



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

Nineteenth Report of Session 2012-13

Drawing special attention to:

*Energy Performance of Buildings (England and Wales) Regulations
2012 (S.I. 2012/3118)*

*General Pharmaceutical Council (Amendment of Miscellaneous
Provisions) Rules Order of Council 2012 (S.I. 2012/3171)*

*Ordered by the House of Lords to be printed
13 February 2013*

*Ordered by the House of Commons to be printed
13 February 2013*

**HL Paper 118
HC 135-xix**

Published on 19 February 2013
by authority of the House of Lords
and the House of Commons
London: The Stationery Office Limited
£0.00

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 Charlotte Littleboy (*Commons Clerk*), Jane White (*Lords Clerk*) and Liz Booth (*Committee Assistant*). Advisory Counsel: Peter Davis, Peter Brooksbank, Philip Davies and Daniel Greenberg (*Commons*); Nicholas Beach and Peter Milledge (*Lords*).

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Instruments reported

At its meeting on 13 February 2013 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. 2012/3118: Reported for defective drafting and for requiring elucidation

Energy Performance of Buildings (England and Wales) Regulations 2012 (S.I. 2012/3118)

1.1 **The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in two respects and require elucidation in a third.**

1.2 The Regulations consolidate previous provisions about the energy performance of buildings with amendments to give effect to new requirements of European law.

1.3 Paragraph (1) of regulation 19 requires an energy assessor who inspects an air-conditioning system to provide a report of the inspection and give it to the client. Paragraphs (2) and (3) of that regulation provide that the report is to include a specified assessment, specified advice and specified information. Regulation 23 requires an energy assessor to include in an energy performance certificate or inspection report a declaration about any personal or business relationship the inspector may have with certain specified persons. The Regulations do not include any sanction for a failure to comply with either regulation 19 or regulation 23. An energy assessor is required by paragraph (1) of regulation 22 to be a member of an accreditation scheme approved by the Secretary of State. The Committee wondered whether compliance with regulations 19 and 23 might be intended to be a matter for accreditation schemes but noted that paragraph (3) of regulation 22, which specifies various matters about which the Secretary of State must be satisfied before approving an accreditation scheme, does not mention a requirement that adequate provision is made by the scheme for ensuring that members comply with regulations 19 and 23. The Committee accordingly asked the Department for Communities and Local Government to explain the intended sanction for failure to comply with regulations 19 and 23 and how that intention was given effect; and to explain the absence from regulation 22(3) of any provision for ensuring that members comply with those regulations.

1.4 In a memorandum printed at Appendix 1 the Department states that the reason why there is no need to provide a sanction for the duty imposed by regulation 19(1) is that its enforcement is a contractual matter between the energy assessor and the client. The Department indicates that the propositions in regulation 19(2) and (3) are matters for the accreditation scheme of which the energy assessor is a member. It also states that ensuring compliance with the disclosure requirements in regulation 23 is similarly a matter for accreditation schemes, and refers the Committee to two sets of requirements for accreditation (referred to in but not printed with the memorandum). The two sets of

requirements respectively contain 87 and 91 pages and the memorandum provides no indication as to where (if at all) they cover obligations imposed by the Regulations.

1.5 The Committee considers that, if the intention is that enforcing the making and giving of a report under regulation 19(1) should be a matter of contract between an energy assessor and client, there appears to be no reason why regulation 19(1) was included in the Regulations at all. The Committee notes that the intended method of securing compliance with regulations 19(2) and (3) and 23 is through accreditation schemes, but would have expected regulation 22(3) to have contained some indication of that: otherwise the source of the sanctions for failure to comply with those obligations is simply uncertain. While it accepts that the Secretary of State, in considering the exercise of the power to approve accreditation schemes under regulation 22(1), is not necessarily limited to considering the factors in regulation 22(3), it is disappointed by the absence of specificity in the Department's response in indicating exactly how (if at all) obligations imposed by the Regulations are covered in the current sets of requirements for accreditation. In addition the Committee notes that the published requirements for accreditation, in so far as based on discretion, cannot under normal judicial review principles be absolute. **The Committee accordingly reports regulation 19(1) for defective drafting and the combination of regulations 19(2) and (3), 22 and 23 for requiring elucidation incompletely provided in the Department's memorandum.**

1.6 Regulation 25 provides that a person may, for the purpose of complying with a duty imposed by the Regulations, copy or issue a copy of any document produced by an energy assessor. The Committee asked the Department to identify the prohibition or restriction to which regulation 25 is an exception and how that was made clear. In its memorandum the Department states that there is a prohibition on disclosure in regulation 30 to which regulation 25 is relevant. It appears to the Committee that regulation 30 provides an exception to the prohibition on disclosure contained in regulation 29 (which specifies that regulations 30 to 32 contain exceptions to that prohibition) and is not itself a prohibition. Regulation 30 does, however, include conditions that must be satisfied before it grants exemption from the regulation 29 prohibition. One of these is that the owner or occupier of the building to which the data relates must not have opted out of the exception in question. The Department's memorandum indicates that regulation 25 allows for disclosure even where there has been such an opt-out.

1.7 The Committee finds it difficult to see how regulation 25, which is referred to in neither regulation 29 nor regulation 30, is intended to provide simply a gloss on regulation 30. In addition, while regulations 29 and 30 refer to disclosure by a person keeping a register on the Secretary of State's behalf, regulation 25 refers in general terms to "any person". If regulation 25 is intended to have the meaning which the Department says it has, it should have been both narrowed and expressly linked to regulation 30 so as to match its purpose exactly. **The Committee accordingly reports Regulation 25 for defective drafting.**

2 S.I. 2012/3171: Reported for unexpected use of the enabling power

General Pharmaceutical Council (Amendment of Miscellaneous Provisions) Rules Order of Council 2012 (S.I. 2012/3171)

2.1 The Committee draws the special attention of both Houses to this Order on the ground that it makes an unexpected use of the enabling power in one respect.

2.2 The Order approves the General Pharmaceutical Council (Amendment of Miscellaneous Provisions) Rules 2012 (“the 2012 Rules”), Part 4 of which amends the General Pharmaceutical Council (Registration) Rules 2010 (“the 2010 Rules”).

2.3 Rule 25 of the 2012 Rules, which is in Part 4, amends rule 10 of the 2010 Rules. Prior to the amendments rule 10 (which requires the provision of evidence of identity in certain cases) stated that a person’s passport, or a copy of a person’s passport certified by a solicitor or equivalent, would constitute an acceptable form of evidence of the person’s identity. The amendments made to rule 10 by rule 25 of the 2012 Rules include the insertion of a new paragraph (3A) (introduced by rule 25(6)) which provides that a certified copy of a passport is acceptable only if it does not include a copy of the front cover of the passport. The Committee was unclear as to the reasons why a copy of a passport which does include a copy of the cover is excluded and so asked the Department of Health to explain, in relation to new rule 10(3A), why a certified copy of a passport including its front cover (as opposed to one without its front cover) is not treated as acceptable supporting evidence.

2.4 In a memorandum printed at Appendix 2 the Department explains that it had become difficult for some persons to be able to obtain a certified copy of the whole of their passports because solicitors had declined to certify a copy including the front page (which bears the Royal Coat of Arms) on the ground that its reproduction is protected under the Copyright, Designs and Patents Act 1988 by Crown copyright. The Department acknowledges that it is not certain that copying the page of a passport bearing the Royal Court of Arms is indeed a breach of copyright or, even if it is, that it would lead to any proceedings by way of enforcement. But it is understandable that solicitors might be reluctant to become involved in reproducing and certifying front pages of passports if there is a possibility that to do so would constitute such a breach. The Committee is grateful for the explanation and it finds it convincing as an explanation of why an option of omitting the front page might be considered.

2.5 The decision to make the omission prescriptive was aimed, according to the memorandum, at preventing anyone who was unaware of a potential copyright issue relating to the front page from copying and supplying it in any event. Here the Committee finds the explanation unconvincing: the range of possible certifiers is limited to those who can be assumed to have sufficient legal expertise to be able to form their own views on such risks of including the front page as might exist. If a solicitor is content to certify a copy of the whole of a passport, that, of course, in no way adversely affects its evidential value, which is what the need for certification is necessarily aimed at. Had the relevant rule provided that a copy with or without the front page would suffice, the aim would have been

fully achieved with a choice extended in a manner likely to be more convenient to those required to comply.

2.6 The Committee accordingly reports rule 25(6) for making an unexpected use of the enabling power.

Instruments not reported

At its meeting on 13 February 2013 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.	Financial Services Act 2012 (Mutual Societies) Order 2013
Draft S.I.	Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) Order 2013
Draft S.I.	Global Green Growth Institute (Legal Capacities) Order 2013
Draft S.I.	Automatic Enrolment (Earnings Trigger and Qualifying Earnings Band) Order 2013
Draft S.I.	Loss of Tax Credits Regulations 2013
Draft S.I.	Renewables Obligation (Amendment) Order 2013
Draft S.I.	Pneumoconiosis etc. (Workers' Compensation) (Payment of Claims) (Amendment) Regulations 2013
Draft S.I.	Mesothelioma Lump Sum Payments (Conditions and Amounts) (Amendment) Regulations 2013
Draft S.I.	Representation of the People (Election Expenses Exclusion) Order 2013

Instruments subject to annulment

S.I. 2013/23	Plant Health (England) (Amendment) Order 2013
S.I. 2013/24	Proceeds of Crime Act 2002 (Appeals Under Part 2) (Amendment) Order 2013
S.I. 2013/38	Assured and Protected Tenancies (Lettings to Students) (Amendment) (England) Regulations 2013
S.I. 2013/105	Pension Protection Fund and Occupational Pension Schemes (Levy Ceiling and Compensation Cap) Order 2013
S.I. 2013/106	Non-Domestic Rating (Transitional Protection Payments) Regulations 2013
S.I. 2013/107	Non-Domestic Rating (Designated Areas) Regulations 2013
S.I. 2013/108	Non-Domestic Rating (Renewable Energy Projects) Regulations 2013
S.I. 2013/109	Uplands Transitional Payment Regulations 2013

S.I. 2013/117 Regional Strategy for Yorkshire and Humber (Partial Revocation) Order 2013

S.I. 2013/132 NHS Bodies (Transfer of Trust Property) Order 2013

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2013/22 Driving Licences (Exchangeable Licences) (Amendment) Order 2013

S.I. 2013/99 Political Parties and Elections Act 2009 (Commencement No. 6) Order 2013

S.I. 2013/113 Financial Services Act 2012 (Commencement No. 1) Order 2013

S.I. 2013/123 Pollution Prevention and Control (Designation of Directives) (England and Wales) Order 2013

S.I. 2013/125 Energy Act 2011 (Commencement No. 2) Order 2013

S.I. 2013/158 Copyright (Certification of Licensing Scheme for Educational Recording of Broadcasts) (Educational Recording Agency Limited) (Amendment) Order 2013

Appendix 1

S.I. 2012/3118: memorandum from the Department for Communities and Local Government

<i>Energy Performance of Buildings (England and Wales) Regulations 2012 (S.I. 2012/3118)</i>
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1. The Committee has requested a memorandum on the following points:
 - (1) What is the intended sanction for failure to comply with regulation 19 or 23 and how is effect given to that intention?
 - (2) Why do the criteria for approval of an accreditation scheme in regulation 22(3) appear to contain nothing express about ensuring that members comply with the obligations under regulations 19 and 23?
 - (3) What is the prohibition or restriction to which regulation 25 is an exception and how is that made clear?

2. On point 1, in relation to regulation 19(1), we do not think it necessary to provide enforcement sanctions for failure to give the person who commissions the inspection a written report, since this would be simply a contractual matter between the parties concerned. An energy assessor who carries out an inspection but does not produce a written report is liable not to be paid for the inspection work.

On point 1, in relation to regulation 19(2) and (3), enforcement of the provisions in paragraphs (2) and (3) is not in the legislation, but instead is in the Accreditation Scheme Operating Requirements for domestic energy assessors. An independent body may be licensed by the Secretary of State to operate a scheme to accredit and monitor energy assessors. These are the accreditation schemes referred to in regulation 22. Currently there are ten such licensed schemes. An energy assessor may not operate without belonging to an accreditation scheme, and must lodge an energy performance certificate or an inspection report on the register via that scheme. It is not possible for an energy assessor to enter energy performance or inspection data directly onto the register other than through the relevant accreditation scheme operator.

The detailed requirements for accreditation schemes for domestic energy assessors with regard to both inspection reports and energy performance certificates are attached for information:

An energy assessor who either breaches the legal requirements for an inspection report or energy performance certificate, or who fails to comply with the terms of the code of conduct operated by the accreditation scheme, is liable to have accreditation revoked.

Compliance with the requirements for operation of an accreditation scheme, including enforcing the detailed duties which energy assessors must carry out, is a term of the contract between the Secretary of State and the scheme operator. DCLG regularly audits schemes, and takes action against scheme operators which fail to enforce the requirements with respect to energy assessors. Arising from these audits, one scheme operator has had its licence revoked and three others have voluntarily ceased running.

A further safeguard with regard to regulation 19(2) and (3) lies in the fact that the register of data is set up in such a way that it is not possible for an energy assessor, through the scheme operator, to lodge only part of the data. For a report to be lodged successfully, it must include all the relevant data at the same time.

3. On point 1, in relation to regulation 23, the disclosure requirements by energy assessors contained in regulation 23 are covered by the code of conduct for energy assessors which is enforced by scheme operators. The code is in Appendix 1.2 to the Accreditation Scheme Operating Requirements.
4. On point 2, regulation 22(3) contains a general description of the matters which are set out in detail in the Scheme Operating Requirements. In the Department's view, it would therefore not be appropriate to include particular specific details in this regulation.
5. On point 3, there is a prohibition on disclosure of general access data where the owner or occupier has opted out and this is set out in regulation 30, in particular paragraphs (2)(c) and (3). Notwithstanding such an opt-out, regulation 25 allows a person who is under a duty to do so to copy or issue a document produced by an energy assessor – for instance, to make a copy energy performance certificate available to a prospective purchaser. Situations in which regulation 25 needs to be relied on are likely to arise only infrequently, since usually where a duty to copy or issue the document arises it would be in the interests of the person who opted out to opt back in and permit this. However, it could be relevant in situations where there are several different owners and occupiers of a building. Furthermore, if a dispute has arisen between different owners and occupiers of a building, with conflicting alternate notifications to the keeper of the register on opting out or opting in, the keeper of the register after five such instructions will put into effect a permanent opt-out. Regulation 25 could therefore also be relied on where a permanent opt-out has occurred. Even where there has been an opt-out, the register can still be searched by report reference number, which is a unique 24 digit number allocated to a specific energy performance certificate.

Appendix 2

S.I. 2012/3171: memorandum from the Department of Health

General Pharmaceutical Council (Amendment of Miscellaneous Provisions) Rules Order of Council 2012 (S.I. 2012/3171)

1. In its letter to the Department of 30th January 2013, the Committee requested a memorandum on the following point:

“In relation to new rule 10(3A) inserted into the Schedule to S.I. 2010/1617 by rule 25(6) of the Schedule to this Order, explain why a certified copy of a passport including its front cover (as opposed to one without its front cover) is not treated as acceptable supporting evidence.”
2. The Department’s response to the Committee’s point is outlined below.
3. Prior to the amendments made by rule 25(2), (3) and (6) of the General Pharmaceutical Council (Amendment of Miscellaneous Provisions) Rules 2012, rule 10(3)(a)(i) of the General Pharmaceutical Council (Registration) Rules 2010^a required an applicant for registration as a pharmacist or pharmacy technician to provide evidence of identity in the form of the applicant’s passport, a true copy of it certified by a notary or solicitor, or another document considered acceptable by the Registrar. Rule 10(3)(c)(i) provided that evidence of the applicant’s date of birth was to satisfy the same requirements. Rule 10(3)(d) provided for the same requirements to be met in order to demonstrate the applicant’s nationality. Under rule 10(3)(f)(ii), if an applicant sought registration in reliance on rights acquired by virtue of marriage or civil partnership to a national of a relevant European State, the passport (or a true copy of it certified by a notary or solicitor) of a spouse or partner who is a national of a relevant European State was required.
4. The amendments made by rule 25(2), (3) and (6) have the effect that a certified copy of a passport used for any of the purposes outlined above must not include the front cover.
5. The rules excepted the front cover of the passport, which includes the Royal Arms, in order to avoid placing a burden on applicants which could potentially lead to difficulties for them in relation to Crown copyright. Further, it was considered preferable to be prescriptive and make it a condition that the front

^a Scheduled to S.I. 2010/1617.

cover should not be included in order to avoid anyone who was unaware that there could be an issue of that nature from copying and supplying it in any event. Further background is as follows.

6. The General Pharmaceutical Council have become aware that applicants for registration have had difficulty obtaining a ‘true copy’, certified by a notary or solicitor, of a passport. This is because solicitors have declined to certify photocopies of such documents on the grounds that they are Crown copyright and protected under section 163 of the Copyright, Designs and Patents Act 1988.
7. There are two relevant pieces of guidance on the website of the National Archives concerning the extent to which Crown copyright applies in the case of the reproduction of a passport: “Guidance - Reproduction of the Front Cover of the British Passport”^b, and “Guidance: Reproduction of the Royal Arms”^c (copies of both of which are attached).
8. Paragraph 3 of “Guidance - Reproduction of the Front Cover of the British Passport” confirms that copyright applies. Paragraph 4 allows for the copying of the front cover including the Royal Arms where limited provisos apply. Paragraph 8 acknowledges that the personal details part of the passport may be reproduced with the consent of the individual. While this guidance can still be found on the National Archives website and is still referred to by commentators and advisers as if it were still in force, it has now been withdrawn and is in the archived section of their website. However the Identity and Passport Service have confirmed to the General Pharmaceutical Council that they still have no objection to the reproduction of the personal details part. They have also confirmed that they themselves would no longer have any objection to the copying of the front cover.
9. “Guidance: Reproduction of the Royal Arms” sets out limited circumstances in which the use or re-use of the Royal Arms is authorised. For instance, paragraph 4 authorises that it may be used by:-

“Re-users only in the context of copying a government report or legislation. For instance:

- in a press report where the front page of a government report is used to support an accompanying article
- in a photocopied version of a report made, for example, by a library”

^b<http://webarchive.nationalarchives.gov.uk/20101217161214/nationalarchives.gov.uk/documents/reproduction-british-passport.pdf>

^c <http://www.nationalarchives.gov.uk/documents/information-management/use-of-the-royal-arms.pdf>

10. There is nothing in the Guidance that would appear to authorise photocopying the Royal Arms on the front cover of a passport in order to produce a certified copy.
11. Following conversations with officers at the Lord Chamberlain's office and the National Archives, the General Pharmaceutical Council understand that this Guidance may not be enforced in practice, but while it remains live the General Pharmaceutical Council does not consider that that can be safely assumed and is of the view that the correct approach is to take it into account.

Department of Health

5 February 2013