



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

Eighth Report of Session 2009-10

Drawing special attention to:

Tribunal Procedure (Amendment) Rules 2010 (S.I. 2010/43)

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Joint Committee on Statutory Instruments

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

Remit

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

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

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

The Committee usually meets weekly when Parliament is sitting.

Publications

The reports of the Committee are published by The Stationery Office by Order of both Houses. All publications of the Committee are on the Internet at www.parliament.uk/jcsi.

Committee staff

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

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Instruments reported

At its meeting on 10 February 2010 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 two 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 2010/43: Reported for defective drafting

<i>Tribunal Procedure (Amendment) Rules 2010 (S.I. 2010/43)</i>

1.1 **The Committee draws the special attention of both Houses to these Rules on the ground that they are defectively drafted in one respect.**

1.2 Rule 14 amends the Tribunal Procedure (Upper Tribunal) Rules 2008 by adding a new Schedule 2 which deals with appeals relating to national security certificates. Paragraph 9 of the Schedule requires the Upper Tribunal, before giving a direction, issuing a summons or citation, or producing or publishing a written record of, or of reasons for, a decision, to notify the relevant Minister of the proposed action. It also gives the relevant Minister a right to object to the proposal by sending a notice to the Upper Tribunal.

1.3 Paragraph 11 provides that, where the relevant Minister has the right to object, the Upper Tribunal may not proceed with the proposed action unless the time for the relevant Minister to object has expired and either the relevant Minister has not objected or the Tribunal has overruled the relevant Minister's objection.

1.4 In a memorandum printed at Appendix 1, the Ministry of Justice accepts that paragraph 9 erroneously omits to specify a time within which the relevant Minister may send his notice of objection to the Upper Tribunal. A period of 14 days ought to have been specified. The Department undertakes to draw the error to the attention of the Tribunal Procedure Committee with a view to making an amendment as soon as possible. **The Committee accordingly reports rule 14 for defective drafting, acknowledged by the Department.**

Instruments not reported

At its meeting on 10 February 2010 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported.

A memorandum from the Department of Communities and Local Government in connection with the Housing and Regeneration Act 2008 (Registration of Local Authorities) Order (Draft S.I.) is printed at Appendix 2.

Annex

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*

Draft Instruments requiring affirmative approval

- | | |
|---------------------|---|
| Draft S.I. | Charities (Disclosure of Revenue and Customs Information to the Charity Commission for Northern Ireland) Regulations 2010 |
| Draft S.I. | Competition Act 1998 (Land Agreements Exclusion Revocation) Order 2010 |
| Draft S.I. | Criminal Defence Service (Information Requests) (Amendment) Regulations 2010 |
| Draft S.I. | Employee Study and Training (Qualifying Period of Employment) Regulations 2010 |
| Draft S.I. | European Union (Definition of Treaties) (Stabilisation and Association Agreement) (Bosnia and Herzegovina) Order 2010 |
| Draft S.I. | Extradition Act 2003 (Amendment to Designations) Order 2010 |
| Draft S.I. | Financial Services and Markets Act 2000 (Amendments to Part 18A etc.) Regulations 2010 |
| Draft S.I. | Health and Social Care Act 2008 (Regulated Activities) Regulations 2010 |
| Draft S.I. | Housing and Regeneration Act 2008 (Consequential Provisions) Order 2010 |
| • Draft S.I. | Housing and Regeneration Act 2008 (Registration of Local Authorities) Order 2010 |
| Draft S.I. | Police (Northern Ireland) Act 2000 (Renewal of Temporary Provisions) Order 2010 |
| Draft S.I. | Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2010 |
| Draft S.I. | Protection from Tobacco (Sales from Vending Machines) (England) Regulations 2010 |
| Draft S.I. | Renewables Obligation (Amendment) Order 2010 |
| Draft S.I. | Representation of the People (Timing of the Canvass) (Northern Ireland) Order 2010 |

Draft S.I.	Safeguarding Vulnerable Groups Act 2006 (Regulated Activity, Devolution and Miscellaneous Provisions) Order 2010
Draft S.I.	Service Voters' Registration Period Order 2010
Draft S.I.	Social Security (Contributions) (Amendment) Regulations 2010
Draft S.I.	Tobacco Advertising and Promotion (Display of Prices) (England) Regulations 2010
Draft S.I.	Welsh Zone (Boundaries and Transfer of Functions) Order 2010

Instruments subject to annulment

S.I. 2010/95	Community Legal Service (Funding) (Amendment) Order 2010
S.I. 2010/96	Community Legal Service (Financial) (Amendment) Regulations 2010
S.I. 2010/109	South East Derbyshire College (Dissolution) Order 2010
S.I. 2010/115	Video Recordings (Labelling) Regulations 2010
S.I. 2010/121	Export Control (Amendment) Order 2010
S.I. 2010/130	Football Spectators (2010 World Cup Control Period) Order 2010
S.I. 2010/132	Export Control (North Korea) (Amendment) Order 2010

Instruments subject to annulment (Northern Ireland)

S.R. 2010/9	Legal Aid (Scope) Regulations (Northern Ireland) 2010
S.R. 2010/10	Legal Advice and Assistance (Amendment) Regulations (Northern Ireland) 2010

Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2009/3068	Pensions Act 2004 (Code of Practice) (Trustee Knowledge and Understanding) Appointed Day Order 2009
S.I. 2009/3190	Gas (Applications for Licences and Extensions and Restrictions of Licences) Regulations 2009
S.I. 2009/3191	Electricity (Applications for Licences, Modifications of an Area and Extensions and Restrictions of Licences) Regulations 2009
S.I. 2009/3202	Education (Inspectors of Education and Training in Wales) Order 2009
S.I. 2009/3242	Local Transport Act 2008 (Commencement No. 2 and Transitional Provision) Order 2009
S.I. 2009/3332	Saving Gateway Accounts Act 2009 (Commencement No. 1) Order 2009
S.I. 2010/125	Policing and Crime Act 2009 (Commencement No. 3) Order 2010
S.I. 2010/126	Identity Cards Act 2006 (Commencement No. 7) Order 2010
S.I. 2010/128	Work and Families Act 2006 (Commencement No. 3) Order 2010

Appendix 1

S.I 2010/43: memorandum from the Ministry of Justice

<i>Tribunal Procedure (Amendment) Rules 2010 (S.I. 2009/43)</i>

1. In its letter dated 27 January 2010, the Committee requested a memorandum from the Ministry of Justice on the following point:

Should paragraph 9 of Schedule 2 to the Tribunal Procedure (Upper Tribunal) Rules 2008 (inserted by rule 14) have specified a time within which the relevant Minister may object? If not, explain how paragraphs 10 and 11 of that Schedule are intended to operate.

2. The Ministry of Justice's response to the Committee's query is set out below.
3. Paragraph 9 of Schedule 2 to the Tribunal Procedure (Upper Tribunal) Rules 2008 should have specified a time limit, giving the relevant Minister 14 days to submit any such objection. The omission of such a provision in paragraph 9 was a drafting error on the Ministry's part.
4. The Ministry will draw this error to the attention of the Tribunal Procedure Committee for their consideration at their next meeting on 4 March with a view to making an amendment to correct the error as soon as possible.

Ministry of Justice
2 February 2010

Appendix 2

Draft S.I: voluntary memorandum from the Department for Work and Pensions

<i>Housing and Regeneration Act 2008 (Registration of Local Authorities) Order 2010 (Draft S.I)</i>

1. This memorandum explains our approach to our use of section 114 of the Housing and Regeneration Act 2008.
2. Chapter 3 of Part 2 provides for the establishment of a register of providers of social housing. If a body is eligible for registration, it may apply to the regulator to be entered on the register and becomes subject to regulation under Part 2 of the Act. Section 112 sets out the conditions for eligibility for registration. Section 113 sets out three exceptions to eligibility covering three classes of local authority.
3. Towards the end of the passage of the Housing and Regeneration Bill, a decision was taken that local authorities should be brought into the regime. The Government favoured a separate Bill to achieve this but responded to pressure by including what became section 114 of the Act. Their Lordships preferred a broad secondary power that could be used to make the necessary changes to bring local authorities into the regulatory regime under Part 2 of the Act. This would enable local authority tenants to enjoy the same protections and support from the regulator as housing association tenants from the outset¹.
4. Section 114 provides two routes to bring local authorities into registration. Subsection (1) enables the Secretary of State to repeal section 113 or to amend it to permit classes of local authorities to register. This would make local authorities eligible to register if they meet the conditions in section 112. Alternatively, a freestanding requirement to register could be imposed on specified classes of local authorities under subsection (2)(b)². There was no intention that there would be any difference in the scope of application depending on which route local authorities are to be brought into registration nor any expectation that the powers would be exercised differently depending on the route taken. That said, there is a contrast between the way the subsections are drafted that could create the impression some difference was intended.

¹ See Hansard 17th July 2008 http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80717-0004.htm#80717-0004.htm_snew10

² There is also a power to specify individual authorities in section 114(2)(a).

5. Section 113 applies to three classes of local authority. Article 4 of the Order relies on section 114(1) to amend section 113 so that the class referred to in the third exception is no longer mentioned. This means that if a person controlled by a local housing authority or county council provides social housing through its own housing stock, it will be eligible to register under section 112(1) on the coming into force of the amendments to Part 2 of the Act under this Order.
6. Article 3 of the Order relies on section 114(2) to specify two remaining classes of local authority referred to in section 113: English local housing authorities and county councils that provide or intend to provide social housing will be required to register
7. The Committee has requested a memorandum on the following points:

On the coming into force on 1st April 2010 of article 3 of this order and Part 2 of the Housing and Regeneration Act 2008, will the only authorities mentioned in section 113 of that Act be local housing authorities and county councils?

8. Section 113 describes three classes of local authority. Article 4 of this Order removes the reference to persons controlled by a local housing authority or county council. After this Order comes into force, local housing authorities and county councils will be the only authorities mentioned in section 113.

In the light of sections 110 to 112, can section 113 apply to any local housing authorities or county councils other than those in England which provide or intend to provide social housing? If so, how?

9. Section 113 provides for exceptions to section 112(1) and so in that sense only applies to local housing authorities or county councils that meet the other conditions in section 112. It was necessary to retain references to these authorities in section 113 to make it clear that even though they are required to be registered, they are not required to satisfy relevant criteria which apply to those eligible under section 112.

If section 113 does not apply to any other authorities or persons, why is specifying all the local authorities described in section 114(5)(a) considered a proper exercise of the power in section 114(2) to specify a class of such local authorities?

10. We accept that section 114(2) does not state expressly that it is possible to specify all the available classes but we consider it is a proper exercise of the power to specify the two remaining classes referred to in section 113 as we have done. There are two reasons for this. The first is that we do not consider it is necessarily excluded by the wording and certainly this accords with expectations when the clause was debated in

Parliament³. Second, the exercise of the power in this case does involve specifying only two of three available classes.

11. The link between the application of section 113 to local authorities and the scope of section 114(2) is relevant to consideration of whether all the available classes are being specified. We are exercising the power in section 114(1) to amend section 113. At the same time, we are exercising the power in section 114(2) the scope of which is affected by section 113. One possibility to make this absolutely clear by specifying that the exercise of section 114(2) comes into force before the exercise of the power in section 114(1). This means that when article 3 of the Order comes into force, we would be specifying only two of the three classes of local authority. We did not consider however that sequencing in this way would affect the position. The decision for the Secretary of State here is to assess the best way to bring local authorities into the regime and exercise of the two powers at the same time does not affect the scope of section 114(2). The correct time to consider the position under section 114(2) in our view is immediately before the provision comes into force. Where the power is being exercised before section 113 is in force, the definition in section 114(5)(a) is not to be read as requiring actual application but includes authorities to whom section 113 would have applied if it had been brought into force.
12. Section 114 is not as easy to interpret as it might be, perhaps reflecting its late introduction into the Bill. The section was intended to bring local authorities that provide or intend to provide social housing into regulation from the start of the new regime, either by making it permissible for them to register or by imposing a requirement on them to do so.
13. In our view, the exercise of section 114(2)(b) in the Order involves specifying two of the three classes of local authority referred to in section 113. Even if the Order were viewed as specifying all the available classes referred to in section 113, the power would still be available. The context and legislative history demonstrates that there was no intention to limit the ability to impose a requirement to register to certain classes and it is open to the Secretary of State to cumulatively specify classes in this way.

4th February 2010

³ Baroness Andrews (Hansard 17th July 2008, at column 1344) explained that not all local housing authorities provide social housing but the intention following Professor Cole's Report was to submit only the class of authorities that did to registration.