



House of Lords  
House of Commons  
Joint Committee on  
Statutory Instruments

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# Twenty-third Report of Session 2007–08

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**Drawing special attention to:**

*Cosmetic Products (Safety) Regulations 2008 (S.I. 2008/1284)*

*Ordered by The House of Lords to be printed  
25 June 2008*

*Ordered by The House of Commons to be printed  
25 June 2008*

**HL Paper 134**  
**HC 38-xxiii**  
Published on 1 July 2008  
by authority of the House of Lords  
and the House of Commons  
London: The Stationery Office Limited  
£0.00

# Joint Committee on Statutory Instruments

## Current membership

### House of Lords

Lord Brett (*Labour*)  
Lord Campbell of Alloway (*Conservative*)  
Lord Dykes (*Liberal Democrat*)  
Baroness Jones of Whitchurch (*Labour*)  
Lord Kimball (*Conservative*)  
Countess of Mar (*Crossbench*)  
Lord Walpole (*Crossbench*)

### House of Commons

David Maclean MP (*Conservative, Penrith and The Border*)  
(Chairman)  
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Mr Peter Bone MP (*Conservative, Wellingborough*)  
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Mr David Kidney MP (*Labour, Stafford*)  
Mr John MacDougall MP (*Labour, Central Fife*)  
David Simpson MP (*Democratic Unionist, Upper Bann*)

## Powers

The full constitution and powers of the Committee are set out in House of Commons Standing Order No. 151 and House of Lords Standing Order No. 74, available on the Internet via [www.parliament.uk/jcsi](http://www.parliament.uk/jcsi).

## Remit

The Joint Committee on Statutory Instruments (JCSI) is appointed to consider statutory instruments made in exercise of powers granted by Act of Parliament. Instruments not laid before Parliament are included within the Committee's remit; but local instruments and instruments made by devolved administrations are not considered by JCSI unless they are required to be laid before Parliament.

The role of the JCSI, whose membership is drawn from both Houses of Parliament, is to assess the technical qualities of each instrument that falls within its remit and to decide whether to draw the special attention of each House to any instrument on one or more of the following grounds:

- i. that it imposes, or sets the amount of, a charge on public revenue or that it requires payment for a licence, consent or service to be made to the Exchequer, a government department or a public or local authority, or sets the amount of the payment;
- ii. that its parent legislation says that it cannot be challenged in the courts;
- iii. that it appears to have retrospective effect without the express authority of the parent legislation;
- iv. that there appears to have been unjustifiable delay in publishing it or laying it before Parliament;
- v. that there appears to have been unjustifiable delay in sending a notification under the proviso to section 4(1) of the Statutory Instruments Act 1946, where the instrument has come into force before it has been laid;
- vi. that there appears to be doubt about whether there is power to make it or that it appears to make an unusual or unexpected use of the power to make;
- vii. that its form or meaning needs to be explained;
- viii. that its drafting appears to be defective;
- ix. any other ground which does not go to its merits or the policy behind it.

The Committee usually meets weekly when Parliament is sitting.

## Publications

The reports of the Committee are published by The Stationery Office by Order of both Houses. All publications of the Committee are available on the Internet from [www.parliament.uk/jcsi](http://www.parliament.uk/jcsi).

## Committee staff

The current staff of the Committee are John Whatley (*Commons Clerk*), Kath Kavanagh (*Lords Clerk*) and Jacqueline Cooksey (*Committee Secretary*). Advisory Counsel: Peter Davis, Peter Brooksbank and Christine Cogger (*Commons*); Allan Roberts and Peter Milledge (*Lords*).

## Contacts

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## Instruments reported

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At its meeting on 25 June 2008 the Committee scrutinised a number of Instruments in accordance with Standing Orders. It was agreed that the special attention of both Houses should be drawn to one of those considered. The Instrument and the grounds for reporting it are given below. The relevant Departmental memorandum is published as an appendix to this report.

### 1 S.I. 2008/1284: reported for failure to accord with proper legislative practice and defective drafting

|   |
|---|
| <i>Cosmetic Products (Safety) Regulations 2008 (S.I. 2008/1284)</i> |
|---|

1.1 The Committee draws the special attention of both Houses to these Regulations on the grounds that, in several respects, they are not in accordance with proper legislative practice and are defectively drafted.

*Failure to accord with proper legislative practice*

1.2 These Regulations are made by the Secretary of State under section 2(2) of the European Communities Act 1972 pursuant to designations made by Order in Council under that section. In a memorandum printed at the Appendix the Department for Business, Enterprise and Regulatory Reform acknowledges that the preamble should have referred to the designation of the Secretary of State in relation to “measures relating to consumer protection” (that designation was made by S.I. 1993/2661 to which footnote (b) refers), rather than the designation made by S.I. 1972/1811 in relation to specific aspects of consumer protection. That earlier designation was expressly superseded by the later, wider designation. The Committee is satisfied that the fact that the earlier designation is both wide enough to cover the relevant subject matter of the instrument and narrow enough to be contained within the later designation overcomes any possible doubt as to the efficacy of the preamble, even though it is not expressed as it should have been. **The Committee reports the preamble for not being in accordance with proper legislative practice, acknowledged by the Department.**

1.3 Regulation 9(b) refers to the requirements in columns (c), (d) and (e) of Schedule 7 and item 167 of Schedule 3 makes reference to Schedule 7, Part 2. Within Schedule 7 there are no requirements in column (d) in Part 1 and there is no content in Part 2. Similarly Schedules 5 and 6 are divided into two Parts; in each case Part 2 is empty. The Department’s memorandum, while acknowledging that (notwithstanding similar provision in the Directive) the reference in item 167 of Schedule 3 to Part 2 of Schedule 7 ought to have been omitted, explains that—

- the Regulations were designed to implement Council Directive 76/768/EEC as closely as possible;
- Article 4.1(h), which is linked to Annex VII, requires Member States to prohibit the marketing of cosmetic products “containing UV filters listed in Part 1 of Annex VII, beyond the limits and outside the conditions laid down therein”;

- the provisions in Directive 76/768/EEC (Annexes IV, VI and VII) that correspond to Schedules 5, 6 and 7 each contain a Part 2 without any entry;
- it was considered helpful and useful—
  - to reflect the possibility of the future insertion (into Annex VII to the Directive) of limitations and requirements other than that concerning maximum authorised concentration (column (c)), as the empty column (d) envisages; and
  - to transpose the empty Parts of Directive Annexes, as the Directive envisages that there may be substances which will appear in these Parts the marketing of which Member States are required to permit up to a certain date (Article 5(b), (c) and (d) of the Directive); if the Regulations had not contained these Parts, there would have been no indication of the possibility of certain substances being provisionally allowed.

1.4 The Committee does not find this approach persuasive, although it does not rule out the possibility that a degree of deviation from normal standards can properly be accepted when a Community instrument is implemented. An example can be found in the 17th Report for the 2006-2007 Session, in the printing of the memorandum on S.I. 2007/1334 - a case where the responsible Department (in explaining an instrument setting out criminal sanctions for breaches of imprecise provisions of a particular Community Regulation) demonstrated convincingly that there was no realistic method of complying otherwise with Community law. However this is not a parallel case; column (d) of Part 1 of Schedule 7 and Parts 2 of Schedules 5, 6 and 7 have no legislative content; the inclusion of such empty provisions (and references to them) obscures the distinct nature of legislation and complicates the Regulations unnecessarily. Had the currently blank Schedule elements been omitted, they could still be added later by amendment (together with the references to them), were the possibility of the equivalents being filled in Directive 76/768/EEC to become a reality. The Committee, in its 18th Report for the 2006-2007 Session, reported S.I. 2007/1166 (Regulations the interpretation of which depended on other instruments not yet been made) for failure to comply with proper legislative practice “in that they were prepared on the assumption that they would be complete neither internally nor referentially”. In material terms this is similar, and the Department (correctly) makes no attempt to argue that copy-out of empty provisions is a requirement of Community law. **The Committee accordingly reports the reference to column (d) of Schedule 7 in regulation 9(b), the reference to Part 2 of Schedule 7 in item 167 of Schedule 3, the inclusion of the empty column (d) in Part 1 of Schedule 7 and the inclusion of the empty Parts 2 of Schedules 5, 6 and 7 as not being in accordance with proper legislative practice.**

### *Defective drafting*

1.5 Schedule 1 includes S.I. 2006/2907 in the list of Regulations revoked by these Regulations. The Department’s memorandum acknowledges that it should not have done so, because that S.I. was revoked by S.I. 2007/2400 with effect from 7 September 2007. **The Committee reports Schedule 1 for defective drafting in this respect, acknowledged by the Department.**

1.6 In Schedule 3, the concluding words in entry 419 do not read properly and note (4) which refers to EC Regulation No. 999/2001 should have been omitted, as acknowledged by the Department's memorandum. **The Committee reports Schedule 3 for defective drafting in this respect, acknowledged by the Department.**

1.7 Item 18 in Part 1 of Schedule 6 refers in column (d) to a non-existent provision. It accords with the Directive in this respect. The Department agrees in its memorandum that the reference in item 18 should have been omitted. **The Committee reports item 18 in Part 1 of Schedule 6 for defective drafting, acknowledged by the Department.**

### *Remedial action*

1.8 As regards remedial action, the Department has indicated its intention to amend the Regulations in regard to—

- the preamble,
- item 167 in Schedule 3,
- item 419 in Schedule 3, and
- item 18 in Part 1 of Schedule 6,

at the next convenient opportunity. The Committee considers amendment of the preamble to be inappropriate, as it appears impossible in the absence of express authorising provision to change at a later date the specification of powers at the time an instrument was made; but it welcomes the intention to amend the final two provisions mentioned. So far as item 167 of Schedule 3 is concerned, the flaw perceived by the Committee arises as a consequence of unacceptable legislative practice; if it is amended, it would be consistent in addition to amend regulation 9(b) to remove the reference to the requirements in column (d) of Schedule 7. The Committee also considers that, if the Regulations come to be revoked and replaced, the occasion should be taken to remove any empty Schedule elements.

## Instruments not reported

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**The Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported to the respective Houses.**

# Annex

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

- *denotes that the written evidence submitted in connection with the instrument is printed with this Report*
- *denotes written evidence has been submitted but not printed*

## Draft instruments requiring affirmative approval

|                   |  |
|-------------------|--|
| <b>Draft</b>      | Criminal Injuries Compensation Scheme 2008   |
| <b>Draft S.I.</b> | Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2008  |
| <b>Draft S.I.</b> | Mesothelioma Lump Sum Payments (Conditions and Amounts) Regulations 2008   |
| <b>Draft S.I.</b> | Proceeds of Crime Act 2002 (Investigative Powers of Prosecutors in England, Wales and Northern Ireland: Code of Practice) Order 2008 |
| <b>Draft S.I.</b> | Producer Responsibility Obligations (Packaging Waste) (Amendment No. 2) Regulations 2008   |

## Instruments subject to annulment

|                       |   |
|-----------------------|---|
| <b>S.I. 2008/1418</b> | Manchester College of Arts and Technology and City College, Manchester (Dissolution) Order 2008   |
| <b>S.I. 2008/1419</b> | Local Government (Structural and Boundary Changes) (Staffing) Regulations 2008  |
| <b>S.I. 2008/1420</b> | Television Multiplex Services (Reservation of Digital Capacity) Order 2008  |
| <b>S.I. 2008/1421</b> | Multiplex Licence (Broadcasting of Programmes in Gaelic) Order 2008   |
| <b>S.I. 2008/1428</b> | Reporting of Prices of Milk Products (England) Regulations 2008   |
| <b>S.I. 2008/1431</b> | Social Security (Contributions) (Amendment No. 4) Regulations 2008  |
| <b>S.I. 2008/1434</b> | Design Right (Semiconductor Topographies) (Amendment) (No.2) Regulations 2008   |
| <b>S.I. 2008/1435</b> | Motor Vehicles (Driving Licences) (Amendment) (No. 4) Regulations 2008  |
| <b>S.I. 2008/1436</b> | Legal Services Act 2007 (Commencement No. 2 and Transitory Provisions) Order 2008   |
| <b>S.I. 2008/1437</b> | Local Authority Targets (Well-Being of Young Children) (Amendment) Regulations 2008   |
| <b>S.I. 2008/1439</b> | Financial Services and Markets Act 2000 (Market Abuse) Regulations 2008   |
| <b>S.I. 2008/1467</b> | Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants)(Amendment) Regulations 2008                          |
| <b>S.I. 2008/1468</b> | Financial Services and Markets Act 2000 (Amendments to Part 7) Regulations 2008   |
| <b>S.I. 2008/1469</b> | Financial Services and Markets Act 2000 (Amendment of section 323) Regulations 2008   |
| <b>S.I. 2008/1472</b> | Dee Estuary Cockle Fishery Order 2008   |
| <b>S.I. 2008/1497</b> | Protection of Children and Vulnerable Adults and Care Standards Tribunal (Children's and Adults' Barred Lists) (Transitional Provisions) Regulations 2008 |

**Instruments subject to annulment (Northern Ireland)**

- S.R. 2008/242** Police Powers for Designated Staff (Complaints and Misconduct) Regulations (Northern Ireland) 2008
- S.R. 2008/243** Police Powers for Designated Staff (Code of Ethics) Order (Northern Ireland) 2008
- S.R. 2008/248** Legal Aid in Criminal Proceedings (Costs) (Amendment) Rules (Northern Ireland) 2008

**Instruments not subject to Parliamentary proceedings not laid before Parliament**

- S.I. 2008/1466** Criminal Justice and Immigration Act 2008 (Commencement No. 1 and Transitional Provisions) Order 2008
- S.I. 2008/1521** Finance Act 2007, Section 17(2) (Corporation Tax Deduction for Expenditure on Energy-Saving Items) (Appointed Day) Order 2008

# Appendix

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## S.I. 2008/1284: memorandum from the Department for Business, Enterprise & Regulatory Reform

***The Cosmetic Products (Safety) Regulations 2008 (SI 2008/1284)***

1. In its letter to the Department of 11 June, the Joint Committee requested a memorandum on the following points:

1. *Given that the designation by S.I. 1993/2661 of the Secretary of State in relation to consumer protection supersedes the designation in S.I. 1972/1811 in relation to specific areas of consumer protection (see article 3 of S.I. 1993/2661), explain why the wording of the preamble reflects the superseded designation rather than the later one.*
2. *Given that Part 1 of Schedule 7 contains no requirements in column (d) and that there are no entries in Part 2 of that Schedule, explain why regulation 9(b) includes reference to the requirements in column (d) of Schedule 7 being satisfied.*
3. *Given that S.I. 2006/2907 was revoked by S.I. 2007/2400 with effect from 7 September 2007, explain why Schedule 1 to these Regulations includes S.I. 2006/2907 in the list of Regulations revoked by these Regulations.*
4. *Explain the concluding words in entry 419 in Schedule 3 and the cross-reference to EC Regulation No. 999/2001.*
5. *Why are Part 2 of Schedule 5, Part 2 of Schedule 6 and Part 2 of Schedule 7 included, and reference made in item 167 of Schedule 3 to Schedule 7, Part 2, given that there are no entries in those Parts?*
6. *Explain the intended reference in item 18 of Part 1 of Schedule 6, given that the provision referred to does not exist.*

1. *Given that the designation by S.I. 1993/2661 of the Secretary of State in relation to consumer protection supersedes the designation in S.I. 1972/1811 in relation to specific areas of consumer protection (see article 3 of S.I. 1993/2661), explain why the wording of the preamble reflects the superseded designation rather than the later one.*

The Department agrees that the wording of the preamble ought to have reflected the later designation (measures relating to consumer protection).

2. *Given that Part 1 of Schedule 7 contains no requirements in column (d) and that there are no entries in Part 2 of that Schedule, explain why regulation 9(b) includes reference to the requirements in column (d) of Schedule 7 being satisfied.*

The Regulations were designed to implement Council Directive 76/768/EEC as closely as possible. Part 1 of Schedule 7 to the Regulations implements Part I of Annex VII to the Directive. Column (d) to that Annex, like column (d) of Schedule 7, contains no entries. Article 4.1(h) requires member States to prohibit the marketing of cosmetic products—

“containing UV filters listed in Part I of Annex VII, beyond the limits and outside the conditions laid down therein.”

As column (d) of Annex VII envisages the possibility of the addition to the Directive of limitations and requirements other than that concerning maximum authorised concentration it was considered to be helpful to reflect this in the Regulations even though none currently exist.

3. *Given that S.I. 2006/2907 was revoked by S.I. 2007/2400 with effect from 7 September 2007, explain why Schedule 1 to these Regulations includes S.I. 2006/2907 in the list of Regulations revoked by these Regulations.*

The Department agrees that it was not appropriate to include S.I. 2006/2907 in the list of Regulations revoked by these Regulations as S.I. 2006/2907 had already been revoked.

4. *Explain the concluding words in entry 419 in Schedule 3 and the cross-reference to EC Regulation No. 999/2001.*

The concluding words to entry 419 ought not to have included the words “animal products and” or the note numbered (4) which refers to EC Regulation 999/2001. The words “there from” ought to have been “therefrom”. The note numbered (3) ought to have been after the word “Council”.

5. *Why are Part 2 of Schedule 5, Part 2 of Schedule 6 and Part 2 of Schedule 7 included, and reference made in item 167 of Schedule 3 to Schedule 7, Part 2, given that there are no entries in those Parts?*

Part 2 of Schedules 5, 6 and 7 are included without any entries on the basis that the corresponding provisions in the Directive 76/768/EC (Annexes IV, VI and VII) also contain a Part 2 without any entry. It was considered useful to transpose these Parts as the Directive envisages that there may be substances which will appear in these Parts the marketing of which member States are required to permit up to a certain date (article 5(b), (c) and (d) of that Directive). If the Regulations had not contained these Parts there would have been no indication of the possibility of certain substances being provisionally allowed.

Item 167 of Schedule 3 implements reference 167 of Annex II to Directive 76/768. Reference 167 also refers to Part 2 of Annex VII to the Directive in which there are no entries. The Department agrees that the reference in item 167 of Schedule 3 to Part 2 of Schedule 7 to the Regulations ought to have been omitted.

*6. Explain the intended reference in item 18 of Part 1 of Schedule 6, given that the provision referred to does not exist*

Item 18 of Part 1 of Schedule 6 implements reference 18 of Annex VI to Directive 76/768. Reference 18 contains a reference to Annex VI, Part 2, No 8. However this entry was deleted from the Directive by article 7(a) of Commission Directive 88/233/EEC (OJ L 105, 26.4.1988 p. 11). The Department agrees that the reference, in column (d) of item 18 of Part 1 of Schedule 6, to Schedule 6, Part 2, No 8 ought to have been omitted.

The Department is grateful to the Committee for drawing these matters to its attention and will amend the Regulations to make the corrections identified in relation to the preamble and to items 419 and 167 in Schedule 3 and item 18 in Schedule 6 at the next convenient opportunity.

**Department for Business, Enterprise & Regulatory Reform**

16 June 2008