



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Fifth Report
of Session 2010-11**

Drawing special attention to:

*Revenue and Customs (Complaints and Misconduct) Regulations 2010
(S.I. 2010/1813)*

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Joint Committee on Statutory Instruments

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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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Contents

Report	<i>Page</i>
Instruments reported	2
1 S.I. 2010/1813: Reported for defective drafting	2
Instruments not reported	4
Annex	4
Appendix 1	6
S.I. 2010/1813: memorandum from HMRC	6

Instruments reported

At its meeting on 3 November 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 nine 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. 2010/1813: Reported for defective drafting

Revenue and Customs (Complaints and Misconduct) Regulations 2010

1.1 The Committee draws the special attention of both Houses to these Regulations on the grounds that they are defectively drafted in several respects and require elucidation in one respect.

1.2 In a memorandum printed in the Appendix, HM Revenue and Customs acknowledges several instances of defective drafting in these Regulations. There remain a number of matters raised by the Committee which the Department does not address to the Committee's satisfaction.

1.3 Regulation 9(2) defines the expression "conduct matter" as any matter which is not and has not been the subject of a complaint but in the case of which there is an indication that a Commissioner or an officer may have committed a criminal offence or behaved in a manner which would justify the bringing of disciplinary proceedings, and regulation 3(1) defines the expression "recordable conduct matter" as covering specified types of conduct matters and other matters "except in paragraph (4) of regulation 19", a reference that—according to the Department's memorandum—should have been to paragraph (3). Regulation 9(2) is similarly expressed to be subject to regulation 19(4), which appears neither to qualify it nor add to it. Rather it requires the IPCC to notify the complainant of notifications given to, and other matters brought before the attention of the appropriate authority under regulation 19(3). In contrast, regulation 19(3) provides that in certain cases the Independent Police Complaints Commission ("IPCC") may bring a matter (which is not a conduct matter) to the appropriate authority's attention as if it were a recordable conduct matter, and (if it does so) the following provisions of the Regulations have effect as if it were such a matter.

1.4 In contrast with its response on regulation 3(1), the Department claims that the reference to regulation 19(4) rather than 19(3) in regulation 9(2) is intended, and that "paragraph 2(4) of [the Police Reform Act 2002] mirrors regulation 19(4) of these Regulations". The Committee assumes that the Department intended to say that regulation 19(4) of these Regulations mirrors paragraph 2(4) of Schedule 3 to the 2002 Act, but even so the Department's response is incorrect. Paragraph 2(4) of Schedule 3 to the 2002 Act corresponds to regulation 19(3) of these Regulations and not regulation 19(4). **The Committee accordingly considers that regulation 9(2) is defectively drafted.**

1.5 Regulation 20 requires the appropriate authority to keep records, in such form as the IPCC shall determine, of various matters, including (b) every conduct matter recorded by it under regulation 23(3) (conduct matters arising in civil proceedings). Paragraphs (1) and (6) of regulation 24 require the appropriate authority in certain circumstances to record a conduct matter which has not been recorded under regulation 23(3). The Committee asked the Department why regulation 20(b) does not require the appropriate authority to keep records of conduct matters recorded under regulation 24(1) and (6). The Department's response is that regulation 20 mirrors the requirement in regulation 24 of the Police (Complaints and Misconduct) Regulations 2004 and thus the requirements of police forces to keep records or recordable conduct matters arising from civil proceedings; that to extend it as suggested would be putting more onerous record keeping requirements on HMRC than currently exist for the police, which is not the policy intention; and that as drafted regulation 20 is consistent with the provisions of the Police Reform Act 2002. The Committee notes that regulation 20 achieves the Department's policy of consistency with regulation 24 of the 2004 Regulations, but it appears to it that there may be a similar omission in that provision as it refers to conduct matters recorded under paragraph 10(3) but not paragraph 11(1) or (5) of Schedule 3 to the Police Reform Act 2002. The purpose of requiring a record to be made that can be immediately destroyed is not explained. **The Committee accordingly considers that regulation 20(b) requires elucidation, which is partly but not fully set out in the Department's memorandum.**

1.6 More generally, the Committee also asked for how long records are intended to be kept under regulation 20 and why the period was not specified. 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 for ever. **The Committee therefore considers regulation 20 to be defectively drafted in that it fails to indicate what is intended.**

1.7 The Department states that it intends to address the drafting errors which it has acknowledged by way of a correction slip, as it considers that, in the context of the Regulations as a whole, the errors are small scale and obvious and the text and location of the error is equally obvious. The Committee does not agree that all of the errors are suitable for such treatment. Among those admitted by the Department, the errors in regulation 12(5) and (6) are ones where, in the case of the former, it is not obvious to the reader what the correct text should be and, in the case of the latter, it is not obvious to the reader that there is any error. In addition, if the Department takes action to address the other errors identified above, any alteration to regulation 20 could only be effected by an amending instrument.

1.8 The Committee accordingly reports these Regulations for defective drafting and (in one respect) for requiring elucidation, partly acknowledged by the Department and partly described above.

Instruments not reported

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

Annex

Draft Instruments requiring affirmative approval

Draft S.I.	Legislative and Regulatory Reform (Regulatory Functions) (Amendment) Order 2010
Draft S.I.	Local Elections (Northern Ireland) Order 2010
Draft S.I.	National Assembly for Wales (Legislative Competence) (Amendment of Schedule 7 to the Government of Wales Act 2006) Order 2010
Draft S.I.	National Assembly for Wales Referendum (Assembly Act Provisions) (Limit on Referendum Expenses Etc.) Order 2010
Draft S.I.	National Assembly for Wales Referendum (Assembly Act Provisions) (Referendum Question, Date of Referendum Etc.) Order 2010
Draft S.I.	Northern Ireland Assembly (Elections) (Amendment) Order 2010

Instruments subject to annulment

S.I. 2010/2430	Employment and Support Allowance (Transitional Provisions, Housing Benefit and Council Tax Benefit) (Existing Awards) (No. 2) (Amendments) Regulations 2010
S.I. 2010/2440	Welsh Language (Gambling and Licensing Forms) Regulations 2010
S.I. 2010/2450	Social Security (Contributions) (Amendment No. 5) Regulations 2010
S.I. 2010/2451	Social Security Contributions (Decisions and Appeals) (Amendment) Regulations 2010
S.I. 2010/2469	Adoption and Children (Scotland) Act 2007 (Consequential Provisions) Order 2010
S.I. 2010/2473	European Communities (Designation) (No. 4) Order 2010
S.I. 2010/2477	Olympics, Paralympics and London Olympic Association Rights (Infringement Proceedings) Regulations 2010
S.I. 2010/2481	Income-related Benefits (Subsidy to Authorities) Amendment Order 2010
S.I. 2010/2484	Health and Social Care Act 2008 (Primary Dental Services, Private Ambulance Services and Primary Medical Services) (Regulated Activities) (Transitory and Transitional Provisions) Order 2010
S.I. 2010/2494	Tax Credits (Miscellaneous Amendments) (No. 2) Regulations 2010
S.I. 2010/2504	Agricultural Holdings (Units of Production) (England) Order 2010

- S.I. 2010/2509** Income-related Benefits (Subsidy to Authorities) (Temporary Accommodation) Amendment Order 2010
- S.I. 2010/2537** Companies Act 2006 (Transfer of Audit Working Papers to Third Countries) Regulations 2010

Instruments not subject to Parliamentary proceedings laid before Parliament

- S.I. 2010/2479** Premium Savings Bonds (Amendment etc) Regulations 2010

Instruments not subject to Parliamentary proceedings not laid before Parliament

- S.I. 2010/2377** Welfare Reform Act 2009 (Commencement no 3) Order 2010
- S.I. 2010/2460** Birmingham Community Healthcare National Health Service Trust (Establishment) Order 2010
- S.I. 2010/2461** Buckinghamshire Hospitals National Health Service Trust (Establishment) Amendment Order 2010
- S.I. 2010/2462** Central London Community Healthcare National Health Service Trust (Establishment) Order 2010
- S.I. 2010/2463** Eastern and Coastal Kent Community Health National Health Service Trust (Establishment) Order 2010
- S.I. 2010/2464** Hertfordshire Community National Health Service Trust (Establishment) Order 2010
- S.I. 2010/2465** Liverpool Community Health National Health Service Trust (Establishment) Order 2010
- S.I. 2010/2466** Norfolk Community Health and Care National Health Service Trust (Establishment) Order 2010
- S.I. 2010/2467** St George's Healthcare National Health Service Trust (Establishment) Amendment Order 2010
- S.I. 2010/2480** Financial Services Act 2010 (Commencement No. 1 and Transitional Provision) Order 2010
- S.I. 2010/2485** Ashton, Leigh and Wigan Community Healthcare National Health Service Trust (Establishment) Order 2010
- S.I. 2010/2512** Wireless Telegraphy (Exemption and Amendment) Regulations 2010
- S.I. 2010/2541** Violent Crime Reduction Act 2006 (Commencement No. 9) Order 2010

Appendix

S.I. 2010/1813: memorandum from HMRC

Revenue and Customs (Complaints and Misconduct) Regulations 2010 (S.I. 2010/1813)

In its letter dated 20 October 2010 the Committee requested a memorandum responding to a number of points. These points and the Department's responses are set out below.

- (1) *In regulation 3(1), should paragraph (b) of the definition of “recordable conduct matter” refer to paragraph (3) of regulation 19 rather than to paragraph (4)?*

It is correct that paragraph (b) of the definition of “recordable conduct matter” should refer to paragraph (3) of regulation 19 rather than to paragraph (4).

- (2) *Should regulation 7(2)(a)(ii) refer to regulation 28(4) or (5) rather than to regulation 28(5) or (6)?*

It is agreed that regulation 7(2)(a)(ii) should refer to regulation 28(4) or (5) rather than to regulation 28(5) or (6).

- (3) *Should regulation 9(2) refer to regulation 19(3) rather than to regulation 19(4)?*

No. This is in accordance with section 12(2) of the Police Reform Act 2002 (c. 30). Paragraph 2(4) of that Act mirrors regulation 19(4) of these Regulations.

- (4) *Explain the reference in regulation 12(5) to a person appointed under regulation 42 to carry out an investigation.*

The reference in regulation 12(5) to a person appointed under regulation 42 should in fact be a reference to a person appointed under regulation 46 (investigation of a police force under the management or under the supervision of the IPCC). It would also be appropriate to remove the reference to regulation 46 from regulation 12(6).

- (5) *Explain the reference in regulation 16(2)(a) to a requirement under regulation 12(5).*

We now think that the reference to regulation 12(5) is unnecessary as there is no relevant requirement in that paragraph.

- (6) *In regulation 20(b), why is the appropriate authority not required to keep records of conduct matters recorded under regulation 24(1) and (6)?*

This mirrors the requirement in Regulation 24 of the Police (Complaints and Misconduct) Regulations 2004 (S.I. 2004/643) and thus the requirements on forces to keep records of recordable conduct matters arising from civil proceedings. To extend it as suggested would be putting more onerous record keeping requirements on HMRC than currently exist for the police, which is not the policy intention. As drafted the provision is consistent with the provisions of the Police Reform Act 2002, which is the policy intention.

- (7) *In regulation 20, for how long are records intended to be kept and why is the period not specified?*

In regulation 20, 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 standard position in such cases is that records will be held for seven years but this is subject to Data Protection Act considerations on a case by case basis. There are further provisions at regulations 25 and 33, in relation to the duties on the relevant appropriate authority to preserve evidence relating to conduct matters and DSI matters respectively. Again, this mirrors and is consistent with the Police (Complaints and Misconduct) Regulations 2004, which is consistent with the policy intention.

- (8) *In regulation 36(1), should the reference to a person appointed under regulation 48 be to a person designated under that regulation?*

It is agreed that the reference at regulation 36(1) to a person appointed under regulation 48 would be better expressed by a reference to a person designated under that regulation, but we believe that the meaning is clear.

- (9) *In regulation 36(6)(a), should the reference to regulation 38(6) be to regulation 38(2) or (6)?*

No. A DSI matter would always have been referred initially as soon as it was recorded and the initial mode of investigation decision under regulation 38(2) made. An investigation would then begin. This regulation is looking at what happens if during the course of that investigation, it is discovered that there is a conduct matter to be recorded. The IPCC may then decide to re-determine the mode of investigation which is why the reference is only to regulation 38 (6).

- (10) *Should paragraph (5) of regulation 56 be paragraph (3) of regulation 57? If not, explain its relevance.*

On reflection, the Department agrees that paragraph (5) of regulation 56 would be better situated as paragraph (3) of regulation 57. However, when read with regulation 56(2)(c) the sense of regulations 56 and 57 is clear.

- (11) *Explain the reason for regulation 59(8), given regulation 65(1)(a).*

In regulation 59(8) it is agreed that there is an unnecessary duplication and that that paragraph should be removed. The Department apologises for the duplication which mirrors regulations 11 and 27 of the Police (Complaints and Misconduct) Regulations 2004.

HMRC is grateful to the Committee for bringing these points to its attention and apologises for the errors referred to above. As it takes the view that the points raised do not affect the effective operation or authenticity of the Regulations. Subject to the view of the S.I. Registrar, it intends to address these points by way of correction slip. It is felt that this is the appropriate course as, in the context of the Regulations as a whole, the errors are small scale and obvious and the text and location of the error is equally obvious.

HMRC
26 October 2010