



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Seventh Report
of Session 2017–19**

Drawing special attention to:

Fishing Vessels (Codes of Practice) Regulations 2017 (S.I. 2017/943)

NHS Counter Fraud Authority (Establishment, Constitution, and Staff and Other Transfer Provisions) Order 2017 (S.I. 2017/958)

Environmental Impact Assessment (Miscellaneous Amendments Relating to Harbours, Highways and Transport) Regulations 2017 (S.I. 2017/1070)

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Joint Committee on Statutory Instruments

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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. 73, 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 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 Mike Winter (Commons Clerk), Jane White (Lords Clerk) and Liz Booth (Committee Assistant). Advisory Counsel: Daniel Greenberg, Peter Brooksbank, Philip Davies and Vanessa MacNair (Commons); James Cooper, Nicholas Beach and John Crane (Lords).

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Instruments reported

At its meeting on 20 December 2017 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. 2017/943: Reported for defective drafting and for failure to comply with proper legislative practice

Fishing Vessels (Codes of Practice) Regulations 2017

1.1 The Committee draws the special attention of both Houses to these Regulations on the grounds that they are defectively drafted in one respect and fail to comply with proper legislative practice in one respect.

1.2 These Regulations update and consolidate existing regulations relating to fishing safety and enact three Codes of Practice for the construction and safe operation of fishing vessels. Regulation 5 provides that a fishing vessel cannot proceed on a voyage unless it has a certificate of compliance. The Committee asked the Department for Transport to explain whether it is intended that incidental and preparatory journeys, for purposes of repair or similar, are exempted from the requirement for a certificate of compliance, and, if so, how effect is given to that intention. In a memorandum printed at Appendix 1, the Department explains that the requirement for a certificate of compliance applies only to fishing vessels, the definition of which is contained in section 313 of the Merchant Shipping Act 1995, which, in so far as relevant, provides: “fishing vessel” means a vessel for the time being used [...] for, or in connection with fishing for sea fish [...]. The Department asserts that the definition applies on a voyage by voyage basis and that a ship proceeding on a voyage for the purposes of repair would not fall within the definition of a “fishing vessel” during that voyage. The Committee is not convinced: in particular, one might have thought that the words “or in connection with” in the definition of “fishing vessel” were designed precisely to catch repair and other operations during which the vessel is not being used “for fishing” but is being prepared for use for fishing and is therefore being used “in connection with fishing”. The Department does not cite authority on the point and the Committee has not found any: in the absence of clear authority, the Committee believes that the provision should have been drafted so as to put it beyond doubt whether a certificate of compliance is required for ancillary journeys (both possible answers being plausible as a matter of policy). **The Committee accordingly reports regulation 5 for defective drafting.**

1.3 The Regulations refer to three Codes of Practice. The Regulations do not include information about how the Codes can be accessed, although paragraph 9.2 of the Explanatory Memorandum does. The Committee asked the Department why the information was not given in the Regulations. In its memorandum the Department accepts that it would have been appropriate for the information to have been included in the Regulations themselves. Either a footnote or inclusion in the Explanatory Note would have been normal, and helpful for readers who might not be aware of, or think to access, the Explanatory Memorandum. This is the usual practice for information which

readers may reasonably require in order to understand the effect of the instrument. In the Committee's opinion, the Explanatory Memorandum which is routinely laid before Parliament with statutory instruments is an enormously helpful document, and provides valuable background information about the policy intention and the legal context; but it should be used for added-value material of that kind, and not for basic information which readers require in order to understand the effect of the instrument, which would include access information for documents on which the instrument relies. **The Committee accordingly reports the Regulations for failure to comply with proper legislative practice, acknowledged by the Department.**

2 S.I. 2017/958: Reported for failure to comply with proper legislative practice

NHS Counter Fraud Authority (Establishment, Constitution, and Staff and Other Transfer Provisions) Order 2017

2.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they fail to comply with proper legislative practice in one respect.

2.2 This instrument establishes a new special health authority, the NHS Counter Fraud Authority, to carry out the Secretary of State's counter fraud functions relating to the health service in England. It provides for the transfer from the old authority (BSA) of staff and property concerned in delivering the Secretary of State's counter fraud functions prior to 1 November 2017. Article 9 provides that items of property of the BSA identified in the document "The NHS Business Services Authority Transfer of Property to the NHS Counter Fraud Authority Agreement 2017" signed on 26 September 2017 are to be transferred on the transfer date. No indication is given of where this document is available. The Committee asked the Department of Health to explain where the document referred to in article 9(1) is available.

2.3 In a memorandum printed at Appendix 2, the Department explain that some of the property in the Agreement, or aspects of its description, is sensitive, for example, in terms of IT or operational security or because of third party commercial interests. The Department therefore does not intend to publish the Agreement, but arrangements for inspection of a version omitting the sensitive information may be made via the Department's Anti-Fraud Unit at 39 Victoria Street, London SW1H 0EU.

2.4 The Regulations could have defined the class of transferred property in general terms by reference to the purpose for which it is held, as is commonly done in Transfer of Functions Orders under the Ministers of the Crown Act 1975. Once the Regulations have chosen to make a precise transfer by reference to a specified document, it is unhelpful to deny the public access to the document on grounds of sensitivity. The Committee notes, however, the Department's arrangements for access to a redacted version of the Agreement and acknowledgement that it would have been helpful to include a reference to the arrangements in explanatory material. The Committee believes that in order for readers to be able to understand the effect of the law it is important that documents referred to in legislation should be made publicly available, and **accordingly reports article 9(1) for failure to comply with proper legislative practice.**

3 S.I. 2017/1070: Reported for failure to comply with proper legislative practice and for requiring elucidation

Environmental Impact Assessment (Miscellaneous Amendments Relating to Harbours, Highways and Transport) Regulations 2017

3.1 **The Committee draws the special attention of both Houses to these Regulations on the grounds that they fail to comply with proper legislative practice in one respect and require elucidation in three related respects.**

3.2 These Regulations amend the Harbours Act 1964, the Highways Act 1980, the Transport and Works Act 1992 and the Transport and Works (Application and Objections Procedure) (England and Wales) Rules 2006 to enable the procedures governing applications for Harbour Revision and Empowerment Orders under the 1964 Act, decisions in respect of trunk road projects under Part 5A of the 1980 Act and applications for Orders under Part 1 of the 1992 Act to comply with the European Union Directive governing environmental impact assessments.

3.3 The Regulations rely on section 105 of the Deregulation Act 2015, which allows any provision that may be made by order, regulations or rules to be made by any other of those forms of legislation made by statutory instrument. The purpose of the section is to allow instruments with cognate purposes to be combined, whether or not the enabling power prescribes the same form (the choice of which has become increasingly arbitrary in recent decades). The preamble to the Regulations cites section 105 of the 2015 Act. The Committee asked the Department to explain that, having regard to the fact that the new edition of Statutory Instrument Practice states (paragraph 1.4.7) that reliance on section 105 should be cited neither in the preamble nor in a footnote. In a memorandum printed at Appendix 3, the Department accepts that there was no need to have referred to section 105 in the preamble and apologises to the Committee for this oversight. The Committee expresses no view at present as to whether it agrees with the line taken by Statutory Instrument Practice in this respect, having regard to the decision of the Court of Appeal in *Vibixa Ltd and another v Komori UK Ltd and others* [2006] EWCA Civ 536 and generally; but, subject to that, it is obviously important that drafting practice across all statutory instruments should be consistent where inconsistency could cause doubts or confusion, and should accord with published statements of intention. **The Committee accordingly reports the preamble for failure to comply with proper legislative practice, acknowledged by the Department.**

3.4 The Committee also asked the Department to explain the inclusion of reference to regulations in the Conservation of Habitat and Species Regulations 2010 which were to have been repealed before these Regulations came in to force: Schedule 2, paragraph 2 (inserted regulation 105ZA) and paragraph 4 (inserted regulation 105BA(2)(b)); and Schedule 4, paragraph 7 (inserted regulation 8A(2)). In its memorandum, the Department acknowledges that these Regulations include reference to regulations which had been revoked when these Regulations came into force. It explains that “The Department was not aware at the time that these Regulations were made that another Department had made the Conservation of Habitats and Species Regulations 2017 ... a matter of days beforehand. The Department regrets that this was the case.” The Department also argues that section 17 of the Interpretation Act 1978 ensures that the provision made in these

Regulations in relation to the 2010 Regulations remains effective. Although in an ideal world drafting Departments would be fully aware of each others' activities and take them into account, the size and complexity of legislative activity today makes that clearly impossible; incidents such as this are therefore bound to occur from time to time. The Committee agrees that section 17 of the Interpretation Act 1978 will do what is required; any suggestion that its effect is contra-indicated by the obsolete reference having been inserted after the repeal should be sufficiently rebutted by the opportunity that this exchange with the Committee has given to the Government to record publicly that this was simply a failure in inter-departmental communication. **The Committee accordingly reports Schedule 2, paragraphs 2 and 4 and Schedule 4, paragraph 7 as requiring elucidation, provided by the Department's memorandum.**

Instruments not reported

At its meeting on 20 December 2017 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

Instruments to which the Committee does not draw the special attention of both Houses

Draft instruments requiring affirmative approval

Draft S.I.	Small Business, Enterprise and Employment Act 2015 (Consequential Amendments, Savings and Transitional Provisions) Regulations 2017
Draft S.I.	Transfer of Responsibility for Relevant Children (Extension to Wales, Scotland and Northern Ireland) Regulations 2017
Draft S.I.	Environmental Permitting (England and Wales) (Amendment) Regulations 2018
Draft S.I.	European Parliamentary Elections (Amendment) Regulations 2018
Draft S.I.	European Parliamentary Elections Act 2002 (Amendment) Regulations 2018
Draft S.I.	Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2017

Instruments subject to annulment

S.I. 2017/760	Jobseeker's Allowance (Hardship) (Amendment) Regulations 2017
S.I. 2017/1075	Ionising Radiations Regulations 2017
S.I. 2017/1100¹	Patents and Patents (Fees) (Amendment) Rules 2017
S.I. 2017/1101	Childcare Payments (Eligibility) (Amendment) Regulations 2017
S.I. 2017/1104	Occupational Pensions (Revaluation) Order 2017
S.I. 2017/1109	Marshall Scholarships Order 2017
S.I. 2017/1112	Air Navigation (Amendment) Order 2017
S.I. 2017/1119	Insolvency (Miscellaneous Amendments) Regulations 2017

¹ The Committee asked the Department for Business, Energy and Industrial Strategy to explain whether these Rules were made with the consent of the Treasury. The Department rightly explained that the provision requiring consent of the Treasury had been repealed.

S.I. 2017/1141	Road User Charging and Workplace Parking Levy (Classes of Motor Vehicles) (England) (Amendment) Regulations 2017
S.I. 2017/1144	Credit Unions Act 1979 (Locality Common Bond Conditions) Order 2017
S.I. 2017/1145	Higher Education and Research Act 2017 (Transitory Provisions) Regulations 2017
S.I. 2017/1156	Motor Cars (Driving Instruction) (Amendment) Regulations 2017
S.I. 2017/1164	Statutory Auditors Regulations 2017
S.I. 2017/1165	Fire and Rescue Authority (Membership) Order 2017
S.I. 2017/1166	Fisheries and Rural Affairs (Miscellaneous Revocations) Regulations 2017
S.I. 2017/1168	Tribunal Procedure (Amendment No. 2) Rules 2017
S.I. 2017/1169	First-tier Tribunal and Upper Tribunal (Chambers) (Amendment No. 2) Order 2017

Instruments not subject to Parliamentary proceedings laid before Parliament

S.I. 2017/1108	Democratic People's Republic of Korea (Sanctions) (Overseas Territories) (Amendment) (No. 3) Order 2017
S.I. 2017/1110	North Korea (United Nations Sanctions) (Amendment) (No. 2) Order 2017

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2017/1105	Dentists Act 1984 (Medical Authorities) Order 2017
S.I. 2017/1116	Childcare Payments Act 2014 (Commencement No. 5) Regulations 2017
S.I. 2017/1162	Policing and Crime Act 2017 (Commencement No. 5 and Transitional Provisions) (Amendment) Regulations 2017
S.I. 2017/1186	Animal Health (Miscellaneous Revocations) Order 2017

Appendix 1

S.I. 2017/943

Fishing Vessels (Codes of Practice) Regulations 2017

1. By a letter dated 6th December 2017, the Joint Committee on Statutory Instruments requested a memorandum on the following points:

(1) Explain whether it is intended that incidental and preparatory journeys, for purposes of repair or similar, are exempted from the requirement for a certificate of compliance, and, if so, how effect is given to that intention.

(2) Explain why an address where hard copies of the Codes of Practice are available is not given.

2. In relation to the first point, the requirement for a certificate of compliance, and, indeed, the regulations as a whole, apply only to fishing vessels. The definition of a fishing vessel is given by s.313 of the Merchant Shipping Act 1995, which, in so far as relevant, provides:

“fishing vessel” means a vessel for the time being used [...] for, or in connection with fishing for sea fish [...]

Whether this definition applies to incidental and preparatory journeys is a question of law which will depend on the individual facts and circumstances of a particular case. The Department takes the view, however, that the definition applies on a voyage-by-voyage basis (hence the provision made in regulation 5(2)), that incidental movement inside a port would not be ‘proceed[ing] on a voyage’ for the purposes of regulation 5(1), and that a ship proceeding on a voyage for the purposes of repair would not fall within the definition of a ‘fishing vessel’ during that voyage.

3. As far as the second point is concerned, the preamble records that extensive consultation took place with both individuals and representative organisations affected by the Regulations. The expression “applicable Code of Practice” is defined in regulation 2 by reference to three specific Codes of Practice, each of which is stated as being incorporated in a Merchant Shipping Notice with a unique identifier. Regulation 2 defines a “Merchant Shipping Notice” as a Notice described as such and issued by the Maritime and Coastguard Agency (being an executive agency of the Department for Transport) and the related footnote provides an electronic address at which Merchant Shipping Notices can be accessed. Paragraph 13.1 of the Explanatory Memorandum provides a name and contact telephone number at the Maritime and Coastguard Agency and paragraph 9.2 points out that the relevant Merchant Shipping Notices are available on the Maritime and Coastguard Agency’s website and that “hard copies can also be obtained from the Maritime and Coastguard Agency”. The Department regrets that this last piece of information was not also repeated in either the instrument itself or in the related Explanatory Note.

Department for Transport

12 December 2017

Appendix 2

S.I. 2017/958

NHS Counter Fraud Authority (Establishment, Constitution, and Staff and Other Transfer Provisions) Order 2017

1. In its letter to the Department of 6th December 2017, the Committee requested a memorandum on the following point:

Explain where the document referred to in Article 9(1) is available.

2. The Department's response to the Committee's point is outlined below.

3. The NHS Business Services Authority, as party to the Agreement, and transferor under the Order, has a copy of the Agreement, and the NHS Counter Fraud Authority as transferee likewise has a copy. Third party contractors affected by the transfer of contracts were consulted and advised of the statutory transfers and their effect. The NHS Counter Fraud Authority carries out investigative work, including the investigation of criminal offences. Some of the property in the Agreement, or aspects of its description, is sensitive, for example, in terms of IT or operational security (such as details of IT products used by the organisations concerned, file names, or the location of servers on the IT systems used by them), or because of third party commercial interests. The Department does not intend to publish the Agreement, but arrangements for inspection of a version omitting the sensitive information may be made via the Department's Anti-Fraud Unit at 39 Victoria Street, London SW1H 0EU.

4. These matters did not seem to lend themselves readily to a footnote, but in light of the Committee's query, the Department acknowledges that a note in the Explanatory Memorandum might have been helpful.

Department of Health

12 December 2017

Appendix 3

S.I. 2017/1070

Environmental Impact Assessment (Miscellaneous Amendments Relating to Harbours, Highways and Transport) Regulations 2017

1. By a letter dated 6th December 2017, the Joint Committee on Statutory Instruments requested a memorandum on the following points:

(1) Given paragraph 1.4.7 of SIP (5th edition), explain why a reference to section 105 of the Deregulation Act 2015 is included in the preamble.

(2) Explain the inclusion of reference to regulations in the Conservation of Habitat and Species Regulations 2010 which will have been repealed when these Regulations come into force (Schedule 2, paragraph 2 (inserted regulation 105ZA), paragraph 4 (inserted regulation 105BA(2)(b) and Schedule 4, paragraph 7 (inserted regulation 8A(2)).

2. In relation to the first point, the Department accepts that there was no need to have referred to s.105 of the Deregulation Act 2015 in the preamble and apologises to the Committee for this oversight.

3. In relation to the second point, the Department acknowledges that these Regulations include reference to regulations in the Conservation of Habitats and Species Regulations 2010 (“the 2010 Habitats Regulations”) which had been revoked when these Regulations came into force.

4. The Department was not aware at the time that these Regulations were made that another Department had made the Conservation of Habitats and Species Regulations 2017 (“the 2017 Habitats Regulations”) a matter of days beforehand. The Department regrets that this was the case.

5. Notwithstanding this, the Department considers that section 17 of the Interpretation Act 1978 ensures that the provision made in these Regulations in relation to the 2010 Habitats Regulations remains effective.

6. Section 17(2)(a) has the effect that the references in these Regulations to the regulations in the 2010 Habitats Regulations which were extant when these Regulations were made are to be read as references to those regulations as re-enacted in the 2017 Habitats Regulations.

7. Moreover, the Department considers that section 17(2)(b) is relevant but only in cases in which there is a need to preserve anything done under regulations 8 or 61 of the 2010 Habitats Regulations. In such cases, section 17(2)(b) has the effect that anything done under those regulations in the 2010 Habitats Regulations could have been done under the corresponding regulations in the 2017 Habitats Regulations and has effect as if so done. It should be noted that the relevant provisions in the 2017 Habitats Regulations 2017 (regulations 8 and 63) are identical (in all material respects) with the corresponding provisions in the 2010 Habitats Regulations which they replace (regulations 8 and 61).

Department for Transport

12 December 2017