Draft Electricity and Gas (Energy Company Obligation) Order 2014

Draft Jobseeker’s Allowance (18–21 Work Skills Pilot Scheme) Regulations 2014

Rail Passengers’ Rights and Obligations (Exemptions) Regulations 2014

Correspondence:
Draft Regulation of Investigatory Powers Codes of Practice

Includes an Information Paragraph on an Instrument

Ordered to be printed 4 November 2014 and published 6 November 2014

Published by the Authority of the House of Lords

London: The Stationery Office Limited

HL Paper 60
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 (Chairman)  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

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.

Statutory instruments

Twelfth Report

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the following instruments and has determined that the special attention of the House should be drawn to them on the grounds specified.

A. Draft Electricity and Gas (Energy Company Obligation) Order 2014

Date laid: 24 October

Parliamentary Procedure: affirmative

Summary: This draft Order provides for a new Energy Company Obligation (ECO) period from April 2015 to March 2017, with new targets for that period. The ECO includes a carbon emissions reduction obligation which energy companies must meet. The Department for Energy and Climate Change laid an earlier draft Order, in July of this year, which proposed that the carbon emissions reduction target for the period from 1 January 2013 to 31 March 2015 should be lowered by 33%. The carbon emissions reduction target now proposed for the two years to March 2017 has been calculated pro rata to that lowered target for the preceding period. Most consultation respondents disagreed with this approach; many wanted a higher target.

We draw this Order to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

1. The Energy Company Obligation (“ECO”) policy places three distinct obligations on energy suppliers who have more than 250,000 domestic electricity and/or gas customers: a carbon emissions reduction obligation (“CERO”); a carbon saving community obligation (“CSCO”); and a home heating cost reduction obligation (“HHCRO”). Each type of obligation requires a supplier as defined in the Order to promote the installation of qualifying measures in domestic premises in Great Britain.

2. Suppliers are already subject to an ECO for the period from 1 January 2013 to 31 March 2015, which was established by the Electricity and Gas (Energy Companies Obligation) Order 2012 (“the 2012 Order”: SI 2012/3018). In July of this year, the Government laid the draft Gas and Electricity (Energy Companies Obligation) (Amendment) (No. 2) Order 2014 (the “draft Amendment Order”), which we brought to the special attention of the House in our 9th Report of this Session.¹

3. We noted that the draft Amendment Order proposed a reduction of 33% in the overall carbon emissions target for the ECO obligation period to March 2015 (from 20.9 MtCO₂ to 14 MtCO₂); and that the Government believed that the changes made by the draft Amendment Order should mean that energy bills to consumers would be at least £30–35 lower than would

otherwise be the case. We suggested that the House might wish to press the Government to explain more clearly their proposal to reduce energy companies’ costs, through lowering the CERO target in the current period, at a time when there were unanswered questions about the level of those companies’ profitability.

4. The Department for Energy and Climate Change (DECC) has now laid the draft Electricity and Gas (Energy Company Obligation) Order 2014, with an Explanatory Memorandum (EM) and impact assessment (IA). The draft Order provides for a new ECO obligation period from April 2015 to March 2017, with new targets for that period. In the IA, DECC states that the CERO target for 2015–17 will be 12.4 MtCO$_2$; and that this is calculated pro-rata to the carbon reduction target levels to 31 March 2015 (as lowered by the draft Amendment Order).

5. In our Report on the draft Amendment Order, we referred to the consultation process which DECC carried out over six weeks between 5 March and 16 April 2014, and which received 266 responses. We noted that 68% of respondents had disagreed with the proposed 33% reduction in the 2015 CERO target.

6. The Department again mentions that consultation in the EM to the latest draft Order. It says that the great majority of consultees firmly supported the proposal that there should be extension in the period of ECO, with new targets set through to 2017. It adds, however, that those who opposed the lowering in ambition of some elements of ECO in the period up to 2015 tended to argue that the new targets for 2017 should be set at a higher level than the Government had proposed.

7. Further information is provided in the consultation response$^2$ published in July of this year. This explains that 140 respondents disagreed with the proposed 2017 CERO target. Energy companies suggested a lower target (of 11.2 MtCO$_2$); it appears, however, that most other respondents who disagreed wanted to see new targets for 2015–17 which were higher than the original 2013–15 targets. In the consultation response, the Department states that on balance the Government considered that the targets proposed were appropriate in the light of their desire to manage the impact of environmental programmes on consumer bills and the best available evidence on delivery costs.

8. In the IA, DECC acknowledges that the impact on energy bills from the Government’s decisions on the ECO targets will depend on how the obligated suppliers deliver the targets and how suppliers choose to pass through costs to bills. The Department states (as we noted in our 9th Report) that early indications from energy suppliers were that the proposed changes to the ECO carbon targets could result in an average reduction in energy bills of £30–£35 (before VAT) in 2014. It offers no comparable figure for the period from 2015 to 2017: no targets had been set for this period before the latest draft Order was laid. In terms of the overall financial impact of the ECO targets, however, DECC states at paragraph 121 of the IA that

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See: 
the average annual delivery cost that could be passed through to consumer bills in the period to 31 March 2015 is estimated to be between £976m to £1,005m; and that the equivalent figure for the two year period to 31 March 2017 is between £787m and £820m.

B. Draft Jobseeker’s Allowance (18–21 Work Skills Pilot Scheme) Regulations 2014

Date laid: 13 October

Parliamentary Procedure: affirmative

Summary: Following an announcement made in the Autumn Statement of December 2013, the Department for Work and Pensions proposes to pilot the 18–21 Work Skills Pilot Scheme. It comprises two phases under which 18–21 year old claimants will be required to attend either skills training or work-related activity to assist their return to work. Phase One is for new claimants of Jobseekers’ Allowance (JSA) and will involve mainly on-line teaching in English and Mathematics for those who have not attained GCSE level. Phase Two will be skills-related, involving mandatory participation in work experience, or a traineeship or similar for those who have been claiming JSA for six months. Both schemes are limited to certain areas and for a limited period, so that they can be evaluated to find which of the variations trialled works best.

This instrument is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

9. These Regulations have been laid by the Department of Work and Pensions (DWP) under the Social Security Contributions and Benefits Act 1992, the Jobseekers Act 1995 and the Housing Grants, Construction and Regeneration Act 1996. The instrument is accompanied by an Explanatory Memorandum (EM) and, as it relates to a pilot scheme, is due to expire 24 months after coming into effect.

10. Following an announcement made in the Autumn Statement of December 2013, DWP proposes to pilot the 18–21 Work Skills Pilot Scheme. It comprises two phases under which 18–21 year old claimants will be required to attend either skills training or work-related activity to assist their return to work. Failure by a claimant to participate in the scheme without good reason will attract a benefit sanction under section 19A of the Jobseekers Act 1995. The Regulations also set out the information to be provided to such claimants and make provision for contracting out certain functions of the Secretary of State.

Phase One

11. Phase One will cover 15,000 new claimants of Jobseekers Allowance (JSA) aged 18–21 in the Black Country, Kent, Mercia, Devon, Somerset and Cornwall areas. Following an initial assessment, those claimants who do not have skills in English and/or Mathematics to GCSE standard will be randomly assigned to a control group, or a “blended learning” group (that is, subject to a mix of on-line and classroom teaching) or a “pure on-line” group (all teaching delivered via the internet and only Skype contact with the teacher). Material provided will be suitable for both native and non-native speakers of English.
12. Participants will be required to study for up to 16 hours a week for up to six months. Rather than formal classes, the learning will be on a “roll-on, roll-off” basis with new participants entering the learning on a weekly basis and leaving it early if they are successful in obtaining a job. Participants who claim JSA again shortly after will be re-assigned to the pilot they had already started.

13. The aim is for participants to increase their attainment by at least one level and there will be an examination: for those who have reached the appropriate level, this will be a GCSE; for others it will be a recognised qualification in functional skills. There will be sanctions for failing to participate in the learning but not for failing to achieve a qualification. Where participants are learning at home using their own IT equipment, providers will carry out random checks to ensure the person who has logged on to the site is the claimant, for example by phoning them, checking identity details, and questioning them about the material they have just accessed.

**Phase Two**

14. Phase Two will cover 3,000 of those 18–21 year olds who have been claiming JSA for six months or longer in Kent. They will be offered work experience, traineeship, or skills training but, according to DWP “doing nothing is not an option”. There is no set length for Phase Two, either in terms of hours per week or length of course: all would depend on the option identified as most appropriate for each particular claimant. For example, Work Experience lasts for up to 30 hours per week for up to eight weeks; traineeships, also up to 30 hours per week, last between six weeks and six months. (It should be noted that neither of these options is mandatory). Mandatory Work Activity, which would be the usual mandatory option if voluntary options are refused, lasts for 30 hours per week for four weeks.

**Funding**

15. Travel expenses and child care costs incurred as a result of participation in the Phase Two scheme will be funded by Jobcentre Plus.

16. DWP state that funding for both phases of the pilot will come from a £19 million envelope derived from the Youth Contract underspend. The responsibility for procuring and funding the English and Mathematics skills training for Phase One will rest with the Skills Funding Agency and hence a budget exchange from DWP to the Department for Business, Innovation and Skills to cover costs.

**Evaluation**

17. Evaluation of both phases and their role in getting people back to work will be conducted by an independent company an interim report will be published in Summer 2016 and a full analysis in Spring 2017.

18. The Committee asked DWP why this scheme would succeed in teaching young people English or Mathematics where their school had not. DWP replied that:

“The claimants will experience a different form of learning in this pilot to their experience at school. It will be online, accessible through their tablets or smartphones, more flexible, and will be more contextualised towards work. Even for those in the ‘Blended Group’ (which includes
some elements of classroom work) on-line activity will comprise the bulk of the learning. We anticipate that this group of learners will find it more attractive and motivating as a result. We will explore whether that is actually the case through the evaluation.”

19. The Committee took the view that poor performance in an English GCSE is usually due to poor comprehension skills and poor oral communications and asked how on-line methods would address these aspects. DWP replied:

“Learners will have access to a wide range of support in which communication skills of some description will be to the fore. This will include webinars, group sessions, telekits, learning groups, and on-line chat rooms. We believe that some of these tools will encourage learners to engage with fellow learners and tutors in a way that traditional classroom learning may not have done.”

20. The Committee notes this DWP pilot with interest and hopes that any positive outcomes highlighted by the evaluation will also be shared with the Department for Education.

C. Rail Passengers’ Rights and Obligations (Exemptions) Regulations 2014 (2014/2793)

Date laid: 22 October

Parliamentary Procedure: negative

Summary: This instrument provides a further blanket five-year exemption for all non-core provisions of an EC Regulation on rail passengers’ rights and obligations so as to give the Department for Transport (DfT) time to consider the evidence on which provisions it might be desirable or otherwise to apply to domestic rail services. It is regrettable that seven years after the EU legislation was agreed, the DfT has still not obtained a clear view of the financial and other implications of the various options. We note that DfT has commenced a consultation exercise with the intention of reducing the number of exemptions by further regulations in 2015, but recall that a similar promise was made in 2009. Although delaying the implementation of all the non-core provisions will save rail firms money, there is an opportunity cost because delay also defers the benefits to passengers such as improved service information and compensation for cancellations. We are not convinced that the Department has given the interests of passengers sufficient priority and maintain the view set out in our report on the 2009 Regulations that the Department’s approach to managing the implementation of this EU legislation appears to have been far from ideal.

These Regulations are drawn to the special attention of the House on the ground that they may inappropriately implement EU legislation.

21. The Department for Transport (DfT) has laid this instrument under the European Communities Act 1972 along with an Explanatory Memorandum (EM). An Impact Assessment (IA) is provided but states that it has low confidence in the figures due to the number of assumptions made.
The EU legislation

22. This instrument exempts domestic train services from the application of the “non-core” provisions of EC Regulation 1371/2007 on Rail Passengers’ Rights and Obligations for a further five years so as to give the Department time to collect evidence as to the desirability or otherwise of applying the EC Regulation in full to domestic services, and to finalise the measures necessary to support the implementation of the Regulation. It commences on 4 December, thereby continuing the blanket exemptions made by the equivalent 2009 instrument which expires on 3 December 2014.

23. The purpose of the EC Regulation is to harmonise the rights of, and obligations on, rail passengers throughout the Community. Its core provisions must be applied to all rail services, these include duties relating to train companies’ liability for carrying passengers and their luggage (including for personal injury and damage to property) and to the right to transport of disabled people. Other “non-core” provisions relate primarily to the information to be provided to passengers; companies’ obligations to passengers in the event of delay, missed connections and cancellations; the definition and monitoring of service quality standards; the personal security of passengers; and the handling of complaints. At the discretion of Member States, these non-core provisions may be the subject of exemptions for up to a maximum of 15 years (until 2024).

The previous exemption Regulations

24. When the Committee considered the 2009 instrument, it expressed the view that “although the EC Regulation was agreed in 2007, the DfT has not yet obtained a clear view of the financial and other implications of the various options. Its recent public consultation process ended on 3 November 2009, far too late to provide answers in time for the EC Regulation’s implementation date of 4 December 2009. The Committee is concerned that DfT may have agreed to the EU Regulation without being fully informed about its implications and does not yet appear be in a position to make sound judgements about which derogations it might be appropriate to apply.”

25. There was further correspondence with the then Secretary of State, Lord Adonis, who said: “I would like to offer my reassurance to the Committee that work on the final decisions is in progress and that decisions will be taken and implemented as early as practicable in 2010. These decisions will be based on appropriate assessments of the impacts of the measures on industry and passengers.”

26. However in January 2011, we received a letter from Theresa Villiers MP, then Minister for Transport, which said:

“... we have decided to maintain the existing exemptions. In reality, our decision is unlikely to disadvantage passengers significantly. Existing rights, which cover many of the provisions of the Regulation, would not be affected ... the first period of exemption will last until 3 December

2014. It may then be renewed twice, for a further period of up to 5 years each time, but it is not legally possible to decide now that the exemptions are going to run beyond December 2014. We will therefore need to make a further decision in 2014 on the use of the exemptions. But for now our decision to maintain the existing SI reflects the current financial pressures on rail and our view that some parts of the Regulation would introduce disproportionate cost. This decision is also in line with the Government stance on reducing regulatory burden, meshes with the franchise reform agenda and has no additional costs involved.”

Further exemption Regulations

27. The current Regulations extend all the exemptions for a further five years until 4 December 2019. Although information gathering has started, the EM states that it has not been possible to do this ahead of the expiry of the existing exemptions in December 2014. There will be a further consultation exercise and “depending on the outcome of that process, the Department intends to bring forward an amending instrument in 2015”. DfT explain that if the exemptions were allowed to lapse then they could not be renewed later if the evidence supported that view.

28. The instrument is accompanied by an IA which states that the rail industry estimates the cost of these provisions as between £31 million (low estimate) and £100 million (high estimate) per year, but, due to the limited evidence base, it has not been possible to conduct a separate analysis and provide a “best estimate”. The IA also described these numbers as having “low assurance”. Part of the aim of the information gathering exercise is to improve these estimates.

29. The IA itemises the different non-core provisions such as reimbursement of the cost of the ticket if passengers are delayed by more than 60 minutes and provisions relating to re-routing passengers and providing information in case of delays.

30. Article 22 of the EU Regulations relates to assistance for disabled passengers and passengers with reduced mobility. A number of additional protections have been provided for disabled passengers under the Equality Act 2010. However, some of the provisions in the EU Regulation require rail firms to provide more support. Paragraph 10 of the IA states that retaining the exemptions maintains the status quo and there is “no specific detriment as a result” of this. This is the basis of the Committee’s concern – DfT’s policy of delay is on the basis that the measures will be costly for the railway operating companies and the passengers will be no worse off. The IA clearly shows that costs imposed on the railway operating companies are transferred directly to the passengers’ benefit – but DfT still does not have sufficient information after seven years to resolve the issue so that passengers may benefit from at least some of the additional provisions.

31. The Committee asked Passenger Focus for its view on the current Regulations:

“Passenger Focus remains disappointed that elements of the implementation of this directive continue to be deferred. The benefits to passengers are therefore being delayed. However we are pleased that the consultation is now beginning and that Government will review the decision next year in the light of the consultation response. We look forward to taking part. The consultation should send a strong signal to the rail industry that changes are due and will be part of running railways in the future.

Franchise renewal provides a good opportunity to incorporate some of these provisions in this directive. We urge the Government to ensure that appropriate terms are incorporated into the new franchises that are currently being negotiated, as well as those that are due for renewal in the coming years.”

32. We also asked the DfT for a comment:

“The exemptions expire on 4 December 2014 and the Department has therefore actively engaged with stakeholders throughout 2014 to gather evidence on the impacts of removing some or all of exemptions, or renewing them in full for another 5 years.

A number of issues emerged during the pre-consultation stage, which took additional time to resolve and revealed that a more detailed examination of all the issues, and further time would be required to gather additional information.

As a result of the early engagement and ongoing analysis, however, we have established a good evidence base on which to seek further information from consultees to inform the Department’s decisions. The initial proposals and analysis are set out in the consultation document and Impact Assessment (IA) which can be found at the following link: https://www.gov.uk/government/consultations/rail-passengers-rights-and-obligations

The consultation document and IA provide a summary of each article of the EU Regulation and the benefits for passengers, the extent to which existing domestic laws and industry practice meet the EU rules, and the Department’s proposed position on whether or not to remove an exemption.

The IA also refers to the potential costs and benefits of removing exemptions, insofar as our initial engagement with the rail industry has been able to partially refresh and adjust costs to provide an estimate of the position in 2014. However, a full reassessment of the costs by industry to capture all changes and developments over the last five years has necessarily had to await the details of our analysis and policy positions in the consultation document.

Our initial proposals suggest that up to two thirds of the exemptions can potentially be removed in 2015 subject to further information from stakeholders on the costs and the benefits for passengers to help ensure the evidence to inform final decisions is suitably robust.

Unfortunately, the wide-ranging scope of the EU Regulation and the resulting complexities in aligning it with the existing domestic regime
has meant that it has not been possible to complete this exercise before the expiry of the current exemptions in December. Given the risks for Government, taxpayers, industry and passengers which we refer to in paragraphs 7.3 – 7.7 of the Explanatory Memorandum, we have had to renew all the current exemptions in order to allow sufficient additional time for appropriate consultation, evidence gathering and detailed analysis to take place. Depending on the outcome of that process, the Department intends to bring forward an amending instrument in 2015 to remove some or all of the exemptions.”

**Conclusion**

33. The Department’s response is encouraging but rather similar to the reassurances we received in 2009 which came to nothing. Once again passengers are promised “jam tomorrow”. It is regrettable that, seven years after the EU legislation was agreed, the DfT has still not obtained a clear view of the financial and other implications of the various options. We note that DfT has commenced a consultation exercise with the intention of reducing the number of exemptions by further regulations in 2015, but we recall that a similar promise was made in 2009. Although delaying the implementation of all the non-core provisions will save rail firms money, there is an opportunity cost because delay also defers the benefits to passengers such as improved service information and compensation for cancellations. We are not convinced that the Department has given the interests of passengers sufficient priority and maintain the view set out in our report on the 2009 Regulations that the Department’s approach to managing the implementation of this EU legislation appears to have been far from ideal.
CORRESPONDENCE

Draft Regulation of Investigatory Powers (Covert Human Intelligence Sources: Code of Practice) Order 2014

34. In our 9th Report of this Session, we published information on these draft Orders, noting that the additional guidance on how the Codes will be enforced by the Office of Surveillance Commissioners and the Intelligence Services Commissioner is not publicly available. The Committee wrote to Rt Hon. Mike Penning MP, Minister of State at the Home Office, to seek clarification of the status of this unpublished guidance in relation to the Codes of Practice and how it might be treated by the courts. We are publishing this correspondence at Appendix 1.

INSTRUMENTS OF INTEREST

Immigration (Removal of Family Members) Regulations 2014 (SI 2014/2816)

35. The Regulations reflect changes made to the Asylum Act 1999 by the Immigration Act 2014. They state that the family of a person who is to be deported from the UK should be given a notice at any time prior to that person’s removal, or in the eight weeks following the removal, to alert them that they too are liable to removal if they do not qualify for residence in their own right. The Home Office states that, once written notice has been served, the family member concerned will be expected to leave the UK voluntarily. There is no set period for them to go but if the people notified do not leave voluntarily they will be liable for enforced removal from the UK. The Committee feels it would have been fairer if the Regulations had also set the broad timescale for their departure.
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**

- Business Improvement Districts (Property Owners) (England) Regulations 2014
- Fuel Poverty (England) Regulations 2014
- Legal Services Act 2007 (the Chartered Institute of Patent Attorneys and the Institute of Trade Mark Attorneys) (Modification of Functions) Order 2014
- Reports on Payments to Governments Regulations
- Scotland Act 1998 (River Tweed) Amendment Order 2015

**Draft instruments subject to annulment**

- Vale (Electoral Changes) Order 2014
- Braintree (Electoral Changes) Order 2014
- Canterbury (Electoral Changes) Order 2014
- Darlington (Electoral Changes) Order 2014
- Suffolk Coastal (Electoral Changes) Order 2014

**Instruments subject to annulment**

- SI 2014/2708 Transfer of Functions (Chequers and Dorneywood Estates) Order 2014
- SI 2014/2761 Immigration (European Economic Area) (Amendment) (No. 3) Regulations 2014
- SI 2014/2816 Immigration (Removal of Family Members) Regulations 2014
APPENDIX 1: CORRESPONDENCE ON THE DRAFT REGULATION OF INVESTIGATORY POWERS CODES OF PRACTICE 2014

Letter from Lord Goodlad, Chairman of the Secondary Legislation Scrutiny Committee, to Rt Hon. Mike Penning MP, Minister of State at the Home Office

I am writing in my capacity as Chairman of the House of Lords Secondary Legislation Scrutiny Committee (SLSC). We have recently considered two draft instruments proposing to bring into force the revised Codes of Practice on Covert Surveillance and Covert Human Intelligence Sources.

Several Members raised the issue of the guidance mentioned at paragraph 9 of the Explanatory Memorandum to each Code. While the Codes themselves are “publicly available and readily accessible by members of any relevant public authority”, the guidance issued by the Office of Surveillance Commissioners and the Intelligence Services Commissioner is not. Your officials explained that this is because it deals with “operationally sensitive matters.” Although your official reassured us that such guidance will not alter the standards set in the Codes and that RIPA and the Codes would always take precedence in law, the Committee was concerned that it was unable to verify that by looking at the guidance.

We would therefore be grateful for a short explanation, perhaps with examples, of the function of this guidance.

In addition we would be interested to know of any precedents: can you give us examples of any other case where enforcement guidance is not publicly available and of contrasting cases where it is.

15 October 2014

Letter from Rt Hon. Mike Penning MP to Lord Goodlad

Thank you for your letter of 15 October about the Codes of Practice on covert surveillance and covert human intelligence sources (CHIS), for which the related statutory instruments are to be considered by Parliament shortly. You asked for an explanation and examples of the guidance provided by the Office of Surveillance Commissioners (OSC) and Intelligence Services Commission (ISC) which is referred to in the Explanatory Memoranda to the Codes, and for other precedents of similar guidance.

I appreciate your concern to ensure that the Commissioners are not giving guidance in private that may conflict with the standards set by Parliament in the Codes of Practice. I do think that the statutory position of the Commissioners is clear in this respect, in that they serve the function of ensuring that the public authorities they oversee uphold the law and the Codes. They therefore have a duty to ensure that any advice or guidance they give is fully consistent with the law and Codes.

Guidance is provided by the Commissioners in a number of forms: written guidance, ad hoc oral guidance through direct discussion with individuals, and guidance provided in inspection reports and annual reports, for example where the Commissioners consider it necessary to recommend improvements to practice.
Any guidance which may be included in open reports by the Commissioners is available publicly on their respective websites. I am attaching a note giving some examples taken from these reports, which you may find helpful in illustrating the nature of the guidance provided.

As officials have explained, the confidential guidance is not made publicly available primarily due to its operationally sensitive nature. The Commissioners are always clear, when providing guidance, that it is not legally binding and that public authorities should seek their own legal advice if in doubt about the lawfulness of any proposed course of action. By way of example, matters on which the OSC have advised include clarification upon the types of authorisation advisable in a given scenario, and how to manage complex authorisations for a CHIS.

A parallel to this arrangement might be found in guidance on police use of firearms. While much of the training and guidance on this is in the public domain, there is tactical material in the College of Policing Authorised Professional Practice guidance series and in the National Police Firearms Training Curriculum that is “restricted to authorised members of the police service”.

I hope this helps in your consideration of these statutory instruments, and provides reassurance that guidance by the OSC and ISC does not alter the standards set by Parliament.

**Examples of guidance provided by the OSC and ISC in the public domain**

**ISC Annual Report 2013**

I have recommended to all the agencies that separate consideration be given to the individual privacy being invaded as part of the test for proportionality. In all cases I want to see this set out separately in the application for these intrusive techniques and to see this wording reflected in the warrants.

**Northern Ireland office**

The NIO also brought to my attention any cases where they had concerns or where there were special restrictions which I scrutinised in addition to those I had already selected for inspection. I approved of this practice and recommended that it is followed elsewhere.

**Secret Intelligence Service (SIS)**

SIS reported an internal policy error in the implementation of an internal authorisation issued under an ISA section 7 authorisation. A desk officer mistakenly thought that ‘internal authorisation’ meant that the form only needed to be signed off by an SIS Director. In fact, the form needed to be signed by both an SIS Director and a senior FCO official. The operational activity was therefore carried out without the senior FCO official’s approval. The error was only discovered after the activity had taken place. The activity itself was still lawful, and on presentation of the case the senior FCO official gave his approval retrospectively. I recommended that staff be reminded of this requirement and SIS have since amended the wording on the operational authorisation form to make it clear that the senior FCO official must also be consulted.
**OSC Guidance examples**

*The effect of Section 48(3)(c) of RIPA*

Surveillance is defined to exclude the product from the interference with property. Searching a vehicle or baggage or placing a device in or on property is interference with it but it is not itself surveillance. There is a difference between activity which a trial judge may consider “de minimis” and continuing interference which may provide a profile over time. The use of product from interference may be surveillance and should be separately authorised.

*Separate CHIS use and conduct authorisations*

It is the practice of some authorities to separate the use and conduct authorisations; there is nothing in the legislation to prevent this but it can lead to error. The principle is that there should be a minimum number of authorisations for a CHIS and each authorisation should stand on its own. Conduct authorisations should not conflict and care should be taken to ensure that the CHIS is clear on what is/is not authorised at any given time and that all the CHIS's activities are properly risk assessed. Care should also be taken to ensure that relevant reviews, renewals and cancellations are correctly performed.

23 October 2014

**Letter from Lord Goodlad to Rt Hon. Mike Penning MP**

Thank you for your reply of 23 October 2014 to my letter, sent on behalf of the Secondary Legislation Scrutiny Committee, in which I sought clarification about the status of unpublished guidance issued by the Office of the Surveillance Commissioners and Intelligence Services Commission in relation to the Codes of Practice on covert surveillance and covert human intelligence sources.

While your response contained some helpful information, for which we are grateful, the Committee would welcome some further clarification with regard to the following statement in your letter: “the Commissioners are always clear, when providing guidance, that it is not legally binding and the public authorities should seek their own legal advice”.

Does the Commissioners’ guidance state explicitly that it is not binding? What happens if there is a difference between the Commissioners’ guidance and the advice given by a public authorities’ own legal adviser? And, in the event of an allegation of breach of the Code, how would failure to adhere to the Commissioners’ guidance be treated?

We would therefore be grateful if you could reflect further on the point and also consider whether there is evidence that the courts do make a distinction between the two types of guidance and whether the material in the parliament-approved Codes does routinely take precedence.

29 October 2014
Letter from Rt Hon. Mike Penning MP to Lord Goodlad

Thank you for your letter of 29 October following my letter of 23 October about the Codes of Practice on covert surveillance and covert human intelligence sources (CHIS), for which the related statutory instruments are to be considered by Parliament shortly. You sought some further clarification in relation to guidance issued by the surveillance commissioners and how failure to adhere to the guidance would be treated.

You ask whether the Commissioners’ guidance states explicitly that it is not binding. As I mentioned in my letter of 23 October the Commissioners provide guidance in a number of forms (written, orally through direct discussions with individuals and guidance provided in inspection and annual reports). Irrespective of the nature of the guidance it should always be clear that it is not legally binding and the Intelligence Services Commissioner has asked me to say that he has not provided any guidance to supplement the code. He may have expressed a view on interpretation of the code but it would be clear that it is just a view and is not legally binding.

You also ask what would happen if there was a difference between the Commissioners’ guidance and the advice given by a public authority’s own legal advisers. In that unlikely event, it would be for the public authority to decide which advice to follow but they would always need to be mindful that the codes of practice take precedence.

In the event that an allegation is made that a public authority has breached the requirements of RIPA (including the codes of practice) it would be for the relevant court to decide the merits of the case. Section 72 of RIPA makes clear that codes of practice issued under Section 71 are admissible in both criminal and civil proceedings and that the codes can be relied upon by a court when making a determination. Given its non-binding nature, Commissioners’ guidance does not carry the same legal status, so would not be determinative to a decision by the court.

I am not aware of any specific situations in which the courts have considered distinctions between Commissioners’ guidance and Parliament-approved codes. However, the Parliament-approved codes must take precedent otherwise we could find ourselves in a situation where public authorities could be found in breach of the code of practice for following Commissioners’ guidance. This position also reflects the fact that the Commissioners’ have a duty to ensure that any advice or guidance they give is fully consistent with the Codes.

I hope this helps in your consideration of these statutory instruments, and provides reassurance that guidance by the OSC and ISC does not alter the standards set by Parliament.

3 November 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. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 4 November 2014 Members declared no interests.

Attendance:

The meeting was attended by Baroness Andrews, Lord Bichard, Lord Borwick, Lord Bowness, Lord Eames, Lord Goodlad, Baroness Hamwee, Baroness Humphreys and Lord Woolmer of Leeds.