



House of Lords
House of Commons
Joint Committee on
Statutory Instruments

**Tenth Report
of Session 2009-10**

Drawing special attention to:

Agency Workers Regulations 2010 (S.I. 2010/93)

Poultry Compartments (England) Order 2010 (S.I. 2010/108)

*Employment Tribunals (Constitution and Rules of Procedure) (Amendment)
Regulations 2010 (S.I. 2010/131)*

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

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Joint Committee on Statutory Instruments

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Lord Clinton-Davis (*Labour*)
Baroness Jones of Whitchurch (*Labour*)
Lord Kimball (*Conservative*)
Countess of Mar (*Crossbench*)
Earl of Mar and Kellie (*Liberal Democrat*)
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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*).

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Instruments reported

At its meeting on 10 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 three 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 2010/93: Reported for defective drafting

<i>Agency Workers Regulations 2010 (S.I. 2010/93)</i>

1.1 The Committee draws the special attention of both Houses to these Regulations on the ground that they are defectively drafted in two respects.

1.2 Regulation 3, in outline, defines an agency worker (A) as an individual temporarily working for a hirer under a contract with a temporary work agency. Paragraph (1) of regulation 5 provides that A shall be entitled to the same basic working and employment conditions as A would be entitled to for doing the same job had A been recruited by the hirer. Paragraph (3) provides that paragraph (1) shall be deemed to have been complied with where A is working under the same relevant terms and conditions as an employee who is a comparable employee and the relevant terms and conditions of that employee are terms and conditions ordinarily included in the contracts of employees who are comparable employees of the hirer, whether by collective agreement or otherwise.

1.3 Paragraph (1) of regulation 14 provides that a temporary work agency shall be liable for any breach of regulation 5, to the extent that it is responsible for that breach.

1.4 Paragraph (2) provides that, subject to paragraph (3), the hirer shall be liable for any breach of regulation 5, to the extent that is responsible for that breach.

1.5 Paragraph (3) provides that a temporary work agency shall not be liable for a breach of regulation 5 where it is established that the agency has, among other things, (a) obtained, or taken reasonable steps to obtain, relevant information from the hirer about the basic working and employment conditions in force in the hirer. To the extent that the agency is not liable by virtue of paragraph (3), the hirer is liable instead.

1.6 Paragraph (4) provides that where the agency or hirer seeks to rely on regulation 5(3), relevant information in paragraph (3)(a) includes information that explains the basis on which it is considered that an individual is a comparable employee and describes the relevant terms and conditions which apply to that employee.

1.7 In a memorandum printed at Appendix 1, the Department for Business, Innovation and Skills acknowledges that paragraph (1) of regulation 14 should have been made explicitly subject to paragraph (3), and undertakes to make an early amending instrument. The Department does not, however, acknowledge that paragraph (2) is wrongly expressed to be subject to paragraph (3), as the latter does not qualify the former in any way. This error should also be corrected.

1.8 The Committee asked the Department how, in the context of paragraph (4) of regulation 14, information sought by the agent from the hirer or provided by the hirer to the agent under paragraph (3)(a) can be relevant to the hirer's own reliance on regulation 5(3). The Department has not produced a cogent response. Regulation 5(3), a general deeming provision that significantly defines A's entitlement, is arguably inapt for direct reliance as a defence to liability that would otherwise apply, for liability can only apply when the conditions applicable to A fall short of A's entitlement. In addition paragraph (3) of regulation 14 expressly provides a defence to the agency where it is established that certain conditions are fulfilled, but not to the hirer. Finally the nature of any information which the agency may have sought from the hirer cannot be determinative of the latter's liability, for the hirer will have the information itself and will be able to use it directly to demonstrate whether regulation 5(3) applies. The Committee considers that the Department, when preparing its amending regulations, might usefully re-examine the structure of the provisions under consideration here.

1.9 For the above reasons the Committee reports regulation 14 of this instrument for defective drafting, acknowledged in part by the Department.

2 S.I 2010/108: Reported for defective drafting

<i>Poultry Compartments (England) Order 2010 (S.I. 2010/108)</i>
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2.1 The Committee draws the special attention of both Houses to this Order on the ground that it is defectively drafted in one respect.

2.2 This Order, material provisions of which are made under the Animal Health Act 1981, implements a Commission Regulation which makes provision for the approval of poultry compartments which meet specified standards of biosecurity. Article 2 designates the Secretary of State as the competent authority as regard the approval of compartments, and article 3 states how applications for approval are to be made. Article 5 requires the Secretary of State to inspect all production sites before approving them as a compartment or part of a compartment.

2.3 Article 4 confers power on an inspector to enter any premises "certified" as a compartment under the Order and any site which contains records relevant to the "certification" of a site as a compartment. The Order does not state what is meant by the references to certification. The Commission Regulation does refer to certificates, but it does so in a wholly different context, in relation to products from approved compartments; it uses the term "approval" in respect of compartments.

2.4 In a memorandum printed at Appendix 2 the Department for Environment, Food and Rural Affairs explains that under the scheme being introduced approved compartments will be issued with certificates by the Department.

2.5 Whilst the Department's explanation is informative, it does not explain why article 4 (but not the rest of the Order) refers to certification rather than approval - an inconsistency replicated in the Explanatory Note - or, in the alternative, why "certified" and "certification" are not covered by a definition in the Order. Article 4 creates a statutory

power of entry, and (despite the Department's statement, in the Explanatory Note, that "the only sanction for failure to comply with this Order is removal of certification") the refusal to allow entry to an inspector exercising powers conferred by the Order is an offence under the Animal Health Act 1981, section 66, and so is obstructing or impeding an inspector when exercising them. It is therefore particularly important that the premises to which the power relates should be clearly defined. **The lack of clarity in identifying premises in relation to which there is a power to enter backed by criminal sanctions is a serious omission, and the Committee accordingly reports article 4 for defective drafting.**

3 S.I 2010/131: Reported for requiring elucidation

Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2010 (S.I. 2010/131)

3.1 The Committee draws the special attention of both Houses to these Regulations on the ground that their form calls for elucidation in one respect.

3.2 Regulation 2(3) inserts an Annex, comprising a list of regulators, at the end of rule 61 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004. The ordering of the list appeared to be neither alphabetical nor conceptual, and accordingly the Committee asked for an explanation of the logic behind it. In a memorandum printed at Appendix 3 the Department for Business, Innovation and Skills explained that it followed the ordering in a materially related 1999 instrument. The memorandum also properly justifies the use of a correction slip to rectify an error in the same Annex. **The Committee reports regulation 2(3) as calling for the elucidation provided in the Department's memorandum.**

Instruments not reported

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

Annex

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

Draft Instruments requiring affirmative approval

Draft S.I.	Building Societies (Financial Assistance) Order 2010
Draft S.I.	National Assembly for Wales (Legislative Competence) (Culture and Other Fields) Order 2010
Draft S.I.	National Assembly for Wales (Legislative Competence) (Education) Order 2010
Draft S.I.	Occupational Pension Schemes (Levies) (Amendment) Regulations 2010
Draft S.I.	Pensions Regulator (Contribution Notices) (Sum Specified following Transfer) Regulations 2010

Instruments subject to annulment

S.I. 2010/134	Business Rate Supplements (Administrative Expenses) (England) Regulations 2010
S.I. 2010/140	Council Tax and Non-Domestic Rating (Demand Notices) (England) (Amendment) Regulations 2010
S.I. 2010/167	Hill Farm Allowance Regulations 2010
S.I. 2010/180	Scottish Register of Tartans Act 2008 (Consequential Modifications) Order 2010
S.I. 2010/187	Business Rate Supplements (Collection and Enforcement) (England) Regulations 2010
S.I. 2010/188	Social Security (Contributions) (Amendment No. 2) Regulations 2010
S.I. 2010/190	School Budget Shares (Prescribed Purposes) (England) (Amendment) Regulations 2010
S.I. 2010/195	Offender Management Act 2007 (Establishment of Probation Trusts) Order 2010
S.I. 2010/196	Pension Protection Fund and Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2010
S.I. 2010/219	Local Authorities (Alteration of Requisite Calculations) (England) Regulations 2010

S.I. 2010/242	National Insurance Contribution Credits (Transfer of Functions) (Northern Ireland) Order 2010
S.I. 2010/246	British Nationality (Rwanda) Order 2010
S.I. 2010/250	Warehousekeepers and Owners of Warehoused Goods (Amendment) Regulations 2010
S.I. 2010/298	Marine and Coastal Access Act 2009 (Commencement No. 2 and Transitional Provisions) Order 2010
S.I. 2010/299	Pharmacy Order 2010 (Commencement No. 1) Order of Council 2010
S.I. 2010/300	General Pharmaceutical Council (Constitution) Order 2010
S.I. 2010/301	Local Authority (Duty to Secure Early Years Provision Free of Charge) (Amendment) Regulations 2010
S.I. 2010/304	Deposits in the Sea (Exemptions) (Amendment) (England and Wales) Order 2010
S.I. 2010/307	Childcare (Fees) (Amendment) Regulations 2010
S.I. 2010/312	Road Vehicles (Construction and Use) (Amendment) Regulations 2010
S.I. 2010/313	Motor Vehicles (Designation of Approval Marks) (Amendment) Regulations 2010
S.I. 2010/319	Port Security (Avonmouth Dock and Royal Portbury Dock and Port of Bristol Security Authority) Designation Order 2010
S.I. 2010/323	Merchant Shipping and Fishing Vessels (Health and Safety at Work) (Biological Agents) Regulations 2010
S.I. 2010/324	Goods Infringing Intellectual Property Rights (Customs) (Amendment) Regulations 2010
S.I. 2010/332	Merchant Shipping and Fishing Vessels (Health and Safety at Work) (Work at Height) Regulations 2010
S.I. 2010/340	Environmental Noise (England) (Amendment) Regulations 2010
S.I. 2010/344	Schools Forums (England) Regulations 2010
S.I. 2010/349	Community Task Force (Miscellaneous Provisions) Order 2010
S.I. 2010/354	Social Security (Community Task Force) Regulations 2010
S.I. 2010/360	Police and Criminal Evidence Act 1984 (Application to Revenue and Customs) Order 2007 (Amendment) Order 2010
S.I. 2010/364	Export Control (Guinea) Order 2010
S.I. 2010/385	Social Security (Credits) (Amendment) Regulations 2010
S.I. 2010/402	Railways (Public Service Obligations) Regulations 2010

- S.I. 2010/411** Electricity (Exemption from the Requirement for a Generation Licence) (Keadby) (England and Wales) Order 2010
- S.I. 2010/413** Electricity (Exemption from the Requirement for a Generation Licence) (Millennium and Kilbraur) (Scotland) Order 2010
- S.I. 2010/418** Police Authorities (Particular Functions and Transitional Provisions) (Amendment) Order 2010
- S.I. 2010/421** Police Authority (Community Engagement and Membership) Regulations 2010
- S.I. 2010/422** Policing Plan (Amendment) Regulations 2010

Instruments subject to annulment (Northern Ireland)

- S.R. 2010/30** Safeguarding Vulnerable Groups (Regulated Activity, Devolution Alignment and Miscellaneous Provisions) Order (Northern Ireland) 2010
- S.R. 2010/31** Safeguarding Vulnerable Groups (Prescribed Criteria and Miscellaneous Provisions) (Amendment) Regulations (Northern Ireland) 2010
- S.R. 2010/42** Police and Criminal Evidence (Application to Revenue and Customs) Order (Northern Ireland) 2007 (Amendment) Order 2010

Instruments not subject to Parliamentary proceedings laid before Parliament

- S.I. 2010/240** Naval, Military and Air Forces Etc. (Disablement and Death) Service Pensions (Amendment) Order 2010
- S.I. 2010/244** Pitcairn Constitution Order 2010

Instruments not subject to Parliamentary proceedings not laid before Parliament

- S.I. 2010/191** Offender Management Act 2007 (Commencement No. 5) Order 2010
- S.I. 2010/235** Inspectors of Education, Children's Services and Skills Order 2010
- S.I. 2010/238** Consular Fees Order 2010
- S.I. 2010/276** Corporate Manslaughter and Corporate Homicide Act 2007 (Commencement No. 2) Order 2010
- S.I. 2010/290** Education (National Curriculum) (Key Stage 2 Assessment Arrangements) (England) (Amendment) Order 2010
- S.I. 2010/302** School Admissions Code (Appointed Day) (England) Order 2010
- S.I. 2010/303** Apprenticeships, Skills, Children and Learning Act 2009 (Commencement No. 2 and Transitional and Saving Provisions) Order 2010
- S.I. 2010/306** NHS Foundation Trusts (Trust Funds: Appointment of Trustees) Amendment Order 2010

- S.I. 2010/310** Buckinghamshire Hospitals National Health Service Trust (Trust Funds: Appointment of Trustees) Order 2010
- S.I. 2010/321** Planning and Compulsory Purchase Act 2004 (Commencement No. 12, Revocation and Amendment) Order 2010
- S.I. 2010/341** Disability Discrimination Act 2005 (Commencement No. 4) Order 2010
- S.I. 2010/383** Animal Welfare (Codes of Practice) (Appointed Day) (England) Order 2010
- S.I. 2010/409** Finance Act 2008, Schedule 38 (Appointed Day) Order 2010
- S.I. 2010/414** Police and Justice Act 2006 (Commencement No. 13) Order 2010
- S.I. 2010/416** Taxation of Chargeable Gains (Gilt-edged Securities) Order 2010

Appendix 1

S.I 2010/93: memorandum from the Department of Business, Innovation and Skills

<i>Agency Workers Regulations 2010 (S.I. 2010/93)</i>

1. This Memorandum has been prepared by the Department for Business, Innovation and Skills and contains information for the Joint Committee on Statutory Instruments.
2. By letter dated 10th February, the Committee requested the Department to submit a memorandum on the following in relation to the above Regulations—

In regulation 14 –

- (a) *why is paragraph (2), but not paragraph (1), expressed to be subject to paragraph (3), and*
- (b) *in paragraph (4), in what way can information sought by the agent from the hirer or provided by the hirer to the agent under paragraph (3)(a) be relevant to the hirer's own reliance on regulation 5(3)?*

3. In relation to point (a), the Department acknowledges that regulation 14(1) should be explicitly subject to paragraph 3. The Department accordingly will make an early amending instrument, (which will come into effect prior to the coming into force date) copies of which will be issued free of charge to purchasers of the original instrument.
4. In relation to point (b), the purpose of regulation 14(4) is to cater for the situation where any party (agency or hirer) seeks to rely on regulation 5(3). Regulation 5(3) is a deeming provision in relation to the right conferred by regulation 5(1), and applies in situations where there is a comparable worker. In such cases, in order for the temporary work agency to rely on regulation 14(3) so that it is not held liable for a breach of regulation 5, the agency needs to obtain information from the hirer as to the basis on which an individual is a comparable employee and the terms and conditions applying to that employee. Given that it is possible for the hirer to be liable in relation to breaches of regulation 5, for example, in situations where the temporary work agency has complied with regulation 14(3), information sought by the agency or provided by the hirer in the circumstances outlined under regulation 14(3)(a), may be relevant in cases where the hirer seeks to rely on regulation 5(3).

Department for Business, Innovation and Skills
22nd February 2010

Appendix 2

S.I. 2010/108: memorandum from the Department for Environment, Food and Rural Affairs

<i>Poultry Compartments (England) Order 2010 (S.I. 2010/108)</i>
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1. The Committee have requested the following:

“Explain the meaning of “certified” in article 4(1)(a). If it is intended to mean “approved”, why was that term not used? (A similar point arises with respect to the Explanatory Note.)”

2. The department acknowledges that Commission Regulation (EC) No 616/2009 (implementing Council Directive 2005/94/EC as regards the approval of poultry compartments and other captive birds compartments with respect to avian influenza and additional preventive biosecurity measures in such compartments) does not mention certificates or certification. However, under the voluntary scheme that is being introduced approved compartments will be issued with certificates by the department. Such certificates will detail the premises which have been approved by the department’s Veterinary Laboratories Association (VLA) as forming a compartment or part of a compartment. Such certificates certify that the relevant premises have been approved as being in full compliance with the relevant conditions.

16 February 2010

Department for Environment, Food and Rural Affairs

Appendix 3

S.I. 2010/131: memorandum from the Department of Business, Innovation and Skills

Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2010 (S.I. 2010/131)

1. This Memorandum has been prepared by the Department for Business, Innovation and Skills and contains information for the Joint Committee on Statutory Instruments.
2. By letter dated 10th February, the Committee requested the Department to submit a memorandum on the following in relation to the above regulations—

In the Annex inserted by regulation 2(3) –

 - (a) *explain the logic behind the ordering of regulators and, in particular, why they are not set out in alphabetical order;*
 - (b) *in the final item, should “and” after “this Schedule” be replaced by a comma and, if not, how is the syntax supposed to work?*
3. In relation to the logic of the ordering of the regulators, this order reflects the ordering of the regulators in the Schedule to the Public Interest Disclosure (Prescribed Persons) Order 1999 (S.I. 1999/1549). The ordering within the 1999 instrument is largely alphabetical with departures from this rule, so that prescribed persons with a similar remit are grouped together. The Department is of the view that in light of the fact that the regulators listed in the 2010 Regulations mirror the prescribed persons in the 1999 Order, it is more user-friendly if the lists appear in the same order. If the lists are ordered on a different basis, this may lead to confusion, as it may not be obvious at first blush that the two lists refer to the same regulators.
4. In relation to the question about the final item in the Schedule, the Department accepts that the better drafting approach is to replace the ‘and’ with a comma. The Department is grateful to the Committee for drawing this to their attention, and proposes to seek the S.I. Registrar’s agreement to replace ‘and’ with ‘,’ via a correction slip. The Department hopes that this would be an acceptable approach as it considers that the error is small scale and obvious, and that its correction does not change the meaning.

Department for Business, Innovation and Skills
22nd February 2010