



House of Lords

House of Commons

Joint Committee on Statutory  
Instruments

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# **Scrutinising Statutory Instruments: Departmental Returns, 2009**

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**First Special Report of 2010-11**





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Joint Committee on Statutory  
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**First Special Report of 2010-11**

*Report together with formal minutes.*

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to be printed 21 July 2010*

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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.

### Current membership

#### House of Lords

Lord Campbell of Alloway (*Conservative*)  
Lord Clinton-Davis (*Labour*)  
Baroness Eccles (*Conservative*)  
Earl of Mar and Kellie (*Liberal Democrat*)  
Lord Rees Mogg (*Crossbench*)  
Baroness Stern (*Crossbench*)

#### House of Commons

Mr George Mudie MP (*Labour, Leeds East*) (Chairman)  
Mr Robert Buckland MP (*Conservative, South Swindon*)  
Michael Ellis MP (*Conservative, Northampton North*)  
John Hemming MP (*Liberal Democrat, Birmingham, Yardley*)  
Mr Ian Liddell-Grainger MP (*Conservative, Bridgwater and West Somerset*)  
Toby Perkins MP (*Labour, Chesterfield*)

### 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](http://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](http://www.parliament.uk).

### 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, Christine Cogger and Daniel Greenberg (*Commons*) and Allan Roberts, Peter Milledge and Nicholas Beach (*Lords*).

### Contacts

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# Departmental Returns 2009

## The work of the Joint Committee on Statutory Instruments

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1. The role of the Joint Committee on Statutory Instruments (JCSI) is to examine the technical qualities of almost every general statutory instrument and those local ones that involve some parliamentary control.<sup>1</sup> Some of the instruments the Committee considers are not statutory instruments (for instance, some Codes of Practice) which fall within our remit because they attract the affirmative procedure. The JCSI does not assess the merits of any instrument or the underlying policy which are the responsibility of other Parliamentary Committees.

2. In a given calendar year on average it has been the case that in the region of 4–5% of instruments scrutinised are drawn to the attention of each House on one or more of the following grounds in accordance with our terms of reference (House of Commons Standing Order 151, House of Lords Standing Order 74):

- 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 it;
- 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.

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<sup>1</sup> A substantial proportion of delegated legislation (for example, local instruments, such as those that relate to temporary road closures, which have only to be published to become law) receives no parliamentary scrutiny. Some instruments are not formally laid before Parliament nor subject to any parliamentary proceedings although they may be scrutinised by the JCSI. An instrument subject to the negative procedure becomes law on the date stated on it but will be annulled if either House (or the Commons only, in the case of instruments dealing with financial matters) passes a motion calling for its annulment within a certain time (usually 40 days). An instrument that is subject to the affirmative procedure must receive Parliament's approval either before it can come into force or to remain in force. Most instruments subject to the affirmative procedure are laid in the form of a draft. The form of parliamentary procedure is usually set out in the parent Act. The procedure for the laying of a statutory instrument is set out in House of Commons Standing Order No. 159. In short, for an SI to be laid before the House of Commons a copy of the instrument must be 'laid on the table of the House', which actually means placing a copy of the Instrument with the Votes and Proceedings Office (part of the Journal Office). Most S.I.s are laid in both Houses and a similar procedure applies in the House of Lords. See also the House of Commons Library Factsheet L7.



3. Our membership is drawn from both Houses of Parliament which usually meets weekly whenever Parliament is sitting to consider a batch of recent instruments and draft instruments. Our assessments on individual instruments and drafts are published in our weekly reports. We identify any instrument or draft that appears to come within any of the grounds set out above and explain why we have reached this conclusion. The report includes a memorandum supplied by the relevant Department in response to our question(s). We generally also list without comment all other instruments we have examined. Occasionally, we publish for interest a memorandum from the relevant Department on an instrument we have examined. Our weekly report is posted on our website<sup>2</sup> usually within five or six days of each Committee meeting. Our reports, which identify the defects that attract the attention of the Committee, should be considered essential reading by anyone involved in drafting statutory instruments.

4. We publish this Annual Report in addition to our weekly reports as a way of providing a further degree of scrutiny of statutory instruments and the progress that Departments may have made in addressing points raised on reported instruments. In this Report we follow up on those instruments that were reported by our predecessor Committee during the previous calendar year and request Departments to update us on the extent to which they are addressing (or not addressing) the concerns the previous Committee raised on those instruments. We also request information from Departments on any outstanding actions on instruments that were reported in previous years and where the predecessor Committee considered last year that action was still outstanding.

5. When necessary it is requested that individual Departments provide substantive responses, particularly where there is a difference of view with the Committee. Noting that the Department disagrees with Committee comments and does not plan to take further action will not cause the removal of the “offending” instrument from the report, whereas further communication may effect a satisfactory resolution.

6. This Report presents information on the 62 statutory instruments that were reported to both Houses during 2009 and the progress that Departments have made in addressing the concerns on those instruments. It also shows the progress made on the 55 instruments which had action outstanding from previous reports.

7. The most common reasons for reporting instruments are set out in the tables in Annex 1. Clearly, different concerns will require different remedies. For example, some errors, such as particular examples of defective drafting or doubtful vires (powers) may require the instrument to be revoked or amended, whereas an unacceptable delay in presenting papers to the Committee may require an assurance from the Department that it has improved its procedures so as to minimise the risk of a repetition of the error. Some reported concerns may require no further action. For example, if an instrument has been reported on the ground that its meaning needs to be explained, the explanation may be found in the memorandum provided to the Committee in response to the Committee’s questioning, or the clarification may have been supplied by the Minister during a debate on the instrument.

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<sup>2</sup> See the Committee website <http://www.parliament.uk/jcsi>

## Monitoring Departments' progress

8. During the calendar year 2009, our predecessor Committee scrutinised 1,461 statutory instruments and found cause to draw the special attention of each House to 62 instruments (4.2% of the total scrutinised) on one or more of the following grounds in accordance with our terms of reference (paragraph 2 above). Our predecessor Committee concluded that there was no need to draw any of the remaining 95.8% of the instruments to the special attention of each House.<sup>3</sup> However, cases of obvious minor errors which could be amended by correction slip were dealt with by letter from Counsel.

9. In addition to monitoring when Departments undertake action on outstanding instruments and commenting where our predecessor Committee believed Departments should be doing more to clear outstanding actions, our predecessor Committee also pressed Departments to take prompt remedial action on particular instruments where it believed this was required. The JCSI has a long standing interest in pressing Departments to reduce the number of defective instruments that remain in effect for too long while the Department waits for “a suitable opportunity to amend”.

10. Ministers are responsible for the good order of the secondary legislation made in their Departments and we expect undertakings to be fulfilled within a reasonable time. It is not acceptable that defects requiring correction should remain in legislation indefinitely.

11. The reasons why the number of instruments reported by the JCSI varies between Departments are likely to relate closely to the varying length and complexity of instruments and the number of instruments made by each Department. We accept that bare statistics of this sort may not be a reliable indicator of a Department's overall performance. For example, we note that the number of instruments outstanding against any one Department takes no account of the fact that certain errors are easier to correct than others, or that certain types of instrument tend to be revoked and replaced regularly, which will affect the speed at which corrections are made.

12. There was a 5% increase in the number of instruments reported in 2009 (62)<sup>4</sup> from the number reported in the previous year (59). However, there was an improvement in clearing outstanding actions. Of the instruments reported in 2009, overall 74%<sup>5</sup> of the outstanding actions have been completed—a 9% increase from last year's figure of 65%. In contrast, there has been a 10% decrease in clearing outstanding actions brought forward from earlier years, with approximately 44%<sup>6</sup> having been completed this year compared with the corresponding 54% indicated in last year's report.

13. Five tables have been prepared based on information supplied by Departments in April 2009.<sup>7</sup> These appear in Annex 1.

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<sup>3</sup> Statistics on the number of instruments made during a calendar year can be found at: <http://www.opsi.gov.uk/si-statistics.htm>.

<sup>4</sup> Table 1

<sup>5</sup> Table 3

<sup>6</sup> Table 4

<sup>7</sup> The information provided by Departments has in some cases been amended for the purpose of consistency.

14. Table 1 shows the number of grounds (see paragraph 14) that had been reported by the previous Committee in 2009, and the progress of Departments in dealing with them as at 1 April 2010;

- Table 2 shows the number of grounds that had been reported in 2008 and in previous years, on which action was outstanding as at 1 April 2009, and the progress of Departments in dealing with them as at 1 April 2010;
- Table 3 shows, by Department, the number of instruments reported in 2009, the number of instruments with action still outstanding on 1 April 2010, and the progress of Departments in dealing with them as at 1 April 2010;
- Table 4 shows, by Department, the number of instruments reported in 2008 or earlier on which action was outstanding as at 1 April 2009, and the progress of Departments in dealing with them as at 1 April 2010;
- Table 5 shows a consolidated view, by Department, of the number of instruments with actions outstanding and the rate of completion as at 1 April 2010.

15. An instrument may be reported on more than one ground, or for a number of points on the same ground. Where an instrument has been reported on more than one separate ground, the sum of these grounds has been included in the tables. However, where an instrument has been reported for several points on the same ground, this has been shown as one ground in the tables.

### **Analysis of returns for instruments reported in 2008**

16. The progress made by Departments in clearing the instruments reported in 2009 is set out in Tables 1 and 3. The figures in Table 1 show that, on average, by 1 April 2010 remedial action had been completed on 80% of the grounds reported in 2009.<sup>8</sup> The comparable figure for the preceding year was 72%. This indicates a 8% improvement in clearing outstanding actions on the grounds reported in 2009.

17. Table 3 shows an increase of 9% in the progress of individual Departments in completing actions on reported instruments in 2009. On average, action has been completed on 74% of instruments reported in 2009 compared with 65% in 2008.

18. The performance of individual Departments, as in previous years, varied considerably. Table 3 shows that, by 1 April 2010, eight Departments had completed the necessary actions to clear all the instruments the previous Committee reported in 2009 and so achieved a clearance rate of 100%. These were: Department for Culture, Media and Sport; Department for Environment, Food and Rural Affairs; Department for Work and Pensions; HM Revenue & Customs; Home Office; Privy Council; Scotland Office and Wales Office.

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<sup>8</sup> The figures are based on our assessment of whether further action is required after having due regard to the response provided by the relevant Department. In the vast majority of cases, there is no disagreement between the Department and ourselves. However, in a limited number of cases, we may not necessarily accept a Department's response that no further action is necessary. In these limited cases, we have decided to count the contested instruments as requiring further action. This approach has the advantages of allowing us to continually monitor the particular instruments from year to year until the required action is completed while also providing Departments with incentives to undertake further remedial action or at least to set out in their Departmental Returns to us a more persuasive case for treating the instrument as requiring no further action.

## **Analysis of returns for instruments reported in 2007 and earlier**

19. Table 4 in Annex 1 shows the progress made by individual Departments in dealing with instruments that were reported in 2008 or earlier. As a newly constituted Committee we offer no comment at this stage on the performance of individual departments, other than to say that we expect appropriate improvement where necessary.

20. Tables 3 and 4 indicate the wide variation that exists among Departments in the speed with which they take action on reported instruments.

21. In Annex 2 to this Report, we list those instruments that were reported in 2009 and those instruments, which although not reported to both Houses by our predecessor Committee, prompted that Committee to request and publish memoranda.

## **Matters to which the particular attention of Departments is drawn**

22. Departments are reminded of the basis on which drafts of affirmative instruments may be submitted (before laying) for advance scrutiny by counsel advising the Joint Committee. The arrangements are set out in paragraphs 22 to 24 of the Joint Committee's Second Special Report of 2008/09. In particular, drafts will not be accepted unless they have been fully checked in accordance with an effective internal procedure which involves approval by a lawyer in the Senior Civil Service. The Committee staff will contact Departments periodically to ascertain details of their procedures and draw their attention to the Committee's requirements. If at any time it appears that a Department's procedures are in practice insufficiently effective, the facility for advance scrutiny may be withdrawn from that Department.

23. We would like finally to pay tribute to our predecessor Committee, under the chairmanship of David Maclean, for all their work during the previous Parliament. The previous Committee's admirable dedication and enthusiasm ensured the efficient scrutiny of statutory instruments during a particularly busy time. We are grateful for the attention and skill which they brought to their work.

## Annex 1: Analysis of Departmental Returns

Notes at the end of Annex.

**Table 1: Analysis of returns for instruments reported in 2009**

**Total number of Instruments Reported 62**

**Total number of grounds reported 69**

Grounds for Reporting	Grounds reported during 2009	Grounds outstanding on 1 April 2010	% of reported grounds on which action has been completed
Defective drafting	34	9	74%
Failure to observe proper practice ( <i>other drafting and similar errors</i> )	14	2	86%
Dubious <i>vires</i>	5	0	100%
Elucidation required	3	1	67%
Unusual or unexpected use of power	8	1	88%
Delay	1	0	100%
Other	0	0	-
<b>Total (Average %)</b>	<b>65</b>	<b>13</b>	<b>80%</b>

**Table 2: Analysis of returns for instruments reported in 2008 or earlier**

Grounds for Reporting	Grounds outstanding on 1 April 2009	Grounds outstanding on 1 April 2010	% of reported grounds on which action has been completed
Defective drafting	28 [1]	27	4%
Failure to observe proper practice ( <i>other drafting and similar errors</i> )	11	5	55%
Dubious <i>vires</i>	3	2	33%
Elucidation required	1	1	0%
Unusual or unexpected use of power	7 [1]	7	0%
Delay	0	0	
Other	0	0	
<b>Total (Average %)</b>	<b>50</b>	<b>42</b>	<b>18%</b>



























































































































