



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Ninth Report
of Session 2009-10**

Drawing special attention to:

*Financial Assistance Scheme (Miscellaneous Amendments) Regulations
2010 (Draft S.I)*

*Ordered by the House of Lords to be printed
3 March 2010*

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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*); Nicholas Beach, Allan Roberts and Peter Milledge (*Lords*).

Contacts

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Instruments reported

At its meeting on 3 March 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 one of those considered. The Instrument and the ground for reporting it are given below.

1 Draft S.I: Reported for an unexpected use of power

Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2010 (Draft S.I.)

1.1 The Committee draws these draft Regulations to the special attention of both Houses on the ground that in one respect they would, if approved and made, appear to make an unexpected use of the power conferred by the enabling Act.

1.2 Section 286(1) of the Pensions Act 2004 (“the 2004 Act”) requires the Secretary of State to “make provision, by regulations, for a scheme for making payments to, or in respect of, qualifying members of qualifying pension schemes (‘the financial assistance scheme’)”. Subsection (3) provides that “regulations under subsection (1) may, in particular, make provision –

a) for the financial assistance scheme to be managed by the Secretary of State, a body established by or for the purposes of the regulations or such other person as may be prescribed;

.....

b) for the property, rights and liabilities of qualifying pension schemes to be transferred to the scheme manager in prescribed circumstances ...

.....

c) applying any provision of Part 1 or 2 with such modifications as may be prescribed;

.....”.

1.3 Provision for the scheme (“the FAS”) required by section 286(1) is made in the Financial Assistance Scheme Regulations 2005 (S.I. 2005/1986), regulation 5(1) of which now provides that the FAS is to be managed by the Board of the Pension Protection Fund established under Part 2 of the 2004 Act (“the Board”). Until July 2009, regulation 5(1) provided that the FAS was to be managed by the Secretary of State. Regulation 15(b) of these draft Regulations inserts a new paragraph 3D into Schedule 1 to S.I. 2005/1986 (which modifies certain provisions of Parts 1 and 2 of the 2004 Act for the purposes of the FAS). Sub-paragraph (a)(iii) of the new paragraph modifies section 161 of that Act so that, where a transfer notice is given in relation to a qualifying pension scheme, the property, rights and liabilities of that scheme are transferred to the Secretary of State.

1.4 The Department for Work and Pensions explain, in paragraphs 3.1 and 3.6 of their memorandum (laid with the draft Regulations), that this provision is made in exercise of the power of modification conferred by section 286(3)(j) of the 2004 Act, even though – as

the Department recognise – section 286(3)(c) confers express power to make provision for the transfer of the property, rights and liabilities of a qualifying pension scheme. But that power enables regulations to provide for transfer only to the *scheme manager*; and it is now the Board, and not the Secretary of State, that is the scheme manager in relation to the FAS.

1.5 The Department acknowledge in paragraph 3.5 of their memorandum that they have chosen to rely on paragraph (j), rather than paragraph (c), of section 286(3) “in order to address potential concerns that paragraph (c) must be given a narrow construction”. Notwithstanding the Department’s assessment (paragraph 3.4 of the memorandum) of the scope of the powers conferred by section 286, any such concerns about the *vires* in subsections (1) and (3)(c) for transfers to the Secretary of State would, in the Committee’s view, be very well founded. But the question remains whether it was ever contemplated, when Parliament conferred the power in section 286(3)(j), that it might be exercised to modify provisions concerned with the Pension Protection Fund so as to enable transfers of a kind not permitted by the specific power conferred in paragraph (c). In a letter dated 3rd February 2010 to the Commons Clerk to the Committee printed at the Appendix, the Department say that they have fully addressed this matter in their memorandum and have nothing further to add.

1.6 In paragraph 3.7 of the memorandum, the Department explain that there was still uncertainty about many aspects of the FAS when section 286 was enacted, and they cite in support passages from speeches made at the time by their Ministers in each House. The Committee has also had regard to the memorandum submitted by the Department in 2004 to the Delegated Powers and Regulatory Reform Committee of the House of Lords about the powers conferred in the clause of the Pensions Bill later enacted as section 286 of the 2004 Act (Volume 2 of that Committee’s 23rd Report of Session 2003-04 (HL Paper 134-II)). In paragraph 863 of that memorandum, it is explained that “subsection (3) allows for secondary legislation to ... require that the remaining assets and liabilities of qualifying pension schemes are in specified circumstances to be transferred *to the assistance scheme*”. (The Committee notes that provision to that effect would have been entirely consistent with the equivalent arrangements for the Pension Protection Fund under Part 2 of the 2004 Act, whereby the assets etc of an eligible scheme are transferred to the Board under section 161.)

1.7 Although paragraph 864 of that memorandum acknowledges the uncertainty about the nature of the provision to be made in regulations, there is no suggestion (either there or in the proceedings on the Pensions Bill referred to by the Department) that the assets of a qualifying pension scheme might be transferred, not to the FAS, but to the Government. While the policy basis for this is explained in paragraphs 7.30 and 7.31 of the memorandum laid with these draft Regulations, the Committee remains unpersuaded by the Department’s assertion in paragraph 3.8 that the arrangements for transfer to the Secretary of State effected by new paragraph 3D(a)(iii) “clearly fall within the options set out by the Minister during the debates”.

1.8 The Committee accordingly reports regulation 15(b), in so far as it inserts new paragraph 3D(a)(iii) into Schedule 1 to S.I.2005/1986, as making an unexpected use of the power conferred by section 286(3)(j) of the 2004 Act.

Instruments not reported

At its meeting on 3 March 2010 the Committee considered the Instruments set out in the Annex to this Report, none of which were required to be reported.

Annex

Draft Instruments requiring affirmative approval

Draft S.I.	Additional Paternity Leave (Adoptions from Overseas) Regulations 2010
Draft S.I.	Additional Paternity Leave Regulations 2010
Draft S.I.	Additional Statutory Paternity Pay (Adoptions from Overseas) Regulations 2010
Draft S.I.	Additional Statutory Paternity Pay (General) Regulations 2010
Draft S.I.	Apprenticeships, Skills, Children and Learning Act 2009 (Consequential Amendments) (England and Wales) Order 2010
Draft S.I.	Building Societies (Insolvency and Special Administration) (Amendment) Order 2010
Draft S.I.	Child Benefit Up-rating Order 2010
Draft S.I.	Commons Councils (Standard Constitution) (England) Regulations 2010
Draft S.I.	Concessionary Bus Travel Act 2007 (Variation of Reimbursement and Other Administrative Arrangements) Order 2010
Draft S.I.	Criminal Defence Service (Representation Orders: Appeals etc.) (Amendment) Regulations 2010
Draft S.I.	Criminal Procedure and Investigations Act 1996 (Code of Practice for Interviews of Witnesses Notified by Accused) Order 2010
Draft S.I.	Damages-Based Agreements Regulations 2010
Draft S.I.	Electoral Law Act (Northern Ireland) 1962 (Amendment) Order 2010
Draft S.I.	Environmental Civil Sanctions (England) Order 2010
Draft S.I.	Environmental Civil Sanctions (Miscellaneous Amendments) (England) Regulations 2010
Draft S.I.	European Parliamentary Elections (Northern Ireland) (Amendment) Regulations 2010
Draft S.I.	Guardian's Allowance Up-rating (Northern Ireland) Order 2010
Draft S.I.	Guardian's Allowance Up-rating Order 2010
Draft S.I.	Jobseeker's Allowance (Work for Your Benefit Pilot Scheme) Regulations 2010
Draft S.I.	Local Education Authorities and Children's Services Authorities (Integration of Functions) Order 2010
Draft S.I.	National Assembly for Wales (Legislative Competence) (Housing) (Fire Safety) Order 2010
Draft S.I.	National Assembly for Wales (Legislative Competence) (Local Government) Order 2010

Draft S.I.	Rehabilitation of Offenders Act 1974 (Exceptions) (Amendment) (England and Wales) Order 2010
Draft S.I.	Safeguarding Vulnerable Groups Act 2006 (Controlled Activity and Miscellaneous Provisions) Regulations 2010
Draft S.I.	Tax Credits Up-rating Regulations 2010
Draft S.I.	Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2010

Instruments subject to annulment

S.I. 2010/98	Civil Enforcement of Parking Contraventions Designation Order 2010
S.I. 2010/99	Bus Lane Contraventions (Approved Local Authorities) (England) (Amendment) Order 2010
S.I. 2010/102	Infrastructure Planning (Interested Parties) Regulations 2010
S.I. 2010/103	Infrastructure Planning (Examination Procedure) Rules 2010
S.I. 2010/105	Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations 2010
S.I. 2010/106	Infrastructure Planning (Fees) Regulations 2010
S.I. 2010/124	Planning Act 2008 (Railways Designation) Order 2010
S.I. 2010/137	Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010
S.I. 2010/141	Criminal Defence Service (Information Requests) (Prescribed Benefits) (Amendment) Regulations 2010
S.I. 2010/142	Criminal Defence Service (Contribution Orders) (Amendment) Regulations 2010
S.I. 2010/144	Export Control (Iran) (Amendment) Order 2010
S.I. 2010/150	Ordinary Statutory Paternity Pay (Adoption), Additional Statutory Paternity Pay (Adoption) and Statutory Adoption Pay (Adoptions from Overseas) (Persons Abroad and Mariners) Regulations 2010
S.I. 2010/151	Statutory Paternity Pay and Statutory Adoption Pay (Persons Abroad and Mariners) Regulations 2002 (Amendment) Regulations 2010
S.I. 2010/152	Additional Statutory Paternity Pay (National Health Service Employees) Regulations 2010
S.I. 2010/153	Social Security Contributions and Benefits Act 1992 (Application of Parts 12ZA and 12ZB to Adoptions from Overseas) Regulations 2003 (Amendment) Regulations 2010
S.I. 2010/154	Additional Statutory Paternity Pay (Birth, Adoption and Adoptions from Overseas) (Administration) Regulations 2010
S.I. 2010/172	Court Funds (Amendment) Rules 2010
S.I. 2010/189	Personal Injuries (NHS Charges) (Amounts) Amendment Regulations 2010
S.I. 2010/198	Pedal Bicycles (Safety) Regulations 2010
S.I. 2010/207	Sexual Offences Act 2003 (Prescribed Police Stations) Regulations 2010

S.I. 2010/210	School Finance (England) (Amendment) Regulations 2010
S.I. 2010/211	National Assistance (Sums for Personal Requirements and Assessment of Resources) Amendment (England) Regulations 2010
S.I. 2010/213	Legal Services Act 2007 (Levy) Rules 2010
S.I. 2010/214	Criminal Procedure and Investigations Act 1996 (Notification of Intention to Call Defence Witnesses) (Time Limits) Regulations 2010
S.I. 2010/228	Immigration and Nationality (Cost Recovery Fees) Regulations 2010
S.I. 2010/265	Mercury Export and Data (Enforcement) Regulations 2010
S.I. 2010/279	National Health Service (Quality Accounts) Regulations 2010
S.I. 2010/283	Personal Injuries (Civilians) Scheme (Amendment) Order 2010
S.I. 2010/284	M6 Motorway (Junctions 8 to 10A) (Actively Managed Hard Shoulder and Variable Speed Limits) Regulations 2010
S.I. 2010/292	Learning and Skills Council for England (Strategy for Greater Manchester) Order 2010
S.I. 2010/295	Food for Particular Nutritional Uses (Miscellaneous Amendments) (England) Regulations 2010

Instruments not subject to Parliamentary proceedings laid before Parliament

S.I. 2010/291	National Savings Bank (Amendment of Obligation of Secrecy Provisions) Regulations 2010
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Instruments not subject to Parliamentary proceedings not laid before Parliament

S.I. 2010/52	Policing and Crime Act 2009 (Commencement No. 2) Order 2010
S.I. 2010/100	Lewisham Hospital National Health Service Trust (Establishment) Amendment Order 2010
S.I. 2010/101	The Planning Act 2008 (Commencement No.4 and Saving) Order 2010
S.I. 2010/112	Local Government and Public Involvement in Health Act 2007 (Commencement No. 9) Order 2010
S.I. 2010/143	Mental Health Act 2007 (Commencement No. 11) Order 2010
S.I. 2010/145	Coroners and Justice Act 2009 (Commencement No. 3 and Transitional Provisions) Order 2009
S.I. 2010/185	Ealing Hospital National Health Service Trust (Establishment) Amendment Order 2010
S.I. 2010/275	Electoral Administration Act 2006 (Commencement No. 1 and Saving Provision) (Scotland) Order 2010
S.I. 2010/293	Welfare Reform Act 2009 (Commencement No. 2 and Transitory Provision) Order 2010

Appendix

Draft S.I: text of letter from the Department for Work and Pensions

Financial Assistance Scheme (Miscellaneous Amendments) Regulations 2010 (Draft S.I)

These draft Regulations were laid on 3 February 2010 and we understand they are to be considered by the Joint Committee on Statutory Instruments at their next meeting on 10 February.

The Department has had the benefit of correspondence with the Deputy Counsel to the Lord Chairman of Committees in relation to the draft Regulations. As a result of that correspondence, the Department has drawn specific matters to the attention of the Joint Committee through paragraph 3.1 to 3.8 of the Explanatory Memorandum.

In the expectation that the Joint Committee might have questions to ask about the use of the power in section 286(1) and (3)(j) to apply provisions of Part 1 or 2 the Pensions Act 2004 with modifications, the Department has fully addressed the matter in its Explanatory Memorandum and, subject of course to any specific questions which the Joint Committee might wish to put to the Department, it has nothing further to add to what has been said in that Memorandum.

Accordingly, if the Joint Committee is minded to report that the special attention of both Houses be drawn to this instrument in respect of the matters referred to in paragraph 3.1 to 3.8 of the Explanatory Memorandum, the Department waives its right to be afforded an opportunity of furnishing further explanations before the Joint Committee does so.

Yours sincerely

Department for Work and Pensions
3 February 2010