Operating with familiarity with recent Reports is important not only for drafting but also for what is put in the JCSI or SCSI directed element of the Explanatory Memorandum that accompanies SIs when laid (conventionally Section 3), and the Committees, while recognising that agreement is not always forthcoming, at least expect to see engagement on the part of Departments. There are two recent contrasting examples:

- the first is in the 2012-13 JCSI 5th Report (SI 2012/985), an elucidation report where the Committee accepted the propriety of the reasoning volunteered and then expanded by a Department for following a precedent criticised in a prior JCSI report, the reasoning being that –
    - the predecessor had not caused trouble in enforcement,
    - the Department needed to make the new SI very quickly after the prior report, and
    - it needed time to consider the prior report in depth to ensure that any change would be legally secure;

- the second is in the 2012-13 JCSI 6th Report (SI 2012/1426), a defective drafting report where a precedent recently criticised was followed without any reason given (Section 3 of the EM stated simply that there were no matters of special interest to the Committee) and the Committeee commented that it expected Departments making statutory instruments '*to be sufficiently familiar with its reports and those of the Select Committee on Statutory Instruments that, where they operate in a manner potentially conflicting with what either Committee has stated to be its preferred approach, they are in a position to explain clearly in section 3 of their Explanatory Memoranda why they have chosen to do so*'.

A parallel criticism appears in the 2013-14 JCSI 16th Report (SI 2013/2325).

29. Underestimating the significance of the Committees can arise from looking at formal leverage in strictly legal terms. The fact that there are no actual legal consequences from an instrument being criticised in a Committee report does not mean that the report can be sidelined. The framework in which the Committees work is parliamentary rather than legal, and those seeking to annul a negative SI can find JCSI/SCSI criticism pretty useful as a makeweight[11]. In addition, in the odd case, letters have been addressed to the relevant Secretary of State or Department about the tone in which a reply has been sent, though that is not intended in any way to inhibit *arguments* that might be adduced.

30. Overestimating the significance of the Committees can arise from over-wide assumptions about what they do. Thus –

- remember that they examine the instruments covered by relevant standing orders and nothing else. Suppose, in examining a new EU instrument, you form a view that no implementing or supplementing SI is needed. If that view is mistaken, you can expect problems with infraction or enforcement, but the one thing you are secure from is an adverse JCSI/SCSI report - quite simply the Committee has nothing to examine;
- also remember that the JCSI/SCSI, unlike the House of Lords Secondary Legislation Scrutiny Committee, has no policy role - the standing orders do not provide for it;
- finally remember that, while the risk of Committee criticism is bound to be a factor to be taken into account in the instruments you prepare, what either Committee is likely to do is not the only factor and does not have to be the overriding factor.

Take one of the most difficult cases from the Departmental lawyers' perspective, i.e. where the Departmental administrators wish to include a provision in an instrument that lawyers regard as being on balance (but not hopelessly) beyond the outer edge of the enabling power. The submission, in including the fully objective legal advice that can be expected up to the moment of the responsible Minister's decision, may well contain a contribution from lawyers on the lines of 'there's a respectable argument but, on a court challenge, the estimate on balance is that we'll lose; if we have to defend a case, the defence would be [...]'. Suppose then that the responsible Minister decides to take the risk and go ahead. From that point – in covering the responsible Minister as well as possible

[11] See the Sixth Standing Committee on Delegated Legislation Thursday 10 April 2003 debate on the Sea Fisheries (Restriction on Days at Sea) Order 2003, which can be found on the internet Hansard.

after the decision is made – the lawyers' role, in anticipating or answering a Committee question, is to present that defence as the Department's working assumption. That accords entirely with the Osmotherly rules, which – while not binding on Parliament – tend to be accepted by the JCSI and SCSI as things stand on a practical basis. The relevant passage (from paragraphs 40 and 41) reads: '*Civil servants who give evidence to Select Committees do so on behalf of their Ministers and under their directions. This is in accordance with the principle that it is Ministers who are accountable to Parliament for the policies and actions of their Departments*'.

31. In other words, the fact you are representing the Department rather than yourself personally may inhibit the tone you use, but in another way it helps you, as you are under no obligation to reveal what your initial advice was. The Committee has not acted as a fact finder, so 'what was your own real view?' is not a follow up question that you need expect to face.

32. What I therefore see as the balanced way – either in answering Committee questions or in anticipating them in the JCSI/SCSI related section of an Explanatory Memorandum or a separate voluntary one – is to recognise that what is most likely to persuade the Committee that the Department is justified is a respectable reasoning process, backed where necessary by appropriate authority such as case law. Similarly – in a case where a mistake has clearly been made – the only purpose of arguing that a Court is bound to construe the position the intended way is to support a statement of reluctance to make an early amendment, which then the Committee can consider, though the Committee is unlikely to be tolerant - save possibly in the case of an instrument due to expire soon - of disinclination to make any amendment at any stage (2012-13 JCSI 5th Report, SI 2012/1102). If, in contrast, the Department plans to make an early amendment, all that is needed is an admission of the mistake and an indication of when the amendment will be made: that will save you and the Committee time.

33. In addition remember that the JCSI and SCSI do not always notice flaws, so –

- do not assume that the fact that a text is precedented and the precedent was not reported is of itself a justification (2013-14 JCSI 18th Report, SI 2013/2877), though there is no reason not to point out a precedent where the underlying intention had been expressly drawn to the JCSI's attention; but
- note also that appendices to JCSI reports sometimes include particular Departmental responses on unreported instruments, to show good examples. Thus the 2007-8 JCSI 9th report contains a specimen (SI 2007/3495), where a potential threat underlying a JCSI question – i.e. identification of a provision the Department seemed no longer to have power to make – was met with frankness, including the admission of an inconsistency (unspotted by the JCSI) in a previous instrument, so as to show that the power had on balance survived. The printing of that type of memorandum as a good example should be helpful in making it clear to Departments that the JCSI's primary aim is not to catch them out but to encourage good drafting being backed by full thought on what is to be achieved, and also by open engagement in responses.

34. On ***informal communications with advisers***, there is a difference of approach that depends on whether the procedure is affirmative or not. Thus:

- on affirmatives (covered by House of Lords lawyers unless they attract Commons procedure alone), there is an offer to carry out a preliminary check on entire SIs in advance of their being formally laid, as that can certainly save trouble on fixing time for debates. It is worthwhile to get in touch with the advisers on timing; the default assumption is that a draft that is of routine or shorter length will be returned within ten working days when Parliament is sitting; actual agreement may take longer, and in adjournment periods much depends on who is present. Note in particular that House of Lords Standing Orders preclude debates before the JCSI has completed consideration, so the need to respond to a question can make a fortnight's difference;
- on other instruments, the quantity is too great for any such advance check, but House of Commons colleagues and I are prepared to offer thoughts on specific issues put to us where Departments finds resolution difficult and would like informal input from here before finalising views.

That is, I hasten to add, not a substitute for internal checking. On my side, the internal analysis of the difficult issue should be complete before a request for informal advice is made, and - on the House of Lords side - the advisers require each draft to have gone through full internal checking and clearance by an identified SCS lawyer before it goes to them. Subject to that, the Committee members in my time have valued informal contacts between advisers and Departments, though remember that the advisers cannot bind the Committee members and accordingly reference in a Departmental memorandum to advice offered as part of prior informal contact is unlikely to be appreciated (2005-6 5th SCSI Report, SI 2006/570).

[redacted]

10 October 2014