



House of Lords  
House of Commons  
Joint Committee on  
Statutory Instruments

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# Twenty-eighth Report of Session 2010-12

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**Drawing special attention to:**

*Building (Amendment) Regulations 2011 (S.I. 2011/1515)*  
*Armed Forces (Terms of Service) (Amendment) Regulations 2011*  
*(S.I. 2011/1523)*

*Ordered by the House of Lords to be printed*  
*14 September 2011*

*Ordered by the House of Commons to be printed*  
*14 September 2011*

HL Paper 196  
HC 354-xxviii  
Published on 20 September 2011  
by authority of the House of Lords  
and the House of Commons  
London: The Stationery Office Limited  
£0.00

# Joint Committee on Statutory Instruments

## Current membership

### House of Lords

Baroness Berridge (*Conservative*)  
Lord Clinton-Davis (*Labour*)  
Baroness Eccles of Moulton (*Conservative*)  
Lord Kennedy (*Labour*)  
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/jcsi](http://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](http://www.parliament.uk/jcsi).

## Committee staff

The current staff of the Committee are John Whatley (*Commons Clerk*), Jane White (*Lords Clerk*) and Jennifer Steele (*Committee Assistant*). Advisory Counsel: Peter Davis, Peter Brooksbank, Philip Davies and Daniel Greenberg (*Commons*); Allan Roberts, Nicholas Beach and Peter Milledge (*Lords*).

## Contacts

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# Instruments reported

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At its meeting on 14 September 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 two 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. 2011/1515: Reported for defective drafting

*Building (Amendment) Regulations 2011 (S.I. 2011/1515)*

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 Regulation 2 of this instrument amends regulation 9(1) of the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007. Regulation 9(1) of the 2007 Regulations previously read as follows:

*(1) Paragraph (2) applies to all buildings in relation to which the Building Regulations 2010 do not apply, other than—*

- (a) buildings which are exempt from those Regulations by virtue of regulation 9 of those Regulations;*
- (b) buildings which are used primarily or solely as places of worship;*
- (c) temporary buildings with a planned time of use of two years or less, industrial sites, workshops and non-residential agricultural buildings with low energy demand; and*
- (d) stand-alone buildings with a total useful floor area of less than 50m<sup>2</sup> which are not dwellings.*

1.3 The amendments made by this instrument are that the reference in sub-paragraph (a) to regulation 9 becomes a reference to regulation 21 and sub-paragraphs (b) to (d) are omitted.

1.4 Regulation 9 of the 2010 Regulations specifies descriptions of buildings to which those Regulations do not apply. Regulation 21 of those Regulations specifies certain descriptions of work to which the energy efficiency requirements of those Regulations apply.

1.5 As there are no buildings which are exempt from the 2010 Regulations by virtue of regulation 21, the Committee asked the Department for Communities and Local Government whether the amendment substituting a reference to that regulation for the reference to regulation 9 was correct, and to explain what is meant by the phrase “buildings which are exempt from the [2010 Regulations] by virtue of regulation 21 of those Regulations”.

1.6 In a memorandum printed at Appendix 1, the Department asserts that the amendment is correct. The Department explains the history of the provisions in question in some detail. Regulation 9(1) of the 2007 Regulations originally referred to the Building Regulations 2000, and in sub-paragraph (a) to regulation 9 of those Regulations. When the 2000 Regulations were consolidated as the Building Regulations 2010, a consequential amendment was made to regulation 9(1) substituting a reference to the 2010 Regulations. In the 2000 Regulations (as amended immediately before consolidation), regulation 9 contained provisions equivalent to those now contained in regulations 9 and 21 of the 2010 Regulations.

1.7 In the Department's view, the reference in regulation 9 of the 2007 Regulations to buildings which are exempt from the 2010 Regulations should be read as a reference to buildings in respect of which works are exempt from the energy efficiency requirements of the 2010 Regulations, and that the reference to regulation 21 of those Regulations is therefore correct. It considers that this would be easily understood in the context of regulation 9 of the 2007 Regulations as those Regulations are concerned with the energy performance of buildings.

1.8 The Committee cannot agree.

1.9 It notes in passing that regulation 9 of the 2007 Regulations is in Part 2 of that instrument. By virtue of regulation 4(1), Part 2 does not apply to buildings of the type mentioned in sub-paragraphs (b) to (d) of regulation 9(1). Those sub-paragraphs were therefore otiose and should not have been included when the 2007 Regulations were made.

1.10 Regulation 9(1)(a) of the 2007 Regulations has previously made perfect sense if the reference to buildings which are exempt from the Building Regulations (of 2000 or 2010) by virtue of regulation 9 of those Regulations was read literally. The Committee notes that the Explanatory Note to the 2007 Regulations when made stated that "Regulation 9 requires certificates for those buildings to which the Building Regulations 2000 do not apply".

1.11 The Department's analysis of the intended meaning of regulation 9(1)(a) is therefore inconsistent with the intended meaning at the time that provision was originally enacted and, the Committee suspects, when it was amended in consequence of the consolidation of the Building Regulations in 2010. Yet regulation 2 of the present instrument is presented by the Department as correcting an error rather than making a substantive change. If, however, a substantive change were the purpose, something more than a simple substitution of "21" for "9" would have been required. It is clearly wrong to refer to buildings to which the Building Regulations 2010 (except only the energy efficiency requirements of those Regulations) apply as buildings which are exempt from those Regulations. A more precise and accurate description of buildings should have been used.

1.12 The Committee is therefore satisfied that regulation 2 of this instrument is defectively drafted, either because it makes an unintended change to the effect of the 2007 Regulations or because it uses words which are inadequate to express clearly the intended new effect. It notes that the deletion of sub-paragraphs (b) to (d) is appropriate albeit for a reason apparently not realised by the Department. **The Committee accordingly reports regulation 2 for defective drafting.**

## 2 S.I. 2011/1523: Reported for failing to comply with proper drafting practice

*Armed Forces (Terms of Service) (Amendment) Regulations 2011 (S.I. 2011/1523)*

2.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they fail to comply with proper drafting practice.**

2.2 Regulations 3 to 11 amend four instruments which were made in 2006 and 2007. The provisions affected are concerned with the right of Service personnel to leave the Service or to transfer to the reserve. The instruments which are amended confer such rights using the traditional legislative expressions “shall be entitled”, “shall have the right”, and so on. The amendments made by this instrument insert similar provisions which instead state that a person “will be entitled” or “will have the right”.

2.3 In a memorandum printed at Appendix 2, the Ministry of Defence states that “will” has been used appropriately. It accepts that “shall” could also be used but states that “will” is the more modern term. The Committee's approach to style, and in particular whether usage should be traditional or modern, starts from a position of neutrality; provided that clarity of effect and consistency is respected, it is prepared to accept either. However it notes that “will” is routinely used purely to denote futurity rather than obligation, and would accordingly need persuasion that it could be appropriate for the conferring of a right. In addition, when existing legislation is amended, the Committee expects consistency as a general rule. In other words, in the absence of convincing special reasons, either—

- the new provisions should not clash with the existing ones if they are left in their previous state, or
- changes (assuming they are justified) should be applied throughout the existing provisions.

Neither is the case here, nor have convincing special reasons been adduced .

2.4 Regulations 13 to 15 contain transitional provisions, and each states that, in cases where specified action was taken before commencement of these Regulations, a provision “will apply” without the amendments made by these Regulations, rather than “applies”. The Department accepts that “applies” could equally have been used. In the Committee's view it would have been more apt to use “applies”, for the provisions apply as soon as the Regulations are in force and then continue to do so.

2.5 The inserted provisions also use the gender neutral plural “their” whilst the existing provisions into which they are inserted use “his”. Again, the Department accepts that “his” could have been used, and the Committee would repeat its preference for a consistent end result.

2.6 The Committee accepts the Department's statement that none of these matters requires amending action to be taken, but is concerned that modernisation should not lead either to internal inconsistency in legislation or to unnecessary use of expressions denoting a future state. **The Committee accordingly reports these Regulations for failing to comply with proper drafting practice.**

## Instruments not reported

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At its meeting on 14 September 2011 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

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### Draft Instruments requiring affirmative approval

<b>Draft S.I.</b>	Electricity and Gas (Internal Markets) Regulations 2011
<b>Draft S.I.</b>	European Union (Definition of Treaties) (Second Agreement amending the Cotonou Agreement) Order 2011
<b>Draft S.I.</b>	Financial Services and Markets Act 2000 (Exemption) (Amendment No. 2) Order 2011
<b>Draft S.I.</b>	Freedom of Information (Designation as Public Authorities) Order 2011
<b>Draft S.I.</b>	Incidental Flooding and Coastal Erosion (England) Order 2011
<b>Draft S.I.</b>	Medicines Act 1968 (Pharmacy) Order 2011
<b>Draft S.I.</b>	Public Services Reform (Scotland) Act 2010 (Consequential Modifications of Enactments) Order 2011
<b>Draft S.I.</b>	Statistics and Registration Service Act 2007 (Disclosure of Pupil Information by Welsh Ministers) Regulations 2011

### Instruments subject to annulment

<b>S.I. 2011/1587</b>	National Health Service (Travel Expenses and Remission of Charges) Amendment Regulations 2011
<b>S.I. 2011/1606</b>	Companies (Reporting Requirements in Mergers and Divisions) Regulations 2011
<b>S.I. 2011/1625</b>	Education (Pupil Registration) (England) (Amendment) Regulations 2011
<b>S.I. 2011/1631</b>	Cleaner Road Transport Vehicles Regulations 2011
<b>S.I. 2011/1652</b>	Road Traffic (Drink and Drugs) (Cambridgeshire Guided Busway) Regulations 2011
<b>S.I. 2011/1655</b>	Feed-in Tariffs (Specified Maximum Capacity and Functions) (Amendment No. 2) Order 2011
<b>S.I. 2011/1659</b>	Legal Services Act 2007 (Licensing Authorities) (Maximum Penalty) Rules 2011
<b>S.I. 2011/1707</b>	Social Security (Miscellaneous Amendments) (No. 2) Regulations 2011
<b>S.I. 2011/1708</b>	Local Justice Areas (No. 2) Order 2011
<b>S.I. 2011/1721</b>	Justices of the Peace Act 1949 (Compensation) (Revocation) Regulations 2011

- S.I. 2011/1727** Charities Act 2006 (Principal Regulators of Exempt Charities) (No. 2) Regulations 2011
- S.I. 2011/1736** Housing Benefit (Amendment) Regulations 2011
- S.I. 2011/1738** Extraction Solvents in Food (Amendment) (England) Regulations 2011
- S.I. 2011/1754** Violent Crime Reduction Act 2006 (Specification for Imitation Firearms) Regulations 2011
- S.I. 2011/1788** Sexual Offences Act 2003 (Prescribed Police Stations) Regulations 2011
- S.I. 2011/1801** Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc.) (Amendment) Regulations 2011
- S.I. 2011/1881** Toys (Safety) Regulations 2011
- S.I. 2011/1917** School Teachers' Pay and Conditions Order 2011
- S.I. 2011/1946** Road Vehicles (Approval) (Amendment) Regulations 2011
- S.I. 2011/1979** Civil Procedure (Amendment No. 2) Rules 2011

**Instruments not subject to Parliamentary proceedings laid before Parliament**

- S.I. 2011/1696** International Criminal Court (Libya) Order 2011

**Instruments not subject to Parliamentary proceedings not laid before Parliament**

- S.I. 2011/1607** Gender Recognition Register (Amendment) Regulations 2011
- S.I. 2011/1658** Prisoners' Earnings Act 1996 (Commencement) (England and Wales) Order 2011
- S.I. 2011/1692** Exempt Charities Order 2011
- S.I. 2011/1695** Designation of Schools Having a Religious Character (Independent Schools) (England) (No. 3) Order 2011
- S.I. 2011/1866** Dentists Act 1984 (Medical Authorities) Order 2011
- S.I. 2011/1953** Grant for Research and Development (Transfer of Contracts etc.) Order 2011

# Appendix 1

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## S.I. 2011/1515: memorandum from the Department for Communities and Local Government

<b><i>Building (Amendment) Regulations 2011 (S.I. 2011/1515)</i></b>
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1. The Committee has requested a memorandum on the following point:

*Is the amendment made by paragraph (a) of regulation 2, the start of which appears to include a surplus “2007”, correct? If so, explain what is meant in the amended regulation 9 by buildings which are exempt from the Building Regulations 2010 by virtue of regulation 21 of those Regulations.*

2. We consider that the amendment to regulation 9 of the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007 (“the 2007 Regulations”) made by this instrument is correct. The consolidation of Building Regulations which was achieved by the Building Regulations 2010 (“the 2010 Regulations”) included a consequential amendment to the date of the Building Regulations referred to in regulation 9(1) of the 2007 Regulations, but no other changes were made to that regulation.
3. The allowable exemptions to the energy efficiency requirements of the Building Regulations were originally in regulation 9 of the Building Regulations 2000 (as amended), but on consolidation moved to regulation 21 of the 2010 Regulations. We therefore considered that regulation 9 of the 2007 Regulations should be amended to refer instead to regulation 21. In addition, we did not see the need to retain regulation 9(1)(b) to (d) in the 2007 Regulations as these categories of exempt buildings are already set out in regulation 21 of the 2010 Regulations.
4. The categories of building listed in regulation 21 are exempt from the energy efficiency requirements of the 2010 Regulations, and this is conveyed in regulation 9 of the 2007 Regulations by referring to buildings exempt from the 2010 Regulations by virtue of regulation 21. We consider this would be easily understood in the context of regulation 9 of the 2007 Regulations as those Regulations are concerned with the energy performance of buildings.
5. In making this amendment to the 2007 Regulations, we have not altered the drafting approach previously taken in those Regulations, and are not aware that any practical difficulties have resulted from this approach.
6. We accept that there is a surplus date in regulation 2 of the Building (Amendment) Regulations 2011, which was unfortunately overlooked when a definition of the 2007 Regulations was added to the Regulations.

Department for Communities and Local Government  
12th July 2011

## Appendix 2

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### **S.I. 2011/1523: memorandum from the Ministry of Defence**

<b><i>Armed Forces (Terms of Service) (Amendment) Regulations 2011 (S.I. 2011/1523)</i></b>
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1. The Joint Committee on Statutory Instruments requested a memorandum in response to the following points made in relation to the above mentioned instrument.

*Given that the auxiliary “will” is routinely predictive rather than apt for setting out legal rights and obligations –*

(a) *why is it used in these Regulations in provisions inserted into instruments materially parallel to existing provisions in those Regulations that routinely use “shall” (for example regulation 7A inserted by article (sic) 5 after regulation 7 of SI 2006/1198 in comparison with surviving regulation 7 of that SI); Observation made on the amendments made by regulation 5 etc?*

2. We are of the view that “will” has been used appropriately. The auxiliary verb “will” accompanies the main verb (“have”) in regulation 5 etc., of the instrument to illustrate that the “right” referred to is not possessed unless or until certain conditions are satisfied; which must of necessity occur at a point in the future. Whilst it is accepted that the auxiliary verb “shall” may also be used to create the same effect, “will” is more a modern term. Use of “will” does not cause the provision to be ambiguous or incomprehensible and in this instance it is considered unnecessary to adopt the linguistic style of other existing provisions. We therefore do not consider that the relevant regulations require amendment.

*Given that the auxiliary “will” is routinely predictive rather than apt for setting out legal rights and obligations –*

(b) *when it is used elsewhere (for example in regulations 13 to 15), why it used in preference to the present tense?*

3. In addition to the point made above, whilst it is accepted that “applies” could equally have been used instead of “will apply”, we consider this to be a stylistic point. We do not consider that the current formulation is ambiguous or that it makes the provisions difficult to understand. As a result we do not consider that the regulations require amendment.

*Why is the gender neutral plural (“their”) used, for example, at the start of introduced regulation 7A of SI 2006/1198 in circumstances where “his” is used in surviving regulation 7 of SI 2006/1198, in a manner that leaves unresolved inconsistency of usage in that SI?*

4. Since the introduction of gender neutral drafting, we have endeavoured to adopt the new approach unless doing so would create ambiguity or be overly cumbersome. We accept, of course, that use of the word “his” and reliance upon the Interpretation Act 1978 would be sufficient, however, in adopting the current style we do not consider that any ambiguity has been created. It is clear in the existing provisions that “his” necessarily includes “her” and use of “their” in the new regulations encompasses both terms and does not create any conflict. Therefore, we do not consider that the new provisions require amendment to correspond with the old terminology. However, in future drafting, we will be happy to adopt the old approach of using masculine gender terms and relying on the 1978 Act.

5. Finally, we are grateful for all the observations made: All will be taken into account when drafting instruments in the future.

Ministry of Defence  
12 July 2011