



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Seventh Report
of Session 2009-10**

Drawing special attention to:

*Common Agricultural Policy Single Payment and Support Schemes
(Integrated Administration and Control System) Regulations 2009
(S.I. 2009/3263)*

Eels (England and Wales) Regulations 2009 (S.I. 2009/3344)

*Regulation of Investigatory Powers (Covert Human Intelligence Sources:
Matters Subject to Legal Privilege) Order 2009 (S.I. 2009/3404)*

*Ordered by the House of Lords to be printed
3 February 2010*

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Joint Committee on Statutory Instruments

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Baroness Jones of Whitchurch (*Labour*)
Lord Kimball (*Conservative*)
Countess of Mar (*Crossbench*)
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Powers

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

Remit

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

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

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

The Committee usually meets weekly when Parliament is sitting.

Publications

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

Committee staff

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

Contacts

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Instruments reported

At its meeting on 3 February 2010 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to three of those considered. The Instruments and the grounds for reporting them are given below. The relevant Departmental memoranda are published as appendices to this report.

1 S.I 2009/3263: Reported for defective drafting

Common Agricultural Policy Single Payment and Support Schemes (Integrated Administration and Control System) Regulations 2009 (S.I. 2009/3263)

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

1.2 In a memorandum printed at Appendix 1 the Department for Environment, Food and Rural Affairs accepts that regulation 12(8) and (9) (which contains an erroneous cross-reference) unnecessarily duplicates the effect of regulation 11(1) and (2). The Department states that the error will be corrected within a reasonable period of time, and that meanwhile it does not appear that any party's position will be prejudiced. **The Committee reports regulation 12(8) and (9) for defective drafting, acknowledged in principle by the Department.**

2 S.I 2009/3344: Reported for defective drafting

Eels (England and Wales) Regulations 2009 (S.I. 2009/3344)

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

2.2 Regulation 5 imposes requirements on persons who import live eels into England or Wales, including the preparation, signing and dating of a certificate identifying the origin of the eels. Regulation 6 imposes requirements on persons who export live eels from England or Wales, including the preparation, signing and dating of a certificate as to the origin of the eels and (where relevant) that the eels were caught in a manner consistent with the relevant eel management plan. Regulation 7(1) reads as follows:

7.—(1) *A person must not accept a consignment of eels unless it is accompanied by—*

- (a) *a certificate prepared under regulation 5 or 6;*
- (b) *where eels have been added to the consignment, a copy of the certificate accompanying the other consignment.*

2.3 The Committee asked the Department for Environment, Food and Rural Affairs to explain how the reference in regulation 7(1)(a) to regulation 6 was relevant, what the

intended effect of regulation 7(1) was in regard to consignments of eels which had not been imported into England or Wales or were imported dead, and how that effect was achieved.

2.4 In a memorandum printed at Appendix 2 the Department explains the intended effect of regulation 7(1) and acknowledges that it is defectively drafted as it goes too wide in particular respects. The Department undertakes to correct regulation 7(1), “hopefully later this year” when it will revisit the Regulations for unconnected reasons. **The Committee accordingly reports regulation 7(1) for defective drafting. It urges the Department to bring forward amending Regulations as a priority matter as the prohibition in that paragraph is framed too widely and failure to comply is an offence under regulation 7(3).**

3 S.I 2009/3404: Reported for defective drafting and not conforming with proper drafting practice

Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2009 (S.I. 2009/3404)

3.1 **The Committee draws the special attention of both Houses to this Order on the grounds that in one respect it is defectively drafted and in a different repeated respect it does not conform with proper drafting practice.**

3.2 Article 2(1) contains various definitions. In a memorandum printed at Appendix 3 the Home Office acknowledges that the definition of “Chief Surveillance Commissioner” should have been omitted, given that the expression appears nowhere else in the Order but only in the Explanatory Note. **The Committee accordingly reports article 2(1) for defective drafting in this respect, acknowledged by the Department.**

3.3 The Department also acknowledges in its memorandum that the definitions of “Her Majesty’s forces”, “intelligence service”, “ordinary Surveillance Commissioner”, “preventing or detecting serious crime” (which contains an erroneous cross-reference) and “senior official” should have been omitted from article 2(1). They either refer to definitions in the enabling Act, which (in consequence of section 11 of the Interpretation Act 1978) apply automatically, or replicate them unnecessarily. Had it been considered desirable to draw readers’ attention to them specifically, it would have been possible to do so by footnotes or in the Explanatory Note, thus avoiding the blending of operative and superfluous text that appears in this Order. **The Committee accordingly reports inclusion of these definitions in article 2(1) for failure to conform with proper drafting practice.**

3.4 The Department further acknowledges a drafting error in the Explanatory Note.

3.5 The Committee is pleased to note that the Department has already laid an Order (S.I. 2010/123) in substitution for this one to correct the errors identified by the Committee.

Instruments not reported

At its meeting on 3 February 2010 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported.

Annex

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

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

Instruments requiring affirmative approval

Code of Audit Practice 2010 for local government bodies

Code of Audit Practice 2010 for local NHS bodies

Draft Instruments requiring affirmative approval

Draft S.I.	Additional Statutory Paternity Pay (Weekly Rates) Regulations 2010
Draft S.I.	Employment Rights Act 1996 (Application of Section 80BB to Adoptions from Overseas) Regulations 2010
Draft S.I.	Environmental Permitting (England and Wales) Regulations 2010
Draft S.I.	Health and Social Care Act 2008 (Consequential Amendments No. 2) Order 2010
Draft S.I.	Human Fertilisation and Embryology (Disclosure of Information for Research Purposes) Regulations 2010
Draft S.I.	Human Fertilisation and Embryology (Parental Orders) (Consequential, Transitional and Saving Provisions) Order 2010
Draft S.I.	Human Fertilisation and Embryology (Parental Orders) Regulations 2010
Draft S.I.	Immigration (Leave to Enter and Remain) (Amendment) Order 2010
Draft S.I.	Immigration and Nationality (Fees) Regulations 2010
Draft S.I.	Jobseeker's Allowance (Lone Parents) (Availability for Work) Regulations 2010
Draft S.I.	Licensing Act 2003 (Mandatory Licensing Conditions) Order 2010
Draft S.I.	Mesothelioma Lump Sum Payments (Conditions and Amounts) (Amendment) Regulations 2010
Draft S.I.	Occupational and Personal Pension Schemes (Automatic Enrolment) Regulations 2010

Draft S.I.	Pneumoconiosis etc. (Workers' Compensation) (Payment of Claims) (Amendment) Regulations 2010
Draft S.I.	Representation of the People (Scotland) (Amendment) Regulations 2010
Draft S.I.	Social Security (Loss of Benefit) Amendment Regulations 2010
Draft S.I.	Social Security Benefits Up-rating Order 2010

Instruments subject to annulment

S.I. 2010/39	Common Agricultural Policy Single Payment and Support Schemes (Appeals) Regulations 2010
S.I. 2010/47	Health and Social Care Act 2008 (Commencement No. 13, Transitory and Transitional Provisions and Electronic Communications) Amendment Order 2010
S.I. 2010/49	Care Quality Commission (Registration) Amendment Regulations 2010
S.I. 2010/76	National Health Service (Functions of the First-tier Tribunal relating to Primary Medical, Dental and Ophthalmic Services) Regulations 2010
S.I. 2010/89	Cross-Border Payments in Euro Regulations 2010
S.I. 2010/123	Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2010

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2010/45	Welfare Reform Act 2009 (Commencement No. 1) Order 2010
S.I. 2010/61	Commons Act 2006 (Commencement No. 5) (England) Order 2010
S.I. 2010/75	The Pollution Prevention and Control (Designation of Directives)(England and Wales) Order 2010

Appendix 1

S.I 2009/3263: memorandum from the Department for Environment, Food and Rural Affairs

<p><i>Common Agricultural Policy Single Payment and Support Schemes (Integrated Administration and Control System) Regulations 2009 (S.I. 2009/3263)</i></p>

1. In its letter dated 20 January 2010, the Committee requested a memorandum on the following point:

Regulation 12(8) and (9) (which contains an erroneous cross-reference) appears to duplicate the effect of regulation 11. What is the purpose of including both sets of provisions?

2. Having reviewed the point raised the Department agrees that regulation 12(9) does contain an erroneous cross reference (the reference to paragraph (4) should have been to paragraph (8)). The Department also accepts that regulation 12(8) and (9) duplicates the effect of regulation 11(1) and (2).

3. The Department does not believe that the effect of regulation 11(3) is duplicated anywhere else in the Regulations. The purpose of 11(3) is to ensure that members who manage a body corporate are culpable for any acts and omissions in connection with the member's functions of management.

4. The errors were unfortunately introduced when the Department sought at a late stage in the instrument's preparation to bring it into line with current approaches to the liability of partnerships and unincorporated associations.

5. It seems that the error will not affect the criminal liability of any party, since regulation 12(8) and (9) merely unnecessarily duplicate regulation 11(1) and (2), and it is clear what the erroneous cross reference should have been. Accordingly it does not appear that any party's position will be prejudiced.

6. The Department thanks the Committee for drawing the erroneous cross reference and duplication to its attention. The Department will ensure that it is corrected within a reasonable period of time.

Department for Environment Food and Rural Affairs
26 January 2010

Appendix 2

S.I 2009/3344: memorandum from the Department for Environment, Food and Rural Affairs

<i>Eels (England and Wales) Regulations 2009 (S.I. 2009/3344)</i>

1. The Committee has asked the Department for Environment, Food and Rural Affairs for a memorandum on the following points:

In relation to regulation 7(1) (acceptance of a consignment of eels in England or Wales), explain:

(a) how the reference in sub-paragraph (a) to regulation 6 (export of live eels from England or Wales) is relevant;

(b) the intended effect in regard to consignments of eels which have not been imported into England or Wales or were imported dead, and how that effect is achieved.

2. With regard to (a), the intended effect of regulation 7(1) was to ensure that those transporting a consignment of imported eels or eels for export do so only if the consignment is accompanied by a certificate signed by the importer or exporter.

3. With regard to (b), regulation 7 was intended to apply only to consignments of live eels imported into or exported from England or Wales. This was in order to fulfil the Department's obligations under Article 12 of Council Regulation (EC) 1100/2007 establishing measures for the recovery of the stock of European eel in relation to the traceability of all live eels imported or exported from its territory. It was not intended to apply to consignments of eels sourced in England or Wales.

4. The Department acknowledges that regulation 7 is defectively drafted and undertakes to correct it, hopefully later this year when it will revisit the Regulations for unconnected reasons.

Department for Environment, Food and Rural Affairs
25 January 2010

Appendix 3

S.I 2009/3404: memorandum from the Home Office

Regulation of Investigatory Powers (Covert Human Intelligence Sources: Matters Subject to Legal Privilege) Order 2009 (S.I. 2009/3404)

1. In its letter dated 20th January 2010, the Joint Committee on Statutory Instruments ("the Committee") requested a memorandum on the following points:

"1. With respect to article 2(1), explain-

(a) why the definition of "Chief Surveillance Commissioner" has been included, given that that expression appears nowhere else in the Order but only in the Explanatory Note;

(b) why the definitions of "Her Majesty's forces", "intelligence service", "ordinary Surveillance Commissioner" and "senior official" have been included, given section 11 of the Interpretation Act 1978;

(c) the reference to section 81(6) of the enabling Act in the definition of "preventing or detecting serious crime" and, if it was intended to refer to section 81(5) instead, why the definition has been included, given section 11 of the 1978 Act.

2. Identify the source of the requirement referred to in the last sentence but one in paragraph 3 of the Explanatory Note."

2. The Department apologises for these errors and thanks the Committee for drawing them to its attention.

3. The Department proposes to lay an Order in substitution for S.I. 2009/3404 within the next few days to correct the errors identified by the Committee. Copies will be issued free of charge to purchasers of the defective instrument.

Home Office
25 January 2010