



House of Lords
House of Commons
Joint Committee on Statutory
Instruments

**Government Response to
the Committee's Second
Special Report of Session
2008-09: Scrutinising
Statutory Instruments:
Departmental Returns, 2008**

First Special Report of 2009–10

*Report, together with formal minutes and
appendix*

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Joint Committee on Statutory Instruments

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

The Joint Committee is empowered to draw the special attention of both Houses to an instrument on any one of a number of grounds specified in the Standing Orders under which it works; or on any other ground which does not impinge upon the merits of the instrument or the policy behind it.

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Powers

The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 74, available on the Internet via www.parliament.uk.

Publications

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

Committee staff

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

Contacts

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Report

1. On 16 July 2009 the Committee published its Second Special Report for the session 2008-09 on "Scrutinising Statutory Instruments: Departmental Returns 2008". On 3 December 2009 a letter containing the Government's response to the Committee's Special Report was sent to the Chairman by the Minister of State at the Ministry of Justice. The letter is published as an Appendix to this Special Report.

Appendix

Letter to the Chairman of the Committee from the Minister of State, Ministry of Justice

You invited a response from the Government in relation to the Committee's report on Departmental Returns for 2008. I am sorry that it did not prove possible to respond in the timescale which the Committee suggested.

The Government welcomes the Committee's reports and the constructive way in which the Committee and its advisers deal with the many instruments it has to consider. The Committee's comments are reviewed and lessons to be learnt are drawn to the attention of all draftsmen. This has led to an improvement in the overall quality of delegated legislation, highlighted by the improvement reported by the Committee, reporting 59 instruments (just under 4% of the 1,486 instruments scrutinised) during 2008 as compared with 70 instruments (just under 5% of the 1,473 instruments scrutinised) during 2007. We will continue to strive to achieve further improvements in the quality of delegated legislation.

Your report covered a number of issues and I shall respond to each in turn.

The correction of defective instruments

The Committee's report shows that only 48 instruments have points outstanding at 1 April 2009 as compared with 65 instruments at 1 April 2008. The Committee has, nevertheless, drawn attention to the mixed performance of departments in completing the necessary actions on instruments reported by the Committee.

In our reply to last year's report I said that officials would be taking action to seek greater consistency between departments in clearing outstanding actions and I believe that has contributed to the improvement. We have, however, had further discussion involving all departments and I can now clarify the further action we intend to take.

Drafting teams within departments take seriously the quality and accuracy of the secondary legislation they produce and its accessibility to stakeholders.

Errors that affect the rights or obligations of citizens or businesses are corrected promptly, either by a correction slip, where possible, or by an amending instrument. However, many errors do not have any real effect on rights or obligations. In those cases where it is possible to remedy the error by a correction slip, departments will do so without delay. In addition, whenever practicable and proportionate, departments prepare amending instruments in respect of other errors.

However, in considering whether it is practicable and proportionate to prepare amending instruments, a number of issues need to be taken into account. Drafting teams operate under considerable pressure and resource constraints. The process of making a further instrument can be complex and/or lengthy (for example, involving a consultation), and may be also resource intensive. A requirement to consult or to follow an affirmative procedure may mean that it would not be practical to produce an amending instrument within a specific timeframe. In some cases these processes may result in a disproportionate use of resource (in terms of policy and drafting resource, and Parliamentary and Ministerial time) when preparing an amending instrument.

Therefore, decisions to produce an amending instrument should be taken on a case-by-case basis. The decision should be based on the need to act proportionately to the error, and to balance the urgency of the error against competing demands on resources. Departments believe that, where an error does not affect the rights and obligations of citizens and businesses, they should in principle be able to decide to correct it when the instrument is next reviewed, rather than within a specific timeframe. Departments will need to take a risk-based view of the need for amendment.

In response to requests from the Committee for memoranda, departments agree they should provide clear information about the action they propose to take and a realistic estimate of the timescale for the action, where they accept that an error has occurred. Where departments undertake to bring forward a correcting instrument, they will give appropriate priority to the project. We believe that this will result in greater consistency among departments in their treatment of errors and will lead to a further improvement in clearing points raised by the Committee.

Affirmative Instruments

The Government continues to be grateful for the help provided by the Committee in prioritising its consideration of a number of urgent instruments. We do, however, realise that it is the responsibility of the department concerned to ensure that instruments are laid in good time and this is reinforced in departments. The advice which the Committee has provided in its report about routinely sending an informal draft to the Committee's legal adviser before the draft is laid is very welcome. Where this already occurs departments have found the advice provided to be of considerable assistance and all departments are being encouraged to follow this process.

Orders in Council

In respect of the supply of Orders in Council to the Committee we have identified that where delays have occurred these have been in respect of Orders originating with specific

departments. These departments have been reminded of their responsibilities to improve their processes.

I hope that the Committee will welcome the steps which I have outlined and which we believe will lead both to improvements in the quality of delegated legislation and to the continuing improvement in the relationships between departments and the Committee.

The Heads of Legal within departments will continue to monitor progress and provide scrutiny of departmental activity to ensure the new arrangements are effective.

I am copying this letter to the Ministerial Heads of Departments.

Ministry of Justice