



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

Seventh Report of Session 2014-15

Drawing special attention to:

Equality Act 2010 (Equal Pay Audits) Regulations 2014 (Draft S.I.)

*Ordered by the House of Lords to be printed
21 July 2014*

*Ordered by the House of Commons to be printed
21 July 2014*

**HL Paper 33
HC 332-vii**

Published on 24 July 2014
by authority of the House of Lords
and the House of Commons
London: The Stationery Office Limited
£3.50

Joint Committee on Statutory Instruments

Current membership

House of Lords

Baroness Humphreys (*Liberal Democrat*)
Lord Kennedy (*Labour*)
Lord Lyell (*Conservative*)
Baroness Mallalieu (*Labour*)
Lord Selkirk (*Conservative*)
Baroness Stern (*Crossbench*)
Lord Walpole (*Crossbench*)

House of Commons

Mr George Mudie MP (*Labour, Leeds East*) (Chairman)
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.

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 Simon Patrick (*Acting 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, Peter Milledge and John Crane (*Lords*).

Contacts

All correspondence should be addressed to the Clerk of the Joint Committee on Statutory Instruments, 7 Millbank, London SW1P 3JA. The telephone number for general inquiries is: 020 7219 2026; the Committee's email address is: jcsi@parliament.uk.

Contents

Report	<i>Page</i>
Instruments reported	2
1 Draft S.I: Reported for requiring elucidation	2
Instrument not reported	4
Annex	4
Appendix	5
Draft S.I: memorandum from the Department for Culture, Media and Sport	5

Instruments reported

At its meeting on 21 July 2014 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 one of those considered. The Instrument and the grounds for reporting it are given below. The relevant Departmental memorandum is published as an appendix to this report.

1 Draft S.I: Reported for requiring elucidation

Equality Act 2010 (Equal Pay Audits) Regulations 2014 (Draft S.I.)

1.1 The Committee draws the special attention of both Houses to these draft Regulations on the ground that, in one respect, they require elucidation.

1.2 Regulation 2(1) requires an employment tribunal to order a respondent to carry out an equal pay audit where the tribunal finds there has been an equal pay breach. However, regulation 4 excludes a tribunal from making such an order, during a specified exemption period, where the respondent carries on a business that is an existing micro-business or a new business. The definition of what constitutes an existing micro-business or a new business is set out in the Schedule to the draft Regulations.

1.3 Almost identical provisions for defining new and existing micro-businesses were included in the Consumer Rights (Payment Surcharges) Regulations 2012 (SI 2012/3110) to which the Committee drew special attention in its 21st Report of the 2012–13 Session. In that report, the Committee noted that, while the provisions contain significant distinctions about start times for new businesses and employee numbers for micro-businesses, no indication is given in the provisions as to how one distinguishes, in any case of potentially related operations, what counts as a single business and what counts as part of a larger business. In that case, while arguing that it would be sufficiently clear on the facts of each case what is a separate business, the Department for Business, Innovation and Skills acknowledged that there may be scope for giving greater detail in the Regulations about the factors to consider when determining what constitutes a separate micro-business. The Committee agreed that further thought was required, and expressed the view that further consideration should be given to including provisions which set out the factors which are relevant in deciding whether an operation counts as a separate business.

1.4 In this case, the Department confirmed in paragraphs 3.4 and 3.5 of the explanatory memorandum that it took note of the Committee’s report on SI 2012/3110. However, it explains that it did not include the kind of additional provisions referred to in the Committee’s report because any decision by the Tribunal on whether or not the exemption applies can be appealed. Reference is also made to clause 30 of the Small Business, Enterprise and Employment Bill which sets out definitions of “small business” and “micro-business”. The Department states in the explanatory memorandum that the government does not want to pre-empt the will of Parliament by defining micro-business by reference to that clause.

1.5 The Committee was not convinced that the availability of an appeal, given that it is likely to require the expenditure of further money and resources by a respondent, was by itself an appropriate reason for not including further provision to resolve any doubt about

what constitutes a separate business for the purposes of the draft Regulations. The Committee was also not convinced that any provision would “pre-empt the will of Parliament”. Express provision in the draft Regulations would only have effect for its own purposes, and would not carry with it any implication for how the expression “micro-business” should be defined in other circumstances. Also, any provision in the draft Regulations would relate to new businesses, a matter which is not dealt with in clause 30 of the Small Business, Enterprise and Employment Bill. Accordingly, the Committee asked if any other mechanism existed, apart from an appeal, to assist a tribunal in determining whether a set of related operations constitute a single business; and what consideration was given to including express provision.

1.6 In a memorandum printed as an Appendix, the Department states its view that what constitutes a separate business will be sufficiently clear on the facts of each case. It notes that no concerns were expressed about this issue when the Presidents of the Employment Tribunal for England and Wales and for Scotland were consulted. The Department confirms that it considered whether to include further express provisions in the draft Regulations; but decided not to do so because it considered that it would be inappropriate to go further than the existing model provisions used in earlier statutory instruments until such time as Parliament approves the definitions of “small business” and “micro-business” in the Small Business, Enterprise and Employment Bill. As to other mechanisms for assisting in determining what constitutes a separate business, reference is made to employment tribunal rules of procedure which allow a respondent to request reconsideration by the tribunal before making an appeal. The Department indicates in its memorandum that it will keep the operation of the Regulations under review and that, if it becomes clear that tribunals are finding it difficult to determine whether related operations constitute a single business for the purposes of the Regulations, it will consider making amendments.

1.7 The Committee considers that the information provided in the Department’s memorandum is helpful, in particular in clarifying that no issue was raised when consulting on the draft Regulations, and that the matter will be kept under review with the possibility of future amendments. However, the Committee considers that, given the large number of different circumstances in which related operations may occur, there will necessarily be cases in which it is unclear whether those related operations constitute a single business. The Committee remains of the view that consideration should be given to whether it is possible to reduce the number of cases in which doubt arises by making express provision. The Committee is not persuaded by the Department’s reasons for not doing so. Any definition of “micro-business” contained in the Small Business, Enterprise and Employment Bill will not apply retrospectively to these draft Regulations, nor would it apply to the extent that the draft Regulations make provision about new businesses. Any provision included in the draft Regulations would only have effect for its own purposes, and would not, in the Committee’s view, carry any wider implications as to how the expression “micro-business” should be defined. **Accordingly, the Committee reports the draft Regulations as requiring elucidation, partly provided by the Department’s memorandum.**

Instrument not reported

At its meeting on 21 July 2014 the Committee considered the Instrument set out in the Annex to this Report, which was not required to be reported to both Houses.

Annex

Draft Instruments requiring affirmative approval

Draft S.I. Data Retention Regulations 2014

Appendix

Draft S.I: memorandum from the Department for Culture, Media and Sport

<i>Equality Act 2010 (Equal Pay Audits) Regulations 2014 (Draft S.I.)</i>
--

1. This memorandum is in response to the Committee's request dated 9 July for a memorandum on the following points:
2. *In relation to the matters dealt with in paragraphs 3.4 and 3.5 of the explanatory memorandum:*
 - (a) *Do any mechanisms exist, other than the respondent bringing an appeal, to assist in determining whether a set of related operations constitute a single business for the purposes of the new and existing micro businesses exemption?*
 - (b) *What consideration was given to include express provisions in the draft Regulations to assist the tribunal in making such a determination?*
3. Other than the express provisions set out in the Schedule to the Regulations (in particular paragraph 3(2)–(8)), there is currently no legislative mechanism to assist employment tribunals in determining whether a set of related operations constitute a single business for the purpose of the new and existing micro business exemption. However, the government's view is that the definition of "business" is a question of law and would therefore take its ordinary meaning. We believe that it would be sufficiently clear to a tribunal based on the facts of each case, what constitutes a separate business. It is for this reason that we have not defined what a business is either in s139A or elsewhere in the Equality Act 2010.
4. Where a respondent disagrees with a tribunal's decision about its status as a micro or new business, the respondent may request that the tribunal reconsider its decision. This would be done under rules 70–73 of the Employment Tribunal Rules of Procedure, which is contained in Schedule 1 of SI 2013/1237. If the respondent is not satisfied with the outcome of its request for a reconsideration, the respondent may appeal to an Employment Appeal Tribunal under the Employment Appeal Tribunal Rules 1993 (SI 1993/2854).
5. We considered whether any further express provisions could be set out in the draft Regulations to assist tribunals. We took the view however that it would not have been appropriate to go further than the existing model provisions used in earlier statutory instruments until such time as Parliament has approved the proposed definitions of "small business" and "micro-business" currently contained in the Small Business, Enterprise and Employment Bill 2014.

6. However, we do not anticipate any difficulties arising from our current definitions in these Regulations. If in practice it does become clear that the tribunals are finding it difficult to determine whether related operations constitute part of a respondent's business for the purposes of the exemptions, we will review the Regulations and consider whether we need to make any amendments to them. Should the relevant defining clause in the Small Business, Enterprise and Employment Bill 2014 come in to force, we would in our consideration of any amendment to our Regulations bear in mind the definition of micro-business in that legislation.
7. Whilst developing these regulations we consulted and corresponded with the Employment Tribunals Presidents of England/Wales and Scotland on the draft Regulations. No concerns about the definition of micro or new businesses were raised during that process.

Department for Culture, Media and Sport
14 July 2014