



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Third Report
of Session 2010-11**

Drawing special attention to:

*UK Border Agency (Complaints and Misconduct) Regulations 2010
(S.I. 2010/782)*

*Complaints Against Schools (England) Regulations 2010 (S.I. 2010/853)
Saving Gateway Accounts Act 2009 (Commencement No. 2) Order 2010
S.I. (2010/921)*

*Water Supply (Water Quality) Regulations 2010 (S.I. 2010/994)
Planning (Hazardous Substances) (Amendment) (England) Regulations 2010
(S.I. 2010/1050)*

*Ordered by the House of Lords to be printed
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Joint Committee on Statutory Instruments

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

House of Commons

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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/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, Nicholas Beach and Peter Milledge (*Lords*).

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Instruments reported

At its meeting on 20 October 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 five 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. 2010/782: Reported for defective drafting and not according with proper drafting practice

UK Border Agency (Complaints and Misconduct) Regulations 2010 (S.I. 2010/782)

1.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in many respects, and do not accord with proper drafting practice in one respect.

1.2 In a full and frank memorandum printed at Appendix 1, the Home Office acknowledges around 30 instances of defective drafting in these Regulations. The Department also acknowledges that regulation 68, which deals with how these Regulations are to operate when the person whose conduct is the subject of a complaint or conduct matter has not been identified, should not have been included in Part 7 (which sets out the various actions to be taken at the conclusion of an investigation) but in Part 1 (complaints and misconduct) or Part 2 (handling of complaints and conduct matters). There remain two matters raised by the Committee which the Department does not address to the Committee's satisfaction.

1.3 Regulation 14 requires the appropriate authority to keep records of various matters, but does not say for how long they must be kept. The Department states that records are intended to be kept for as long as it is necessary in accordance with the principles of the Data Protection Act 1998. The Department's standard position is that records will be held for seven years but this is subject to Data Protection Act considerations on a case by case basis. The Committee does not consider that the regulation as drafted gives effect to this intention: if the appropriate authority disposes of records after seven years (otherwise than by virtue of obligations arising from the Data Protection Act) it will be in breach of this regulation. Read literally, a duty to keep records without any limitation of time means that the records must be kept forever. The Committee therefore considers regulation 14 to be deficient in indicating what is intended. .

1.4 Regulation 39 applies where the IPCC, i.e. the Independent Police Complaints Commission, has determined that it should supervise the investigation by the relevant appropriate authority of any complaint or recordable conduct matter or DSI (death or serious injury) matter. Paragraph (2) requires the authority, on being given notice of that determination, to appoint a person to investigate the complaint or matter if it has not already done so. Paragraph (4) provides that, where a person has already been appointed to investigate the complaint or matter, or is selected under that paragraph, and the IPCC is not satisfied with that person, the IPCC may require the authority to select another person "falling within paragraph (2)" to investigate the complaint or matter and to notify the

IPCC of the person selected. Paragraph (5) provides that where a selection made in pursuance of a requirement under paragraph (4) has been notified to the IPCC, the authority shall appoint that person if, but only if, the IPCC notifies the authority that it approves the appointment of that person.

1.5 The Committee asked the Department to explain the reference in paragraph (4) to a person falling with paragraph (2). The Department states that the intention is that in the circumstances described in paragraph (4) the authority should select another person, who has been appointed after notice of a determination by the IPCC has been given in accordance with paragraph (2), to investigate the complaint or matter. This response ignores both the absence of any limited class in paragraph (2) and the fact that paragraph (5) expressly prohibits the authority from appointing a person selected under paragraph (4) unless the IPCC approves that person's appointment. The words "falling within paragraph (2)" in paragraph (4) therefore appear to the Committee to be both otiose and misleading.

1.6 Most of the errors in this instrument would have been prevented if it had been checked properly before being made. The Department explains in its memorandum its standard procedures for checking its statutory instruments, apologises for the fact that these procedures were not followed in this case and sets out proposals for rectification. The Department recognises that this instrument was not prepared to the standard the Committee is entitled to expect. The Committee takes the opportunity of stressing that the public at large are also entitled to expect legislation to be of an acceptable standard.

1.7 The Committee accordingly reports regulation 68 for not according to proper drafting practice, and the Regulations generally for defective drafting on an unacceptable scale.

2 S.I. 2010/853: Reported for defective drafting

<i>Complaints Against Schools (England) Regulations 2010 (S.I. 2010/853)</i>
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2.1 The Committee draws the special attention to these Regulations on the ground that they are defectively drafted in one respect.

2.2 Regulation 1(3) defines the expression "First Tier Tribunal" even though that expression is not used elsewhere in the instrument. In a memorandum printed at Appendix 2, the Department for Education acknowledges that the definition ought not to have been included and undertakes to remove it at the earliest suitable opportunity.

2.3 The Committee accordingly reports regulation 1(3) for defective drafting, acknowledged by the Department.

3 S.I. 2010/921: Reported for defective drafting

Saving Gateway Accounts Act 2009 (Commencement No. 2) Order 2010 (S.I. 2010/921)

3.1 The Committee draws the special attention of both Houses to this Order on the ground that it is defectively drafted in one respect.

3.2 Article 2(2) provides that section 2(1) of the Saving Gateway Accounts Act 2009 comes into effect on 1 July 2010 for the purposes of ensuring an orderly introduction of accounts and on 1 March 2011 for all purposes. Section 2(1) provides that the Commissioners must issue a notice of eligibility to each eligible person (as defined in section 3).

3.3 The Committee was uncertain how the duty of the Commissioners could apply “for the purposes of ensuring an orderly introduction of accounts” but not for other purposes: if the duty exists it must be fulfilled. In a memorandum printed at Appendix 3, HM Revenue and Customs (which points out that the Order was revoked before 1 July 2010) acknowledges that the wording of article 2(2)—aimed at gradual compliance with the section 2(1) duty—might have led to some lack of clarity as to when HMRC was under an obligation to issue notices of eligibility to eligible persons in the period before 1 March 2011, and states that it will reconsider adopting such an approach in future cases. The Committee notes that section 28(2) of the 2009 Act confers power for an order to include provision for the exercise of discretion and transitional provisions as well as incidental, supplementary or consequential provisions, and would suggest that it would have been possible to find a way of providing for the power to issue a notice to have been introduced in effect on 1 July 2010 but the duty not to exist until 1 March 2011. **The Committee, while recognising that the obscurity of article 2(2) has turned out not to be of specific significance, reports that provision for defective drafting, the possibility of which is acknowledged by the Department.**

4 S.I. 2010/994: Reported for defective drafting

Water Supply (Water Quality) Regulations 2010 (S.I. 2010/994)

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

4.2 In a memorandum printed at Appendix 4, the Welsh Assembly Government acknowledges that incorrect cross-references (which it proposes to rectify this year in amending regulations) are included in regulations 6(4), 6(5) and 33(1). In none of these cases was it obvious what the provision was intended to mean. **The Committee accordingly reports regulations 6(4) and (5) and 33(1) for defective drafting, acknowledged by the Department.**

