

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

---

7th Report of Session 2014–15

# **Draft Data Retention Regulations 2014**

## **Correspondence: Improving the quality of secondary legislation**

Includes 4 Information Paragraphs on 5 Instruments

---

Ordered to be printed 22 July 2014 and published 24 July 2014

---

Published by the Authority of the House of Lords

*London* : The Stationery Office Limited  
£price

HL Paper 35

## *Secondary Legislation Scrutiny Committee (formerly Merits of Statutory Instruments Committee)*

### *Historical Note*

In January 2000, the Royal Commission on the Reform of the House of Lords said that there was a good case for enhanced Parliamentary scrutiny of secondary legislation and recommended establishing a “sifting” mechanism to identify those statutory instruments which merited further debate or consideration. The Merits of Statutory Instruments Committee was set up on 17 December 2003. At the start of the 2012–3 Session the Committee was renamed to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

The Committee has the following terms of reference:

- (1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), scrutinise—
  - (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
  - (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (2).
- (2) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—
  - (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
  - (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
  - (c) that it may inappropriately implement European Union legislation;
  - (d) that it may imperfectly achieve its policy objectives;
  - (e) that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument’s policy objective and intended implementation;
  - (f) that there appear to be inadequacies in the consultation process which relates to the instrument.
- (3) The exceptions are—
  - (a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
  - (b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;
  - (c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.
- (4) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.
- (5) The Committee shall also consider such other general matters relating to the effective scrutiny of secondary legislation and arising from the performance of its functions under paragraphs (1) to (4) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

### *Members*

Baroness Andrews	Lord Eames	Baroness Stern
Lord Bichard	Rt Hon. Lord Goodlad ( <i>Chairman</i> )	Lord Plant of Highfield
Lord Borwick	Baroness Hamwee	Lord Woolmer of Leeds
Lord Bowness	Baroness Humphreys	

### *Registered interests*

Information about interests of Committee Members can be found in Appendix 2.

### *Publications*

The Committee’s Reports are published on the internet at [www.parliament.uk/seclegpublications](http://www.parliament.uk/seclegpublications)

### *Information and Contacts*

If you have a query about the Committee’s work, or opinions on any new item of secondary legislation, please contact the Clerk of the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW; telephone 020–7219 8821; fax 020–7219 2571; email [seclegscrutiny@parliament.uk](mailto:seclegscrutiny@parliament.uk).

### *Statutory instruments*

The National Archives publishes statutory instruments on the internet at <http://www.legislation.gov.uk/>, together with a plain English explanatory memorandum.

# Seventh Report

## INSTRUMENT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

---

**The Committee has considered the following instrument and has determined that the special attention of the House should be drawn to it on the ground specified.**

### **A. Draft Data Retention Regulations 2014**

*Date laid: 21 July*

*Parliamentary Procedure: affirmative*

*Summary: These Regulations have been laid by the Home Office under the Data Retention and Investigatory Powers Act 2014 which was passed as emergency legislation last week to put the legal basis for data retention beyond doubt. Because these Regulations, in effect, replicate the obligations on providers contained in the 2009 Regulations that they revoke, and do not provide for the retention of any additional categories of communications data, the Home Office does not consider that the accelerated timetable causes any prejudice to telecommunications providers. The Regulations will take immediate effect but the Act has a sunset clause of 31 December 2016 and, if no further action is taken, these Regulations would also end on that date. These Regulations make additional provision for a new statutory code of practice to provide detailed guidelines for data retention and information about the application of the safeguards. The Code will largely encompass existing best practice and put it on a statutory footing. The Code has not yet been prepared but the Home Office intends to do so as quickly as possible and consult on the draft over the summer, before laying it formally later this year.*

**These Regulations are drawn to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House.**

1. These Regulations have been laid by the Home Office under the Data Retention and Investigatory Powers Act 2014 (“the 2014 Act”) which was passed as emergency legislation last week to put the legal basis for data retention beyond doubt. They are intended to revoke and replace the Data Retention (EC Directive) Regulations 2009 (SI 2009/859) (“the 2009 Regulations”), which they mainly replicate as domestic legislation, after the Court of Justice of the European Union declared the Data Retention Directive (2006/24/EC) invalid on 8 April 2014.
2. The Regulations will come into force on the day after they are made to ensure that telecommunications service providers continue to retain certain data and make it accessible to the police on request. The requirements apply to internet access, internet telephony and internet e-mail as well as mobile and fixed line telephony. Because these Regulations, in effect, replicate the obligations on providers contained in the 2009 Regulations that they revoke, and do not provide for the retention of any additional categories of communications data, the Home Office does not consider that the accelerated timetable causes any prejudice to telecommunications providers. Transitional provisions are also provided to ensure continuity between the

two regimes. The 2014 Act has a sunset clause of 31 December 2016 and if no further action is taken these Regulations would also end on that date.

3. Although communications companies may retain some data for a short while for business purposes, for example billing questions, these Regulations can require communications companies on whom a notice is served to retain specified data, which may be broader, for the duration set out in the notice, which can be up to 12 months. Any data would have to fall within the categories set out in the Regulations which are the same as those set out in the Schedule to the 2009 Regulations.
4. Law enforcement may issue requests on a case by case basis when necessary; what is made available is the context not the content of a communication. It can include the time and duration of a communication, the number or e-mail address of the originator and recipient, and sometimes the location of the device from which the communication was made but not the actual wording of the e-mail or what was said during the phone call. Communications data is used by the intelligence and law enforcement agencies during investigations regarding national security and, organised and serious crime. It enables investigators to identify members of a criminal network, place them in specific locations at given times and can be used as evidence in court. Communications data can also be useful in the investigation of missing persons.
5. The Home Office states that these Regulations only differ from the 2009 Regulations in providing additional safeguards. For example, they provide for data to be retained for a maximum of 12 months, allowing different data types to be retained for shorter periods when appropriate (whereas the 2009 Regulations provided for a blanket 12 months).

#### *Guidance to follow*

6. In addition these Regulations make provision for a new statutory code of practice to provide detailed guidelines for data retention and information about the application of safeguards. There is currently no data retention code of practice and its absence will not affect the operation of the Regulations. The Code will largely encompass existing best practice and put it on a statutory footing. The Code is not available yet. The Home Office intend to prepare it as quickly as possible and consult on the draft over the summer, before laying it formally later this year.

## **CORRESPONDENCE**

---

### **Improving the quality of secondary legislation**

7. The Committee is concerned about a recent rise in the number of correcting instruments. We drew attention to this in our last end of session report but have observed that the number of such corrections appears to be increasing (for example, we noted that in the first six months of 2014, 45 such instruments have been issued, which compares with 43 for the whole of 2013 and 48 for the whole of 2012). We therefore drew the matter to the attention of Mr Richard Heaton, Permanent Secretary and First Parliamentary Counsel at the Cabinet Office. The correspondence is included at Appendix 1.

## INSTRUMENTS OF INTEREST

---

### Draft Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014

### Draft Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014

8. The Department for Business, Innovation and Skills (BIS), which has laid these instruments with Explanatory Memoranda (EMs) and impact assessments, states that “orphan works” are copyright works or performers’ rights for which one or more right holder cannot be identified (or if identified, cannot be located), so that permission to use them cannot be obtained. Orphan works, some of which are culturally and economically significant, can be used lawfully only to a very limited extent at present.
9. The objective of the *draft Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014* is to create a licensing scheme within the framework of UK copyright law to allow for the reproduction of any orphan work. The scheme would enable the lawful use of orphan works for both commercial and non-commercial use, for example, in books, TV programmes, exhibitions and on web-sites. BIS says that it would enable access to culturally valuable works, contribute to economic growth, minimise existing perverse incentives to use orphan works illegally and protect rights holders. The licensing scheme will be operated by an authorising body, appointed by the Secretary of State: this will be the Intellectual Property Office.
10. In amending earlier legislation,<sup>1</sup> the *draft Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014* serve to implement EU Directive 2012/28/EU (“the Directive”) on certain permitted uses of orphan works. The Directive creates a limited exception to copyright to allow cultural and heritage organisations to digitise orphan works in their collections and to make them available to the public on their websites. The Directive does not allow any other uses, does not apply to all works, and can only be used by publicly accessible cultural and heritage organisations. BIS states that the Directive contains a number of important safeguards for the rights holder. In particular, in order to establish the orphan work status, a diligent search for the rights holder must be carried out in the Member State where the work was first published or broadcast; in the case of an unpublished work, the search is carried out in the state where the organisation that holds the work is established.
11. The Government conducted public consultation over seven weeks to 28 February 2014 on the proposed implementation of the Directive. BIS states that the responses received demonstrated general support for the Government’s approach. On 30 May 2014, the Government published a summary of the consultation.<sup>2</sup>

---

<sup>1</sup> The Copyright, Designs and Patents Act 1988.

<sup>2</sup> See: <https://www.gov.uk/government/consultations/copyright-uk-orphan-works-licensing-scheme>

12. We have received a written submission from Mr Tom Rivers, which expresses concerns about the draft Regulations, notably about the commencement of licences granted by the authorising body, and about details of a diligent search; and also about the evidence base which BIS has presented. We have in turn sought and received a response from BIS to these concerns. We are publishing both documents on our website.<sup>3</sup>

#### **Draft Statement of Changes to Immigration Rules (HC 532)**

13. This Statement of Changes in Immigration Rules was laid on 10 July and its provisions in relation to Tier 1 (Entrepreneur) came into effect the next day. The change addresses abuse of a route by which someone already present in the UK as a Tier 4 (Student) or Tier 1 (post Study Work) migrant can apply to stay longer as a Tier 1 (Entrepreneur). The Home Office states that checks on those who have in the past been granted leave to remain under this route suggest that few have actually engaged in entrepreneurial activity and that a significant proportion have, in breach of their conditions, taken employment, typically in low-skilled jobs. Other provisions, implementing the Immigration Act 2014, which comes into force on 28 July, state how considerations of Article 8 of the European Convention on Human Rights, which requires respect for private and family life, will be counterbalanced against public interest considerations in relation to foreign criminals and allow the Secretary of State to deport foreign criminals before their appeal against deportation has been heard, where she is convinced that there is no risk of serious irreversible harm. Another provision facilitates a new 12 month Mathematics Teacher Exchange scheme between England and China. Following concerns, all tests provided by Cambridge International Examinations and certain tests by Cambridge English and Trinity College London are removed from the list of approved English language qualifications used in the immigration process.

#### **Care Quality Commission (Reviews and Performance Assessments) Regulations 2014 (SI 2014/1788)**

14. Following an extensive review by the Nuffield Trust<sup>4</sup> on how best to provide meaningful information on the performance of health and social care providers, the Care Act 2014 changed the scope for the periodic performance assessments to be undertaken by the Care Quality Commission (CQC) and the method by which they are devised. This instrument sets out which providers will be subject to the scheme including GP Practices, hospitals, care homes and domiciliary care providers. For each provider the CQC will conduct a review, provide a report and publish its assessment. It will be for CQC to determine the exact methodology of the ratings and which indicators will be used. They have already started publishing material on their proposals for consultation.<sup>5</sup>

---

<sup>3</sup> See: [www.parliament.uk/seclegpublications](http://www.parliament.uk/seclegpublications)

<sup>4</sup> *Performance rating providers for quality: a policy worth pursuing?* published 22nd March 2013.

<sup>5</sup> <http://www.cqc.org.uk/public/get-involved/consultations/consultation-how-we-regulate-inspect-and-rate-services#Hospitals>

**Immigration Act 2014 (Specified Anti-fraud Organisation) Order 2014  
(SI 2014/1798)**

15. Part 3 of the Immigration Act 2014 is concerned with powers to regulate illegal migrants' access to services. Preventing them from opening a bank account will make it more difficult for them to access other lines of credit or banking products, thereby preventing them from building up a credit history and unlawfully establishing a life in the UK. The Order specifies CIFAS as the anti-fraud organisation to which the Home Office will send data about individuals who are known to be in the UK unlawfully and whom the Secretary of State has decided should be "disqualified persons". Banks and building societies will be required to undertake an immigration status check with CIFAS before opening current accounts and will be obliged to refuse the application of a disqualified person.

## **INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE**

---

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

### **Draft instruments subject to affirmative approval**

Anti-social Behaviour, Crime and Policing Act 2014  
(Consequential Amendments) Order 2014

Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014

Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014

Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2014

Judicial Appointments (Amendment) Order 2014

### **Draft instruments subject to annulment**

HC 532          Statement of Changes in Immigration Rules

### **Instruments subject to annulment**

SI 2014/1766 Further and Higher Education (Student Support) (Amendment) Regulations 2014

SI 2014/1787 Criminal Justice Act 2003 (Alcohol Abstinence and Monitoring Requirement) (Prescription of Arrangement for Monitoring) Order 2014

SI 2014/1788 Care Quality Commission (Reviews and Performance Assessments) Regulations 2014

SI 2014/1789 Registration of Civil Partnerships (Fees) Order 2014

SI 2014/1790 Registration of Births, Deaths and Marriages (Fees) (Amendment) Order 2014

SI 2014/1791 Marriage of Same Sex Couples (Registration of Buildings and Appointment of Authorised Persons) (Amendment) Regulations 2014

SI 2014/1797 Housing (Right to Buy) (Prescribed Forms) (Amendment) (England) Regulations 2014

SI 2014/1798 Immigration Act 2014 (Specified Anti-fraud Organisation) Order 2014

SI 2014/1818 Community Legal Service (Funding) (Amendment) Order 2014

SI 2014/1822 Co-operative and Community Benefit Societies and Credit Unions (Arrangements, Reconstructions and Administration) (Amendment) Order 2014

- SI 2014/1824 Civil Legal Aid (Procedure, Remuneration and Statutory Charge) (Amendment) Regulations 2014
- SI 2014/1826 Sudan (European Union Financial Sanctions) Regulations 2014
- SI 2014/1827 South Sudan (European Union Financial Sanctions) Regulations 2014

## APPENDIX 1: CORRESPONDENCE – IMPROVING THE QUALITY OF SECONDARY LEGISLATION

---

### Letter from Lord Goodlad, Chairman of the Secondary Legislation Scrutiny Committee, to Mr Richard Heaton, Permanent Secretary and First Parliamentary Counsel at the Cabinet Office

I am writing in my capacity as Chairman of the House of Lords Secondary Legislation Scrutiny Committee (SLSC) which the House of Lords has appointed to scrutinise the policy content of all secondary legislation laid before the House.

We observed in our last end of session report that the Committee's work was made more onerous by the number of correcting instruments that we had to consider during the session, whether in the form of replacement drafts of affirmative instruments or correcting instruments for negatives. Our observations indicated that these corrections are due to both policy and drafting revisions. It appears that the number of such instruments has continued to increase in the current session.

Whilst we understand that no figures on corrections are collected centrally, even a simple search of the number of Statutory Instruments with the rubric heading which states that they have been issued free of charge demonstrates that, in the first six months of 2014, 45 such instruments have been issued, which compares with a total of 43 instruments for the whole of 2013 and 48 in 2012. So far this year 15% of the affirmatives that the Committee has considered have been corrections.

Given your promotion of the Good Law initiative across government, the Committee has asked me to draw this to your attention and ask for your views on why the problem has arisen and how it may be remedied. **I look forward to your response and would be grateful if it could be provided by Friday 11 July.**

**3 July 2014**

### Letter from Mr Richard Heaton to Lord Goodlad

My office is strongly committed to excellent legislation, both primary and secondary. Parliamentary Counsel is not responsible for secondary legislation; this is the accountability of individual departments and, increasingly, of the Treasury Solicitor's Department which is expanding to become the in-house provider of legal services for most departments across Whitehall. But Jonathan Jones (the new Treasury Solicitor) and I are keen to raise the standard and improve the consistency of secondary legislation drafting. I hope the growth of a shared legal service provided by Jonathan's department will make this easier, for example by better monitoring of quality across legal teams, and more flexible use of experienced and skilled drafters.

Meanwhile, my office are active participants in the training of government lawyers, running regular training in drafting skills for government lawyers, both for individual departments and under the Government Legal Service's training programme. This training is aimed at raising the standards of drafting and focuses on the importance of ensuring accuracy and a clear and coherent outcome. A cross-Whitehall group of drafting specialists exists to act as a point of contact and facilitate the sharing of best practice. The reports of your Committee and of the Joint Committee on Statutory Instruments are important pointers to areas on which we need to focus.

I know from my own experience as a departmental lawyer that correcting instruments are something that all legal teams try to avoid. I do not know the reason for the recent increase you have experienced: I will bring this to GLS colleagues' attention, and we will try and discern any pattern or underlying cause. Meanwhile, if your Committee or supporting staff have any information or analysis that you could share on the problems you are observing, I know we would find that helpful in better understanding how departments are falling short.

**14 July 2014**

## **APPENDIX 2: INTERESTS AND ATTENDANCE**

---

Committee Members' registered interests may be examined in the online Register of Lords' Interests at [www.publications.parliament.uk/pa/ld/ldreg.htm](http://www.publications.parliament.uk/pa/ld/ldreg.htm). The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 22 July 2014 Members declared no interests.

### **Attendance:**

The meeting was attended by Baroness Andrews, Lord Bichard, Lord Bowness, Lord Eames, Lord Goodlad, Lord Plant of Highfield, Baroness Stern and Lord Woolmer of Leeds.