



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

Thirty-second Report of Session 2010-12

Drawing special attention to:

*European Union Act 2011 (Commencement No.1) Order 2011
(S.I. 2011/1984)*

*European Union Act 2011 (Commencement No.2) Order 2011
(S.I. 2011/1985)*

*Access to the Countryside (Appeals against Works Notices) (England)
Regulations 2011 (S.I. 2011/2019)*

*Ordered by the House of Lords to be printed
9 November 2011*

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Joint Committee on Statutory Instruments

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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

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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*), 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*).

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Instruments reported

At its meeting on 9 November 2011 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. 2011/1984 and S.I. 2011/1985: Reported for not being made in a single instrument

European Union Act 2011 (Commencement No.1) Order 2011 (S.I. 2011/1984) and European Union Act 2011 (Commencement No.2) Order 2011 (S.I. 2011/1985)

1.1 The Committee draws the special attention of both Houses to these Orders on the ground that their provisions should have been combined in a single instrument.

1.2 Each of these Orders consists of a preamble taking up two lines, an article 1 which, with its heading, takes up four lines, and an article 2 which, with its heading, takes up four lines, bringing into force (in the case of S.I. 2011/1984) Part 1 of, and Schedule 1 to, the European Union Act 2011 on 19 August 2011 and (in the case of S.I. 2011/1985) the remaining provisions of that Act on 19 September 2011. The Orders were both made on the same day by the Secretary of State for Foreign and Commonwealth Affairs. The price of each Order to a purchaser is £4. Had there instead been a single Order with article 2 of S.I. 2011/1985 appearing as article 3, the Order would have still had a retail price of £4.

1.3 In a memorandum printed at Appendix 1, the Foreign and Commonwealth Office accepts that it would have been possible for the two Orders to be combined in one instrument so as to halve the cost to the purchaser, and undertakes to ensure that consideration will be given to the possible cost to the public when determining arrangements for commencement of legislation.

1.4 The Committee accordingly reports these Orders on the ground that their provisions should have been incorporated in a single instrument.

2 S.I. 2011/2019: Reported for doubtful *vires* and defective drafting

Access to the Countryside (Appeals against Works Notices) (England) Regulations 2011 (S.I. 2011/2019)

2.1 The Committee draws the special attention of both Houses to these Regulations on the grounds that in one respect there appears to be a doubt whether they are *intra vires* and in three respects they are defectively drafted.

2.2 These Regulations are made, so far as is relevant, under powers conferred by sections 38(6) and 44(2) of the Countryside and Rights of Way Act 2000 and section 316(1) of and paragraph 4(5) of Schedule 20 to the Marine and Coastal Access Act 2009. As amplified

below, they relate to land to which members of the public have access. The 2000 Act covers inland areas subject to public access and the 2009 Act covers coastal land. Where authorities impose requirements on owners and occupiers relating to works on the land there is scope for appeal.

2.3 Subsection (6) of section 38 of the 2000 Act confers power to make regulations as to the period within which and manner in which appeals under that section are to be brought, the advertising of such an appeal, and the manner in which such appeals are to be considered. Section 44(2), so far as is relevant, confers power to make such incidental, supplementary, consequential or transitional provision as the person making the regulations considers necessary or expedient.

2.4 Sub-paragraph (5) of paragraph 4 of Schedule 20 to the 2009 Act confers powers identical to those conferred by section 38(6) of the 2000 Act but in respect of appeals brought under that paragraph. Section 316(1) of the 2009 Act contains provisions corresponding to those of section 44(2) of the 2000 Act.

2.5 Section 36(3) of the 2000 Act allows the “access authority” to give the owner or occupier of any access land a notice requiring him within a specified period to carry out such works as may be specified in the notice, for the purpose of remedying a failure to observe a restriction which he is required to observe by an agreement under section 35 (which relates to access to the land in question). Section 38(1) provides that, where a notice under section 36(3) has been given to any person in respect of any land, he or any other owner or occupier of the land may appeal against the notice.

2.6 Paragraph 3(3) of Schedule 20 to the 2009 Act allows the “relevant authority” to give the owner or occupier of land a notice stating that, after the end of the period specified in the notice, it intends to take all necessary steps for carrying out the works required for the purposes of the coastal access duty. Paragraph 3(6) states that, where a notice under paragraph 3(3) is given to any person as the owner or occupier, the relevant authority must give a copy of the notice to every other owner or occupier of the land. Paragraph 4(1) provides that where a notice under paragraph 3(3) has been given to a person in respect of any land, that person or any other owner or occupier of the land may appeal to the Secretary of State.

2.7 Regulation 4, of this instrument, which is entitled “Manner and period for appeal” includes at paragraph (4), the following provision:

Where the appropriate authority gives notice under –

- (a) section 36(3) of the 2000 Act, or*
- (b) paragraph 3(3) of Schedule 20 [to the 2009 Act]*

to the owner or occupier of any land, the appropriate authority must take such steps as are reasonable to give a copy of that notice to every other owner or occupier of the land.

2.8 The Committee asked the Department for Environment, Food and Rural Affairs to identify the enabling power for regulation 4(4) and also to explain why regulation 4(4)(b) replicates the provisions of paragraph 3(6) of Schedule 20 to the 2009 Act, albeit in a less strict way.

2.9 In a memorandum printed at Appendix 2, the Department states that the enabling power for regulation 4(4)(a) is the power to make incidental or supplementary provision in section 44(2) of the 2000 Act. It argues that that the provision is incidental or supplementary because the exercise of the right of appeal conferred by section 38(1) by any owner or occupier of the land other than the recipient of the notice under section 36(3) is only reasonably practicable if the owner or occupier in question receives a copy of that notice.

2.10 The Department also states that the enabling power for regulation 4(4)(b) is the equivalent provision in section 316(1) of the 2009 Act, and gives the same explanation of why this is considered to be the case.

2.11 The Committee does not agree with the Department's arguments. Regulation 4(4) appears to be neither incidental nor supplementary to a power to make provision as to the matters specified in section 38(6) of the 2000 Act and paragraph 4(5) of Schedule 20 to the 2009 Act. Instead, it appears to supplement the provisions of section 36 of the 2000 Act and paragraph 3 of Schedule 20 to the 2009 Act, which are concerned with the giving of the notice the giving of which gives rise to a right of appeal. The fact that the Department acknowledges that regulation 4(4)(b) is otiose in that it repeats the requirements of paragraph 3(6) of Schedule 20 to the 2009 Act (albeit in a watered-down fashion, requiring the appropriate authority only to take such steps as are reasonable) serves to support the Committee's view. It may be that the Department had spotted that the 2000 Act should have included a provision equivalent to paragraph 3(6) of Schedule 20 to the 2009 Act, and decided to make good the deficit by including regulation 4(4)(a), but it is not reasonable to conclude that the powers under which this instrument is made extend so far as to permit the filling of such gaps outside the scope of the appeal process itself. **The Committee accordingly reports regulation 4(4) for being of doubtful *vires*.**

2.12 The Committee also reports the inclusion of regulation 4(4)(b) for defective drafting, acknowledged by the Department.

2.13 Regulation 5 of this instrument requires the Secretary of State, as soon as practicable after having received all the information required in order to be able to entertain the appeal, to notify the appropriate authority in writing, and by virtue of paragraph (2) of that regulation the notice must be accompanied by a questionnaire in respect of the information required by the Secretary of State to determine the appeal.

2.14 Regulation 6 provides that the appropriate authority must ensure that, within two weeks of its receipt of the notification under regulation 5, the appellant receives information and documents including: (a) the questionnaire mentioned in regulation 5(2) duly completed by the relevant authority (which must also state the date on which it is sent to the Secretary of State) together with a copy of each document referred to in it.

2.15 Regulation 7(1) requires the Secretary of State to give notice of various matters “*as soon as practicable after receiving the information to be supplied in accordance with regulation 6*”

2.16 The Committee asked the Department to explain the italicised words. The Department states that the reference to the Secretary of State receiving information supplied in accordance with regulation 6 is a reference to the information supplied to the Secretary of State in the form of the questionnaire mentioned in regulation 5(2). Regulation 6(a) requires the appropriate authority to state the date on which the questionnaire is sent to the Secretary of State. The Department accordingly considers it clear from regulation 5(2) and 6(a) that the questionnaire must be sent to the Secretary of State.

2.17 The Department appears to the Committee to have failed to notice that fact that regulation 6(a) requires the appropriate authority to ensure that the *appellant* receives the questionnaire. There is nothing in the Regulations requiring the appellant to forward the questionnaire to the Secretary of State (and indeed if that were the intended procedure it would be impossible for the appropriate authority to state, as required by regulation 6(a), the date on which it was sent to the Secretary of State).

2.18 It appears clear to the Committee that two structural elements are missing from the Regulations. First, a requirement that the appropriate authority send the completed questionnaire to the Secretary of State, and secondly a requirement that the appropriate authority send *a copy of the completed questionnaire* to the appellant. **The Committee accordingly reports regulations 5 and 6 for defective drafting.**

2.19 The Regulations provide for appeals to be determined in any of three ways: on the basis of an inquiry, a hearing, or written representations only. Part 3 of the Regulations, headed “Determination of Appeals”, is divided into three numbered Chapters. Chapter 1 is headed “Appeals to be determined on the basis of written representations”, Chapter 2 “Appeals to be determined by way of a hearing”, and Chapter 3 “Appeals to be determined by way of an inquiry”. Although it is possible to infer from the content of Chapters 2 and 3 that they apply only in the circumstances described by their headings, it is not so clear in the case of Chapter 1, and in particular regulation 15. This regulation states what the Secretary of State must do once a decision on an appeal has been made, and is capable of applying in the case of any of the three types of appeal procedure.

2.20 The Department states that it is clear from the context. First, regulation 14 makes it clear that the Secretary of State or the inspector may proceed to a decision on the basis of written representations. (This is not strictly accurate: regulation 14 allows a decision to be made on the basis only of such statements of case, representations and comments as have been received within a specified time limit.) Secondly, the cross-headings to the Chapters should be used as an aid to construction. Thirdly, equivalent but different provision concerning the action to be taken following a decision is contained in Chapters 2 and 3.

2.21 The Committee accepts that a court, if it needed to reach a view on the scope of Chapter 1, might well rely on the arguments adduced by the Department but considers that the possibility of relying purely on the combination of context and non-operative words such as headings for purposes of interpretation should not be used to excuse a failure to set out clearly what is intended in the text of the instrument, and considers that the fact that

two different provisions may each be capable of applying in the same given circumstances is evidence of structural incompleteness. The Department could instead have made the wording of the three Chapters clearer as to the circumstances in which they apply, or perhaps more simply have added an additional Chapter at the beginning of Part 3 indicating when each of the following Chapters applies. **The Committee accordingly reports Part 3 of the Regulations for defective drafting.**

Instruments not reported

At its meeting on 9 November 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

Draft Instruments requiring affirmative approval

Draft S.I. Water Supply (Amendment to the Threshold Requirement) Regulations 2011

Instruments subject to annulment

S.I. 2011/2105 Smoke Control Areas (Authorised Fuels) (England) (Amendment) (No. 2) Regulations 2011

S.I. 2011/2106 Smoke Control Areas (Exempted Fireplaces) (England) (No. 2) Order 2011

S.I. 2011/2436 Transfer of Functions (Her Majesty's Land Registry, the Meteorological Office and Ordnance Survey) Order 2011

S.I. 2011/2451 Agricultural Holdings (Units of Production) (England) Order 2011

S.I. 2011/2452 Energy Performance of Buildings (Certificates and Inspections) (England and Wales) (Amendment) Regulations 2011

S.I. 2011/2453 Storage of Carbon Dioxide (Amendment of the Energy Act 2008 etc.) Regulations 2011

S.I. 2011/2455 Southgate College (Dissolution) Order 2011

S.I. 2011/2468 Crime and Disorder Act 1998 (Responsible Authorities) (Amendment) Order 2011

S.I. 2011/2490 Prostitution (Public Places) (Scotland) Act 2007 (Disqualification from Driving) Order 2011

Draft instruments subject to annulment

Draft S.I. Daventry (Electoral Changes) Order 2012

Draft S.I. Hartlepool (Electoral Changes) Order 2012

Draft S.I. Rugby (Electoral Changes) Order 2012

Draft S.I. Swindon (Electoral Changes) Order 2012

Draft S.I. West Lindsey (Electoral Changes) Order 2012

Instruments not subject to Parliamentary proceedings laid before Parliament

S.I. 2011/2437 Iraq (United Nations Sanctions) (Amendment) Order 2011

Instruments not subject to Parliamentary proceedings not laid before Parliament

- S.I. 2011/1770** Flood and Water Management Act 2010 (Commencement No. 1 and Transitional Provisions) (England) Order 2011
- S.I. 2011/2443** Cluster Munitions (Prohibitions) Act 2010 (Isle of Man) Order 2011
- S.I. 2011/2444** Immigration (Guernsey) Order 2011
- S.I. 2011/2459** Finance Act 2011, Section 42 (Appointed Day) Order 2011
- S.I. 2011/2485** Constitutional Reform and Governance Act 2010 (Commencement No. 6, Specified Day and Transitional Provision) Order 2011
- S.I. 2011/2492** Offshore Installations (Safety Zones) (No. 4) Order 2011
- S.I. 2011/2515** Police Reform and Social Responsibility Act 2011 (Commencement No. 1) Order 2011

Appendix 1

S.I. 2011/1984 and S.I. 2011/1985: memorandum from the Foreign and Commonwealth Office

European Union Act 2011 (Commencement No.1) Order 2011 (S.I. 2011/1984) and European Union Act 2011 (Commencement No.2) Order 2011 (S.I. 2011/1985)

The Committee has requested a memorandum on the following point:

Why were the provisions of these two instruments not combined in a single instrument, thus halving the cost to a purchaser of both?

In order to honour commitments given by the Minister of Europe during the passage of the European Union Bill through Parliament, it was agreed that arrangements should be made to allow for the commencement of Part 1 of the European Union Act 2011 one month after the date of Royal assent. Accordingly, S.I. 2011/1984 made provision for the entry into force of Part 1 of the European Union Act 2011 one month after the date of Royal assent was granted.

It was not considered necessary to provide for early commencement of the remainder of the European Union Act 2011 and, accordingly, S.I. 2011/1985 European Union Act 2011 (Commencement No.2) Order 2011 provided that for the remainder of the Act to come into force two months after the date of Royal assent in accordance with normal practice.

The Foreign and Commonwealth Office accepts that with the benefit of hindsight it would have been possible for the two Orders to be combined in one instrument so as to halve the cost to the purchaser as the Committee has suggested and acknowledges the admonishment from the Joint Committee in this regard. We will ensure that the point made by the Joint Committee is noted and that going forward consideration is given to the possible cost to the public when determining arrangements for commencement of legislation.

Foreign and Commonwealth Office
31 October 2011

Appendix 2

S.I. 2011/2019: memorandum from the Department for Environment, Food and Rural Affairs

Access to the Countryside (Appeals against Works Notices) (England) Regulations 2011 (S.I. 2011/2019)

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

(1) *Identify the enabling power in respect of regulation 4(4).*

1. The enabling power in respect of regulation 4(4)(a), which provides for the appropriate authority to give a copy of a notice under section 36(3) of the Countryside and Rights of Way Act 2000 (c.37) (“the 2000 Act”) to every other owner or occupier of the land, is the power to make incidental or supplementary provision in section 44(2)(b) of that Act, which enables the Secretary of State to make such incidental or supplementary provision as she considers necessary or expedient. The provision made in regulation 4(4)(a) is incidental or supplementary to provision in regulation 4(2) and (3) as to the period within which appeals are to be brought. This is because the exercise of the right of appeal provided by section 38(1) of the 2000 Act by any other owner or occupier of the land within the period specified in the notice under section 36(3) is only reasonably practicable if the owner or occupier in question receives a copy of that notice.

2. With regard to the enabling power for regulation 4(4)(b) which provides for the appropriate authority to give a copy of a notice under paragraph 3(3) of Schedule 20 to the Marine and Coastal Access Act 2009 (c.23) (“the 2009 Act”), section 316(1) of that Act provides a similar power to make incidental or supplemental provision in relation to regulations made under that Act. The provision made in regulation 4(4)(b) is again incidental or supplemental to provision in regulation 4(2) and (3) as to the period within which appeals are to be brought for reasons analogous to those mentioned in paragraph 1 above in relation to a notice under section 36(3) of the 2000 Act.

(2) *Explain why regulation 4(4)(b) replicates the provisions of paragraph 3(6) of Schedule 20 to the 2009 Act, albeit in a less strict way.*

3. The Department accepts that, since paragraph 3(6) of Schedule 20 to the 2009 Act makes provision for a notice under paragraph 3(3) of that Schedule to be given to every other owner or occupier of the land, regulation 4(4)(b) is otiose. The Department will accordingly amend regulation 4(4) at the next available opportunity.

- (3) *Explain the reference in regulation 7(1) to the Secretary of State receiving the information to be supplied in accordance with regulation 6, given that the information referred to -*
- (a) in regulation 6(a) appears not to be expressly required, and*
 - (b) elsewhere in regulation 6 appears not to be required,*
- to be sent to the Secretary of State by that provision.*

4. The reference in regulation 7(1) to the Secretary of State receiving information supplied in accordance with regulation 6 is a reference to the information supplied to the Secretary of State in the form of the questionnaire mentioned in regulation 5(2). Regulation 6(a) requires the appropriate authority to state the date on which the questionnaire is sent to the Secretary of State. The Department considers it is clear from regulation 5(2) and regulation 6(a) that the questionnaire must be sent to the Secretary of State.

- (4) *Why does the text of Chapter 1 of Part 3 (and in particular regulation 15) not contain anything to restrict its application to appeals which are to be determined on the basis of written representations?*

5. Regulation 14 makes it clear that the Secretary of State or the inspector may proceed to a decision on the appeal on the basis of written representations, and since regulation 15 follows directly afterwards, the Department considers that it is clear from the context that regulation 15 similarly applies only in relation to decisions on such appeals. This is particularly the case when these provisions are read with the cross-heading to Chapter 1 of Part 3 of the Regulations, which the Department considers to be an aid to the construction of that Chapter, and the corresponding cross-headings to Chapter 2 (which follows immediately after regulation 15) and Chapter 3 (which indicate that appeals to be determined by way of a hearing or inquiry are governed by Chapters 2 and 3 respectively), and in the light of the separate provisions of regulations 23, 24, 36 and 37 in relation to the notification of decisions in appeals determined by way of a hearing or inquiry.

Department for Environment, Food and Rural Affairs
1st November 2011